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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Ref: McC11071

Delivered: 18/09/19

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY DEBORAH McGUINNESS
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW (No 2)

-v-

THE SENTENCE REVIEW COMMISSIONERS

McCLOSKEY LJ

Introduction

[1] By the earlier judgment of this court, then constituted as a panel of two judges, delivered on 1 August 2019 it was determined that this application for leave to apply for judicial review is neither a criminal cause nor a criminal matter. This determination has not been challenged on appeal. Given the liberty of the citizen factor, this case has been processed on a fast track from its inception and in accordance with the so-called “*rolled up*” procedural mechanism.

The Challenge

[2] Deborah McGuinness (“the applicant”) 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. The agency known as the Sentence Review Commissioners (“*the SRC*”), a public authority established by the Northern Ireland (Sentences) Act 1998, is the Respondent.

[3] The principal interested party in these proceedings, legally represented throughout, is Michael Stone (hereinafter “*the prisoner/Mr Stone*”), a convicted murderer of some notoriety sentenced to life imprisonment in 1989 for the aforementioned murders and certain related offences and whose victims include the brother of the applicant, Thomas McErlean deceased (“*the deceased*”).

[4] 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, and who has a relevant rule making function and is the respondent in the ongoing forum of the uncompleted proceedings before the SRC.

[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.”

In short, the central question to be determined by the court is whether the SRC is legally competent to consider Mr Stone’s case at this stage and to engage in actions and decisions having legal effects and consequences.

Statutory Framework

[6] There is an assortment of statutory provisions, of both primary and subordinate legislation, bearing directly or indirectly and to a greater or lesser extent on the issues to be considered. These are assembled in the Appendix to this judgment. I shall attempt the following summary:

- (i) The Northern Ireland (Sentences) Act 1998 (the “1998 Act”) established the SRC as a new public authority, per section 1.
- (ii) Section 3 (“Applications”), under the umbrella of “Eligibility for Release”, created the mechanism of a declaration of eligibility for release. It allows any qualifying prisoner to apply to the SRC for this species of declaration.
- (iii) By section 3(2) (and following) the SRC is empowered to make such a declaration only if specified conditions are satisfied. In the particular

case of life prisoners the fourth of the statutory conditions is that “...if released immediately, he would not be a danger to the public”, per section 3(6).

- (iv) The application must be in respect of a “*qualifying offence*” as defined, namely one committed before 10 April 1998 and of the “*scheduled*” variety, per section 3(3)(a) and (7).
- (v) Per section 6: where the SRC accedes to the application the declaration granted 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”, per section 6(1), and this, per section 6(2), triggers a right to be released on licence.
- (vi) Section 8 empowers the Secretary of State for Northern Ireland (“SOSNI”) to apply to the SRC to revoke a declaration under section 3(1) prior to release.
- (vii) A release licence must contain the three conditions specified in section 9(1) and only these conditions, namely not supporting a terrorist organisation, non-engagement in terrorism and, as regards life prisoners, not becoming a danger to the public: per section 9(1).
- (viii) SOSNI is empowered to suspend a licence under section 4 or section 6 based on a specified belief, which will then entail the SRC exercising the power of either (a) confirming the licence if it “*thinks*” that the prisoner has not broken and is not likely to break a condition or (b) otherwise revoking the licence: per section 9(4).
- (ix) Section 16 empowers SOS NI to make an order suspending, or later reviving, the operation of section 3, *viz* the core regime established by the statute. Such an order cannot affect any sentence in respect whereof a licence under the statute is either current or suspended.
- (x) By a combination of section 2 of and Schedule 2 to the 1998 Act SOSNI is empowered to make rules prescribing “*the procedure to be followed in relation to proceedings of the Commissioners under this Act*”.
- (xi) Following upon this general empowerment there is a series of specific provisions whereby SOSNI “*may*” make rules of a certain type. By paragraph 8 of Schedule 2 the rules “... *may prevent successive applications under any provision of this Act being made in specific circumstances*”.

