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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Rodger's (Robert James Shaw) Application [2014] NIQB 79

IN THE MATTER OF AN APPLICATION BY ROBERT JAMES SHAW RODGERS FOR JUDICIAL REVIEW

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STEPHENS J

Introduction

[1] On 25 September 1974 Robert James Shaw Rodgers, the applicant, murdered Kieran William McIlroy at Parkend Street, Belfast. A member of the public who witnessed the offence pointed the applicant out to an army patrol. Following his arrest and caught red-handed with the murder weapon, the applicant pleaded guilty at Belfast City Commission on 11 February 1975. He was sentenced to life imprisonment. The only possible motive for this murder was the victim's religion. After approximately 16 years he was released from prison on licence in July 1990. The applicant's evidence is that after his release, he consciously decided to "move away from violence" and paramilitary activity. That he went to university and became heavily involved in youth and community work, including cross-community work. In short, that he left his past life behind him.

[2] However, the murder of Mr McIlroy was not the only murder committed by the applicant. On 30 September 1973 he murdered Eileen Doherty at Annadale Embankment, Belfast. The factual background to that murder included the use of a hijacked taxi which was later found and from which palm prints were taken. Years later and in 2009, improvements in technology and the work of the Historical Enquiries Team, led to the electronic matching of the prints to the applicant. On 14 December 2010 the applicant was arrested on suspicion of her murder. On 14 February 2013 he was convicted by Horner J of that offence (see judgment under citation [2013] NICC 2) and a life sentence was

imposed. On 15 March 2013 Horner J fixed 16 years as the minimum term to be served by the applicant (see judgment under citation [2013] NICC 4).

[3] Both murders were sectarian. Both were committed in connection with terrorism and the affairs of Northern Ireland.

[4] The applicant contends that if he had been sentenced for both of these offences prior to 28 July 1998 he would have been released under the provisions of the Northern Ireland (Sentences) Act 1998 ("the 1998 Act"). That he has already served more than two years for an offence in connection with terrorism and the affairs of Northern Ireland. That in the past having served two years was the criteria applied in other cases and that the exercise of the Royal Prerogative of Mercy ("the RPM") or some other method, was used to enable prisoners to be released if they had served more than two years in prison in either the United Kingdom or Ireland for pre 10 April 1998 troubles-related offences. The 10 April 1998 being the date of the Belfast Agreement, otherwise known as the Good Friday Agreement. That, in the circumstances, the failure by the Secretary of State, on 22 April 2013, to recommend the exercise of the RPM was unlawful. The grounds upon which the applicant relies are that:

(a) His case fits within a category of analogous cases in which the RPM has previously been exercised by the then Secretary of State expressly to supplement the provisions of the statutory early release scheme contained in the 1998 Act and to address cases which fall "within the spirit" although not the letter of the scheme established pursuant to the Belfast Agreement, that there has been an "*unfair or unequal approach to the exercise of the RPM*" between his case and other cases in which the RPM was exercised and that the unfairness or unequal approach is to such a degree as to establish illegality.

(b) The applicant has a legitimate expectation that the RPM would be exercised in his case on the basis of the policy which was previously operated, which policy it is submitted, can be discerned from the cases in which the RPM was previously exercised.

(c) In the alternative, if the Secretary of State in fact had no policy in relation to the exercise of the RPM in conjunction with the 1998 Act, that itself was unlawful. Firstly, the respondent's failure to define the policy was procedurally unfair because a person, such as the applicant, could not make meaningful representations as to the use of the RPM in his case if he was unaware of the factors to be taken into account. Secondly, the failure to have a policy would be in breach of Article 5 ECHR, since the completely unfettered use of the RPM was likely to give rise to arbitrary and capricious detention. For detention to be lawful the legal rules governing it must be adequately accessible and precise, and not arbitrary. For instance if a distinction is made between those who benefit

from the exercise of the RPM and those who do not, the applicant is entitled to know what these distinctions are in order to ascertain whether the distinctions fall foul of the prohibition on discrimination (within the ambit of Article 5) under Article 14 ECHR on the basis of unequal treatment being afforded to prisoners depending on whether they were nationalists or loyalists.

(d) The reason given by the Secretary of State was that the RPM had not previously been used to relieve an offender of the obligation to serve 2 years in relation to one offence where the offender had served 2 years in relation to another offence was in fact incorrect. The applicant asserts that in the case of James McArdle the fact that he had served 2 years in relation to offences committed in England was the reason or one of the reasons for exercising the RPM so that he did not have to serve 2 years for offences committed in Northern Ireland.

(e) The categorisation of the cases in which the RPM had been exercised did not accurately reflect what had previously occurred. Accordingly that the Secretary of State had approached the exercise of her discretion in the applicant's case leaving out of account the correct factual background to the previous use of the RPM in the context of the 1998 Act.

(f) The Secretary of State has failed to give any or adequate reasons for her decision not to recommend the exercise of the RPM to the applicant.

(g) There has been discrimination on the basis of unequal treatment being afforded to prisoners depending on whether they were nationalists or loyalists.

[5] Leave to apply for judicial review was initially refused ([2013] NIQB 69) and the applicant successfully appealed that decision to the Court of Appeal. The matter now comes before this court for determination.

The statutory framework and the Royal Prerogative of Mercy ("the RPM")

[6] The Belfast Agreement dated 10 April 1998 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland followed intense negotiations involving the political parties in Northern Ireland and the Governments of the United Kingdom and Ireland. Annex B to the Belfast Agreement contained a commitment by both Governments to "put in place mechanisms to provide for an accelerated programme for the release of the prisoners …." In addition it was also stated that "the intention would be that should the circumstances allow it, any qualifying prisoners who remained in custody two years after the commencement of the scheme would be released at that point."

[7] The Belfast Agreement dealt with the accelerated release of *those who were in prison*, it being apparent that their accelerated release was a component part of the peace process. The issue of *those not yet convicted* or *convicted but not in prison* was not addressed in the Belfast Agreement and there was no provision in that Agreement for individuals falling into those categories.

[8] In Ireland the commitment as to the release of prisoners was implemented by the Criminal Justice (Release of Prisoners) Act 1998. This Act established a Release of Prisoners Commission to advise the Government of Ireland on the release of prisoners but left sole responsibility for specifying "qualifying prisoners" and the actual release of prisoners with the Minister of Justice, Equality and Law Reform. That legislation was considered in the judicial review application of *Desmond O'Hare v The Minister for Justice Equality and Law Reform Ireland and the Attorney General* [2001] IEHC 121. In that case the applicant, who was still detained, contended that he was entitled to be released at the conclusion of the two year period referred to in Annex B to the Belfast Agreement. O'Caoimh J concluded that the Belfast Agreement is in fact a multi-faceted agreement. That included under the Agreement were Constitutional Issues, Democratic Institutions in Northern Ireland, the North/South Ministerial Council, the British - Irish Council, British - Irish Intergovernmental Conference, provisions on Human Rights and Economic, Social and Cultural issues. He stated that the Applicant believed that he was entitled to be released at this point by reason of the effluxion of the two year period but noted that the intention was that "should the circumstances allow it" any qualifying prisoner who remained in custody two years after the commencement of the scheme would be released at that point. He was of the opinion that the Agreement was couched in language which was not to be construed in the same manner in which one would construe an Act of the Oireachtas but whose terms are essentially political in nature. He stated that there was no automatic entitlement to a qualifying prisoner to be released from custody at the conclusion of the two year period referred to and that it was clear that the provisions of this part of the Agreement only envisaged such release where 'the circumstances allowed it.' In conclusion, that the Applicant had failed to demonstrate that the Minister had failed to have regard to the relevant provisions of the Belfast Agreement in his approach to the Applicant's request for an early release. The application for judicial review was refused. The case is important in a number of respects emphasising, as it does, the essential political nature of the Belfast Agreement following multi-party talks together with the multi-faceted nature of the Agreement and the approach taken by the court in Ireland to the construction of the language of the Agreement. Also in Ireland there was no enforceable right for an offender to be automatically released if he had served 2 years in prison.

[9] In the United Kingdom the commitment was implemented by the 1998 Act which came into force on 28 July 1998. In summary form the 1998 Act provided that:

(a) A prisoner is a person *serving* a sentence of imprisonment either for a fixed term or for life (see section 12). Accordingly for an individual to benefit from the provisions of the Act he or she had to be serving a sentence of imprisonment. However, an individual who is temporarily released from prison under rule 27 of the Prison and Young Offenders Centres Rules (Northern Ireland) 1995 is still serving a sentence of imprisonment and the provisions of the 1998 Act applied to such an individual. The papers before me contain a number of examples of prisoners who having been on the run, were temporarily released under rule 27 upon their return to Northern Ireland, and were entitled to make an application though not physically in prison.

