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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

AN APPLICATION BY SEAMUS MORGAN
FOR A WRIT OF HABEAS CORPUS

DATES OF HEARING 3 AND 5 AUGUST 2021

Mr John Larkin QC with Mr McCleave (instructed by McNamee McDonnell Solicitors) for the applicant
Dr Tony McGleenan QC with Mr Philip McAteer (instructed by the Crown Solicitor) for the respondent
Dr Tony McGleenan QC with Mr Philip McAteer (instructed by the Departmental Solicitors) for the respondent

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Before: Treacy LJ and Keegan J

KEEGAN J (giving the judgment of the court)

Introduction

[1] This is an application by Seamus Morgan for the issue of a Writ of Habeas Corpus to secure release from imprisonment pursuant to a conviction imposed by the Crown Court for one offence under section 11(1) of the Terrorism Act 2000, namely belonging or professing to belong to a proscribed organisation. The applicant is currently held in HMP Maghaberry pursuant to a committal warrant.

[2] This application began by way of *ex parte* application to the court. However, the court pursuant to Order 54 Rule 2 (1)(a) of the Rules of the Court of Judicature (Northern Ireland) 1980 ("Rules of the Court of Judicature") directed an originating motion and so the case proceeded, *inter partes*, with the relevant authority who are

responsible for the ongoing detention of the applicant appearing to answer the claim.

Background

[3] This is set out in the affidavit of the applicant dated 6 July 2021. In summary, on 13 November 2020, the applicant was convicted of the offence as stated above after a guilty plea. He was sentenced in the Crown Court by Colton J to a Determinate Custodial Sentence ("DCS") of three years. In accordance with the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order") the judge also stated that the custodial period would be 18 months with a period of 18 months on licence. This meant that the applicant was entitled to be released on 24 June 2021. Subsequent to this sentence the law changed as we explain below. The result of this was that the applicant was not released in June. He is now required to serve a minimum of 2 years and his release is then conditional on the Parole Commissioners having given the necessary direction. The revised date of earliest release is 25 December 2021.

[4] The genesis of the new law derives from the terror attack at Fishmongers Hall on 29 November 2019 after which the UK government announced its intention to introduce a new approach to the sentencing and management of terrorist offenders. This included, *inter alia*, longer sentences and ending early release for terrorist offenders. Following a further terror attack on Streatham on 2 February 2020, the government introduced emergency legislation, namely the Terrorist Offenders (Restriction of Early Release) Act 2020 ("TORER") to ensure that terrorist offenders serving or sentenced to a determinate sentence could not be released before having served two thirds of the requisite custodial period and only with the agreement of the Parole Board. TORER had both retrospective and prospective effect in Great Britain but did not extend to Northern Ireland. Nevertheless, Ministers were committed to revisiting the issue in respect of Northern Ireland and this resulted in the subsequent Counter Terrorism and Sentencing Bill which was introduced to Parliament.

[5] The policy background to the Bill was detailed in explanatory notes which have been made available to the court. This Bill sought to adopt a new approach to the sentencing and management of terrorist offences. In particular, Clause 30 of the Bill sought, by introducing a new Article 20A into the 2008 Order, to extend release restrictions to specified terrorist offenders in Northern Ireland, equivalent to those established under TORER, so that in effect offenders would have to serve two thirds of their custodial term and have their cases referred to the Parole Commissioners prior to release. This intention found expression in the Counter Terrorism and Sentencing Act 2021 ("the 2021 Act"). This Act received Royal Assent on 29 April 2021. By virtue of section 50 of the 2021 Act, section 30 entered into force the day after the act was passed. Section 30 introduced Article 20A into the 2008 Order from 30 April 2021. That is the legislative provision at the core of this case as the issue is whether or not the applicant is lawfully detained under the new provision which

provides for an extension to the custodial period from one half to two third and upon the necessary direction from the Parole Commissioners.

[6] In the affidavit filed by the applicant at paragraph 19 he states as follows:

> "It is my understanding that the offence for which I was convicted was specified in Parts 2 and 4 of Schedule 2A to the 2008 Order. I therefore come within Article 20A (1) and Article 20A (2) and I am therefore subject to the consequences provided by that provision."

