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(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW) DIVISIONAL COURT

IN THE MATTER OF AN APPLICATION BY DEBORAH McGUINNESS
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW (No 3)

-v-

THE SENTENCE REVIEW COMMISSIONERS

Before: McCloskey J and Keegan J

McCLOSKEY J (delivering the judgment of the court)

Introduction

[1] This is the decision of the panel, to which both members have contributed, on the question of whether these proceedings are to be characterised a criminal cause or matter. This follows an expedited hearing on 22 July 2019, in keeping with the expedited track to which this case has been assigned from its inception.

[2] This decision has considerable implications for onward appeal rights: see section 41 of and Schedule 1 to the Judicature (NI) Act 1978. In short, if this is not a criminal cause or matter adjudication will be undertaken by a single judge of the Queen's Bench Division (subject to [42] *infra*) in accordance with section 16(5) of the Judicature (NI) Act 1978 with an ensuing right of appeal without leave to the Court of Appeal and the possibility of an onward appeal to the Supreme Court. On the other hand, if this is deemed a criminal cause or matter, adjudication will be by a bench of two or more judges and the only avenue for further recourse will be an appeal to the Supreme Court which would be dependent, crucially, on the certification by this court of a point of law of general public importance, which

certification would unlock the door to the second pre-requisite namely the grant of leave to appeal by either this court or the Supreme Court.

[3] The history of these proceedings can be gleaned from the court's several orders to date. In short, the case is advancing on an expedited and so-called "rolled up" track and the court continues to wrestle with certain challenging case management issues. There have been four listings to date, the most recent whereof (on 22 July 2019) was devoted to the parties' arguments on the criminal cause or matter issue and certain case management issues.

The Challenge

[4] The three protagonists are:

- (i) Deborah McGuinness ("the Applicant"), who is the surviving sister of one of the victims of murders perpetrated by Michael Stone in a notorious attack on mourners at Milltown Cemetery, Belfast on 22 March 1988.
- (ii) The Sentence Review Commissioners ("*the Commissioners*"), a public authority established by the Northern Ireland (Sentences) Act 1998.
- (iii) Michael Stone (hereinafter "*the prisoner/Mr Stone*"), a convicted murderer of some notoriety sentenced to life imprisonment in 1988 for the aforementioned murders and certain related offences and whose victims include the brother of the Applicant, Thomas McErlean deceased ("*the deceased*") and an active participant in these proceedings.

Other agencies to be noted are the Parole Commissioners, a public authority established by the Life Sentences (NI) Order 2001, The Department of Justice (the "*Department*") which has significant functions and responsibilities under the last mentioned measure and the Secretary of State for Northern Ireland (the "*Secretary of State*") who previously exercised important functions and responsibilities relating to life prisoners, has a relevant rule making function and is the respondent in the ongoing forum of the Commissioners.

[5] The essence of the Applicant's challenge can be gleaned from the Order 53 Statement, as amended:

“3.1 The Applicant seeks to challenge three decisions related to the consideration of the inmate, Michael Stone, for early release:

3.2 The decision of the Sentence Review Commissioners to accept the application made by the prisoner for early release

3.3 The decision of the single Commissioner to direct that the application be the subject of a preliminary indication by a panel of Sentence Review Commissioners.

3.4 The decision of the Sentence Review Commissioners to not provide information about the proceedings before them and the decisions made in relation to the application of the prisoner for early release to the Applicant.”

[6] Shortly following the initiation of these proceedings, Mr Stone’s case in the forum of the Commissioners progressed to the stage of a formal determination, dated 25 June 2019, in the form of a “preliminary indication”. This records that the prisoner had applied to the Commissioners under Section 3 of the Northern Ireland (Sentences) Act 1998 for a declaration that he is eligible for release in accordance with the provisions of that Act. It is stated that his application, together with the response papers provided on behalf of the Secretary of State, have been considered. The Commissioners’ preliminary indication is in these terms:

“On the basis of the available documentary information, the Commissioners hereby indicated that they are minded to make a substantive determination to the effect that the application in respect of the [specified] sentences should be refused”

The offences are then detailed in a list. All of the convictions were made on 03 March 1989 and they consist of six counts of murder, five of attempted murder, three of conspiracy to murder, six of wounding with intent, one of doing an act with intent to cause an explosion, two of causing an explosion with intent, nine of possessing firearms and ammunition with intent and three of possessing explosives with intent. The six counts of murder were punished by a sentence of life imprisonment. The

remaining 29 counts attracted determinate sentences ranging from 20 to 27 years imprisonment.

[7] The prisoner, exercising his statutory right, has challenged the Commissioners' preliminary indication. The effect of this, in very brief compass, is that he is now entitled to an oral hearing before a panel of Commissioners, with certain associated procedural rights. Following some insistent probing, the court has been informed that there is an anticipated hearing date of 20 August 2019, subject to certain qualifications. It is the choreography of the extant proceedings in this court with the uncompleted underlying proceedings before the Commissioners which has given rise to the case management challenges mentioned above and addressed *infra*.

Factual Matrix

[8] 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, having been convicted following a non-jury trial, received the sentences noted in [6] above. 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 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) 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.

[9] 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. 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 was 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).

Judicial Review No 1

[10] In *McGuinness (No. 1)* [2019] 10 NIQB this Applicant challenged the decision of the Department to formally refer the case of the prisoner to the Parole Commissioners under the Life Sentences (Northern Ireland) Order 2001. The Department's referral decision was based upon its assessment that the prisoner would become eligible for release on parole in March 2018. The Applicant's challenge succeeded. By its judgment delivered on 15 January 2019, a different constitution of this court held that the aforementioned assessment was erroneous in

law. The court concluded that the calculation of the prisoner's earliest release date must make no allowance for the period of some six years which elapsed between the date of his exceptional early release from prison (under the Northern Ireland (Sentences) Act 1998 - *infra*) and the date of his subsequent detention giving rise to his conviction in respect of further, newly committed terrorist offences. The court made an order quashing the Department's decision.

[11] Acceding to a subsequent application on behalf of the Department and the prisoner, the court certified that its decision involved a point of law of general public importance. This paved the way for an application to the Supreme Court for leave to appeal. This court has been informed that the Supreme Court has recently granted this application and the appeal has now been listed for hearing on 15 October 2019. The point of law certified is the following:

"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?"