(b) A prisoner may apply to the Sentence Review Commissioners for a declaration that he is eligible for release in accordance with the provisions of the Act (see section 3).

(c) The Commissioners shall grant the application if (and only if) various conditions are met such as that the sentence was passed in Northern Ireland (or England and Wales or Scotland provided the prisoner is serving a sentence of imprisonment in Northern Ireland) for a qualifying offence and is one of imprisonment for life or for a term of at least five years (see sections 3 and 17 together with schedule 3).

(d) If the sentence was passed in Northern Ireland then a qualifying offence is an offence which was committed before 10 April 1998, was when committed a scheduled offence within the meaning of the Northern Ireland (Emergency Provisions) Act 1973, 1978, 1991 or 1996 and was not the subject of a Certificate of the Attorney General for Northern Ireland that it was not to be treated as a scheduled offence in the case concerned.

(e) If the sentence was passed in England and Wales or Scotland then a qualifying offence is an offence which was committed before 10 April 1998, was committed in connection with terrorism and the affairs of Northern Ireland and certified by the appropriate law officer as an offence which if it had been committed in Northern Ireland would have been a scheduled offence within the meaning of the Northern Ireland (Emergency Provisions) Act 1973, 1978, 1991 or 1996.

(f) If a fixed term prisoner is granted a declaration in relation to a sentence then he has a right to be released on licence (so far as that sentence is concerned) on the day on which he has served one third of his sentence. This is subject to one qualification which is not material to this description.

(g) If a life sentence prisoner is granted a declaration in relation to a sentence then the Commissioners must specify a day which they believe marks

the completion of about two thirds of the period which the prisoner would have been likely to spend in prison under sentence. The prisoner has a right to be released on licence (so far as that sentence is concerned) on that day.

(h) The only licence conditions which can be imposed are:-

(i) That he does not support a specified organisation.

(ii) That he does not become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs in Northern Ireland, and

(iii) In the case of a life prisoner, that he does not become a danger to the public.

[10] So in general terms it can be seen that a serving prisoner is entitled to be released on licence when he has served one third of all his fixed termed sentences or two thirds of the period that he would be likely to serve in prison under a life sentence. So whenever the 1998 Act came into force on 28 July 1988 all those prisoners who had served those periods of time were entitled to be released on licence. They were also entitled to be released on licence after 28 July 1988 whenever they had served those periods of time. This did not satisfy that part of the Belfast Agreement which stated that "the intention would be that should the circumstances allow it, any qualifying prisoners who remained in custody two years after the commencement of the scheme would be released at that point." The UK Government satisfied that qualified statement of intention by further release provisions known as "accelerated release" contained within Section 10 of the 1998 Act. The accelerated release day was defined by reference to when the sentence was passed as follows:-

(a) If the sentence was passed *before* the day on which the Act came into force (that is before 28 July 1998) then the accelerated release day is the second anniversary of that day (that is 28 July 2000) (see section 10(4)).

(b) If the sentence was passed *after* the day on which the Act came into force (that is after 28 July 1998) *but* the prisoner had been on remand prior to that day in relation to that offence then the accelerated release day was the second anniversary of that day (that is 28 July 2000) (see section 10(5)).

(c) If the sentence was passed *after* the day on which the Act came into force (that is after 28 July 1998) *and* the prisoner had not been on remand prior to that day in relation to that offence then the accelerated release day was *the second anniversary of the start of the sentence* (see section 10(6)).

[11] So it can be seen that in contrast to the Belfast Agreement the 1998 Act made provision for *those not yet convicted*. That provision was that if they had *not* been on remand prior to 28 July 1998 for an offence then they would be *entitled to be released on the second anniversary of the start of the sentence*. Accordingly if an individual was convicted and sentenced after 28 July 1998 for a qualifying offence committed before 10 April 1998 and for which he had *not* been on remand prior to 28 July 1998, then he would have to serve two years of that sentence before he was entitled to be released on licence. Having served that further two years he could in theory subsequently be convicted and sentenced for yet another qualifying offence and in those circumstances he would again be required to serve a further two years before he was entitled to be released on licence. This would be the position regardless as to whether he had been imprisoned prior to 28 July 1998 for a qualifying offence and regardless as to whether he had served any earlier two year period. So a component part of the statutory scheme is that a prisoner who is released under the 1998 Act having served either one third of his fixed term sentence or two thirds of the period which the prisoner would have been likely to spend in prison under a life sentence or having been released on the accelerated release day, could then some years later be prosecuted for and convicted of a further qualifying offence which was committed prior to 10 April 1998. In those circumstances the 1998 Act provides that he is only entitled to be released on licence once he has served two years of any further sentence. An individual could be convicted sequentially (provided there is no abuse of process) of a whole series of qualifying offences having to serve 2 years in relation to each offence. This risk could be avoided if on arrest for one offence he voluntarily confessed to all the other offences. By adopting that course he could avoid the risk of sequential periods of 2 years in prison.

[12] It can also been seen that accelerated release was different from early release. Under accelerated release an offender, who was a serving prisoner over the two year period between 28 July 1998 and 28 July 2000 was entitled to accelerated release:-

(a) despite the fact that he had not served one third of a fixed term sentence or had not served two thirds of the period which he would have been likely to spend in prison under a life sentence and

(b) regardless as to whether the sentences were consecutive or concurrent.

So in the case of consecutive sentences an individual would be entitled to accelerated release even if that individual had served no time in respect of a particular consecutive sentence. In short serving two years in prison between 28 July 1998 and 28 July 2000 entitled an offender to accelerated release. The Secretary of State stepped outside the requirement to serve two years between those dates in the case of on the runs by using the RPM in situations where an offender had previously served two years. However, as will become apparent,

the requirement under Section 10(6) to serve two years of a new sentence has never been relaxed or waived except in the highly fact specific case of Mr McArdle.

[13] In this case despite Mr Rodgers having served the period that he was required to serve in prison in relation to a life sentence imposed prior to 28 July 1998 and upon being subsequently convicted, his accelerated release day is the second anniversary of the start of the subsequent sentence. There is no statutory provision that entitles a person who has already served two years for another qualifying offence to any earlier release upon a subsequent conviction for another qualifying offence.

[14] The provisions of section 10(4), (5) and (6) of the 1998 Act amongst other provisions could by order be amended by the Secretary of State. A draft of the order would have to be laid before and approved by resolution of, each House of Parliament. Accordingly if Secretary of State wished to amend the provisions so that prisoners, such as Mr Rodgers, who are subsequently convicted but who had served two years or more in prison for an earlier qualifying offence would be entitled to accelerated release without having to serve a further two years, then there was a public and democratic method which could be deployed. There has been no attempt by any Secretary of State by order to amend the provisions contained in section 10(4), (5) and (6) of the 1998 Act.

[15] There are other statutory provisions and rules that are relevant to this case. Section 23 of the Prison Act (Northern Ireland) 1953 (which was repealed by the Life Sentences (Northern Ireland) Order 2001) contained the power for the Minister to release on licence a person serving a term of imprisonment for life. It provided that:-

> "Subject to compliance with such conditions, if any, as the Minister may from time to time determine, the Minister may at any time if he thinks fit release on licence a person serving a term of imprisonment for life."

This power was exercised by the then Secretary of State between 2000 and 2002 to release life sentence prisoners who would not otherwise have been entitled to be released under the 1998 Act. This was expressed to have been done in order to cover specific factual cases which were considered to be anomalous. Section 23 has been repealed. In essence the Parole Commissioners are now responsible for release of life sentence prisoners but there is power in Article 7 of the Life Sentences (Northern Ireland) Order 2001 for, since devolution, the Department of Justice to release life prisoners on compassionate grounds. These judicial review proceedings are brought against the Secretary of State as respondent in relation to the exercise of the RPM and not against the Department of Justice in relation to the exercise of any power to release on licence.

[16] Rule 27 of the Prison and Young Offenders Centres Rules (Northern Ireland) 1995 under the heading "Temporary Release" provides:-

> "27. (1) A prisoner to whom this rule applies may be temporarily released for any period or periods and subject to any conditions.
>
> (2) A prisoner may be temporarily released under this rule for any special purpose or to enable him to have health care, to engage in employment, to receive instruction or training or to assist him in his transition from prison to outside life.
>
> (3) A prisoner released under this rule may be recalled to prison at any time whether the conditions of his release have been broken or not.
>
> (4) This rule applies to prisoners other than persons-
>
> (*a*) remanded in custody by any court; or
>
> *(b)* committed in custody for trial; or
>
> *(c)* committed to be sentenced or otherwise dealt with before or by the Crown Court.
>
> (5) In considering any application for temporary release under this rule previous applications, including any fraudulent applications, may be taken into account."