[7] The applicant avers that the above provision violates the protections afforded to him under Articles 5, 6 and 7 of the European Convention on Human Rights ("ECHR"). His affidavit explains that given the change in the law the applicant instructed his legal representatives to ensure that his rights were protected by the lodgement of an appeal against the order of Colton J on 13 November 2020 and by seeking an extension of time. He confirms that the appeal was lodged on 21 June 2021 and at the same time a bail application was sought. Various directions were made in relation to this and ultimately an order was received accompanied by a decision of the Single Judge Huddleston J, dated 30 June 2021. In the decision of the single judge, the application to extend time and bail was refused. As part of this process the court requested submissions in relation to a decision of the Divisional Court in England and Wales in this area, namely *R(Khan) v Secretary of State for Justice* [2020] 1 WLR 3932. The single judge dealt with this issue in his decision at paragraphs [8] and [9] and determined that section 20A applied to the applicant. Following the refusal of leave and bail the applicant brought the current application for habeas corpus.

[8] There are further affidavits filed by the applicant's solicitor, Mr McNamee, dated 6 July 2021 and 7 July 2021. The first affidavit refers to the fact that on 5 July 2021 the solicitor received a copy of the committal warrant from the Appeals and Lists Office. The second affidavit also refers to this committal warrant which indicates that the sentence of three years was amended to state two years' imprisonment and one year on licence.

The Issues

[9] This is an application for habeas corpus which the court has facilitated in vacation given the nature of the remedy sought. The net issue is whether or not the ongoing detention of the applicant post 25 June 2021 is lawful. As this is a habeas corpus application it was treated as an urgent application and was dealt with as promptly as possible. However, this was not without some complication for the following reasons. First it became apparent that there were other proceedings listed before the Court of Appeal in October 2021, namely the appeal from sentence referred to above. Second, the court queried whether or not judicial review was also contemplated given the subject matter. The court sent various questions on 6 July

2021 to the parties in relation to this. Third, there was an issue as to composition of the court given that the parties could not agree whether or not this was a criminal cause or matter.

[10] Ultimately, as will be apparent, the court has sat as a two person court for various reasons, not least to avoid further delay in this case. Also, whilst the application originated in July, the argument only crystallised on 3 August 2021 when a new argument was raised during the course of the hearing in relation to the applicability of Article 20A. Following from this the court could only conclude this matter on 5 August 2021 and now provides this ruling within an accelerated timeframe.

[11] This court is grateful for the assistance of counsel in working through the issues at fast pace which allowed this case to complete. The court has in reaching its conclusion considered all of the written and oral submissions. Having done so we consider that the case comes down to two core questions:

(i) Does Article 20A apply to the applicant? If it does, it seems clear that the applicant is lawfully detained.

(ii) Can the court read the legislation in a Convention compatible way which would result in the release of the applicant pursuant to a Writ of Habeas Corpus given the court's obligations under Section 3 of the Human Rights Act 1998?

Discussion

[12] First we must deal first with the issue of whether or not this is a criminal cause or matter. The Supreme Court has recently considered this issue in *Re Mc Guinness's Application for Judicial Review* [2020] UKSC 6. The issue is obviously of significance due to the appeal rights which are contained in section 41 of the Judicature Act ("the Judicature Act") and which were discussed in that case. As this is a habeas corpus application we were in addition referred to section 45 of the Judicature Act specifically section 45(2) which restricts appeal rights from a Single Judge. However, we note that section 45(1) preserves appeals in proceedings upon application for habeas corpus whether civil or criminal against an order for release of the person restrained as well as against refusal. The restriction on appeal is solely from an appeal from a single judge dealing with a criminal cause. That chimes with Order 54 Rule 4(2) of the Rules of the Court of Judicature which provides in relation to an application for a Writ of Habeas Corpus that:

> "Where such an application in a criminal cause or matter is heard by a single judge and the judge does not order the release of the person restrained, he shall direct an originating motion to a court consisting of two or more judges."

[13] Mindful of the issues raised by section 45(2) of the Judicature Act regarding restricted appeal rights, however remote they may be, and taking into account the parties' hesitation to commit to a view on this issue until the court had heard full argument and to avoid delay we sat as a court of two to determine this and the substantive issue. This approach was with the agreement of the parties adopting a procedure which had been utilised in the case of *Re Terence McCafferty's Application (Habeus Corpus)* [2009] NIQB 28 (also at [2009]NICA 59). In *McCafferty* Weatherup J referred to fact that in *Re Coleman's Application* [1988] NI 2005 the Court of Appeal on hearing an appeal from the Divisional Court concluded that the application had not concerned a criminal cause or matter. However, Lowry LCJ concluded that the first instance divisional court comprising two judges had jurisdiction to hear an application that was not a criminal cause or matter. Accordingly, we consider we have jurisdiction in the present application whether or not this is a criminal cause or matter.

