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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW), DIVISIONAL COURT

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IN THE MATTER OF AN APPLICATION BY DEBORAH McGUINNESS FOR JUDICIAL REVIEW

-v-

DEPARTMENT OF JUSTICE

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Before: McCloskey J and Colton J

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McCLOSKEY J

Introduction

[1] This is the judgment of the panel to which both members have contributed, following an expedited hearing on 10/01/19.

[2] These are judicial review proceedings in which the High Court constituted itself as a divisional court. It did so following receipt of written submissions from the two main parties contending that this is a criminal cause or matter. While the court harboured reservations about this having regard to the jurisprudence on this troubled subject, including the decisions in Re JR27 [2010] NIQB 12 and R (Belhaj) v Secretary of State for Foreign Affairs [2018] UKSC 33, at [20], with its stress on " *a criminal **matter***" [our emphasis], in a context marked by a need for acute expedition and involving the liberty of the citizen it was decided on a pragmatic basis to treat this as a criminal cause or matter. This step, of course, has considerable implications for onward appeal rights: see section 41 of and Schedule 1 to the Judicature (NI) Act 1978.

[3] The central issue to be determined by the court is whether the assessment on the part of the Respondent, the Department of Justice ("*the Department*"), that by July 2018 Michael Stone (hereinafter "*the prisoner/Mr Stone*"), a convicted murderer of some notoriety sentenced to life imprisonment in 1988 and whose victims include the brother of the Applicant, Thomas McErlean deceased ("*the deceased*"), had served

the judicially determined minimum term (or tariff) of 30 years imprisonment is vitiated by illegality.

The Concerned Public Authorities

[4] The agencies featuring in the matrix of these proceedings are:

(a) The Sentence Review Commissioners, a public authority established by the Northern Ireland (Sentences) Act 1998.

(b) The Parole Commissioners, a public authority established by the Life Sentences (NI) Order 2001.

(c) The Department of Justice (the "*Department*") which has significant functions and responsibilities under the last mentioned measure.

(d) The Secretary of State for Northern Ireland (the "*Secretary of State*") who previously exercised important functions and responsibilities relating to life prisoners.

Factual Matrix

[5] The following are the salient aspects of the factual matrix:

(a) The murder of the Applicant's brother was perpetrated by the prisoner in a shooting attack on a group of defenceless mourners attending a burial at Milltown Cemetery on 16 March 1988. The prisoner was arrested on 22 March 1988.

(b) On 03 March 1989 at Belfast Crown Court the prisoner received a sentence of life imprisonment, having been convicted of six counts of murder, five counts of attempted murder, three counts of conspiracy to murder and 21 further counts (in summary) relating to the possession of explosive substances, the possession of firearms and ammunition, causing an explosion and wounding with intent. The sentence of life imprisonment was imposed in respect of the six counts of murder. Concurrent sentences ranging from 20 to 27 years imprisonment were imposed in respect of the other convictions. The trial judge recommended a tariff of 30 years imprisonment. (This had no binding effect under the legal arrangements then prevailing).

(c) On 17 February 1999 the Sentence Review Commissioners made a formal statutory determination acceding to the prisoner's application under section 3 of the Northern Ireland (Sentences) Act 1998 *(infra)* for a declaration of eligibility for early release and specifying that such eligibility would materialise on 22 July 2000.

(d) On 24 July 2000 the prisoner was released on licence.

(e) On 24 November 2006 the prisoner perpetrated another much publicised attack, on this occasion at Parliament Buildings, Stormont.

(f) On the same date the prisoner was arrested and he was remanded in custody the following day.

(g) On 25 November 2006 the Secretary of State suspended the prisoner's licence under the statutory provisions. The Sentence Review Commissioners became seized of his case afresh.

(h) On 06 September 2007 the Sentence Review Commissioners informed the prisoner that they were minded to revoke his licence.

(i) On 14 November 2008 the prisoner was convicted of two counts of attempted murder, together with seven further counts consisting mainly of firearms and explosives offences.

(j) On 08 December 2008 the prisoner received two determinate sentences of 16 years' imprisonment in respect of the attempted murder convictions and other determinate sentences ranging from one year to ten years' imprisonment, all to operate concurrently, all arising out of the Stormont incident.

(k) On 06 January 2011 the Court of Appeal dismissed the prisoner's appeals against conviction.

(l) On 06 September 2011 the Sentence Review Commissioners formally determined to revoke the licence upon which the prisoner had been released on 24 July 2000.

(m) On 29 July 2013 (in accordance with the statutory regime outlined *infra*) the Lord Chief Justice of Northern Ireland determined that the tariff in respect of the life sentence imposed on 03 March 1989 should be 30 years imprisonment.

(n) On 05 September 2013 the Department certified that the release provisions of the 2001 legislation (*infra*) would not apply to the prisoner until he had "*… served a period of 30 years, which includes the time spent in custody on remand*".

(o) On 10 September 2013 the Northern Ireland Prison Service calculated that the prisoner's "*parole referral date*" would be 06 September 2017.

(p) By letter dated 20 September 2017 the Prison Service (in effect the Department) made a formal statutory referral of the prisoner's case to the Parole Commissioners, intimating that the tariff expiry date would be 21 March 2018.

[6] The Parole Commissioners' interaction with the prisoner was, in accordance with the statutory arrangements, triggered by the Prison Service's revised tariff expiry date of 21 March 2018, which stimulated a "*three year pre-tariff*" review on 20 March 2015 and the aforementioned referral by the Department. On 16 April 2018 a panel of Commissioners formally determined that the prisoner would not be released. The next milestone in this process will be reached on 15 January 2019 at a further hearing to be conducted by a panel of Commissioners*. This latter arrangement is the reason for the high speed judicial processing of the Applicant's challenge.

[In light of the judgment of this court, delivered on the same date, this was suspended*]

[7] As of 21 March 2018 the prisoner had not in fact served a period of 30 years imprisonment. In summary:

(a) Upon his release on licence on 24 July 2000 he had been imprisoned for a total period of 12 years and 124 days pursuant to the life sentence imposed on 03 March 1989.

(b) Between 24 July 2000 and his arrest on 24 November 2006 he was released on licence, a period of six years and 123 days.

(c) Between 24 November 2006 and 21 March 2018 he was imprisoned for a further period of 11 years and 116 days.

Accordingly, the prisoner as of March 2018 had served a total term of just under 24 years imprisonment. The reason for the Department's tariff expiry assessment date is its view that the calculation of the period of imprisonment served in accordance with the Lord Chief Justice's tariff of 30 years should include the licence period of just over six years. If this period is excluded from the calculation the prisoner's tariff expiry date will be 22 July 2024 (or thereabouts). The focus is, therefore, on a period of some six years and four months.

[8] The Applicant contends, in a nutshell, that the Department has erred in law in including the prisoner's period of release on licence between July 2000 and November 2006 in its calculation of his tariff expiry date.

Statutory Framework

[9] This has two main components, the first being the Northern Ireland (Sentences) Act 1998.

Section 1

"Sentence Review Commissioners

1. - (1) The Secretary of State shall appoint Sentence Review Commissioners.