This was the rule used in some cases in the period 2000-2002 to enable "on the runs" to return to Northern Ireland and then apply for early or accelerated release without physically having to return to prison.

[17] The RPM can be exercised in a number of ways. Every exercise of the RPM is an act of grace and as such may be made subject to compliance by the recipient with such conditions if any as the Sovereign may think fit to impose. The conditions may be precedent or subsequent and the RPM may be made dependent on the due performance of those conditions, see *The Home Office Memorandum on the Royal Prerogative of Mercy dated June 1970* at paragraphs 246 and 257. The applicant initially suggested that he was entitled to a free pardon by the exercise of the RPM but during the course of submissions it became

apparent that he was contending that the RPM should be exercised in his case not to affect a pardon but rather to secure his release on licence. He also accepted that the conditions attached to that licence need not be restricted to those contained in the 1998 Act and if he breached those conditions he could be recalled to prison.

[18] The RPM was used in the period 2000-2002 in a limited number of cases to remit the unexpired portions of fixed term sentences without any conditions being imposed. If the offenders had been released under the 1998 Act they would have been released on licence with conditions. Parity and equal treatment with all those released under the 1998 Act, together with the interests of the public, should have required conditions to be attached to the RPM so that, for instance, if an offender became concerned in the commission of acts of terrorism he could be recalled to prison.

Legal principles as to whether the exercise of the RPM is justiciable and the intensity of review

[19] Sir Anthony Hart, giving the judgment of the Court of Appeal in *Terence McGeough's Application for Judicial Review* [2012] NICA 28 stated that the RPM is a residual power which can only be exercised in circumstances where the legal process may be unable to resolve an apparent injustice. "It begins where the legal rights end". That it is a flexible power and one which should not be regarded as only exercisable in certain defined categories of circumstances. That as it is a power which is only exercised in those rare situations where the legal process may leave an apparent injustice unresolved, its exercise is likely to be highly dependent upon the particular facts of each case, facts which will almost certainly vary greatly from one case to another.

[20] In *McGeough* the Court of Appeal also considered the question as to whether the exercise of the RPM was justiciable. The court concluded that it was open to the courts to interfere:-

(a) If it is clear that the decision-maker had refused to pardon someone on irrational grounds.

(b) Where there may have been an error of law on the part of the decision-maker, as where the decision-maker errs in law in considering whether he or she has a power to grant a pardon.

(c) Where there has been an unfair or unequal approach to the exercise of the RPM in individual cases.

The Court of Appeal however indicated that the decision-maker should be afforded a wide degree of latitude within which to make his decision and that it is only in the clearest of cases that the courts should interfere, and should only

do so where the applicant surmounts a high factual threshold. The court emphasised this degree of latitude when referring to a review on the basis of unfairness or unequal approach stating that the decision-maker should be afforded a wide ambit of discretion and stating that the courts should exercise proper restraint when reviewing any decision in this area, a restraint that requires the applicant to surmount a high factual threshold to show that there has been unfairness or inequality.

[21] The Court of Appeal in *McGeough* considered the exercise of the RPM in the context of the Belfast Agreement and the 1998 Act. The court agreed that to exercise the RPM to relieve an individual convicted after the day on which the Act came into force of having to "serve 2 years of their sentence before obtaining accelerated release" would be inconsistent with the express provisions of the Act. That any decision under the RPM, which relieved an offender of his or her obligation to serve 2 years of their sentence, is likely to arise only in exceptional circumstances.

[22] The Court of Appeal in *McGeough* considered the specific cases described as "anomalies" where the RPM was exercised despite the offender not falling within *some of* the express provisions of the 1998 Act. The anomalies being cases where prisoners were accepted to have fallen within the spirit, though not the letter, of the 1998 Act, particularly when viewed in the light of the Belfast Agreement which gave rise to the 1998 Act. That is persons who were excluded from the 1998 Act by a technical consideration for example in the case of Seamus Clarke whose case did not fall within the 1998 Act because he had only received 4 years imprisonment and that did not qualify. I would add other examples of technical considerations such as:-

(a) Where a prisoner had a number of sentences that qualified but other sentences which did not qualify because, for instance, they did not meet the requirement of being 5 years in length albeit that either directly or indirectly they were connected to other sentences that were of sufficient length.

(b) Where a prisoner was convicted of an offence which was not scheduled either at the time that it was committed or at the time of his conviction but later became scheduled.

(c) Where a prisoner was convicted in Ireland, but was in prison in Northern Ireland in circumstances where if he had remained in Ireland he would have been entitled to be released.

(d) Where a prisoner was convicted in both England and in Northern Ireland, where if he had been first prosecuted in Northern Ireland, then he would have been entitled to be released as were his co-offenders in relation to the Northern Irish offences.

[23] The Court of Appeal in *McGeough* left for further consideration whether it was open to the Secretary of State to allow political considerations to play a part in the exercise of the RPM.

[24] Mr Scoffield Q.C., who appeared on behalf of the applicant with Mr Devine, submitted that this court is not bound to apply the principles set out in *McGeough* as to the intensity of review and the wide degree of latitude given the subsequent judgment of the Supreme Court in *Kennedy v The Charity Commission* [2014] UKSC 20. Mr Scoffield, relying on paragraphs 51, 52, 54 and 55 of the judgment of Lord Mance in *Kennedy*, submitted that the intensity of review is heavily dependent on the context. That in the context of fundamental rights that the scrutiny is likely to be more intense. That as the context in this case is the right of the applicant not to be deprived of his liberty unfairly or unequally in comparison to others, that this context requires an intense level of scrutiny. Accordingly, that the court is required to look very closely at the process by which the facts have been ascertained and at the logic of the inferences drawn from them.

[25] *McGeough* is a decision of the Court of Appeal specifically addressing the intensity of review and the wide degree of latitude in the context of the exercise of the RMP and the 1998 Act. That is the precise context of this application. Mr McGeough applied for leave to appeal to the Supreme Court and that application was refused. The Court of Appeal has determined the intensity of review and the wide degree of latitude in this context and I consider that this court is required to apply the principle as set out in *McGeough*. I proceed on that basis.

[26] Applying the principles set out in *McGeough* I consider that the burden is on the applicant to establish to a high factual threshold that there has been an unfair or unequal approach to the exercise of the RPM. That is not to displace the ordinary civil standard of proof in relation to the facts ascertained by the Secretary of State or in relation to the facts as determined by this court as to what was involved in the decision making process. Rather the high factual threshold affords a wide margin of appreciation to the decision maker so that it is only in the clearest of cases that the court should conclude that there has been unfairness or an unequal approach.

Legal Principles as to the requirement for a policy

[27] The applicant contends that as an aspect of procedural fairness the Secretary of State should have a policy in relation to the exercise of the RPM in the context of the 1998 Act to enable those seeking the exercise of the RPM to make meaningful representations. In that respect the applicant relied on the decision of the Court of Appeal in *B v Secretary of State for Work and Pensions* [2005] EWCA Civ 929. That case concerned a claim by the Secretary of State to

recover overpayments of benefits. In the course of the hearing it became apparent that the relevant department had a written policy which had not been published. Lord Justice Sedley stated:

> "[43] It is axiomatic in modern government that a lawful policy is necessary if an executive discretion of the significance of the one now under consideration is to be exercised, as public law requires it to be exercised, consistently from case to case but adaptably to the facts of individual cases. If – as seems to be the situation here – such a policy has been formulated and is regularly used by officials, it is the antithesis of good government to keep it in a departmental drawer. Among its first recipients (indeed, among the prior consultees, I would have thought) should be bodies such as the Child Poverty Action Group and the Citizens Advice Bureaux. Their clients are fully as entitled as departmental officials to know the terms of the policy on recovery of overpayments, so that they can either claim to be within it or put forward reasons for disapplying it, and so that the conformity of the policy and its application with principles of public law can be appraised, although two such policies were evidently described or shown to Newman J in R (on the application of Larusai) v Secretary of State for Work and Pensions [2003] EWHC 371 Admin: see para 15 and 19."

It is contended on behalf of the applicant that the significance of the decision in his case, which might lead the applicant to be deprived of his liberty unfairly or unequally in comparison to others, is of far more significance than an entitlement to recover overpayment of benefits and, accordingly, that it is necessary for the Secretary of State to have a policy.