Judicial Review No 3

[12] The genesis of this further inter-connected judicial review challenge may be concisely stated. Following *McGuinness (No. 1)* the prisoner's legal representatives turned their attentions to the 1998 Act. Invoking its machinery they submitted an application to the Commissioners for a declaration under Section 3 that the prisoner is eligible for release under this enactment. The Commissioners accepted jurisdiction and began processing the application accordingly. Upon learning of this the Applicant initiated the present proceedings. Her primary contention is that the Commissioners lack jurisdiction to entertain the prisoner's application. Her second, subsidiary complaint is that she has certain rights of participation in the Commissioner's process of which she has been denied.

Case Management

[13] These judicial review proceedings and those of the Commissioners continue to advance on twin, parallel tracks. Thus far there has been no application to this

court for an order of interim relief injunctioning the process of the Commissioners. Balancing the interplay between these two inter-related legal processes has not been straightforward for the court. If the Applicant's primary challenge succeeds, it will follow that the Commissioners have been acting *ultra vires* from the outset of their process. If the challenge fails, the Commissioners can lawfully make a final determination of the prisoner's application, one outcome whereof could be the restoration of his liberty. Any injunctive interference by this court would delay that event. This is the first consideration which must attract some weight. The second is that the uncompleted process of the Commissioners has presumably involved the investment of significant time and resources to date. The third is that the Commissioners' process has reached an advanced stage, with arrangements being actively made to convene an imminent hearing and complete the procedures necessary for their final determination: see [7] above. It is projected that this landmark will be achieved approximately six weeks hence.

[14] The court having explored the main potential scenarios at the hearing, the parties helpfully cooperated with the court in the compilation of the following:

Scenario 1

The Court determines its constitution and lists the substantive hearing in advance of 20 August 2019, determining the primary issue namely that of the Commissioners' jurisdiction before 20 August 2019. The following issues arise:

- a) The Court's determination on the constitution of the court may itself be appealed. However, it may be that any appeal on constitution could be reserved and included as a ground in any appeal of the determination on jurisdiction itself, particularly if the hearing takes place within the time to appeal the decision on constitution.
- b) If the Court finds in favour of the Applicant on jurisdiction, the hearing before the Commissioners would not take place as scheduled. If the Respondent and/or interested party were to appeal the decision on jurisdiction successfully, a hearing would then be relisted. Depending on the length of time for the appeals process, this may result in the need for further materials to provide the Commissioners with a more updated position.
- c) If the Court finds in favour of the Commissioners/interested party on the primary issue of jurisdiction, the scheduled hearing before the Commissioners on 20 August 2019 might not proceed. This could occur if the Applicant appeals the determination of the Court on jurisdiction before the 20 August 2019 and seeks an interim relief/stay order pending appeal.

- d) Depending upon possible appeal routes, it may be possible that any appeal of this Court's determinations could be brought before the Supreme Court in its determination of the appeals in *Re McGuinness (No 1)* given the similarity of the issues arising and the fact that the Commissioners might seek permission to intervene.
- e) If after appeals are exhausted, the final determination is that the Commissioners do have jurisdiction to consider and determine Mr Stone's application for early release, there remain issues regarding the Applicant's participation rights in the Commissioners' process. The court's determination of this discrete issue, if it materializes, could be separately appealed.

Scenario 2

The Court determines that the application is a criminal cause or matter and lists the hearing on jurisdiction after the hearing on 20 August 2019 but before the Sentence Review Commissioners issue a substantive determination. The following issues arise:

- a) The court's determination on the constitution of the court may itself be appealed which could disrupt the court's listing of the hearing on jurisdiction.
- b) The hearing before the Sentence Review Commissioners would be allowed to be completed but this Court would not have heard all matters arising out of the application including the issues around participation rights and any challenge to the substantive determination itself. This scenario has the disadvantage of time and cost being spent on the SRC hearing in circumstances where there is no ruling on jurisdiction and no outcome to the SRC hearing.
- c) In this scenario, if the Court finds in favour of the Applicant on jurisdiction, any substantive determination of the Commissioners would become void, subject to any reversal of that position on any subsequent appeal.
- d) If the Court dismisses the Applicant's jurisdiction challenge or makes a decision in favour of the Applicant which is reversed on appeal, the substantive determination of the Commissioners would stand but there would be remaining issues regarding the Applicant's participation rights in the Commissioners' proceedings. The substantive determination may also itself be the subject of judicial review by any of the parties. In such circumstances, this Court would likely have to have a further hearing relating to this case in some form.
- e) Depending upon possible appeal routes, it may be possible that any appeal of this Court's determinations could be brought before the Supreme Court in its determination of the appeals in *Re McGuinness (No 1)* given the similarity of

the issues arising and the fact that the Commissioners are likely to seek permission to intervene in those appeals from the Supreme Court. This would be somewhat less feasible than in Scenario 1

Scenario 3

The Court lists the hearing on jurisdiction in late August/early September 2019 when the Commissioners' substantive determination will likely have been made. The following issues arise:

- a) The court's determination of the criminal cause or matter issue might be appealed which could disrupt the court's listing and determination of the jurisdiction challenge.
- b) The Court could, via a single hearing, adjudicate upon the Applicant's jurisdiction challenge, the participation challenge and any new matters arising out of the Commissioners' substantive determination.
- c) If the Commissioners' substantive determination is favourable to Mr Stone, the Applicant would likely apply to this court for interim relief to prevent his release. This could raise challenging timetabling and other issues. Mr Stone has previously made clear his strong preference is for judicial determination of the jurisdiction issue at least in advance of the Commissioners' forthcoming hearing.
- d) Any hearing postdating promulgation of the Commissioners' final determination might be delayed pending the outcome of the decision of the Supreme Court in *Re McGuinness (No 1)*.

[15] We consider that there is one clearly identifiable scenario which this court must strive to avoid. This scenario would entail a final determination of the Commissioners in favour of the prisoner at a stage when this court has not completed its adjudication of the Applicant's primary challenge to their jurisdiction. This could give rise to the prisoner being released and/or his re-arrest following release or an order prohibiting his release, via interim relief, with this court's decision on the Commissioners' jurisdiction following later.