(2) The Secretary of State shall so far as reasonably practicable ensure that at any time-

(a) at least one of the Commissioners is a lawyer, and

(b) at least one is a psychiatrist or a psychologist.

(3) In making appointments the Secretary of State shall have regard to the desirability of the Commissioners, as a group, commanding widespread acceptance throughout the community in Northern Ireland.

(4) Schedule 1 (which makes further provision about the Commissioners) shall have effect.

(5) In subsection (2)(a) "lawyer" means a person who holds a legal qualification in the United Kingdom."

Section 3

"Applications

3. - (1) A prisoner may apply to Commissioners for a declaration that he is eligible for release in accordance with the provisions of this Act.

(2) The Commissioners shall grant the application if (and only if)-

(a) the prisoner is serving a sentence of imprisonment for a fixed term in Northern Ireland and the first three of the following four conditions are satisfied, or

(b) the prisoner is serving a sentence of imprisonment for life in Northern Ireland and

the following four conditions are satisfied.

(3) The first condition is that the sentence-

(a) was passed in Northern Ireland for a qualifying offence, and

(b) is one of imprisonment for life or for a term of at least five years.

(4) The second condition is that the prisoner is not a supporter of a specified organisation.

(5) The third condition is that, if the prisoner were released immediately, he would not be likely-

(a) to become a supporter of a specified organisation, or

(b) to become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland.

(6) The fourth condition is that, if the prisoner were released immediately, he would not be a danger to the public.

(7) A qualifying offence is an offence which-

(a) was committed before 10th April 1998,

(b) was when committed a scheduled offence within the meaning of the Northern Ireland (Emergency Provisions) Act 1973, 1978, 1991 or 1996, and

(c) 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.

(8) A specified organisation is an organisation specified by order of the Secretary of State; and he shall specify any organisation which he believes-

(a) is concerned in terrorism connected with the

affairs of Northern Ireland, or in promoting or encouraging it, and

(b) has not established or is not maintaining a complete and unequivocal ceasefire.

(9) In applying subsection (8)(b) the Secretary of State shall in particular take into account whether an organisation-

(a) is committed to the use now and in the future of only democratic and peaceful means to achieve its objectives;

(b) has ceased to be involved in any acts of violence or of preparation for violence;

(c) is directing or promoting acts of violence by other organisations;

(d) is co-operating fully with any Commission of the kind referred to in section 7 of the Northern Ireland Arms Decommissioning Act 1997 in implementing the Decommissioning section of the agreement reached at multi-party talks on Northern Ireland set out in Command Paper 3883.

(10) The Secretary of State shall from time to time review the list of organisations specified under subsection (8); and if he believes-

(a) that paragraph (a) or (b) of that subsection does not apply to a specified organisation, or

(b) that paragraphs (a) and (b) apply to an organisation which is not specified,

he shall make a new order under subsection (8)."

<u>Section 4</u>

"*Fixed term prisoners*

4. - (1) If a fixed term prisoner is granted a declaration in relation to a sentence he has a right to be released

on licence (so far as that sentence is concerned) on the day on which he has served-

(a) one third of his sentence, plus

(b) one day for every day of remission which he has lost, and not had restored, in accordance with prison rules.

(2) If the day arrived at under subsection (1) falls on or before the day of the declaration, the prisoner's right to be released under that subsection is a right to be released by the end of the day after the day of the declaration.

(3) If a prisoner would have a right to be released on or by the end of a listed day he has a right to be released on or by the end of the next non-listed day; and the listed days are-

(a) Saturday,
(b) Sunday,
(c) Christmas Day,
(d) Good Friday, and
(e) a public holiday in Northern Ireland.

(4) If a prisoner is released on licence under this section his sentence shall expire (and the licence shall lapse) at the time when he could have been discharged on the ground of good conduct under prison rules."

<u>Section 6</u>

"Life prisoners

6. - (1) When Commissioners grant a declaration to a life prisoner in relation to a sentence they 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 the sentence.

(2) The prisoner has a right to be released on licence (so far as that sentence is concerned) -

(a) on the day specified under subsection (1), or

(b) if that day falls on or before the day of the declaration, by the end of the day after the day of the declaration.

(3) But if he would have a right to be released on or by the end of a listed day (within the meaning of section 4(3)) he has a right to be released on or by the end of the next non-listed day."

Section 9

"Licences: conditions

9. - (1) A person's licence under section 4 or 6 is subject only to the conditions-

(a) that he does not support a specified organisation (within the meaning of section 3),

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

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

(2) The Secretary of State may suspend a licence under section 4 or 6 if he believes the person concerned has broken or is likely to break a condition imposed by this section.

(3) Where a person's licence is suspended-

(a) he shall be detained in pursuance of his sentence and, if at large, shall be taken to be unlawfully at large, and

(b) Commissioners shall consider his case.

(4) On consideration of a person's case-

(a) if the Commissioners think he has not broken and is not likely to break a condition imposed by this section, they shall confirm his licence,

and

(b) otherwise, they shall revoke his licence.

(5) Where a person's licence is confirmed-

(a) he has a right to be released (so far as the relevant sentence is concerned) by the end of the day after the day of confirmation, or

(b) if he is at large, he has a right (so far as the relevant sentence is concerned) to remain at large."

(6) But if he would have a right to be released by the end of a listed day (within the meaning of section 4(3)) he has a right to be released by the end of the next non-listed day.

(7) Detention during suspension of a licence shall not be made unlawful by the subsequent confirmation of the licence."

[10] By section 12(2):

"A fixed term prisoner is a prisoner serving a sentence of imprisonment for a fixed term"

Section 12(3) provides:

"A life prisoner is a prisoner serving a sentence of imprisonment for life."

By section 12(4):

"References to a sentence of imprisonment for life include references to a sentence of detention at the Secretary of State's pleasure."

[11] The second main component of the statutory framework is <u>the Life Sentences (NI) Order 2001</u> (the "*2001 Order*"). By **<u>Article 2(2):</u>**

- "*The Commissioners*" means the Parole Commissioners for Northern Ireland.

- "*The release provisions*" mean Article 6(3) – (7).

- "*Life prisoner*" means a prisoner serving one or more life sentences.

- "*Life sentences*" means "*either of the following imposed for an offence, whether committed before or after the appointed day, namely –*

  (a) *A sentence of imprisonment for life;*

  (b) *A sentence of detention during the pleasure of the Minister in charge of the Department of Justice under Article 45(1) of the Criminal Justice (Children) (NI) Order 1998.*"

[12] **Article 5(1) – (3)**

> "*Determination of tariffs*
>
> (1) Where a court passes a life sentence, the court shall, unless it makes an order under paragraph (3), order that the release provisions shall apply to the offender in relation to whom the sentence has been passed as soon as he has served the part of his sentence which is specified in the order.
>
> (2) The part of a sentence specified in an order under paragraph (1) shall be such part as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it.
>
> (3) If the court is of the opinion that, because of the seriousness of the offence or of the combination of the offence and one or more offences associated with it, no order should be made under paragraph (1), the court shall order that, subject to paragraphs (4) and (5), the release provisions shall not apply to the offender."