[28] *R (on the application of Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 was a case in relation to the exercise of a discretion as to the continued detention of the applicant following completion of a prison sentence where a recommendation for deportation had been made by a court. The discretion was contained in paragraph 2(1)(a) of Sch 3 to the Immigration Act 1971 which provided that where a recommendation for deportation made by a court was in force and the person was not detained in pursuance of the sentence or order of any court 'he shall … be detained pending the making of a deportation order … *unless the Secretary of State directs him to be released pending further consideration of his case* or he is released on bail'. The Secretary of State had two policies in relation to the exercise of that discretion one published and

the other unpublished. At paragraph [34] and in relation to the need for a policy Lord Dyson stated:

> "The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements."

Lord Phillips at paragraph 302 stated

> "I agree with Lord Dyson that, under principles of public law, it was necessary for the Secretary of State to have policies in relation to the exercise of her powers of detention of immigrants and that those policies had to be published. This necessity springs from the standards of administration that public law requires and by the requirement of art 5 that detention should be lawful and not arbitrary. Decisions as to the detention of immigrants had to be taken by a very large number of officials in relation to tens of thousands of immigrants. Unless there were uniformly applied practices, decisions would be inconsistent and arbitrary. Established principles of public law also required that the Secretary of State's policies should be published. Immigrants needed to be able to ascertain her policies in order to know whether or not the decisions that affected them were open to challenge."

Factual background to the consideration of the exercise of the RPM in relation to the applicant

[29] On 7 February 2013, after the evidence at his trial had concluded and one week before he was convicted on 14 February 2013, the applicant's solicitor wrote to the Secretary of State inquiring as to whether it was her intention to (recommend the) exercise of the RPM to remit the sentences of prisoners who were convicted of historic offences connected to the Troubles and who possibly fell within the spirit but not the strict terms of the early release scheme set up following the Belfast Agreement.

[30] After the applicant was convicted on 14 February 2013 and a life sentence had been imposed on him and by letter dated 7 March 2013 the Crown Solicitor replied stating that "my client has considered your correspondence and I write to advise that they are not minded to recommend the exercise of the RPM". The letter went on to state:-

> "However, if there is any specific detail you wish to bring to my client's attention, then I will forward same to them."

[31] On 11 April 2013 a pre-action protocol letter was sent by the applicant's solicitor which prompted a response dated 18 April 2013 that this was premature as no decision had been taken. The letter went on to state that given that there had been no further detail provided in response to the invitation to do so that a decision would now be taken.

[32] The applicant's solicitor responded on 19 April 2013 stating that they were at a significant disadvantage in making any further representations on behalf of the applicant given the lack of reasons in the "not minded to recommend" letter dated 7 March 2013.

[33] Following the letter dated 18 April 2013 the matter was referred to the Secretary of State for her decision. The information provided to the Secretary of State was contained in a document dated 19 April 2013 prepared by the "Security and Legacy Group" of the Northern Ireland Office. The document considered various comparators. It stated that the applicant's case was in fact identical in substance to that of Mr Robert James Clark in which a decision had been made that he was not eligible for the RPM. The document went on to consider various other potential comparators. It stated that the RPM had been granted 16 times since 2000. That in each case the RPM was used to address anomalies that otherwise prevented the application of the early release scheme. It then set out what was termed in these proceedings "the fourfold categorisation" of cases in which the RPM or some other method had been used in order to release individuals. This fourfold categorisation was referred to in a written answer in Parliament on 29 May 2002. I set out the fourfold categorisation with the addition in italics of the names of the individuals which the respondent contends fall into each category:

(a) To correct anomalies in the treatment of offenders convicted of the same offence and given the same sentence as co-defendants but who would otherwise have served longer in prison; *Applied to James McArdle in 2000.*

(b) To release prisoners who would have been eligible for release under the Belfast Agreement had they not transferred from a different jurisdiction; *Applied to Sean Branniff; Fergal Toal in 2000.*

(c) To release prisoners who would have been eligible to be released under the Belfast Agreement had their offences (which subsequently became scheduled offences) been scheduled at the time they were committed; *Applied to Hugh Clarke; Eugene Fanning; Malachy McCann; Edward F Campbell; Daniel Keenan; James Monaghan; SJ Clarke; Gerard Fryers*.

(d) To release prisoners who would have been eligible to be released under the Belfast Agreement had they not served their sentences overseas having been convicted extra-territorially. (*Applied to Robert J Campbell; Paul Magee; Angelo Fusco; Gerard Sloan; Anthony Sloan.)*

[34] The document dated 19 April 2013 stated that it was not believed that the applicant fell into any of these categories. That to use the RPM in the applicant's case would be unprecedented and extremely difficult to justify either legally or presentationally. It would in effect be allowing someone who has served time for one offence to argue that they should not be imprisoned again for an entirely separate offence. The document contained a recommendation that there was no basis for the exercise of the RPM in the applicant's case given that the previous sentence (for the murder of Kieran McIlroy) was for an entirely separate offence to that which he had just been convicted (the murder of Eileen Doherty). It was asserted that this meant that he was not in a similar position to other individuals who had been granted the RPM. It was therefore recommended to the Secretary of State that she agree that the applicant should not be granted the RPM and that her officials instruct the Crown Solicitor on her behalf to advise the applicant's legal team that their client is not deemed eligible for the RPM or other special treatment reiterating that his current offences are separate and in no way linked to his previous ones. On that basis, that he is not found eligible for the RPM.

[35] Upon receipt of that document from the Security and Legacy Group dated 19 April 2013 the Secretary of State commented:-

> "Mr Rogers' case does not appear to fall into any of the categories where the RPM has been granted in the past. I am unable to see a justification for application of the RPM in entirely novel circumstances. I therefore accept the recommendation and submission. The RPM should not be exercised in this case."

[36] By letter dated 29 April 2013 the Crown Solicitor wrote stating that the Secretary of State does not find your client eligible for the RPM or any other special dispensation. The reasons given were:-

> "(a) The offence for which your client has now been convicted and sentenced relates to an

entirely separate offence, committed at a different time from that for which he previously served a life sentence; and

(b) My client does not agree that an anomaly exists in relation to your client."

[37] On 24 May 2013 the applicant commenced these judicial review proceedings.

[38] By letter dated 20 June 2013 the applicant's solicitor wrote under the Freedom of Information Act 2000 asking the Secretary of State a number of questions including:-

(a) asking her to confirm whether a policy has ever existed in relation to the exercise of discretion in respect of the RPM in this jurisdiction; and

(b) that even if no policy exists that she confirms what criteria that is applied and considered in circumstances where an individual would seek to persuade the Secretary of State that they should benefit from the RPM.

The reply dated 29th August 2013 was that:-

"(a) The Northern Ireland Office does not hold any information relevant to this question; and

(b) It is not clear how this request differs from your first request. Please provide further clarification as to what this request is intended to cover. It might be helpful to specify the kind of information that you would expect to receive."

From this exchange I conclude that there was no policy in relation to the exercise of the RPM

Factual background to the exercise or to the consideration of the exercise, of the RPM in relation to the 1998 Act

[39] The RPM was exercised 16 times in the context of the 1998 Act in the period 2000-2002. Since 2002 there have been three requests, including the applicant's request, for the RPM to be exercised, all of which have been refused. The applicant states that the unfair and unequal approach to the exercise of the RPM relates to:-

(a) certain cases in the period 2000-2002; and

(b) what he submits was the policy which can be discerned from the refusal to exercise the RPM in the case of *McGeough*. That Mr McGeough was distinguished from other comparators on the basis that "the decision to exercise the RPM in each of those cases were consistent and based upon *the position* that only those who had served a period of two years imprisonment within the jurisdiction of the United Kingdom or the Republic of Ireland should be considered for the exercise of the RPM" (*emphasis added*). Mr McGeough had been imprisoned in Germany and the USA. Applying the *position* as identified to the Court of Appeal the applicant asserts that as he had served two years imprisonment in the United Kingdom that he should be considered for the exercise of the RPM.

[40] Since *McGeough's* case was decided further documents have become available and accordingly more information is available to this court. I will summarise the factual position in relation to the exercise of the RPM in relation to a number of cases in the period 2000-2002. I will then summarise the factual position in relation to the other two cases where the exercise of the RPM has been considered since 2002 in the context of the 1998 Act.

Factual background to the exercise of the RPM in the period 2000 - 2002

[41] It is convenient to consider the various cases in which the RPM was used during this period in distinct groups in the same order as the fourfold categorisation.