- (xii) By rule 9 of the Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 (*"the 1998 Rules"*) a *"further application"* is defined as *"any successive application made under section 3(1) or section 8(1) of the Act"*. The SRC *"may only"* determine a further application if in their view either circumstances have altered since the *"most recent substantive determination"* or there is new material not considered by SRC when making the most recent substantive determination.
- (xiii) Rules 14 and 15 prescribe the procedures whereby the SRC makes a *"preliminary indication"*, namely a *"minded to decide"* [my shorthand] determination followed by the *"substantive determination"*.
- (xiv) The Life Sentences (NI) Order 2001 (the *"2001 Order"*) established a body known as the Life Sentence Review Commissioners (later remained the *"Parole Commissioners"*) and devised a regime relating to the determination of the minimum term (or so-called *"tariff"*) to be served by a *"life prisoner"*; the conditions for the duty to release life prisoners; release on licence; the duration and condition of licences; the recall of life prisoners released on licence; and associated ancillary matters.
- (xv) Article 11 of the 2001 Order devises a regime for the treatment of the discrete cohort of the *"existing life prisoners"*, as defined (a cohort embracing Mr Stone).
- (xvi) Finally it is appropriate to draw attention to section 12 of the Interpretation Act 1978 highlighted in the submissions of Mr Scofield QC (with Mr Richard McConkey of counsel) on behalf of Mr Stone:

"(1) Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires."

Factual Matrix

[7] 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 3 March 1989 at Belfast Crown Court the prisoner, having been convicted following a non-jury trial, received the sentences noted 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 SRC 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 SRC became seized of his case afresh.
- (h) On 6 September 2007 the SRC 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 8 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 6 January 2011 the Court of Appeal dismissed the prisoner's appeals against conviction.
- (l) On 6 September 2011 the SRC 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 3 March 1989 should be 30 years imprisonment.
- (n) On 5 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 6 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.

The Parole Commissioners' Involvement

[8] The Parole Commissioners' earlier interaction with the prisoner was, in accordance with the statutory arrangements, triggered by the Department'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 3 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). This was the impetus for the first judicial review challenge brought by this applicant: see [11] *infra*.

The More Recent History

[9] Shortly after the initiation of these proceedings, Mr Stone's case in the forum of the SRC 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 SRC 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 SRC's 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 3 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.

[10] The prisoner, exercising his statutory right, challenged the SRC's preliminary indication. This gave rise to an oral hearing before a panel of Commissioners on 20 August 2019. Given that the proceedings in that forum had reached such an advanced stage this court declined to interfere by the grant of interim relief - and, indeed, was not requested to do so: see [17] of the judgment delivered on 1 August 2019 and [14] *et seq* hereof.

Judicial Review No 1

[11] In McGuinness (No. 1) [2019] NIQB 10 this applicant challenged the decision of the Department to formally refer the case of the prisoner to the Parole Commissioners under the 2001 Order. 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.

[12] 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 15th 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?"

This Judicial Review [No 2]

[13] 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 SRC for a declaration under Section 3 that the prisoner is eligible for release under this enactment. The SRC accepted jurisdiction and began processing the application accordingly. Upon learning of this the applicant initiated the present proceedings. Her primary contention is that the SRC lack jurisdiction to entertain the prisoner's application. Her second, subsidiary complaint is that she has certain rights of participation in the SRC process of which she has been denied. This judgment is confined to the first of these challenges only, given the prosaic and compelling factor of necessary expedition coupled with the enhanced procedural facilities which the applicant secured as these proceedings advanced, partly in response to certain judicial exhortations and partly *qua* litigant in public law proceedings governed by the duty of candour.