Article 6 (1) – (4)

> "*Duty to release certain life prisoners*
>
> (1) In this Order -
>
> (a) references to a life prisoner to whom this

Article applies are references to a life prisoner in respect of whom -

(i) an order has been made under paragraph (1) of Article 5; or

(ii) a direction under paragraph (4) or (5) of that Article has been given; and

(b) references to the relevant part of his sentence are references to the part of his sentence specified in the order or direction,

and in this Article "appropriate stage", in relation to such a direction, has the same meaning as in Article 5(6).

(2) But if a life prisoner is serving two or more life sentences -

(a) he is not to be treated for the purposes of this Order as a life prisoner to whom this Article applies unless such an order or direction has been made or given in respect of each of those sentences or such a direction will be required to be given at the appropriate stage; and

(b) the release provisions do not apply in relation to him until he has served the relevant part of each of them.

(3) As soon as -

(a) a life prisoner to whom this Article applies has served the relevant part of his sentence; and

(b) the Commissioners have directed his release under this Article,

it shall be the duty of the Department of Justice to release him on licence.

(4) The Commissioners shall not give a direction under paragraph (3) with respect to a life prisoner to whom this Article applies unless -

(a) the Department of Justice has referred the prisoner's case to the Commissioners; and

(b) the Commissioners are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined."

Article 6(6)

"In determining for the purpose of this Article whether a life prisoner to whom this Article applies has served the relevant part of his sentence, no account shall be taken of any time during which he was unlawfully at large, unless the Department of Justice otherwise directs."

[13] Articles 8 and 9 regulate the topic of release on licence and recall.

Article 8(1) – (2)

"*Duration and conditions of licences*

(1) Where a life prisoner is released on licence, the licence shall, unless previously revoked under Article 9(1) or (2), remain in force until his death.

(2) A life prisoner subject to a licence shall comply with such conditions (which may include on his release conditions as to his supervision by a probation officer) as may for the time being be specified in the licence; and the Department of Justice may make rules for regulating the supervision of any descriptions of such persons."

Article 9(1) – (2)

"*Recall of life prisoners while on licence*

(1) If recommended to do so by the Commissioners, in the case of a life prisoner who has been released on licence, the Department of Justice or the Secretary of State may revoke his licence and recall him to prison.

(2) The Department of Justice or the Secretary of

State may revoke the licence of any life prisoner and recall him to prison without a recommendation by the Commissioners, where it appears to it or him that it is expedient in the public interest to recall that person before such a recommendation is practicable."

By **Article 9(6):**

"On the revocation of the licence of any life prisoner under this Article, he shall be liable to be detained in pursuance of his sentence and, if at large, shall be deemed to be unlawfully at large."

[14] The statutory arrangements for the *ex post facto* determination of a life prisoner's tariff are contained in **Article 11**:

"Existing life prisoners

(1) This Article applies where, in the case of an existing life prisoner, the Department of Justice, after consultation with the Lord Chief Justice and the trial judge if available, certifies its opinion that, if this Order had been in operation at the time when he was sentenced, the court by which he was sentenced would have ordered that the release provisions should apply to him as soon as he had served a part of his sentence specified in the certificate.

(2) This Article also applies where, in the case of an existing life prisoner, the Department of Justice certifies its opinion that, if this Order had been in operation at the time when he was sentenced, a direction would have been given that the release provisions should apply to him as soon as he had served a part of his sentence specified in the certificate.

(3) In a case to which this Article applies, this Order shall apply as if -

(a) the existing life prisoner were a life prisoner to whom Article 6 applies; and

(b) the relevant part of his sentence within the meaning of Article 6 were the part specified in the certificate.

(4) In this Article "existing life prisoner" means a life prisoner serving one or more life sentences passed before the appointed day but does not include a life prisoner -

(a) who had been recalled to prison under section 23 of the Prison (Northern Ireland) Act 1953 and who is not an existing licensee; or

(b) whose licence has been revoked under Article 46(2) of the Criminal Justice (Children) (Northern Ireland) Order 1998 and who is not an existing licensee."

[15] Certain provisions of the Prison Act (NI) 1953 (the "*1953 Act*") also featured in the arguments presented to the court. It is convenient to begin with a repealed provision which the court raised during the hearing. **Section 23(1)**, until its repeal by the 2001 Order, provided that the Secretary of State (or his predecessor) was empowered to "*… at any time if he thinks fit release on licence a person serving a term of imprisonment for life*". We shall elaborate briefly on this *infra*. Two further provisions of this statute were raised in argument on behalf of the prisoner.

Section 24

"Temporary discharge of prisoners on account of ill-health.

(1) If the **[**Department**]** is satisfied that by reason of the condition of a prisoner's health it is undesirable to detain him in prison, but that, such condition of health being due in whole or in part to the prisoner's own conduct in prison, it is desirable that his release should be temporary and conditional only, the **[**Department**]** may, if **[**the Department**]** thinks fit, having regard to all the circumstances of the case, by order authorise the temporary discharge of the prisoner for such period and subject to such conditions as may be stated in the order.

(2) Where an order of temporary discharge is made in the case of a prisoner not under sentence, the order shall contain conditions requiring the attendance of the prisoner at any further proceedings in his case at which his presence may be required.

(3) Any prisoner discharged under this section shall comply with any conditions stated in the order of temporary discharge, and shall return to prison at

the expiration of the period stated in the order, or of such extended period as may be fixed by any subsequent order of the [Department], and if the prisoner fails so to comply or return, he may be arrested without warrant and taken back to prison.

(4) Where a prisoner under sentence is discharged in pursuance of an order of temporary discharge, the currency of the sentence shall be suspended from the day on which he is discharged from prison under the order to the day on which he is received back into prison, so that the former day shall be reckoned and the latter shall not be reckoned as part of the sentence."

Section 38

"***Arrest, etc., of persons unlawfully at large.***

(1) A constable or a prison officer may arrest without warrant any person—

(a) whom he reasonably suspects of having committed, or attempted to commit, any offence against this Act; or

(b) whom he reasonably suspects of being unlawfully at large;

and convey him before a justice of the peace to be dealt with according to law, or take him to the place in which he is required by law to be detained.

(2) Where any person sentenced to imprisonment, … [or ordered to be detained in a young offenders centre] is unlawfully at large at any time during the period for which he is liable to be detained in pursuance of the sentence, then, unless the [Department] otherwise directs, no account shall be taken, in calculating the period for which he is liable to be so detained, of the time during which he is absent from prison."

The Evolution of the Life Sentence In Northern Ireland

[16] Prior to the advent of the 1998 Act and, more particularly, the 2001 Order the Secretary of State was the dominant public authority in the matter of the release of life prisoners. This was the effect of section 23 of the 1953 Act, noted above and now repealed. Section 23 could not survive the advent of the Human Rights Act 1998,

having effect from 02 October 2000 and its introduction into domestic law of Article 6(1) ECHR. This legislative innovation was the impetus for a series of statutory and judicial interventions which, in summary, recognised the primacy which had to be accorded to the judicial role in the release of life prisoners. In short, a Minister of the executive was incapable of constituting an independent and impartial tribunal in what was in substance a sentencing decision.