(a) James McArdle: who was first convicted of offences in England and then convicted in Northern Ireland and who would have been treated differently under the 1998 Act than his co-offenders who were convicted in Northern Ireland

[42] *James McArdle* and three others were arrested on 10 April 1997 as part of the "South Armagh Sniper Gang". He and the others were questioned for seven days in Gough Barracks in relation to a number of offences committed in Northern Ireland. He co-arrestees were all charged in connection with the South Armagh incidents and remanded in custody to Maze Prison. However, Mr McArdle was also wanted for questioning in respect of the Canary Wharf explosion and on 17 April 1997 he was released without charge in Northern Ireland but immediately re-arrested by members of the Metropolitan Police who took him to London. On 19 April 1997 he was charged with offences in connection with the Canary Wharf bombing. In June 1998 he was convicted of conspiracy to cause an explosion and he was sentenced to 25 years in prison. In September 1998 he was transferred to the Maze Prison in Northern Ireland. In January 1999 he was charged with the South Armagh offences. On 19 March 1999 he was convicted in Northern Ireland of conspiracy to murder and

possession of firearms and ammunition with intent to endanger life and property. He was sentenced to 20 years' imprisonment. The three other individuals who had been arrested in April 1997 were also convicted at the same time in respect of the same charges and 20 year sentences were imposed. However, one of them was also given three life sentences for murder and another 25 years for attempted murder.

[43] The three other offenders were entitled to be released on 28 July 2000 because all the sentences were passed in March 1999 after 28 July 1998 but they fell within Section 10(5) of the 1998 Act as they had all been on remand since April 1997. Accordingly the accelerated release date was 28 July 2000. It can be seen that two of those offenders had committed additional serious offences in Northern Ireland which warranted the imposition of life sentences and a sentence of 25 years for attempted murder.

[44] The position in relation to Mr McArdle was different. He did not fall within Section 10(5) as the sentence was passed in Northern Ireland in March 1999 after 28 July 1998 and he had not been on remand in respect of those offences prior to that date. Accordingly his case fell within Section 10(6) and he in contrast to his co-accused for the South Armagh offences would have had to serve two years in respect of that sentence before he was entitled to be released. His accelerated release date would have been 19 March 2001 as opposed to 28 July 2000. By 28 July 2000 he had served some ten months in respect of the Northern Ireland Sentences which were imposed on 19 March 1999. In the event it was decided to use the RPM to remit the unexpired portion of his Northern Ireland offences to allow him to be released on 28 July 2000. The RPM was signed by Her Majesty the Queen on 25 July 2000 and he was released on 28 July 2000.

[45] The applicant contends that Mr McArdle was sentenced for an offence in England and served two years in relation to that offence and the fact that he had served two years in relation to that offence was considered to relieve him of the obligation to serve two years in relation to the offences which he committed in Northern Ireland. Accordingly the applicant contends that the reason put forward by the Secretary of State in his case that the offence for which the applicant had been convicted and sentenced related to an entirely separate offence committed at a different time from that which he had previously served a life sentence was incorrect. I consider that to be far too simplistic an analysis of the facts of Mr McArdle's case and that the case does not establish any precedent that absent the facts in Mr McArdle's case that time served in relation to another offence should be taken into account under Section 10(6) of the 1998 Act to require the exercise of the RPM to relieve the offender of having to serve two years in prison in relation to an offence for which he is subsequently convicted.

[46] The case of Mr McArdle is quite different from the applicant's.

(a) Mr McArdle was part of an existing cohort of serving prisoners in 1998. The applicant was convicted years later.

(b) Mr McArdle's case fell within Section 10(6) of the 1998 Act but only because of the administrative decision as to the order in which the charges were brought against him as opposed to against his co-accused. His case was not a pure Section 10(6) case where an individual is subsequently convicted years later of an offence which was committed prior to 10 April 1998. The applicant's case is a pure Section 10(6) case. As will become apparent all pure Section 10(6) cases have been treated in exactly the same way as the applicant's by requiring the offender to serve two years in prison. The RPM has never been exercised in relation to any offender who years after the Belfast Agreement was convicted of a qualifying offence but who had served 2 years or more in prison at an earlier stage in relation to another qualifying offence.

(c) If Mr McArdle had not been released there would have been a disparity of treatment as between him and his co-accused. There is no such factor in the applicant's case.

(d) The RPM was not used in Mr McArdle's case in relation to a life sentence. No life sentence has ever been remitted by the use of the RPM. The applicant contends that the RPM should be used in his case and that, given that the alternative method of using Section 23 of the Prison Act (Northern Ireland) 1953 in relation to a life sentence is no longer available to the Secretary of State, the RPM should be used to achieve the same objective. In the event it is not necessary for me to decide whether despite the fact that the RPM has never been used in relation to a life sentence it should now be used to achieve the same objective as was achieved by the use of section 23 of the Prison Act (NI) 1953. It could be suggested that since devolution the equivalent powers under Article 7 of the Life Sentences (Northern Ireland) Order 2001 could only be exercised by the Department of Justice and that the RPM should not be used to circumvent the devolution of justice.

[47] Mr McArdle's case raised a clear anomaly which arose by reason of the investigative and administrative convenience of proceedings being brought first in England. The facts of his case are entirely different from the facts of the applicant's case.

[48] Mr Scoffield submitted that the fourfold categorisation was flawed, particularly in this case because it did not reflect that consideration as to the

time served in relation to one offence was taken into account in considering a recommendation as to the exercise of the RPM in relation to another offence. Dr McGleenan Q.C., who appeared on behalf of the Secretary of State with Mr McAteer, asserted that the categorisation was "descriptive albeit with some inadequacies." I consider that the fourfold categorisation did simplify the reasons for the previous exercise of the RPM and was descriptive. However the description "to correct anomalies in the treatment of offenders convicted of the same offence and given the same sentence as co-defendants but who would otherwise have served longer in prison" did capture the essence of the dominant reason for the recommendation of the exercise of the RPM in Mr McArdle's case.

(b) Braniff and Toal: who were convicted in Ireland but were serving their sentences in Northern Ireland

[49] There is a paucity of information in relation to the use of the RPM in respect of *Sean Joseph Gerard Braniff* and *Fergal Toal*. It appears from the information that is available that they were both convicted in Ireland for qualifying offences but they were serving their sentences in Northern Ireland. If they had remained in Ireland they would have been released under the Criminal Justice (Release of Prisoners) Act 1998 but they had been transferred to Northern Ireland. As consequence they did not come within the provisions of the 1998 Act by virtue of the fact that the sentences had not been passed in Northern Ireland, England and Wales or Scotland. This was a clear anomaly. They had been convicted in Ireland and were eligible for release in Ireland however they were serving their sentences in Northern Ireland. They did not fall within the wording of the 1998 Act as the sentences had not been imposed in the United Kingdom. Their cases bear no similarities to the present application. The applicant has not sought to contend that he has been treated unfairly or unequally in comparison to these individuals.

(c) Hugh Clarke and others: the categorisation of being convicted of offences in Northern Ireland that were not at the time but subsequently became scheduled offences

[50] The fourfold categorisation in relation to this group was "To release prisoners who would have been eligible to be released under the Belfast Agreement had their offences (which subsequently became scheduled offences) been scheduled at the time they were committed." As will become apparent that is an over simplification of the detailed facts of each case. However I do not consider that this over simplification obscured from consideration by the Secretary of State any case that was analogous to that of the applicant.

[51] On 14 June 1972 *Hugh Clarke* was convicted of causing an explosion, possession of firearms in suspicious circumstances and possession of a firearm with intent. He was given concurrent sentences of 8, 4 and 4 years imprisonment respectively. On 16 October 1972 he was convicted of attempting

to escape from a prison, false imprisonment (three counts) and of assault and of obstruction of a constable, for which he received sentences of 2, 1 (three times) and 1 year's imprisonment respectively. The court ordered that the one year sentences be served consecutively to the two year sentence and that all the sentences should be consecutive to those already being served. So his effective sentence was increased to 10 years. In 1975 he escaped from Newry Courthouse having served over 2 years in custody (1,092 days, marginally less than 3 years). By the date of his escape he had nearly served 1/3 of all his fixed term sentences. The offences were not qualifying offences because:

(a) the offences of which he was convicted in 1972, *when committed* were not scheduled. They became scheduled in 1973 or 1978.

(b) the sentences relating to his attempted escape were less than five years in length;

(c) he had not served 1/3 of all his fixed term sentences and therefore was not entitled to early release; and

(d) he was not a serving prisoner between 28 July 1998 and 28 July 2000 and therefore was not entitled to accelerated release.