[16] We do not overlook another factor namely the Applicant's secondary challenge to the process of the Commissioners. However, as this court has already observed at one of its hearings to date, there is nothing in the Commissioners' procedural rules which precludes the presentation of detailed written submissions on behalf of the Applicant or absolves the Commissioners from considering same. Allied to this is the Commissioners' public law duty to take into account all material evidence and factors. The Commissioners have not thus far demurred from these observations of the court. The Applicant's secondary challenge entails the contention

that she is entitled to greater procedural rights. This is reflected in her quest for an order of mandamus requiring the Commissioners “... to provide the Applicant with all relevant documentation and information relating to the application of the prisoner for early release.” We note the absence of any suggestion in the Applicant’s pleaded case that she has a further legal entitlement to representation at the forthcoming Commissioners’ hearing.

[17] The realities of the two parallel legal processes are inescapable. It falls to the court, in the exercise of its case management powers and giving effect to the overriding objective, to balance and reconcile all of the foregoing in a pragmatic and proportionate way. We consider that a fair and proportionate balance is struck at this stage by an order incorporating the following elements:

- (a) The proceedings of the Commissioners will continue up to and beyond the date of the forthcoming hearing to consider the prisoner’s challenge to their preliminary indication.
- (b) There shall be no promulgation of the Commissioners’ determination until this court has delivered its substantive judgment.
- (c) There shall be a substantive hearing before this court on 03 September 2019 (out of term).
- (d) Any appropriate refinement and updating of this order will be provided.
- (e) There shall be liberty to apply.

Statutory Framework

[18] There is an assortment of statutory provisions bearing directly or indirectly, to a greater or lesser extent, on the issues, including that of criminal cause or matter, raised in these proceedings. These are assembled in the Appendix to this judgment.

The Life Sentence

[19] The topic of the evolution of the life sentence in Northern Ireland, the human rights dimension of this species of sentence and the differences between this

jurisdiction and that of England and Wales were considered in *McGuinness (No. 1)* at [22]-[32]. We refer to these passages without reproducing same.

Criminal Cause Or Matter?

[20] We begin with the Judicature (Northern Ireland) Act 1978 and the Rules of the Court of Judicature, borrowing the following from *Re JR 27* [2010] NIQB 12, at [12] - [13]:

“ Judicature (Northern Ireland) Act 1978

[12] The mechanism of appealing from decisions of the High Court differs according to whether the decision is given in a civil or criminal matter, by virtue of Section 35 of the Judicature (Northern Ireland) Act 1978 ("*the 1978 Act*") which provides, insofar as material:

"(1) *Subject as otherwise provided in this or any other statutory provision, the Court of Appeal shall have jurisdiction to hear and determine in accordance with rules of court appeals from any judgment or order of the High Court or a judge thereof.*

(2) *No appeal to the Court of Appeal shall lie –*

(a) *except as provided by the following provisions of this Part from any judgment of the High Court in any criminal cause or matter ..."*

The prohibition against an appeal from the High Court to the Court of Appeal in a criminal cause or matter is reinforced by Section 41, which provides, insofar as material:

"41. (1) *Subject to the provisions of this section, an appeal shall lie to the [UK] Supreme `Court, at the instance of the defendant or the prosecutor-*

(a) *from any decision of the High Court in a criminal cause or matter;*

(b) *from any decision of the Court of Appeal in a criminal cause or matter upon a case stated by a county court or a magistrates' court.*

(2) *No appeal shall lie under this section except with the leave of the court below or of the [UK] Supreme `Court; and, subject to section 45(3), such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the [UK] Supreme `Court, as the case may be, that the point is one which ought to be considered by the [UK] Supreme `Court."*

Thus Sections 35 and 41 of the 1978 Act both contemplate expressly that the High Court may exercise jurisdiction in a criminal cause or matter. There is no prescription of this jurisdiction, nor is there any definition of the words

"*criminal cause or matter*". Section 41 is supplemented by the detailed regulatory regime contained in Schedule 1.

[13] Under Part II of the 1978 Act, jurisdiction in applications for judicial review is conferred on the High Court. Section 16(5) provides:

"Except where a statutory provision otherwise provides, any jurisdiction of the High Court or a division thereof shall be exercised by a single judge".

The procedural regime which governs applications for judicial review is contained in Order 53 of the Rules of the Court of Judicature of Northern Ireland, the genesis whereof is found in Section 18 of the 1978 Act. This is followed by Sections 19-25, which regulate a variety of matters pertaining to judicial review applications. It is clear from a consideration of Part II of the 1978 Act as a whole that the jurisdiction of the High Court in applications for judicial review encompasses both civil and criminal matters. This is consonant with the historical development of this supervisory jurisdiction, which has at no time discriminated according to whether the act or decision of the inferior court or tribunal or other public authority under challenge was criminal or civil in character."

The judgment continues at [14]:

"Order 53, Rules of the Court of Judicature of Northern Ireland

[14] In accordance with Section 18 of the 1978 Act, Rules of Court governing applications for judicial review were duly made. These are contained in Order 53 of the Rules of the Court of Judicature of Northern Ireland. From the perspective of composition of the court, Order 53, Rule 2 makes an important distinction between civil and criminal matters. Under the banner "Exercise of Jurisdiction in a Criminal Cause or Matter", it provides:

"2. - (1) Save as otherwise provided by this Order and subject to paragraph (3) and to rules 3(3) and 8(1), in a criminal cause or matter the jurisdiction of the Court on or in connection with an application for judicial review shall be exercised by three judges sitting together.

(2) Where the Lord Chief Justice so directs, such jurisdiction may be exercised by two judges.

(3) In vacation any jurisdiction under this rule may, where necessary, be exercised by a single judge.

(4) No appeal shall lie from an order made by a judge exercising jurisdiction under paragraph (3), but an application may be made by motion within 10 days to the court, constituted in accordance with paragraph (1) or (2), to set aside or discharge the order and to substitute such other order as the Court may think fit.