[17] As noted above, the first incursion into the domain of the executive in this sphere was effected by the creation of the Sentence Review Commissioners, a quasi-judicial body, by the 1998 Act and the associated statutory regime in which they operated. Notably, the right to be released on licence conferred on both fixed term prisoners and life prisoners by sections 4 and 6 of the 1998 Act was related directly to the determination ("*declaration*") of the Commissioners and was not dependent upon the exercise of any power or function by the executive.

[18] In brief, the dominant statutory provision throughout the relevant history was section 23 of the 1953 Act, onto which was grafted an elaborative administrative structure involving civil servants and independent professionals who formed the Life Sentences Review Board, a non – statutory body which had an advisory role vis-à-vis the Secretary of State. All of this is recorded in Re Whelan's Application [1990] NI 348 at 360 ff, Re Wright's Application [1996] NI 83 at 87 – 88 and (on appeal) Re Wright's Application [1997] NI 318 at 322 d - 325 a.

[19] The advent of the Human Rights Act 1998, specifically Article 6(1), was the impetus for the decision of the Northern Ireland Court of Appeal in Re King's Application [2003] NI 43. The central focus of these proceedings was Article 11 of the 2001 Order which, by its terms, purported to invest the executive – initially the Secretary of State and latterly the Department – with the function and responsibility of releasing life prisoners. The Northern Ireland Court of Appeal resolved the Article 6 ECHR incompatibility issue by holding, giving effect to section 3 of the Human Rights Act, that the executive was bound by the tariff determined by the judiciary. Similar developments occurred in England and Wales: see especially R (Anderson) v Secretary of State for the Home Department [2002] UKHL 46 (considered in further detail *infra).*

The Core Issue

[20] The central issue is whether Mr Stone's period of licensed release of some six years under the 1998 Act should be included in his judicially determined tariff of 30 years. The resolution of this issue is not to be found in the express provisions of either the 1998 Act or the 2001 Order. In the ideal world, the legislature would have made provision for the eventuality lying at the heart of these proceedings. The reality is that it did not do so. The court is, therefore, driven to fill the resulting void by reference to what the legislature has enacted in the two measures in question, the broad context in which each came into operation, the pre-enacting history and the governing legal principles. Ultimately the task of the court is to ascertain the implied

and unexpressed intention of the legislature. The arguments presented by the three participating parties resolved to two choices. The first is that the legislature intended that the period of the prisoner's release on licence should be included in his judicially determined tariff of 30 years. The second is that the tariff requires the prisoner to be imprisoned for a total gross period of 30 years, disregarding the period of release on licence.

The DNA of the Life Sentence

[21] The modern sentence of imprisonment dates from when the death penalty for murder was abolished by the Murder (Abolition of Death Penalty) Act 1965. Detailed statutory regulation of the life sentence is a comparatively recent phenomenon in both this jurisdiction and that of England and Wales. In this jurisdiction the advent of the Belfast Agreement in April 2018 provided the impetus for the first major statutory intervention, via the 1998 Act. Thitherto the most important statutory provision had been (the now repealed) section 23 of the 1953 Act by which the sole power to release a life sentence prisoner was conferred on the Minister for Home Affairs (later the Secretary of State). In England and Wales the equivalent statutory power was conferred on the Home Secretary by section 61(1) of the Criminal Justice Act 1967, latterly section 29 of the Crime (Sentences) Act 1997.

[22] As a result, until the most recent series of statutory reforms (*infra*), there was much focus on Ministerial policy in both jurisdictions. In Northern Ireland the Secretary of State was supported by the Northern Ireland Office which, in turn, had a specially designated Life Sentence Unit. The Secretary of State had the further support of the non-statutory agency noted in [18] above (the "*Board*"). The practice and policy of the Secretary of State were set forth in an explanatory memorandum "Life Sentence Prisoners in Northern Ireland", published in 1983. As this made clear, the function of the Board was purely advisory and there was a settled practice of consulting the Lord Chief Justice and the trial judge, if available.

[23] These arrangements are recorded in Re Whelan's Application [1990] NI 348 at 350-352. One of the most important aspects of the policy was expressed in the following terms:

> "*There are two essential criteria which must be met by all cases before they can be considered for release – firstly that the offender has served a period commensurate with the gravity of the offence for which he was convicted and secondly that the release of the prisoner will not, as far as it is reasonably possible to assess, present an undue risk to the public.*"
>
> [p 352D/E.]

Perusal of Article 5(2) and Article 6(4)(b) of the 2001 Order confirms that this statutory intervention did not alter the essential character of the life sentence.

[24] As the judgments at first instance and on appeal in Re Wright's Application [1996] NI 83 and [1997] NI 318 confirm, the possibility of a life prisoner in Northern Ireland being released remained subject to the same statutory and policy arrangements until the introduction of the 1998 Act. By this stage there was an increasing awareness of the differences between the arrangements in Northern Ireland and those prevailing in England and Wales. Northern Ireland did not have a statutory agency equivalent to the Parole Board, established in England and Wales by the 1967 Act (noted above). Nor did this jurisdiction have any provision equivalent to section 34 of the Criminal Justice Act 1991, which, in the case of discretionary life sentences, empowered the trial judge to make an order specifying the so-called "penal" element of the sentence. This provision did not apply to mandatory life sentences. The release of discretionary life sentence prisoners was decided by the Parole Board, whereas the decision maker in the case of mandatory life prisoners was the Home Secretary. The imbalance which this created was addressed by the importation of significant common law fairness protections in the decision of the House of Lords in Doody v Secretary of State for the Home Department [1993] 3 All ER 92. As noted in the seminal speech of Lord Mustill, by that stage the division of the life sentence into "penal" and "risk" elements was well established: by statute as regards discretionary life prisoners and by executive policy as regards mandatory life prisoners (see 99-101).

[25] The distinct and separate components in the life sentence of retribution and deterrence (on the one hand) and protection of/risk to the public (on the other) were by the 1990's firmly embedded in the two jurisdictions. The underlying policy was essentially the same in both. In the Secretary of State's published policy in Northern Ireland it was expressed thus:

> *"Society regards murder as a unique crime, which demands an exceptional penalty; that is why life imprisonment has been made the mandatory penalty for the offence."*

Compare the observations of Lord Scarman in Re Findlay [1985] AC 318 at 332 -333:

> *"But the Secretary of State has clearly to consider other aspects of the early release of a prisoner serving a sentence of imprisonment. Deterrence, retribution and public confidence in the system are factors of importance. The Parole Board, through its judicial and other members, can offer advice on these aspects of the question. But neither the Board nor the judiciary can be as close, or as sensitive, to public opinion as a minister responsible to Parliament and the electorate. He has to judge the public acceptability of early release and to determine the policies needed to maintain public confidence in the system of criminal justice."*

In Wright, having cited this passage, MacDermott LJ added, at 324f:

> "*For our part we would add that the weight to be given to such factors will vary from time to time and regard may well be had to the current frequency of a particular type of offending and its impact on the public generally.*"