Case Management

[14] The following is borrowed from the court's earlier decision of 1 August 2019. These judicial review proceedings and those of the SRC continue to advance on twin, parallel tracks. Thus far there has been no application to this court for an order of interim relief injuncting the process of the SRC. 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 SRC has been acting *ultra vires* from the outset of their process. If the challenge fails, the SRC 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 SRC has presumably involved the investment of significant time and resources to date. The third is that the SRC's 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 was projected that this landmark would be achieved approximately six weeks thence.

[14] The court having explored the main potential scenarios at the hearing, the parties helpfully cooperated with the court in the compilation of a series of foreseeable scenarios. The court reasoned that there was one clearly identifiable scenario which it must strive to avoid, namely a final determination of the SRC in favour of the prisoner at a stage when this court had 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 SRC's jurisdiction following later.

[15] The court ruled, at [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.*"

The Life Sentence

[16] 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]. I refer to these passages without reproducing same.

The Parties' Core Submissions

[17] On behalf of the applicant, Mr Ronan Lavery QC (with Mr Michael O'Brien of counsel) submitted, in substance, that the 1998 Act devised a "one chance only" benefit for those prisoners granted early release under its provisions. Release gave them the opportunity to demonstrate by their conduct that they were worthy of the exceptional benefit conferred. There would be no entitlement to make a fresh application for a declaration of eligibility in the event of revocation of a prisoner's licence. Mr Stone's licence having been revoked, at this juncture his case belongs exclusively to the framework of the 2001 Order. The previous declaration of eligibility in his favour under section 3 of the 1998 Act has not been extinguished.

[18] Mr Lavery prayed in aid the following excerpts from Hansard on 10 June 1998 during the second reading of the Bill which was to become the 1998 Act. Dr Norman A Godman, a Scottish MP, asked SOSNI the following:

"In Scotland, when a prisoner is released under licence, he or she has to be of good behaviour, and can be put back in prison if convicted of a criminal offence. Should not the same hold in these circumstances?"

SOSNI replied:

*"It does. Many safeguards are built in and, as we go through the Bill, we will see that it is robust. **If released prisoners break the licence in any way, they will be taken back and will serve their full sentence.** As a further safeguard, if circumstances deteriorate in Northern Ireland, the programme of release will be stopped and no prisoners will be released."*

[My emphasis.]

Mr Lavery invited the court to resort to this statement as an aid to interpreting the 1998 Act.

[19] On behalf of the SRC Mr Peter Coll QC (with Mr Philip McAteer of counsel) drew to the attention of the court the statement of Lord Scott in *Re McClean* [2005] NI 490 at [49] – [50]:

“The 1998 Act and the 1998 Rules made thereunder constitute the statutory scheme enacted in order to discharge the government’s undertaking in the Good Friday Agreement to put in place a review process that would permit the early release of prisoners serving sentences for sectarian offences if this could be done consistently with the need to protect the community. The statutory scheme was introduced in the pursuit of a highly important political objective Its well-spring was political, namely the political imperative of trying to move towards a political settlement in Northern Ireland”

Mr Coll submitted that the plain meaning of the language in section 3 supports the availability of a second application in the case of a released prisoner whose licence has been revoked. It was contended that this is supported by Rule 9(3). There is no identifiable statutory policy precluding a further application by prisoners such as Mr Stone. On the contrary: one of the clearly identifiable policy imperatives of the legislation was that of the reintegration of prisoners into the community, per Annex B (paragraph 5) to Strand 3 of the Belfast Agreement. Mr Coll further submitted that the applicant’s case is defeated by the plain meaning of the statutory language, in particular section 3. He further emphasised the factors of the liberty of the citizen and the reintegration provisions of the Belfast Agreement (*infra*).