(5) *Where in accordance with paragraph (2) a matter is heard before two judges and those judges differ in opinion, it shall be re-heard and determined by three judges.*

(6) *Notwithstanding this rule, any jurisdiction on consent may be exercised by a single judge in accordance with section 16(5) of the Act.*

(7) *A court of two or more judges exercising jurisdiction pursuant to this rule shall be called a Divisional Court."*

Other examples of the impact which the distinction between criminal and civil proceedings has on the constitution of the High Court are readily found. Order 52, Rule 1 provides that the power to punish for contempt of court by an order of committal is exercisable only by a chamber of two or more judges. Similarly, where an application for a Writ of habeas corpus is made in a criminal cause or matter, it must be heard by a chamber of two or more judges where the judge who considers the matter initially does not order the release of the person restrained: see Order 54, Rule 4(2)."

[21] The court in *JR27* also gave consideration to the MacDermott Report, at [15] - [16]:

[15] Some useful historical context is provided in the MacDermott Report ("Report of the Committee on the Supreme Court of Judicature of Northern Ireland", Cmnd. 4292), which forms the background to the Judicature (Northern Ireland) Act 1978. The report describes the High Court's jurisdiction to issue prerogative writs and orders and grant declaratory judgments and orders as "*important weapons in the legal armoury of the subject*" (see paragraph 103) and continues:

"104 In Northern Ireland, as in England, the prerogative writs have formed a valuable part of the protective and supervisory jurisdiction of the High Court and the ancient jurisdiction of the Court of Queen's Bench in relation thereto is now exercised on the Crown side of the Queen's Bench Division ...

[The remedy of certiorari] has in recent years been brought into the realm of administrative law in relation to bodies which do not claim to be and would not be recognised as courts but which, having a duty to act judicially, are subject to the controlling jurisdiction of the High Court."

The report further notes that the modern jurisdiction of the High Court is traceable to the Judicature Acts 1877-1897 and continues:

"87 This mode of conferring or defining jurisdiction followed the example set in 1873 with regard to the Superior Courts in England and the pattern was repeated when Section 40(1) of the [Government of Ireland Act 1820] provided that the High Court of Justice in Northern Ireland constituted under that Act should have and

exercise all such jurisdiction as had previously been exercised by the High Court of Justice in Ireland and by the judges of that court."

[16] The MacDermott Report also gave specific consideration to the topic of Divisional Courts. It noted that under the Supreme Court of Judicature (Ireland) Act 1877, the jurisdiction of the High Court was exercisable by either a single judge or a Divisional Court. See paragraph 177:

*"A Divisional Court consists of at least two judges. It hears all such causes and matters as are not to be heard by a single judge and deals with all business on the common law side which would have been proper to have been transacted or disposed of by the court sitting **in Banco** if the Act of 1877 had not been passed".*

It noted the modernisation which had been introduced in England by Section 60 of the Supreme Court of Judicature (Consolidation) Act 1925 and proposed the abolition of Divisional Courts, while making provision for certain classes of case to be heard by a chamber of at least two judges. Paragraph 183 continues:

*"One alternative would be to recommend that the direct appeal to the House of Lords in criminal applications for **habeas corpus** be retained and re-enacted, substituting 'the High Court' for 'a Divisional Court', and that criminal applications for **habeas corpus** in the High Court be added to the proceedings to be heard by more than one judge."*

However, the Committee declined to recommend this.

Thus the MacDermott's Committee's proposal was that while certain aspects of the jurisdiction of the High Court would be exercised by two judges, Divisional Courts would be abolished, with the Court of Appeal having jurisdiction to hear and determine appeals "*from any judgment or order of the High Court*" (see paragraph 231). In the event, the 1978 Act did not reflect this recommendation. There may well be a case for reinstating this proposal now and, as regards this issue, there is unanimity of opinion amongst the members of this present chamber of judges."

[22] In *McGuinness (No. 1)*, the court adopted an essentially pragmatic approach to the issue of criminal cause or matter, as appears from [2] of its judgment:

*"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."

Resort to pragmatism was driven by the timetabling constraints imposed by the underlying proceedings of the Parole Commissioners, the factor of the liberty of the citizen and the overarching public interest.

JR 27

[23] Probably the most extensive treatise of the topic of criminal cause or matter in this jurisdiction is to be found in the decision of a Divisional Court in *Re JR 27* (*supra*) a majority decision. In that case the majority decided that a challenge to the retention by the police of the fingerprints of a suspected child offender by an application for judicial review was a criminal cause or matter. In the leading judgment of the majority one finds the following passage at [36]:

"In my opinion, the governing principles are to be applied to the matrix in the present case in the following way:

- (a) *Adopting the language of Viscount Simon LC in Amand, a possible and foreseeable outcome of the impugned measures is the prosecution and punishment of the Applicant for a criminal offence on some future date.*
- (b) *In the language of Lord Wright in Amand, if any of the impugned measures is 'carried to its conclusion', the Applicant is at risk of future prosecution and punishment for a criminal offence.*
- (c) *To borrow the phraseology of Lord Porter in Amand, any of the impugned measures may properly be considered to be 'a step in a criminal proceeding', which 'need not of itself of necessity end in a criminal trial or punishment', it being sufficient that it '... puts [the Applicant] in jeopardy of a criminal charge ...' at some future date.*

- (d) *In the words of Megaw LJ in St. Germain, by reason of any of the impugned measures there is '... in contemplation the possibility of trial by a court for some offence ... the prospect that a judicial tribunal will try a criminal charge ...'.*
- (e) *Bearing in mind the decision in Blandford Justices, I consider that there is no sensible or logical distinction between a case where any of the impugned measures occurs in the course of criminal proceedings which, when the subsequent challenge materialises, are no longer in existence (on the one hand) and one where the impugned measure occurs as a prelude to a possible future process of a criminal nature or 30 possible future criminal proceedings which may, or may not, materialise (on the other).*
- (f) *The impugned measures belong exclusively to the realm of the criminal justice process: none of them has any other legal family or home. There is no possible third characterization: the choice lies between civil and criminal. Applying the blunt formula of Sir John Donaldson MR in Carr -v- Atkins, each of the impugned measures is something which is not civil. In addition, as stated by His Lordship '... the fact that there are no criminal proceedings does not ... matter'."*

As this passage makes clear, there were two determining factors in the conclusion of the majority. The first was the nexus between the measure under challenge and the possibility of future prosecution of the litigant. The second was the dominant stamp of the criminal justice process. In the dissenting judgment of the Lord Chief Justice, the determining factor was the assessment that the legal challenge entailed the review of a discretion which His Lordship considered to be unconnected with the criminal investigation or criminal proceedings past, present or in contemplation: see [47].