[26] The division noted above, which had become an entrenched feature of the life sentence, was considered again by the House of Lords in Re (Anderson) v Secretary of State for the Home Department [2002] UKHL 46. Lord Bingham, having noted the then current statutory provision in England and Wales, section 29 of the Crime (Sentences) Act 1997, observed:

> "*This section, no doubt deliberately, gives little indication of the procedures which in practice follow imposition of a mandatory life sentence on a convicted murderer, although for some years now those procedures have been well understood and routinely followed in practice.*"

He continued at [7]:

> "*The first stage is directed to deciding how long the convicted murderer should remain in prison as punishment for the murder or murders he has committed. This is what* [the Home Secretary] *meant when he referred to 'retribution and deterrence', although deterrence should be understood as meaning general deterrence; deterrence of the particular convicted murderer is embraced in the notion of retribution. In determining the appropriate measure of punishment in a particular case all the traditional factors may, and should so far as appropriate, be taken into account: pure retribution, expiation, expression of the moral outrage of society, maintenance of public confidence in the administration of justice, deterrence, the interests of victims, rehabilitation and so on. The term of imprisonment appropriate in a particular case is subject to no minimum and no maximum: it may in a case of sufficient gravity extend to the whole life of the convicted murderer …*"

As this decision and others both preceding and following it make clear, the first component of the life sentence was habitually described, whether in statutory or policy language, as the tariff, the minimum term, the penal term and the penal element.

[27] Significant changes to the release of life sentence prisoners were precipitated by the advent of the Human Rights Act 1998, which came into force largely on 02 October 2000. Two landmark decisions in the two jurisdictions held that the power of the relevant Government Minister to decide on release was incompatible with Article 6 ECHR. The first decision was that of the Northern Ireland Court of Appeal in Re King's Application [2003] NI 43. The court resolved the issue by applying section 3 to Article 11(1) of the 2001 Order in such a way as to oblige the Secretary of State to accept the tariff recommended by the Lord Chief Justice and the trial judge if available, with the lesser term to prevail in the event of differing judicial recommendations: see [40] – [41].

[28] Just ten days later the House of Lords, in R (Anderson) v Secretary of State for the Home Department [2002] UKHL 46 (and without reference to King), determined the same issue with regard to the equivalent English statutory provision, section 29 of the Crime (Sentences) Act 1997. Differing from the Northern Ireland Court of Appeal, the House held that section 29 could not be reconfigured by the application of section 3 of the Human Rights Act: see per Lord Bingham at [30]. As a result a declaration of incompatibility was made.

[29] In England and Wales the decision in Anderson was the impetus for the elaborate scheme for determining the minimum term component of a life sentence devised by Schedule 21 to the Criminal Justice Act 2003 ("the 2003 Act") and certain related measures. This was not replicated in Northern Ireland, where statutory intervention post - dating the 2001 Order was rendered unnecessary by the decision in King. The formulation of the "*minimum term*" in section 269(3) of the 2003 Act differs slightly from its Northern Ireland counterpart, Article 5(2) of the 2001 Order (reproduced in [11] above). It is in these terms:

> "*… such part as the court considers appropriate taking into account –*
>
> *(a) The seriousness of the offence, or of the combination of the offence and any one or more offences associated with it ….*"

The linguistic differences are of no apparent moment.

[30] Schedule 21 to the 2003 Act constitutes the main difference between the two life sentence statutory regimes which have evolved in the two jurisdictions. It derives from section 269(5), which provides that in determining the minimum term the court must have regard to the general principles set out in Schedule 21 and any applicable guidelines. A further element of the English regime not replicated in Northern Ireland is the Practice Direction: Criminal Proceedings – Consolidation 2002 (as amended in 2005), at paragraph 49 especially. While the effect of these measures is to render the exercise of measuring the minimum term in England and Wales more prescriptive and, one might add, more mechanical than in this

jurisdiction, it has been held that provided that adequate reasons are given, the sentencing judge's discretion can prevail: see for example R v Last [2005] 2 CR App R(S) 381. This is reinforced by R v Sullivan [2005] 1 Cr App R(S) , which held that the minimum term can range from a period of less than eight years to whole life.

[31] This prompts brief reference to the so – called "whole life" tariff. In R v Secretary of State for the Home Department, ex party Hindley [2001] 1 AC 410, the House of Lords held that there was (per Lord Steyn at page 416H):

> *"…. no reason, in principle, why a crime or crimes, if sufficiently heinous, should not be regarded as deserving lifelong incarceration for purposes of pure punishment."*

Lord Steyn added at 417H:

> *"There is nothing logically inconsistent with the concept of a tariff by saying that there are cases where the crimes are so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution and deterrence."*

[32] In Vintner v United Kingdom [2013] 34 BHRC 605, the Grand Chamber of the ECtHR held that provided that provision is made for review and there is the possibility of release a whole life sentence will not infringe Article 3 ECHR : see [119] – [122]. The Court added, at [120], that while the margin of appreciation enjoyed by each of the Contracting States rendered inappropriate any prescription of the timing of the first review or its format, it –

> *"…. would also observe that the comparative and international law materials before it show clear support for the institution of a dedicated mechanism guaranteeing a review no later than 25 years after the imposition of a life sentence, with further periodic reviews thereafter …"*

Notably, the materials belonging to the broader European and international canvass both predate and postdate 1998. The ECtHR reiterated this approach, with some refinements confined to the quality of the domestic law pertaining to review of the minimum term, in Hutchinson v United Kingdom [2017] 43 BHRC 667.

Resolution

[33] The question for this court to determine is whether the period of six years licensed release enjoyed by the prisoner between 2000 and 2006 should be included in his judicially determined tariff of 30 years imprisonment. The full consequences of serious reoffending whilst released pursuant to a 1998 Act licence, consequential loss of liberty, revocation of the licence and further convictions in respect of serious terrorist crime, followed by the imposition of a retrospectively judicially determined

tariff, are not addressed in either of the two main statutory codes considered above. Thus the court is required to search for the implied and unexpressed intention of the legislature. Giving effect to what we consider to be elementary principle, the court has embarked upon an extensive examination of the pre-enacting history and the broader legislative, jurisprudential and policy context to which the two statutory measures belong: see R (Quintavalle) v Secretary of State for Health [2003] UKHL 13 at [8], per Lord Bingham. We did not identify any contrary contention in the parties' arguments.

[34] The "*tariff*" - or "*minimum term*", "*penal element*" or "*actual term*" (a phrase coined by Lord Bingham) - belongs exclusively to the realm of life sentences. The life sentence is to be contrasted with the multifarious other forms of sentence which have been devised by exhaustive and elaborate statutory intervention during recent decades. The review of the history and broader context which we have conducted above leads inexorably to the conclusion that the life sentence has consistently been regarded as a punishment with two components, one guaranteed and concrete and the other more elusive. The first component consists of the period during which the convicted person must be imprisoned in order to reflect the requirements of retribution and deterrence. This period can range from some few years to the remainder of the offender's natural life. The second component, which does not arise in the case of whole life tariffs, is the further period during which the convicted person may have to be imprisoned in order to protect the public.