[14] We have considered the helpful oral and written submissions on this point. We note again that this issue has taken up considerable time in a case which requires an accelerated hearing. However, we can understand that these issues are not straightforward and this is a rather unique case and so we make no criticism of the parties for the approach adopted, and indeed, the court has found assistance in looking at the case in the round to come to a conclusion on this matter.

[15] Having reflected on the issue we consider that the answer is essentially found in the dicta which is binding upon us from the *McGuinness* case. This decision of Lord Sales applied the law found in *Amand* [1943] AC 147 and the views of the Lord Chief Justice in *Re JR27's Application [2010] NIQB 12.* In particular, we note paragraphs [78], [79], [80] and [81] of *Mc Guinness* as follows:

> "78. The common issue raised by Mrs McGuinness in her claim in the present case and by the Department of Justice and by Mr Stone in their appeals does not relate to the commencement or conduct of any underlying criminal process involving Mr Stone. He is not currently the subject of any outstanding, undetermined criminal charge against him on which he is to be tried and may be subjected to sentence. The present proceedings are concerned with whether the Department of Justice has correctly understood and implemented a criminal sentence imposed on Mr Stone in the past. The criminal process against him was exhausted before the Department of Justice took the decision which is under challenge in these proceedings. Applying the guidance in *Amand*, therefore, the High Court's decision was not in "a criminal cause or matter." The relevant right of appeal is to the Court of Appeal, not to the Supreme Court.

> 79. That conclusion gains further support from a number of matters. First, since the 1873 Act the relevant statutes have provided for a general right of appeal from the High Court to the Court of Appeal. The "criminal cause or matter" category operates as an exception to that general right. It is appropriate that it should be construed in a way which is focused with some precision on an underlying criminal process which is under review in the High Court, so that it does not improperly undermine the general right of appeal which the relevant statutes confer.
>
> 80. Secondly, the decision-making process of the Department is not at all like a judicial criminal process against a defendant on a charge. Therefore, the judicial review proceedings in the High Court here are not equivalent to an appeal in relation to a judicial proceeding, as in cases like *Fletcher*, *Ex p Woodhall* and *Amand*. Accordingly, the aspect of the underlying rationale for section 41(1) and section 18(1) which is to limit the scope for what can in substance be regarded as a second appeal does not apply.
>
> 81. Thirdly, application of the guidance in *Amand* ensures that overall coherence regarding the availability of the right of appeal to the Court of Appeal is maintained in relation to cases which raise similar issues."

[16] In this case the criminal proceedings have concluded. We understand that the current issue impacts on the applicant's release date. Following from *McGuinness* it is clear that such questions fall outside the definition of criminal cause or matter. We consider that this case is ultimately concerned with the two core questions set out at paragraph [11] above which raise issues of statutory construction and application of interpretative methods to the relevant legislation. Therefore, we consider that this case does not come within the definition of criminal cause or matter. We see no prejudice in this approach for the applicant given that full appeal rights are maintained. Having considered this issue now in some detail we are reminded of the Lord Chief Justice's analysis in *JR27*, the fact that this issue has been vexing the courts for some time, the recommendations of the MacDermott report from long ago, the need to keep in mind the full panoply of appeal rights and the benefit of the Northern Ireland Court of Appeal, if needs be, looking at important cases on appeal prior to recourse to the Supreme Court.

[17] So turning to the two issues we deal first with the issue of the application of section 20A which is essentially a matter of statutory interpretation of domestic law.

Question (i) Does Article 20A apply to the applicant?

[18] The operative part of Article 20A reads as follows:

> **"20A Restricted eligibility for release on licence of terrorist prisoners**
>
> (1) This Article applies to a fixed-term prisoner (a "terrorist prisoner") who -
>
> (a) is serving a sentence imposed (whether before or after the commencement date) in respect of an offence within paragraph (2); and
>
> (b) has not been released on licence before the commencement date.
>
> (2) An offence is within this paragraph (whenever it was committed) if -
>
> (a) it is specified in Part 2, 4, 5 or 7 of Schedule 2A (terrorism offences punishable with imprisonment for life or more than two years);
>
> (b) it is a service offence as respects which the corresponding civil offence is so specified; or
>
> (c) it was determined to have a terrorist connection.
>
> …
>
> (2A) Paragraphs (3) to (7) apply unless the terrorist prisoner's sentence -
>
> (a) is a serious terrorism sentence or an extended custodial sentence;
>
> (b) was imposed after the commencement of section 31 of the Counter-Terrorism and Sentencing Act 2021; and
>
> (c) was imposed in respect of an offence that -
>
> (i) is specified in Part 2 or 5 of Schedule 2A (terrorism offences punishable with imprisonment for life);