The Belhaj Decision

[24] The United Kingdom Supreme Court has made a recent contribution of substance to the jurisprudence belonging to this sphere. In *Belhaj v Director of Public Prosecutions* [2018] UKSC 33 the litigation matrix had two main components. The first was a decision of the DPP not to prosecute a senior officer of the British Secret Intelligence Service for alleged involvement in the abduction, imprisonment and torture of certain individuals. The second was whether the Administrative

Court, within the framework of the Justice and Security Act 2013, could properly receive “closed” material disclosed only to the court and the Special Advocate but not to the claimants. The resolution of the latter issue turned on the question of whether the judicial review proceedings were “*proceedings in a criminal cause or matter*”. In the particular litigation context this time honoured phrase appeared in Section 6(11) of the statute.

[25] The Supreme Court reversed the Divisional Court’s decision that these were not proceedings in a criminal cause or matter. The leading judgment of the majority was delivered by Lord Sumption. One distils from this the following central themes and principles:

- (a) The judicial review jurisdiction of the High Court in matters of a criminal nature is extensive: [16].
- (b) Judicial review cannot be regarded as an inherently civil proceeding: [16].
- (c) The word ‘*matter*’ expands and enlarges ‘*cause*’ (per Lord Wright in Amand v Secretary of State for Home Affairs [1943] AC 147 at 159-160): [17].
- (d) A decision collateral to the exercise of criminal jurisdiction may be a criminal cause or matter: [17].
- (e) The expression “*criminal cause or matter*” is to be given its natural and ordinary meaning: [20].
- (f) “A ‘*cause*’ is a proceeding, civil or criminal, actual or prospective, before a court. A ‘*matter*’ is something wider, namely a particular legal subject matter, although arising in a different proceeding.”: [20].

In the concurring judgment of Lord Mance there is a notable emphasis on the question of whether the subject matter of the judicial review challenge falls “*naturally within the concept*” of proceedings in a criminal cause or matter: see especially [26]. In this particular respect the judgments of both Lord Sumption and Lord Mance appear to resonate with *JR27*.

The McAtee Decision

[26] In the wake of *Belhaj* the English Court of Appeal gave judgment in *R (McAtee) v Secretary of State for Justice* [2018] EWCA Civ 2851. There, as appears from [10], the claimant formulated his challenge in the terms of an attack on an asserted decision of the Secretary of State for Justice to subject him to an indeterminate licence for a minimum period of 10 years without any right of review. A perusal of the judgment of the learned President indicates that this was, properly analysed, a challenge to the statutory regime governing sentences of imprisonment for public protection, or “IPPs”: see [42] and [45] in particular. The Court of Appeal held that the proceedings had the status of a criminal cause or matter. Having considered the decision as a whole, we draw attention to three passages in particular: first at [47]:

“While the Supreme Court in Belhaj has affirmed the approach taken nearly 130 years ago in ex parte Woodhall and has endorsed a broad meaning for the words “criminal cause or matter”, we make clear that, where this particular jurisdictional issue arises, a careful individual appraisal remains necessary by reference to the circumstances of each case. It certainly is not the law that just because the underlying proceedings are criminal in nature then any decision or step thereafter taken which has some sort of connection with those criminal proceedings is necessarily of itself a criminal cause or matter. That is made clear by Lord Sumption in Belhaj (at [20]) and in his approval of the approach and decision taken in Guardian News.”

Second, at [49]:

“It is, in our view, accordingly salutary that there should not be an over-expansive interpretation of the phrase ‘criminal cause or matter’ and neither should there be an over-expansive approach to addressing the jurisdictional issue.”

Third, at [50]:

“To focus solely on the relief sought in these proceedings also would involve a departure from the requirement, established by the authorities, to focus on the underlying subject matter in which such issue is raised. On one view, this judicial review claim could indeed be said itself to be a

criminal 'cause'. But in any event, as Lord Sumption has explained, a 'matter' is something wider: a particular legal subject matter, although arising in a different proceeding. That assuredly can be said of the present case."

Discussion

[27] Duly guided by the decision of the Supreme Court in *Belhaj* which is of course binding on this court, we conclude as set forth below. In doing so we take cognizance of the parties' respective submissions. We begin by reminding ourselves of the basic question to be determined: is this application for leave to apply for judicial review a proceeding which is a criminal cause or matter?

[28] Two themes in particular emerge from *Belhaj*. First, bearing in mind that the court is construing a statutory phrase, the hallowed principles that the words "*criminal cause or matter*" are to be given their ordinary and natural meaning is engaged. Second, attention must be paid to the disjunctive "*or*": it is designed to distinguish between a criminal cause (on the one hand) and a criminal matter (on the other). *Belhaj*, as set forth above, is authority, binding on this court, for the proposition that a criminal cause is a proceeding, actual or prospective, before a court. Pausing, we consider that this judicial review proceeding does not fall within this formulation. This serves to refine the issue to be determined, the question becoming: are these judicial review proceedings a criminal matter?

[29] The starting point in determining this question is that, per *Belhaj*, a criminal matter denotes something wider than a criminal cause. It is a particular legal subject matter arising other than in a criminal cause: *Belhaj* at [20]. *Belhaj* further makes clear that there is no single, universal legal test or principle to be applied in answering the question we have posed. It is trite that every *proceeding* - the most neutral term of all and possibly the most helpful - must be considered in its particular context, with its individual features.

[30] The foregoing proposition emerges clearly from a review of the many cases belonging to this field. Such a review was carried out in *Belhaj* at [16]-[18] and in *JR27* at [20]-[31]. The decision in *JR27* provides an illustration of the proposition. Properly analysed, *JR27* gave effect to the guiding principle which it distilled from the decision of the House of Lords in *Amand v Secretary of State for Home Affairs* [1943] AC 147, at page 162 in particular (per Lord Wright). The *ratio* of *Amand* is that a proceeding is a criminal cause or matter if it could ultimately result in the conviction and punishment of the person concerned. It is abundantly clear from the assortment of decided cases that this is not the only test available. Rather, it was the appropriate test to be applied in both *Amand* and *JR27*. As it happens, it was also

applicable in *Belhaj* since the judicial review proceedings had as their ultimate aim the prosecution of the public official concerned. In *JR27*, the court opined at [22] that the unifying theme of the three speeches in *Amand* was that of the “jeopardy principle”. We consider that the authority of *JR27* is unshaken by *Belhaj*. But neither its particular ratio nor that of *Belhaj* serves to determine the issue in the present case.