[35] We consider these two components to be the very essence of the life sentence. The first, by definition, denotes a period of imprisonment which may variously be described as fixed, concrete and immediately ascertainable. The only element of calculation involved is the deduction of relevant remand custody from the judicially imposed period of incarceration (and, possibly, any periods of compassionate release or other forms of pre – sentence release: an issue which does not arise for determination in this case). The second component is of quite a different nature. It is not concrete, calculable or ascertainable at any stage given that it involves an exercise of evaluative judgement and prediction on the part of the relevant agency (the Parole Commissioners) at the appropriate stage or stages. In some cases there will be no second component: these are (a) cases where the Commissioners are satisfied that upon the expiry of the tariff it is no longer necessary for the protection of the public from serious harm that the prisoner should remain incarcerated: per Article 6(4)(b) of the 2001 Order and (b) unrevised whole life tariffs

[36] In all cases a life sentence takes the form of a punishment which endures for the lifetime of the convicted person. This analysis follows inexorably from the basic philosophy examined above and is confirmed by Article 8(1) of the 2001 Order, considered in the context of its surrounding provisions and the pre-enacting history. The legal reality is that a released life prisoner is not accorded unconditional liberty: rather the liberty which release entails is conditional upon compliance with the conditions of the offender's licence. In a nutshell, liberty is never absolute for the life

prisoner. It is, rather, qualified for the offender's lifetime by the conditions of the release licence.

[37] We turn to consider the effect of the 1998 Act in the light of our examination of the statutory, jurisprudential and policy context dating from the abolition of the death penalty in 1965 and prevailing at the time when the 1998 Act was devised. The context to which this statute belongs had one unmistakeable feature. There was no dissent from the court's suggestion that the arrangements devised by the 1998 Act were exceptional, or extraordinary. They are correctly thus described because they introduced a unique mechanism for the release of convicted terrorist prisoners at a substantially earlier date than their release would have occurred in accordance with the pre-existing legal rules. The uniqueness of these statutory arrangements was a reflection of one of the most contentious elements of the political settlement forming the background to the 1998 Act, namely the Belfast Agreement.

[38] The relevant portion of the Belfast Agreement stated, under the rubric of "*Prisoners*":

> "*1. Both Governments will put in place mechanisms to provide for an accelerated programme for the release of prisoners, including transferred prisoners, convicted of scheduled offences in Northern Ireland or, in the case of those sentenced outside Northern Ireland, similar offences (referred to hereafter as qualifying prisoners). Any such arrangements will protect the rights of individual prisoners under national and international law.*
>
> *2. Prisoners affiliated to organisations which have not established or are not maintaining a complete and unequivocal ceasefire will not benefit from the arrangements. The situation in this regard will be kept under review.*
>
> *3. Both Governments will complete a review process within a fixed time frame and set prospective release dates for all qualifying prisoners. The review process would provide for the advance of the release dates of qualifying prisoners while allowing account to be taken of the seriousness of the offences for which the person was convicted and the need to protect the community. In addition, 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.*

> *4. The Governments will seek to enact the appropriate legislation to give effect to these arrangements by the end of June 1998.*
>
> *5. The Governments continue to recognise the importance of measures to facilitate the reintegration of prisoners into the community by providing support both prior to and after release, including assistance directed towards availing of employment opportunities, re-training and/or reskilling, and further education."*

These passages of this international treaty unmistakeably form a significant element of the context in which the ensuing legislation, namely the 1998 Act, was devised.

[39] The aforementioned context was both acknowledged and explained by the House of Lords in Re McClean [2005] UKHL 46. Per Lord Bingham, at [2]:

> *"The Belfast (or Good Friday) Agreement reached at multi-party talks on Northern Ireland and signed on 10 April 1998 (Cm 3883) had as its political objective to break the cycle of political and sectarian violence which had disfigured the life of the province over a number of years. To that end the Governments of the United Kingdom and Ireland agreed, among other things, to put in place mechanisms for an accelerated programme for the release of prisoners convicted of offences scheduled under the Northern Ireland (Emergency Provisions) Acts 1973, 1978 , 1991 or 1996 as, very broadly, offences motivated by political or sectarian considerations. But prisoners affiliated to organisations which had not established or were not maintaining a complete and unequivocal ceasefire were not to benefit from the accelerated release arrangements. The situation in this regard was to be kept under review. Both Governments agreed to complete a review process within a fixed time frame and to set prospective release dates for all prisoners qualifying for release. The review process would provide for the advance of the release dates of qualifying prisoners while allowing account to be taken of the seriousness of the offences for which the prisoners had been convicted and the need to protect the community. It was the parties' intention that, should the circumstances allow it, any qualifying prisoners who remained in custody two years after the commencement of the scheme should be released at that point. Both Governments would seek to enact appropriate legislation to give effect to these arrangements by the end of June 1998. It seems plain that the intention was to promote reconciliation by early release of prisoners who had committed offences motivated by*

political or sectarian considerations but who were now willing to renounce violence."

Lord Bingham continued, at [3]:

> *"Her Majesty's Government honoured its legislative undertaking by introducing what became the Northern Ireland (Sentences) Act 1998 , which received the royal assent on 28 July 1998 and was brought into force on the same day. The key feature in the enacted scheme, provided for in section 3(1) , is a declaration that a prisoner is eligible for release in accordance with the provisions of the Act. Such a declaration may be made in respect of a prisoner serving a life sentence or a determinate sentence of at least five years, but for present purposes no account need be taken of the latter. In the case of a life sentence prisoner a declaration may be made only if four conditions are satisfied. The first is that the sentence should have been passed in Northern Ireland for an offence committed before 10 April 1998 (the date of the Belfast Agreement), that the offence when committed should have been scheduled under one of the Emergency Provisions Acts already mentioned and that the offence in question should not have been, in effect, excluded from the relevant schedule by certificate of the Attorney General: that, in summary, is the effect of section 3(3) and (7) . The second condition is that the prisoner should not be a supporter of an organisation specified by order of the Secretary of State as concerned in terrorism connected with the affairs of Northern Ireland, or promoting or encouraging it, and which has not established or is not maintaining a complete and unequivocal ceasefire: that is the effect of section 3(4) and (8) . The third condition, closely linked with the second, is that if the prisoner were released immediately he would not be likely to become a supporter of a specified organisation or to become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland: section 3(5) . The fourth condition, mostly directly in issue in this case and applicable only to life sentence prisoners, is that if the prisoner were released immediately he would not be a danger to the public: section 3(6) ."*

Lord Bingham described this as an "*extraordinary scheme*" at [5]. This description in our view can only make sense by reference to our analysis of the DNA of the life sentence above.

[40] The main submission of Mr Ronan Lavery QC and Mr Michael O'Brien of counsel on behalf of the Applicant was (in terms) that given the departure which the 1998 Act effected from the norm (as ascertained and outlined in the court's survey above) it should be strictly and narrowly construed. Mr Lavery emphasised the exceptionality of this statutory measure. He further drew attention to the sentence expiry provision applicable to fixed term prisoners, in section 4(4) of the Act, highlighting the absence of any comparable provision in the discrete regime relating to life prisoners in section 6 or the licence recall provisions in section 9. Mr Lavery further pointed to the absence from the 1998 Act of any provision comparable to section 38(2) of the 1953 Act.