The fact that the offences were not scheduled when committed but subsequently became scheduled was a clear anomaly. The fact that there were sentences of inadequate length to be qualifying sentences was approached on a holistic basis taking into account all the other offences of which he had been convicted. The fact that he was not entitled to early release or to accelerated release was considered in the context that he was one of a small group of prisoners who were on the run and he had already served 2 years in custody. Having served 2 years in custody was not the only consideration and it was not in the context of section 10(6). The RPM was exercised to grant remission of 92 days of Clarke's eight year sentence and 1,095 days of his consecutive sentences of imprisonment. The description that the RPM was exercised to release Hugh Clarke who would have been eligible to be released under the Belfast Agreement had his offences (which subsequently became scheduled offences) been scheduled at the time they were committed, is too simplistic but it reflects the dominant reason. This was not a section 10(6) case. The facts are not analogous to the applicant's.

[52] On 7 June 1973 *Eugene Martin Fanning* was convicted at Belfast City Commission of robbery (two counts) and of carrying firearms with intent. He was given three concurrent sentences of nine years imprisonment. In 1975 he escaped from Newry Courthouse having served over two years in custody (763 days). The offences were not qualifying offences within the 1998 Act as:

(a) he was convicted in June 1973 and the offences only became scheduled in July 1973.

(b) he had not served 1/3 of all his fixed term sentences and therefore was not entitled to early release; and

(c) he was not a serving prisoner between 28 July 1998 and 28 July 2000 and therefore was not entitled to accelerated release.

The fact that the offences were not scheduled when committed but subsequently became scheduled was a clear anomaly. The fact that he was not entitled to early release or to accelerated release was considered in the context that he was one of a small group of prisoners who were on the run and he had already served 2 years in custody. Having served 2 years in custody was not the only consideration and it was not in the context of section 10(6). The RPM was exercised to grant remission of 1,759 days of each of his sentences. Again the description in the fourfold categorisation is too simplistic but it reflects the dominant reason. This was not a section 10(6) case. The facts are not analogous to the applicant's.

[53] On 21 June 1974 *Malachy McCann* was convicted of possession of firearms and ammunition with intent and possession of explosive substances with intent. He was given concurrent sentences of 10 years and 7 years imprisonment respectively. On 26 November 1974 he was convicted of attempted escape from lawful custody for which he received a sentence of 3 years imprisonment to be served consecutively to those already being served. In 1975 he escaped from Magilligan Prison having served 16 days less than 2 years in prison (714 days). His sentences could not be dealt with under the 1998 Act because:

(a) the offences of which he was convicted in 1974, when committed, were not qualifying offences;

(b) his sentence for attempted escape was less than 5 years;

(c) he had not served 1/3 of his fixed term sentences having served marginally less than 2 years of an effective 10 year sentence; and

(d) he was not a serving prisoner between 28 July 1998 and 28 July 2000 and therefore was not entitled to accelerated release.

The RPM was exercised to grant remission of 1,127 days of his 7 years imprisonment, 22 days of his tenure sentence and 1,095 days of his 3 year sentence. This is not a section 10(6) case and the facts are not analogous to the applicant's.

[54] In May 1973 *Edward Francis Campbell* was convicted and sentenced to 6 years for possession of a firearm and ammunition with intent: 3 years for false imprisonment: 3 years for having a firearm in a public place: 3 years for carrying a firearm with intent: 3 years for possession of a firearm in suspicious circumstances; 3 years for possession of a firearm when committing and offence and 1 year for taking and driving away. All the sentences were concurrent. In February 1975 having served 714 days in custody, that is marginally less than 2 years, he absconded from the Royal Victoria Hospital. The only sentence which he had not then served was the 6 year sentence (2/18). The offences which he had committed were not scheduled at the time of commission but were subsequently scheduled. The RPM was exercised to remit the outstanding portion of his 6 year sentence. If the offence had been scheduled at the time then he would have been entitled to be released after 2 years having served 1/3 of his fixed term sentence. He was within days of having done that. The case is factually different from the applicant's case. This is not a section 10(6) case. There is reference to the context in which the decision to recommend the exercise of the RPM was made in that the timing was "Routine – although if there is an act of decommissioning we would want to be able to move swiftly on this" (2/18). The facts are not analogous to the applicant's.

[55] In October 1972 *Daniel Joseph Keenan* was convicted and sentenced to 10 years for causing an explosion. After having served between 2 years and 1 month in prison and in 1975 he escaped from Magilligan prison. His sentences could not be dealt with under the 1998 Act because:

(a) the offences of which he was convicted in 1972, when committed, were not qualifying offences;

(b) he had not served 1/3 of his fixed term sentence having served marginally less than 2 years; and

(c) he was not a serving prisoner between 28 July 1998 and 28 July 2000 and therefore was not entitled to accelerated release.

This is not a section 10(6) case and the facts are not analogous to the applicant's.

[56] On 18 October 1972 before the Emergency Provisions Act 1973 came into operation *James Martin Monaghan* was convicted of possession of explosives with intent and sentenced to 10 years imprisonment. After serving approximately 3 years and in 1975 he escaped from Magilligan prison. His sentences could not be dealt with under the 1998 Act because:

(a) the offences of which he was convicted in 1972, when committed, were not qualifying offences;

(b) he had not served 1/3 of his fixed term sentence having served approximately 3 years; and

(c) he was not a serving prisoner between 28 July 1998 and 28 July 2000 and therefore was not entitled to accelerated release.

This is not a section 10(6) case and the facts are not analogous to the applicant's.

[57] The applicant relied as a relevant comparator on the facts in relation to *Seamus Joseph Clarke*.

[58] In 1976 Mr Clarke was convicted on five counts of murder, one of causing an explosion and one of conspiracy to cause an explosion. He was sentenced to five life sentences, 14 years and 7 years respectively (1/157, 1/173/37, 2/5 and 2/26).

[59] In 1978 he was convicted of causing grievous bodily harm with intent and two offences of attempting to cause grievous bodily harm with intent. He was sentenced to 7 years and 4 years (x 2) respectively. The 1978 sentences were to be concurrent with each other but consecutive to the 14 year and 7 year sentences imposed in 1976.

[60] On 25 September 1983 having served 8 years he escaped from the Maze Prison. The applicant contends that at the date of Mr Clarke's escape he could not have served any time in prison in relation to the 1978 offences which were consecutive to, for instance, a 14 year sentence imposed in 1976. Whether that is correct depends on the remission that was available at the time. If for instance 50% of the 1976 sentence was remitted then he had served one year in relation to the 1978 offences.

[61] On 16 March 2001 Mr Clarke returned to Northern Ireland. He was granted temporary release under Rule 27 of the 1995 Rules and signed applications to the Sentence Review Commissioners. On 29 March 2001 he was released on licence his application having been approved by the Sentence Review Commissioners. I consider that this could only have been on the basis that the Commissioners were satisfied that he had served two thirds of the period which he was likely to serve in prison in respect of the life sentences and one third of his fixed term sentences. The only reason why Mr Clarke did not come within the 1998 Act was that he had two non-qualifying sentences of 4 years for attempted grievous bodily harm with intent. This appears to have been a case of the use of the RPM where an offender had a number of sentences that qualified but other sentences that did not qualify because of their length. The approach appears to me to have been a holistic approach looking at all his offences. There were references to the factor being taken into account of time having been served of 8 years in relation to other offences as a consideration in relation to the question as to the use of the RPM in relation to the 4 year non-

qualifying offences. However it is too simplistic to say that this is a case of time being served in relation to one sentence being set off against another as the only reason for the use of the RPM. It is certainly not a case of that occurring within the context of Section 10(6). It is not analogous to the applicant's case.

[62] The skeleton argument filed on behalf of the applicant contended that the case of *Gerard Fryers* was a further illustration of unfair and unequal treatment to the applicant. However, Mr Scoffield stated during submissions that the applicant was no longer relying on Mr Fryers as a comparator.

(d) Campbell, Fusco, Sloan and Magee: all of whom had escaped from Crumlin Road Prison

[63] *Robert Joseph Campbell*, *Anthony Gerard Sloan*, *Paul Patrick Magee* and *Angelo Fusco* were all members of an IRA gang which carried out an attack on the RUC police station at Antrim Road, Belfast in May 1980. Captain Westmacott was murdered during that attack. They were all prosecuted for a range of serious offences but on 10 June 1981 two days before they were convicted and sentenced on 12 June 1981 all four offenders escaped from the Crumlin Road prison. They were each sentenced in their absence.

(a) Robert Joseph Campbell was convicted of the murder of Captain Westmacott. He was also convicted of attempted murder and possession of firearms and ammunition with intent to endanger life and property. He was sentenced to two life sentences for murder and attempted murder and 20 years for the firearms offences.

(b) Angelo Fusco was convicted of murder, two counts of attempted murder, belonging to a proscribed organisation and three counts of possession of firearms and ammunition with intent to endanger life and property. He was sentenced to three life sentences for murder and attempted murder, 10 years for belonging to a proscribed organisation and two sentences of 20 years and one of 14 years for the firearm offences to be served concurrently.