[20] On behalf of Mr Stone, Mr David Scoffield QC (with Mr Richard McConkey of counsel) highlighted section 16 of the 1998 Act whereby the jurisdiction of the SRC may be suspended and possibly revived subsequently, in support of the contention that the SRC remains legally competent in Mr Stone’s case. This, he emphasised, is the only provision regulating the possible extinguishment of the jurisdiction of the SRC. Mr Scoffield further drew attention to the combination of paragraph 8 of Schedule 2 to the 1998 Act and rule 9(3) of the 1998 Rules. These provisions, he argued, contemplate a further application to the SRC by prisoners such as Mr Stone. Third, it was contended that while the 1998 Act makes express provision for the revocation of SRC licences, it contains nothing precluding a further, subsequent application to the SRC by the prisoner concerned. Finally, Mr Scoffield relied on the interaction between paragraph 8 of Schedule 2 to the 1998 Act and Rule 9(3) of the Rules.

Consideration and Conclusions

[21] I consider that in principle the task to be performed by the court differs not from that undertaken in *McGuinness No 1* [2019] NIQB 10, where the following was stated at [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.”

[22] It is appropriate to begin with some basic reflections. First, the 1998 Act has no self-contained lifespan. Second, there is no express provision in the 2001 Order purporting to affect the operation of the 1998 Act and, in particular, nothing modifying or extinguishing the jurisdiction of the SRC, prospectively or at all. Indeed these two measures of legislation do not speak to each other. Third, the existence and continued operation of the 1998 Act would have been an obvious factor at the time when the 2001 Order was devised. Fourth, no later piece of legislation has been made to alter or extinguish the jurisdiction of the SRC under the 1998 Act. Fifth, sections 8 and 16 of the 1998 Act demonstrate that attention was paid to certain future scenarios and no provision was made purporting to prohibit a further application to the SRC by a benefiting prisoner whose licence has been revoked.

[23] Next, there are certain *dicta* in *Re McClean* lending some support to the stance adopted on behalf of the SRC and Mr Stone. In *McClean* the prisoner, like Mr Stone, had his licence revoked following release under the 1998 Act. Lord Scott observed at [51]:

“The 1998 Act and its rules constitute a statutory scheme of which the Respondent was, and still is, a potential beneficiary.”

[My emphasis.]

Lord Brown, at [107], expressed himself “*in full agreement*” with this section of the opinion of Lord Scott. Lord Rodger agreed with Lord Brown. None of the five members of the Judicial Committee demurred from Lord Scott. I acknowledge of course that Lord Scott’s statement on this discrete issue is brief and is properly characterised *obiter*.

[24] The 1998 Rules, being subordinate to the parent statute under which they were made, are not capable of conferring substantive jurisdiction on the SRC. However the parent statute expressly provided, by paragraph 8 of Schedule 2, that the Rules “*may prevent successive applications under any provisions of this Act being made in specific circumstances*”. From this it follows that a provision of the Rules precluding a further application to the SRC by a benefiting prisoner whose licence has been revoked would have been possible and clearly *intra vires*. However there is no such provision. There is a direct correlation between paragraph 8 of Schedule 2 and Rule 9. Thus the opportunity created by paragraph 8 was seized by the rule makers. Given this analysis, the absence of any provision in the Rules precluding a further application to the SRC by prisoners such as Mr Stone must rank as a factor of some significance.

[25] Furthermore, I consider that the exercise of statutory construction in which the court is engaged attracts a principle of interpretation of some pedigree and longevity, namely that state interference with the liberty of the citizen requires clear authority of law. See *Bennion on Statutory Interpretation* (7th Edition), paragraph 27.3 (PP720 – 722). The rationale of this principle is explored in the decision of this court in *Re Hegarty’s Application* [2018] NIQB 20 at [30]. If section 3 of the 1998 Act does not empower the SRC to consider Mr Stone’s application at this stage he will, in consequence of *McGuinness No 1*, remain incarcerated for a very long further period. Intervention by the SRC at this stage provides Mr Stone with his only opportunity of securing earlier release. Neither section 3 nor any other provision of the 1998 Act states, clearly or at all, that resort by Mr Stone to the SRC at this stage and in the prevailing circumstances is not available to him.