[41] The arguments on behalf of the Department developed by Mrs Neasa Murnaghan QC, with Mr Terence McCleave of counsel and, on behalf of the prisoner, Mr David Scoffield QC, with Mr Richard McConkey of counsel, had much in common. Mrs Murnaghan suggested that the extraordinary release provisions of the 1998 Act should be viewed from the perspective of the maintenance of peace and stability in a deeply divided society rather than the conferral of some benefit or reward on individual prisoners. She further submitted that to accede to the Applicant's challenge would create a lack of certainty for all released life prisoners.

[42] The submissions of Mr Scoffield on behalf of the prisoner had a particular emphasis on the 2001 Order. The central plank of his argument was Article 6(6). Mr Scoffield submitted that, given this provision, it would be perverse to hold that the prisoner's period of some six years lawful release cannot be taken into account; but for Article 6(6) a period unlawfully at large plainly would have been taken into account and thus would have been treated as part of the relevant absconding prisoner's sentence; and that, in consequence, there is an ascertainable legislative intention that the prisoner's period of six years release on licence should count towards the calculation of the earliest parole eligibility date. Mr Scoffield further highlighted the absence from the 1998 Act of any provision equivalent to section 24(4) of the 1953 Act. Finally he prayed in aid the principle against double penalisation.

[43] We begin by reflecting on two notorious facts. The first is that the provisions in the Belfast Agreement relating to the early release from prison of convicted terrorist offenders were highly contentious and divisive. This controversy continued for many years thereafter, particularly as regards the cohort of so-called "on the run" escaped terrorist prisoners. The ensuing legislation reflected the elements of heavy political compromise which these provisions of the Belfast Agreement entailed. Second, the primary legislation required to give effect to this aspect of the Belfast Agreement, namely the 1998 Act, was compiled at great haste, receiving the Royal Assent just some three months later. Given these two facts, the legislative gaps which this challenge highlights are unsurprising.

[44] The two main statutory regimes are separate, though overlapping. The overlap occurs by virtue of certain provisions of the 2001 Order, a later statutory

measure, applying to prisoners (such as Mr Stone) released under the 1998 Act. However, the 1998 Act governed all of the following in the case of Mr Stone: his eligibility to be considered for exceptional early release; the ensuing determination of his release eligibility; the terms of his release namely a licence containing the obligatory and exclusive conditions prescribed by section 9; the initial suspension of his licence; and its subsequent revocation.

[45] The main provisions of the 2001 Order bearing on Mr Stone's case are Articles 5, 6 and 11. The impact of these provisions in the present case is such that one is in effect working backwards. Article 11 applied to Mr Stone as he was an "*existing life prisoner*" to whom none of the exceptions in Article 11(4) applied, his licence having been revoked under section 9(4) of the 1998 Act. In consequence it fell to the Lord Chief Justice to fix Mr Stone's tariff retrospectively. This exercise, completed on 29 July 2013, resulted in the imposition of a judicially imposed tariff of 30 years imprisonment. By virtue of the statutory fiction enshrined in Article 11(1) and considered in Re King (*supra*) this period of imprisonment became operative retroactively with effect from 03 March 1989, with the preceding period of remand custody of almost 12 months to be deducted.

[46] By dint of the interlocking nature of the aforementioned provisions of the 2001 Order, Mr Stone's tariff of 30 years represented the period considered by the Lord Chief Justice "*… appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it*": per Article 5(2). The combined effect of Article 11(1) and Article 5(1) was that the "*release provisions*" would not apply to Mr Stone until his tariff had expired. (In passing, the Department's "Certificate of Opinion" under Article 11(1), issued on 05 September 2013, is an accurate reflection of these statutory provisions.) The tariff "*period*" is stated in unqualified terms and without any exception.

[47] Having served "*the relevant part of his sentence*" (the terminology of Article 6) is a pre-requisite, the first, to the release of a life prisoner. The "*relevant part*" of the sentence of a life prisoner is the judicially determined tariff. The second precondition to a life prisoner's release on licence is a direction from the Parole Commissioners, which can be made only where they are "*... satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined*". All of this is the combined effect of Articles 5 and 6 of the 2001 Order.

[48] We are satisfied that the relevant statutory provisions, as analysed and construed above and considered in their full context, provide no support for the central contention advanced on behalf of the Department and the prisoner, namely that his six year period of conditional licenced release should be included in his tariff of 30 years imprisonment. In our view, all of the relevant statutory provisions, considered in tandem, reaffirm the legal rule emerging clearly from our review of the broader context namely that the tariff component of every sentence of life imprisonment entails incarceration for the totality of the gross period, subject only to

the lawful deduction of any reckonable pre-sentence period or periods of remand custody and (an issue not arising for determination in this case), the possible deduction of lawful release from imprisonment for compassionate, rehabilitation or other kindred purposes. This analysis, we would add, we consider harmonious with Lord Bingham's scholarly extra – judicial exposition in "The Mandatory Life Sentence For Murder" (The Business Of Judging, p 229), making due allowance for subsequent statutory developments.

[49] We consider that the legislative intention underpinning the regime established by the 1998 Act was, in furtherance of one of the readily identifiable overarching public interests namely the promotion of peace and stability in a deeply divided and stricken society, the conferral of a conditional benefit, of an exceptional nature, on qualifying convicted terrorist offenders. The case on behalf of the Department and the prisoner overlooks entirely the unmistakeably bilateral nature of the unique arrangements devised by the 1998 Act. Release for the beneficiary prisoners was strictly conditional upon compliance with the statutory licence conditions. This qualified form of liberty would endure until death for every compliant released life prisoner. The non-compliant prisoner, in contrast, would suffer the restoration of loss of liberty. This, in turn, would give rise to either confirmation or revocation of the prisoner's licence. Revocation would reflect an assessment that the non-compliant prisoner, by his conduct, had abused the trust reposed in him and would in consequence forfeit the exceptional statutory benefit conferred upon him. The conferral of a further benefit on such prisoners in the form of full credit for the period of their licensed release from prison seems to us impossible to deduce from the statutory provisions considered in their full context. We consider that this windfall, wholly unmerited on any reasonable view, cannot have been intended by the legislature.

[50] Thus we are unable to identify an implied legislative intention that a life prisoner released on licence under the 1998 Act and, thus, required to observe fully his licence conditions for the remainder of his natural life should, in the event of recall to prison, revocation of the licence on account of egregious breaches thereof and related further convictions for terrorist offences, secure the still further benefit of, in effect, the reduction of his tariff by the subtraction of the period of his release on conditional licence. We discern no anomaly, much less any absurdity, in this assessment. It further accords with principle, common sense, justice and fairness to all – prisoners, victims and society alike.

[51] With particular reference to the main arguments advanced to the contrary and insofar as not already addressed above:

(i) We consider our approach to release on licence under the 1998 Act to be conducive, rather than antithetical, to legal certainty.