(c) Anthony Gerard Sloan was convicted on two counts of possession of firearms and ammunition with intent to endanger life and property and one count of unlawful imprisonment. He was sentenced to 20 years for the first firearms offence, 18 years for the second and 5 years for unlawful imprisonment.

(d) Paul Patrick Magee was convicted of murder, attempted murder and three counts of possession of firearms and ammunition with intent to endanger life and property. He was sentenced to two life sentences for murder and attempted murder and two sentences of 20 years and one of 18 years for the firearm offences to be served concurrently.

[64] Robert Joseph Campbell, Paul Patrick Magee and Angelo Fusco had each been in prison in Northern Ireland on remand awaiting trial for 13 months. Anthony Gerard Sloan had been in prison in Northern Ireland on remand for 9 months. Accordingly all four of them had served a part of their sentence in prison in Northern Ireland.

[65] All four of the offenders were subsequently arrested in Ireland. They were each in Ireland prosecuted for and convicted extra territorially of firearms and other offences committed in Northern Ireland relating to their escape from the Crumlin Road prison in Northern Ireland. Sentences of imprisonment were imposed in Ireland with Angelo Fusco serving 7 years and 8 months in prison in Ireland, Robert Campbell serving 8 years, Paul Patrick Magee 8 years, Anthony Gerard Sloan approximately 8 years.

[66] When they were nearing the completion of their prison sentences in Ireland the Northern Irish authorities sought extradition to Northern Ireland. In those extradition proceedings in Ireland there was for instance in relation to Mr Sloan an appeal to the Supreme Court. During the course of those proceedings an indication was given by the then Secretary of State that the time spent in the Republic would be credited against the Northern Ireland sentence. The same applied for instance in relation to Mr Fusco (2/1/7)

[67] None of the four offenders fell within the provisions of the 1998 Act for the following reasons:-

(i) They had not served 1/3 of their fixed term sentences and they had not served 2/3 of the period which they would have been likely to spend in prison under their life sentences. Accordingly they were not entitled to early release.

(ii) They were not serving a term of imprisonment in Northern Ireland as at 28 July 1998

(iii) They were not entitled to accelerated release as to be entitled they would have had to be in prison in Northern Ireland between 28 July 1998 and 28 July 2000.

However

(a) They had served either 13 months or in the case of Mr Sloan 9 months on remand in prison in Northern Ireland.

(b) They had all served between 7 and 8 years in prison in Ireland for offences committed in Northern Ireland.

(c) The position was complicated by the indication given by the Secretary of State in relation to extradition from Ireland.

[68] On 24 December 2000 the RPM was granted in respect of the determinate sentences imposed on all four offenders to remit the unexpired portion of their sentences. In respect of the life sentences the power under Section 23 of the Prison Act (Northern Ireland) 1953 to release a life sentence prisoner on licence was utilised. So for instance in relation to Paul Patrick Magee before he escaped he would have served 13 months in prison in Northern Ireland in respect of an effective 20 year sentence for the firearm offences and in respect of his life term. The unexpired portion of the 20 year sentence of approximately 19 years for the firearm offences was remitted under the RPM. In addition the then Secretary of State exercised powers under Section 23 of the Prison Act (Northern Ireland) 1953 to release him under licence in respect of the three life sentences.

[69] In the highly fact specific circumstances of these cases a factor taken into consideration was that the offenders had served 7 – 8 years in prison in Ireland in relation to the escape offences when considering whether to recommend the exercise of the RPM in circumstances where they had not served 2 years in relation to the original offences. That factor has to be seen in the context of indications given during extradition proceedings which are not present in the applicant's case. In addition these cases were not section 10(6) cases where the offender is convicted subsequently. There has been no case under section 10(6) (apart from McArdle's case) where time served in relation to an earlier offence is taken into account in order to relieve the offender of having to serve 2 years in relation to the subsequent offence. These cases are far from analogous to the applicant's case

[70] Furthermore these individuals had served time on remand in relation to the original offences and the applicant is contending that he should not serve any time at all in respect of his most recent sentence. These cases do not establish the proposition that an offender should be entirely relieved of having to serve any time in relation to the other offence and so the question would then arise as to how much time should be served. Mr Scoffield accepted that it would be overly prescriptive to say that because it was 9 or 13 months for these individuals then it should be 9 or 13 months for the applicant. The answer in the applicant's case is 2 years. This distinction is not only in accordance with the 1998 Act but it is well within the parameters of the margin of appreciation of the Secretary of State.

Factual background to the consideration of the exercise of the RPM in the period since 2002

[71] The 3 cases in which consideration has been given to the exercise of the RPM since 2002 in the context of the 1998 Act are Robert James Clarke, Terence Gerard McGeough and the applicant.

(a) Robert James Clarke

[72] On 14 June 1975 *Robert James Clarke* in the New Lodge area of Belfast murdered Margaret O'Neill in an indiscriminate drive-by shooting which was sectarian in character and politically motivated. He was convicted on his plea of guilty and sentenced in February 1976 to life imprisonment. He served 15 years in prison being released on licence in 1990. Years later the Historical Enquiries Team re-opened an investigation into the murder of Alfredo Fusco which occurred on 3 February 1973. New fingerprint technology allowed them to identify Mr Clarke as the gunman who left his prints at the crime scene. So after 28 July 1998 Mr Clarke was prosecuted for and convicted of the murder of Alfredo Fusco which he had committed prior to 10 April 1998. Again this was a sectarian and politically motivated murder. On 28 February 2011 Mr Clarke was sentenced to life imprisonment for that murder and on 8 April 2011 the tariff was set at 25 years. On 21 March 2011 his solicitors wrote seeking "a Royal Pardon" on his behalf referring to the Belfast Agreement and on the basis that Mr Clarke had already served 15 years in prison. On 16 May 2011 the Crown Solicitor wrote indicating that the Secretary of State did not find that Mr Clarke was eligible for the RPM or any other special dispensation. The letter stated that:-

> "The offences for which your client has now been convicted and sentenced relate to entirely separate offences from that for which he previously served a life sentence."

Further correspondence ensued in which the solicitors referred to the use of the RPM in relation to Anthony Sloan and James McArdle. In the event judicial review proceedings were not commenced by Mr Clarke and he was released on licence on his accelerated release day having served two years in prison.

[73] Mr Clarke's case fell within Section 10(6) of the 1998 Act insofar as sentence was passed after 28 July 1998 and he was not in custody on remand in relation to the murder of Alfredo Fusco prior to that date. It is a direct comparator to the applicant's case.

(b) Terence Gerard McGeough

[74] On 13 June 1981 Terence Gerard McGeough attempted to murder Samuel Brush, a Postman and part-time member of the UDR. After committing this offence Mr McGeough left Northern Ireland and spent years in other countries including Germany and the United States of America. He was imprisoned in both of those countries for a total period of 7½ years in relation to other offences for which he was convicted in the USA and in relation to which he was charged in Germany though there is some equivocation as to whether he was convicted

in that country. All the offences whether in Northern Ireland or Germany or the USA were in connection with terrorism and the affairs of Northern Ireland and all were committed prior to 10 April 1998. However Mr McGeough was not a serving prisoner and therefore did not come within Annex B of the Belfast Agreement. He had not yet been convicted of any offence in Ireland or in the United Kingdom and if prosecuted and convicted in Northern Ireland he would fall within Section 10(6) of the 1998 Act. This would mean that he would not be entitled to accelerated release until the second anniversary of the start of the sentence.

[75] He was prosecuted for the 1981 offence and convicted on 18 February 2011 ([2011] NICC 7). On 6 April 2011 he was sentenced to 20 years' imprisonment ([2011] NICC 16). He applied for the exercise of the RPM given that he had served 7½ years in prison in Germany and the USA prior to 28 July 1998. The then Secretary of State declined to recommend the exercise of the RPM and Mr McGeough brought judicial review proceedings. The application was refused by Treacy J and Mr McGeough's appeal to the Court of Appeal was dismissed. Leave to appeal to the Supreme Court was refused.