[31] In *JR27* one finds the following passage in the leading judgment of the majority, at [30]:

“I do not consider an exhaustive review of the other Northern Ireland decisions necessary, not least because each of them is properly to be regarded as an application of the general principles to its particular context. The importance of context in this field cannot be overstated. I consider that the exercise of comparing the instant case with earlier decided cases, while unquestionably tempting, runs the risk of being an arid one, with possible resulting error.”

We identify nothing in the above passages that is inconsistent with the authoritative guidance now provided by *Belhaj*.

[32] There is another aspect of *JR27* which illuminates the task of this court. The decided cases considered in *JR27* included *Carr v Atkins* [1987] QB 963. Both the factual and legal matrix of the proceedings underlying the judicial review challenge in that case and the judgment of Sir John Donaldson MR impelled the court in *JR27* to state at [31]:

“.... It is not necessary that the underlying process take the form of what would conventionally be considered to be proceedings in a court or tribunal. This is clear not only from some of the comparatively more recent decisions but also the decision in Amand itself.”

Another noteworthy feature of the judgment of the Master of the Rolls in *Carr v Atkins* is the statement (at page 968) that the orders under challenge, which were not made in criminal proceedings conventionally so-called, were made “*in a criminal context*”. One can link this to [36](f) of *JR27*:

“The impugned measures belong exclusively to the realm of the criminal justice process: none of them has any other legal family or home. There is no possible third characterisation: the choice lies between civil and criminal”

[33] In *McAtee* one finds some emphasis on the consideration that whereas the sentencing court had for long been *functus*, the sentence itself (a) must be considered part of the underlying criminal process and (b) was extant and continuing: see especially [45] and [57]. While *McAtee* is not binding on this court, it is of persuasive authority and while its reasoning gives no cause for concern its conclusion relates to a quite different legal context. We would add that in the present case none of the parties dissented from this court’s suggestion that one of the tools, or tests, to be applied in a context such as the present is that of examining the nature and strength of the enduring nexus between the judicial review application and the criminal proceedings belonging to the background, or history. This we consider consistent with [47] of *McAtee*.

[34] The present case provides yet another illustration of the difficulties which can arise when the criminal cause or matter conundrum presents itself. As *Belhaj* recognises, these words are not self-explanatory; quite the contrary, they are of doubtful meaning: see [19]. There have been repeated judicial laments about the problems which this phrase poses in practice and frequent exhortations about the desirability of a statutory definition: see for example *JR27* at [50] and [51]. In the absence of any statutory intervention of the kind exhorted the task which the court must perform remains unchanged and is one of the classic common law variety.

[35] Enjoined as we are to take into account the full context in which these judicial review proceedings have unfolded, we remind ourselves of the summary of the factual history in [7] - [9] above, our digest of *McGuinness (No. 1)* in [10]-[11], our outline of the framework of the present proceedings in [12]-[15] and the assorted statutory provisions in the Appendix. In brief compass, Mr Stone’s interaction with the State since the beginning of the story on that fateful and notorious day on 16 March 1988 at Milltown Cemetery has unfolded entirely within the criminal justice system. He was arrested by the police; a criminal investigation ensued; he was prosecuted and then convicted; the Commissioners made a determination about his eligibility for early release; release on licence followed; he then committed further serious offences stimulating yet another police investigation, prosecution and conviction; he appealed against his conviction unsuccessfully; the Commissioners revoked his licence; the Lord Chief Justice determined a tariff of 30 years imprisonment; and, most recently, the two public authorities in Northern Ireland invested with statutory powers and responsibilities relating to the release on licence of life prisoners have been actively involved in Mr Stone’s case.

[36] Mr Stone is seeking his release on licence by invoking a statutory regime which, in our view, must be regarded as belonging to the criminal justice compartment of the Northern Ireland legal system. Since March 1988 Mr Stone's interaction with the State has been confined exclusively to criminal justice agencies: the police, the Public Prosecution Service, the Department of Justice, the Sentence Review Commissioners and the Parole Commissioners. These are notable features of the broader context to which this judicial review challenge belongs.

[37] We do not pretend that there is any bright luminous principle to be plucked from the extensive jurisprudence in determining the question of whether these proceedings are, in the language of Section 41(1)(a) of the Judicature Act, a criminal cause or matter. The analysis in [41] - [42] above inclines superficially in favour of concluding that this judicial review is a criminal matter. However, adopting what we consider to be the robust approach espoused in [15] and [20] of *Belhaj*, we consider that a conclusion to this effect would not be harmonious with either the statutory language or the underlying legislative intention. We elaborate as follows.

[38] This judicial review challenge to the Commissioners' assumption of jurisdiction in response to Mr Stone's application to them seeking release on licence from his sentence of life imprisonment has multiple criminal justice trappings: but this is not the statutory test. A broader and more nuanced approach, always keeping to the forefront the statutory language and the underlying intention of Parliament, is required. A demonstrably clear affinity with the criminal justice system does not equate to the statutory test of criminal cause or matter. While in *JR27* the criminal justice system was considered to provide the "legal family or home" to which the proceedings were held by the majority to unmistakably belong, that decision ultimately turned on the application of the *Amand* principle. An enduring nexus between the current proceedings and Mr Stone's original conviction is in our view not determinative. With the passage of time this nexus has become increasingly frail and distant. The prisoner's interaction with the criminal courts came to an end over a decade ago. The index sentence was imposed some 20 years ago.

Criminal Cause Or Matter: Conclusion

[39] Having regard to the facts and factors highlighted, we have been unable to identify any legislative intention that these proceedings should be classified a criminal cause or matter. The contrary conclusion would nourish the argument that all sentence review and release disputes, extending possibly to temporary and compassionate release decisions, are criminal matters. We do not attempt to decide this broad issue. But this surely cannot have been Parliament's intention. This door,

with floodgates potential, would be opened if we were to decide otherwise. This is a factor reinforcing our conclusion.

[40] We have already concluded, in [29] above, that these proceedings plainly do not have the character of a criminal cause. While the determination of whether they constitute a criminal matter is not quite as straightforward for the reasons given we supply a similarly negative answer.