[26] I accept the submission of Mr Coll and Mr Scoffield that the parliamentary statement of SOSNI (*ante*) does not qualify as a permissible aid to the interpretation of the 1998 Act. The so-called “rule” in *Pepper v Hart* [1993] AC 593 is engaged only where, in the language of Lord Browne-Wilkinson (at p 634), the statutory provision under scrutiny “... is ambiguous or obscure or the literal meaning of which leads to an absurdity”. I consider that the submissions of Mr Lavery fail to identify any ambiguity, obscurity or absurdity. Thus the applicant’s quest to rely on the parliamentary statement of SOSNI falls at the first hurdle.

[27] Furthermore, and in any event, the statement appears to be of the *ad hoc* variety and is therefore to be treated with caution: as in *Robinson v Secretary of State for Northern Ireland* [2002] 32 it must be treated with caution for the reasons given by Lord Bingham at [17]. This need for caution is reinforced by other features of the broader context, which include the high speed which characterised all of the parliamentary activity required to give effect to the Belfast Agreement. This was highlighted in *McGuinness No 1* at [43], as a “*notorious fact*”:

“... the primary legislation 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 3 months later."

Finally, the parliamentary statement of SOSNI is to be viewed as cursory and incomplete.

[28] One of the pillars of Mr Lavery's submissions was the statement of Kerr LCJ in *In Re Brady's Application* [Unreported 15 November 2007] at [2]:

"True it is that there is no explicit provision in the 2001 Order which extinguishes the jurisdiction of the Sentence Review Commissioners under the 1998 Act. We consider that the respective purposes of the two items of legislation are only reconcilable and compatible on the basis that ... when a life sentence prisoner moves from the dimension or context of accelerated or early release under the 1998 Act to the different context of release under the 2001 Order, that supervening jurisdiction effectively extinguishes the earlier jurisdiction ..."

We cannot conceive it to be the case that it was the intention of parliament that someone such as the Appellant would have two co-existing jurisdictions to which resort could be had."

Brady was an appeal against a decision of the High Court dismissing a prisoner's challenge to the revocation of his licence granted under the 1998 Act.

[29] It cannot be overlooked that this judgment is both *ex tempore* and unreported. Furthermore it cannot detract from the operation of section 12(1) of the Interpretation Act 1978 (considered above). Third, there is no reference in the judgment to either Schedule 2 to the 1998 Act or the Rules made thereunder. The judgment is, moreover, conclusionary in nature. It does not contain anything comparable to the detailed examination of the primary and secondary legislation in which this court has engaged with the assistance of the considered submissions of the parties' counsel. Finally, the attention given to the issue of harmonious co-existence of the two statutory regimes concerned seems to have been relatively fleeting. For this combination of reasons I do not consider that the decision in *Re Brady* is of the requisite precedent status required to impel this court to the conclusion that the SRC is, at this stage, *functus officio*.

Omnibus Conclusion

[30] For the reasons given, I consider that the SRC is legally competent to determine the further application which it has received from Mr Stone under the 1998 Act and Rules made thereunder.

[31] This conclusion will of course disappoint Ms McGuinness and other family members. However, it must be recognised that they have the important safeguard that the SRC is bound to conscientiously discharge its statutory functions and responsibilities and, further, will be precluded from declaring that Mr Stone is eligible for release unless it considers that the statutory conditions are satisfied. The operative conditions in the case of Mr Stone are, first, that he must not be a supporter of a terrorist organisation; second, if released, he must be considered not likely to become a supporter of such an organisation; third, if released, he must be considered not likely to become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland; and, finally, the SRC must be satisfied that he would not be a danger to the public (all per section 3 of the 1998 Act). Ms McGuinness must not under-estimate the strengths and importance of these statutory safeguards. Furthermore, the decision of the SRC will be vulnerable to legal challenge.

[32] I grant leave to apply for judicial review and dismiss the substantive application.

APPENDIX OF STATUTORY PROVISIONS

There are 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."*