[76] In the Court of Appeal it was argued on behalf of the Secretary of State that when one examined the various comparators to which Mr McGeough had pointed it was apparent that, unlike him, each of those concerned, with the exception of Hardy, had served periods of imprisonment in Northern Ireland, or elsewhere within the United Kingdom or the Republic of Ireland, in respect of offences committed in Northern Ireland. The respondent's case was that *if* there was a policy, it was confined to considering whether the RPM should be exercised to resolve the situation of any individual whose circumstances might be said to amount to an anomaly in that they fell within the spirit of the Belfast Agreement but were excluded from the operation of the Sentences Act by technical considerations. The Court of Appeal held that *if* the approach of the Secretary of State can be considered a policy in the circumstances of the present case that the comparators put forward on behalf of Mr McGeough were far from analogous to Mr McGeough's case. The Court of Appeal accepted that the circumstances of the decision to exercise the RPM in each of the other cases was consistent and based upon the position that only those who had served a period of 2 years' imprisonment within the jurisdiction of the United Kingdom or the Republic of Ireland should be considered for the exercise of the RPM. The Court of Appeal held that these two countries were the only countries who were signatories to the Belfast Agreement and it was entirely understandable for the respondent to take the view that only those who had served 2 years' imprisonment in either of those countries or whose circumstances were very closely analogous thereto in the case of Mr McArdle, should benefit from the exercise of the RPM to ensure that they be released after having served at least 2 years' incarceration in either country.

[77] Mr McGeough's case was argued on the basis that he had served 7½ years abroad and it is understandable that the distinguishing feature discerned in his case was that he had not been imprisoned in the United Kingdom or in Ireland. However, another distinguishing feature is that his case is a pure section 10(6) case and in that respect the facts are analogous to the appellant's case and to the case of Robert James Clarke, with the same outcomes.

[78] I reject the contention that there was a policy to be discerned from the decision in *McGeough* that anyone who had served 2 years in prison in the United Kingdom or in Ireland would be entitled to the exercise of the RPM upon a subsequent conviction that fell to be dealt with under section 10(6) of the 1998 Act.

Conclusions

(a) Unfair or unequal treatment

[79] The then Secretary of State in the period 2000-2002 went beyond the terms for early and accelerated release contained in the 1998 Act. Once the RPM or some other method is used which goes beyond the 1998 Act then those affected have to be treated fairly and consistently.

[80] If one is looking for a comparable case Mr Scoffield accepted that the best comparable case would be the case of a person who was convicted and sentenced to imprisonment before 10 April 1998 and then having served more than 2 years was released and then was convicted years later of another offence with the RPM then being used to secure his immediate release upon his subsequent conviction without having to serve any time in prison or without having to serve the full two years in prison. I consider such a case would be truly analogous to that of the applicant. The applicant has been unable to point to a single such case. All the cases in the period 2000 - 2002 related to the use of the RPM in the context of Section 10(4) and 10(5) of the 1998 Act. There was one exception and that was the case of Mr McArdle which fell within Section 10(6) but only because of the administrative convenience of charges in relation to offences that were committed in England being brought to trial before the offences which were committed in Northern Ireland.

[81] I have considered each of the cases to which I have been referred in which the then Secretary of State stepped outside the terms of the 1998 Act and I consider that this was done in limited and highly fact dependent circumstances. Furthermore, the Secretary of State did not fundamentally change the legislative scheme. The applicant contends that as a result of the previous exercise of the RPM that where someone has served 2 years in prison either in the United Kingdom or in Ireland then upon subsequent conviction they ought to be entitled to immediate release without having to serve any further time in prison. This would be totally contrary to Section 10(6) of the

1998 Act which only entitles a person to accelerated release upon subsequent conviction after having served 2 years of the sentence that is then imposed. If the RPM had been used to achieve such a fundamental change then a question would arise as to whether the previous use of the RPM was lawful. One could not have a legitimate expectation that a Secretary of State is going to adhere to an unlawful policy. However, I am content that such a question does not arise as the RPM was not previously used either intentionally or unintentionally to achieve such an objective.

[82] In the context of Section 10(6) there have been four cases in which the RPM has been considered. Those are the cases of Mr McArdle, Mr McGeough, Mr Rodgers and the applicant. The facts of Mr McArdle's case are completely different. The true comparable cases are those of Mr Rodgers and Mr McGeough. They are both pure Section 10(6) cases. The RPM was not exercised in either of them and it has not been exercised in the applicant's case. The applicant has not established any unfair or unequal treatment.

[83] I reject the applicant's ground of challenge set out in paragraph [4] (a) of this judgment.

(b) Policy

[84] There has been no policy in relation to the exercise of the RPM and accordingly the applicant has not established any expectation that the RPM would be used on the facts of his case based on any policy operated in the period 2000-2002.

[85] The issue as to whether there ought to be a policy was not raised in *McGeough* but has been raised in this case. The applicant did not suggest that there should be a policy applicable to all situations in which the RPM could be used. Rather it was initially contended that there should be a policy in relation to the operation of the RPM in the context of the 1998 Act. Section 10(4) and 10(5) cases are not going to arise in the future and therefore the submission became that there should a policy in relation to the exercise of the RPM in the context of Section 10(6) of the 1998 Act.

[86] A factor that indicates that there should be a policy are the references to the spirit of, but not the letter of, the Belfast Agreement or the spirit of, but not the letter of, the 1998 Act (see paragraph 16 of *McGeough*). The spirit of an agreement or of an Act is a nebulous concept lacking definition particularly in relation to an agreement as one is searching for the spirit which has been agreed to by all those participating in the negotiations rather than in the subsequent and unilateral actions of one party to the agreement. The spirit of the Belfast Agreement or of the 1998 Act could mean different things to different people. If that was the defining feature in relation to the operation of the RPM then decisions could be made in an arbitrary manner and there would be a need for a

policy not only for the benefit of the individual offenders but also to reassure the public as to the operation of such a significant part of the political settlement that occurred on 10 April 1998. However, whilst there has been reference to the concept of the spirit of the Belfast Agreement and to the spirit of the 1998 Act, I consider that this has been presentational. That what has occurred on each occasion when the RPM was exercised was a minute examination of the individual facts of the particular case.

[87] I consider that the operation of the RPM in the context of Section 10(6) of the 1998 Act is "likely to be highly dependent on the particular facts of each case, facts which will almost certainly vary greatly from one case to another" (see paragraph 14 of *McGeough*). I also consider that no policy should undermine the legislative intent that those subsequently convicted should serve two years imprisonment before being entitled to accelerated release. On those grounds I do not consider that this is an area which is amenable to a policy which could conceivably cover the factual situations which might arise. Any policy that was created could only reiterate the legislative intent that a person subsequently convicted should serve two years in relation to any sentence imposed before being entitled to accelerated release and then go on to state that each case will be considered on its particular facts. I consider that the number of occasions upon which decisions require to be made are not so numerous that a policy is necessary to ensure consistency from case to case. The RPM has been exercised 16 times in the last 14 years. It has not been exercised in Northern Ireland since 2002. I am also satisfied that it was perfectly possible to bring all the facts in relation to the applicant's case to the attention of the Secretary of State without there being a policy in existence.

[88] The reasons for the applicant's detention are found in the judgments of Horner J. He has been found guilty of murder and a lawful sentence has been imposed. His continued detention is in accordance with the 1998 Act. There has been no unfair or unequal treatment in relation to the operation of the RPM.

[89] I reject the applicant's grounds of challenge set out in paragraph [4] (b)-(c) of this judgment.

(c) Reasons and the fourfold categorisation

[90] The Secretary of State gave as one of the reasons for declining to recommend the exercise of the RPM in relation to the applicant that the offence for which the applicant had now been convicted and sentenced relates to an entirely separate offence, committed at a different time from that for which he previously served a life sentence. I consider that a fair reading of the Secretary of State's reasoning has to be seen in the context of Section 10(6) of the 1998 Act which is in the context of the category of prisoners which I have labelled "those not yet convicted" as at the date of the Belfast Agreement. It is correct that in that context there has been no previous case (and again I exclude Mr McArdle's

case) where time served in relation to an earlier conviction has been used as a reason for relieving the offender of serving two years in relation to a subsequent conviction. In that context the Secretary of State's reason was not only clear and adequate but also correct.

[91] That was not the only reason advanced by the Secretary of State. It was also stated that there was no anomaly in the applicant's case. That reason was not only clear and adequate but also correct.

[92] I have found that the fourfold categorisation was descriptive and simplistic but that it did not obscure from consideration by the Secretary of State any case that was analogous to that of the applicant.

[93] I reject the applicant's grounds of challenge set out in paragraph [4] (d) (e) & (f) of this judgment.

(d) Discrimination

[94] No discrimination has been asserted in the context of Section 10(6) of the 1998 Act which is the context of this case. Mr McGeough, Mr Rodgers and the applicant are drawn from different sides of the nationalist-loyalist divide and they have been treated equally.

[95] I reject the applicant's grounds of challenge set out in paragraph [4] (g) of this judgment.

(e) Outcome

[96] I do not consider that any of the grounds of challenge to the decision of the Secretary of State have been made out. The application for judicial review is dismissed.