Nullity Or Mere Irregularity?

[41] Finally, we address briefly one further procedural issue which the court raised during the hearing. In formulating the question which was canvassed, we leave to one side the separate question of whether the present freestanding decision of the court could be challenged before the Northern Ireland Court of Appeal under Section 35 of the Judicature Act. The different question which the court canvassed is whether, in the event of an appeal against the later, substantive decision of this court, whether in the forum of the Court of Appeal or that of the Supreme Court, our final substantive decision could suffer the fate of being rendered a nullity in the event of one of those appellate courts holding that our discrete decision on the criminal cause or matter issue was wrong in law.

[42] The provisions of the Judicature Act bearing on this issue are Section 16(5), Section 41, Section 55, Section 102 and Schedule 1. Section 1(f) of the Interpretation Act (Northern Ireland) 1954 is also relevant. The material provisions of the Rules of the Court of Judicature are, in logical sequence, Order 53, Rule 2 and Order 2.

[43] Consideration of the totality of these provisions of primary and subordinate legislation yields the analysis that the constitution of the High Court in any judicial review case belongs to the realm of procedure. In our view this leads to the conclusion that by virtue of Order 2, Rule 1 the incorrect judicial constitution of this court would constitute an irregularity and, as such, would not operate to nullify any ruling, order or judgment. One of the consequences of this assessment is that, in principle, any judgment or order of this court could be the subject of an application to set aside for irregularity under Order 2, Rule 2.

[44] In this context we draw attention to the construction of Section 16(5) of the Judicature Act espoused by the Court of Appeal in *Re Coleman's Application* [1988] NI 205 at 209B-209G, per Lord Lowry LCJ. The court held that Section 16(5) does not preclude the exercise of jurisdiction in the High Court by a bench comprising more than one judge. Simultaneously, the court cautioned that "*different questions*" could arise in the scenario of only one judge purporting to exercise the jurisdiction of the

High Court where a plurality of judges is required by the statute. One pragmatic consequence of this decision may be that in cases where the criminal cause or matter issue is one of particular difficulty the court, irrespective of its constitution at the stage of determining this discrete issue, may be naturally inclined to reach a decision giving effect to Order 53, Rule 2 ie constituting itself as a divisional court of two or more judges. Beyond this we do not venture, in recognition of the limited argument which this issue generated.

Omnibus Conclusion

[45] For the reasons given the court concludes that this application for judicial review is neither a criminal cause nor a criminal matter. A divisional court is, therefore, not required for adjudication of the Applicant's substantive judicial review challenge.

APPENDIX OF STATUTORY PROVISIONS

While what follows is probably excessive we conceive it our duty to explore the statutory arrangements expansively. These have four main components.

[1] 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 2

“Commissioners' Procedure

2. Schedule 2 (which makes provision about the procedure to be followed in relation to the Commissioners' functions) shall have effect. “

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)."

Section 4

"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."*

Section 6

"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 8

"Revocation of declaration

8. - (1) *The Secretary of State shall apply to Commissioners to revoke a declaration under section 3(1) if, at any time before the prisoner is released under section 4 or 6, the Secretary of State believes-*

(a) *that as a result of an order under section 3(8), or a change in the prisoner's circumstances, an applicable condition in section 3 is not satisfied, or*

(b) *that evidence or information which was not available to the Commissioners when they granted the declaration suggests that an applicable condition in section 3 is not satisfied.*

(2) *The Commissioners shall grant an application under this section if (and only if) the prisoner has not been released under section 4 or 6 and they believe-*

- (a) *that as a result of an order under section 3(8), or a change in the prisoner's circumstances, an applicable condition in section 3 is not satisfied, or*
- (b) *that evidence or information which was not available to them when they granted the declaration suggests that an applicable condition in section 3 is not satisfied. “*

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."*

Section 12(2):

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

Section 12(3)

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

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.”

[2] Schedule 2, 1998 Act

“COMMISSIONERS’ PROCEDURE (Sch.2)

Rules

1. *The Secretary of State may make rules prescribing the procedure to be followed in relation to proceedings of the Commissioners under this Act; and in particular rules may-*

- (a) make provision for the matters set out in this Schedule;*
- (b) confer functions on the chairman (or on joint chairmen, jointly or concurrently).*

Allocation of cases

2. *The rules may provide-*

- (a) for the allocation of proceedings to panels of Commissioners;*
- (b) for the taking of specified decisions by a single Commissioner.*

Conduct of proceedings

3. - (1) *The rules may require the Commissioners conducting the proceedings to include a psychiatrist or psychologist in specified circumstances.*

(2) *The rules may prevent a person who is serving a sentence of imprisonment or detention from representing or acting on behalf of a prisoner.*

(3) *The rules may provide for applications to be dealt with in the order decided by the Commissioners.*

Applications

4. *The rules may require an application to be made in a specified form and to be accompanied by specified documents.*

Evidence and information

5. *The rules may make provision about evidence and information, including provision-*
- (a) *requiring Commissioners to send to the Secretary of State copies of applications and such related documents as the rules may specify;*
 - (b) *requiring the Secretary of State to provide specified information to the Commissioners;*
 - (c) *for the giving of evidence by or on behalf of the Secretary of State, the [Police Service of NI] and others;*
 - (d) *about the way in which information or evidence is to be given;*
 - (e) *for evidence or information about a prisoner not to be disclosed to anyone other than a Commissioner if the Secretary of State certifies that the evidence or information satisfies conditions specified in the rules;*
 - (f) *preventing a prisoner from calling any witness without leave of Commissioners.*

Exclusion of persons from proceedings

6. *The rules may provide for proceedings to be held in private except where Commissioners direct otherwise.*

7. - (1) *The rules may permit Commissioners to hold proceedings in specified circumstances in the absence of any person, including the prisoner concerned and any representative appointed by him.*

(2) *Where a prisoner and any representative appointed by him are excluded from proceedings by virtue of subparagraph (1), the Advocate General for Northern Ireland may appoint a person to represent the prisoner's interests in those proceedings.*

Successive applications

8. *The rules may prevent successive applications under any provision of this Act being made in specified circumstances.*

Legal aid

9. - (1) *The rules may allow Commissioners to award a prisoner money for legal advice or representation.*