(ii) The overarching aim of the relevant provisions of the Belfast Agreement, as discussed above, in no way detracts from the analysis that life prisoners such

as Mr Stone are, or were, the individual beneficiaries of this exceptional regime as reflected in the ensuing legislation.

(iii) We consider that Mr Stone has enjoyed the full benefit intended by the legislature for defaulting released life prisoners such as him.

(iv) Article 6(6) does not affect our analysis of the legislative intention elaborated above. This provision had its advent in the 2001 Order and not the 1998 Act, it simply replicates its statutory predecessor (section 38(2) of the 1953 Act) and, in our view, is readily explained as being designed to cater for compelling mitigating factors or other exceptional circumstances in the case of an "*unlawfully at large*" prisoner: for example, a genuine misunderstanding relating to the terms of temporary release or compelling compassionate individual circumstances. The self-evidently elevated threshold engaged by Mr Scoffield's perversity argument is manifestly not overcome. Further, the argument that but for Article 6(6) account would have been taken of a period or periods unlawfully at large does not follow from the statutory language or otherwise and fails to address the public law principles which an argument of this nature engages (see Wade and Forsyth, Administrative Law, 10th Ed, p321 ff).

(v) Our analysis and construction of the relevant statutory provisions gives rise to no double penalisation: Mr Stone is simply required to serve the whole of his gross tariff prior to becoming eligible for the possibility of further release on licence, having forfeited the benefits of his exceptional and conditional release on licence under the 1998 Act by his egregious breaches of licence in electing to commit further serious terrorist offences.

(vi) Our approach is supported by the absence from the 1998 Act of any analogue to section 4(4) as regards released life prisoners and anything comparable to section 38(2) of the 1953 Act, as highlighted in the submissions of Mr Lavery, together with the absence of any cross-referring, qualifying or incorporating provision in either of the main statutory codes.

(vii) In short, the Belfast Agreement afforded to convicted terrorist offenders such as Mr Stone the opportunity to demonstrate that they were worthy of the exceptional benefit of significantly accelerated release from sentenced custody. Those, such as Mr Stone, who have by choice failed to do so forfeit this benefit and revert to their pre-release status.

(viii) We consider that recourse to extreme hypothetical examples – such as the released life prisoner whose 1998 Act licence is revoked on the eve of the expiry of his tariff – does not undermine our analysis. Such a prisoner would, logically and in principle, be no different from Mr Stone. Any exceptional personal circumstances would belong to the realm of an appeal to the Royal

Prerogative of mercy or recourse to section 24(1) of the 1953 Act if applicable. Our analysis in the instant case gives rise to no identifiable absurdity.

(ix) The (ultimately muted) reliance on an isolated part of the tariff determination of Kerr LCJ in R v Brady [2007] NILSCT 1 is in our estimation of no avail to the Department or Mr Stone. The passage in question, at [3], reads:

> "On 13 November 2003 the prisoner's licence was suspended and he was returned to custody on the life sentence. He has now served 16 years and 5 months of his life sentence ; the period of 5 years during which he was at liberty on licence under the 1998 Act is not deductible from this period for the purposes of calculating his release date once the minimum term is fixed."

This passage is in our view ambiguous, does not appear to have been the product of adversarial argument, was not necessary for the decision being made, is not contained in a conventional judgment and was plainly not designed or intended to be an authoritative statement of the law. In summary, it lacks the essential trappings of a binding precedent judicial decision.

(x) Ultimately, to conclude otherwise than as set out above would in our view be inimical to good sense and reason and would further no identifiable public interest. Furthermore, we consider our approach to be fully consonant with the public interest underpinning the first and basic component of every life sentence namely retribution and deterrence. The adjustment to this discrete public interest effected by the Belfast Agreement and reflected in the ensuing 1998 Act does not permit Mr Stone to include his period of licensed release from 1990 – 1996 in his minimum term of 30 years' imprisonment.

[52] Finally the court requested, and has considered, the transcript of Mr Stone's sentencing in respect of his subsequent offences – see [5] (j) above – and the associated official records. While no argument on this discrete issue materialised this facility was made available to the parties. We confine ourselves to the observation that if the Applicant's challenge were to be rejected – or perhaps in any event - Mr Stone will have served no effective sentence for his further serious terrorist offences committed while released on licence, while receiving credit of some six years remission in respect of his life sentence tariff. The final submissions of the parties relating to [54] below suggests that this assessment is uncontroversial.

Conclusion

[53] The Department's assessment that Mr Stone became eligible for release on parole in March 2018 is erroneous in law. The calculation of Mr Stone's earliest release date must make no allowance for the period of approximately six years

which elapsed between the date of his exceptional early release from prison and the date of his subsequent further detention. The Department's decision must be quashed in consequence. From this it follows that the earliest date upon which Mr Stone might be released on parole licence will fall around July 2024. The precise date is neither unequivocally stated in the evidence nor an agreed fact and its calculation is not a matter for this court.

…………………………………………………………………………………….

Postscript [1]*: Appeal

[54] We refer to [2] above. The court is seized of an application on behalf of both the Department and Mr Stone [a] to certify that our decision entails a point of law of general public importance and [b] to grant leave to appeal to the Supreme Court. The court accedes to the first request in light of the arguments presented, the novelty and importance of the central issue, the factor of substantial deprivation of liberty which our decision entails and the further evidence now provided concerning the wider impact of what we have decided. Having considered the parties' representations, we frame the point of law of general public importance in the following terms:

> ***Where a life prisoner convicted of inter alia terrorist murders secures early release on licence under the Northern Ireland (Sentences) Act 1998 ("the 1998 Act") and such licence is revoked due to fundamental breaches occasioned by further terrorist offending while on release and the prisoner is convicted of such further offences, receiving no effective additional sentence, having regard to the provisions of the 1998 Act and the Life Sentences (NI) Order 2001 is the prisoner's judicially determined "tariff" to include the period of his release on licence ?***

[The inclusion of the words underlined was contested by Mr Stone's legal representatives]

[55] We certify as above and consider that the Supreme Court should be the arbiter of whether leave to appeal should be granted.

Postscript [2]*: Final Order

[56] This is now agreed by all parties and is in the following terms:

1. An Order of Certiorari removing to the High Court and quashing the decision of the Department of Justice ("the Respondent") dated 20th September 2017 to formally re-

fer the case of the prisoner, Michael Stone, to the Parole Commissioners pursuant to Article 6 of the Life Sentences (Northern Ireland) Order 2001.

2. An Order extending time to make an application for judicial review pursuant to Order 53, Rule 4(1) of the Rules of the Court of Judicature.
3. The Applicant's costs shall be paid by the Respondent, to be taxed in default of agreement.
4. The costs of the Applicant, an assisted person, shall be taxed in accordance with the provisions of Schedule 2 to the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981
5. The costs of the first interested party, Michael Stone, an assisted person, shall be taxed in accordance with the provisions of Schedule 2 to the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981
6. The second interested party, the Parole Commissioners, shall bear its own costs.

[* The Postscripts were finalised by the court on 04/02/19 (judgment having been pronounced on 15/01/19) following a further listing and receipt of the parties' written submissions, including the further evidence noted in [52] above. The order of the Court was finalised by the presiding judge on 05/02/19]