(2) *The Secretary of State shall pay any sums which the Commissioners award."*

[3] The Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules

Rule 2

“Application and interpretation

2. - (1) *These Rules shall apply to proceedings of the Commissioners under the Northern Ireland (Sentences) Act 1998 (c.35).*

(2) *In these Rules, unless the context otherwise requires: -*

‘the Act’ means the Northern Ireland (Sentences) Act 1998;

‘ancillary appeal’ shall be construed in accordance with rule 13;

‘ancillary application’ shall be construed in accordance with rule 12;

‘ancillary decision’ shall be construed in accordance with rule 11;

‘ancillary hearing’ shall be construed in accordance with rule 18;

‘applicant’, in relation to a case, means the person who has made the application and is -

(a) *the person concerned in relation to applications made under section 3(1) of the Act;*

(b) *the Secretary of State in relation to applications made under section 8(1) of the Act;*

‘application’ means an application made under sections 3(1) or 8(1) of the Act;

‘application papers’ shall be construed in accordance with rule 7;

‘case’ means a set of proceedings to which these Rules apply;

‘Chairman’ means the Sentence Review Commissioner appointed chairman (or, where there are joint chairmen, one of the joint chairmen), under Schedule 1 of the Act;

‘chairman of the panel’ shall be construed in accordance with rule 4;

'Commissioner' means a Sentence Review Commissioner appointed under section 1 of the Act;

'damaging information' shall be construed in accordance with rule 22;

'direction' means a type of ancillary decision and shall be construed in accordance with rule 11;

'further application' shall be construed in accordance with rule 9;

'hearing' means an ancillary hearing or a substantive hearing;

'legal aid direction' shall be construed in accordance with rule 24;

'panel' shall be construed in accordance with rule 4;

'party', in relation to a case, means the Applicant or the Respondent;

'person concerned', in relation to a case, means the person to whom the case relates whose sentence is, or sentences are, under review by the Commissioners or who is a recalled prisoner;

'preliminary indication' shall be construed in accordance with rule 14;

'recalled prisoner' means a person whose licence has been suspended under section 9(2) of the Act;

'representative' shall be construed in accordance with rule 5;

'Respondent', in relation to a case, means the person responding to the application and is the person concerned in relation to applications made under section 8(1) of the Act and the Secretary of State in relation to applications made under section 3(1) of the Act;

'response papers' shall be construed in accordance with rule 8;

'single Commissioner' shall be construed in accordance with rule 3;

'substantive determination' shall be construed in accordance with rule 15;

'substantive hearing' shall be construed in accordance with rule 19; and

'working day' means any day other than a Saturday, Sunday or public holiday in Northern Ireland."

Rule 9

“9. - (1) Subject to paragraph (2), any successive application made under section 3(1) or 8(1) of the Act shall be referred to as a further application.

(2) The Commissioners may only determine a further application if in their view:

- (a) circumstances have changed since the most recent substantive determination was made in respect of the person concerned; or*
- (b) reliance is placed in support of the further application on any material information, document or evidence which was not placed before the Commissioners when the most recent substantive determination was made in respect of the person concerned.*

(3) For the purposes of these Rules, an application is successive where it is not the first application to have been made under the section of the Act in question by or in respect of the person concerned.”

Rule 10

“Further papers

10. - (1) Subject to paragraphs (2) and (3), the Applicant may not supplement or add to the application papers, and the Respondent may not supplement or add to the response papers, after these have been served on the Commissioners, without the leave of the Commissioners granted by way of ancillary decision.

(2) Any document required or authorised by these Rules to be served by or on the Applicant shall be appended to and form part of the application papers and any document required or authorised by these Rules to be served by or on the Respondent shall be appended to and form part of the response papers.

(3) In relation to further applications, the parties may make reference to and the Commissioners may have regard to the application papers and response papers served in previous cases relating to the person concerned save that

there shall be no disclosure of any damaging information thereby."

Rule 28

"Recalled prisoners

28. - (1) This rule applies where the Commissioners are required to consider the case of a recalled prisoner by virtue of section 9(3)(b) of the Act.

(2) Subject to the provisions of this rule, the recalled prisoner shall be treated as the person concerned and a party to the case as if he were an Applicant who had made an application under section 3(1) of the Act and the Secretary of State shall be treated as a party to the case as if he were the Respondent in relation to that application.

(3) Pursuant to paragraph (2), the Commissioners shall determine the case on this basis in accordance with these Rules save where the provisions of this rule indicate otherwise.

(4) Rule 7(1) shall not apply and the recalled prisoner shall instead serve on the Commissioners one original set and one copy set of papers which shall be treated as the application papers and which shall comprise the following:

- (a) so much of the information and documents specified in Schedule 1 to these Rules as the recalled prisoner sees fit to include;*
- (b) a statement made in response to the notice of and reasons for suspension of the recalled prisoner's licence under section 9(2) of the Act as provided in accordance with section 11(4) of the Act; and*
- (c) any further supporting information or documents which the recalled prisoner wishes to rely on.*

(5) Rule 8(1) and (4) shall not apply and the Secretary of State shall instead serve on the Commissioners one original set and one copy set of papers which shall be treated as the response papers and which shall comprise the following:

- (a) a further copy of the notice of and reasons for suspension of the recalled prisoner's licence under section 9(2) of the Act as provided in accordance with section 11(4) of the Act;*

- (b) *so much of the information and documents specified in Schedules 2 and 3 to these Rules as the Secretary of State sees fit to include; and*
- (c) *any further supporting information or documents which the Secretary of State wishes to rely on.*
- (6) *The case shall not be treated as a further application save for the purposes of rule 10(3).*
- (7) *If the recalled prisoner is unlawfully at large, the Commissioners shall have power to direct where any hearings shall be held.*
- (8) *For the purposes of this rule:*
 - (a) *the words 'seven days' in rules 5, 7, 8, 12, 13, 14 and 22, the words 'fourteen days' in rule 16 and the words 'twenty one days' in rules 8 and 16 shall be substituted by the words 'three working days'; and*
 - (b) *the words 'fourteen days' in rule 14 shall be substituted by the words 'seven days'."*

[4] **The Life Sentences (NI) Order 2001 (the "2001 Order")**

Article 2(2)

- "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."

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."

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."

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."

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."*