(ii) is a service offence as respects which the corresponding civil offence is so specified;

(iii) is specified in Part 3 or 6 of that Schedule (other offences punishable with life imprisonment) and was determined to have a terrorist connection; or

(iv) is a service offence as respects which the corresponding civil offence is so specified and was determined to have a terrorist connection.

(3) The Department of Justice shall release the terrorist prisoner on licence under this Article as soon as –

(a) The prisoner has served the relevant part of the sentence; and

(b) The Parole Commissioners have directed the release of the prisoner under this Article.

(4) The Parole Commissioners shall not give a direction under paragraph 3 with respect to the terrorist prisoner unless –

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

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

[19] The first argument is that Article 20A yields to Article 8 of the 2008 Order. This provision reads as follows:

"**Length of custodial period**

8.—(1) This Article applies where a court passes—

(a) a sentence of imprisonment for a determinate term, other than a serious terrorism, an extended custodial sentence or an Article 15A terrorism sentence; or

(b) a sentence of detention in a young offenders centre in respect of an offence committed after the commencement of this Article.

(2) The court shall specify a period (in this Article referred to as "the custodial period") at the end of which the offender is to be released on licence under Article 17.

(3) The custodial period shall not exceed one half of the term of the sentence.

(4) Subject to paragraph (3), the custodial period shall be the term of the sentence less the licence period.

(5) In paragraph (4) "the licence period" means such period as the court thinks appropriate to take account of the effect of the offender's supervision by a probation officer on release from custody—

(a) in protecting the public from harm from the offender; and

(b) in preventing the commission by the offender of further offences.

(6) Remission shall not be granted under prison rules to the offender in respect of the sentence."

[20] The point raised by Mr Larkin is that Article 8 is actually the operative provision and that Article 8(2) provides rights to the prisoner to be released under Article 17. Article 17 states:

"**Duty to release certain fixed-term prisoners**

17.—(1) As soon as a fixed-term prisoner, other than one to whom Article 18 or 20A applies, has served the requisite custodial period, the Department of Justice shall release the prisoner on licence under this Article."

[21] The argument advanced is simply that the applicant has served the custodial term set by Colton J and Article 8 of the 2008 Order has conferred rights upon him and they have not been taken away by the legislative amendments. In particular, reference is made to the fact that the wording of Article 8 is in the present tense i.e. that "this Article applies." As the written argument states 'put shortly if Article 8

applies to the applicant, that is, if he has been subject to a determination under that Article, then Article 20A does not.'

[22] The counter argument is that Article 8 and Article 20A perform different functions. The 2008 Order makes provision for sentencing in Chapter 2. This deals with custodial sentences in Articles 4-11. Chapter 4 of the 2008 Order makes separate provision for release on licence in Articles 16-24. The argument raised by the respondent is that the duties, powers and constraints which arise in Chapter 2 are exclusively directed to the court, however the duties, powers and constraints that arise in Chapter 4 are directed towards the Department of Justice, the Parole Commissioners or the Secretary of State, in other words those who manage the prisoner. The point made is that in introducing the amended Article 20A the legislature sought to make operative amendments to the release regime. It was not necessary to make any other amendments to Article 8.

[23] We have considered the competing positions and whilst Mr Larkin has presented his case with characteristic vigour and acuity we prefer the argument raised by Dr McGleenan. We consider that the answer to the question is found in the structure of the 2008 Order. There, Article 8 is directed to where a court passes a sentence and this dictates the exercise to be carried out at that specific time. Article 17 is a declaration of what should happen in relation to release but does not apply to circumstances which fall under Article 20A. Article 20A applies to release provisions and so this is the governing provision. We also agree with Dr McGleenan that the fact that Article 8 has no enduring role in the determination of eligibility for release is illustrated by recall provisions contained in Article 28. In any event we are satisfied that whilst Article 8 reflects the position at the date of sentencing the legislation has been amended and Article 20A applies from the date when the Act came into force if a prisoner has been sentenced and meets the other requirements of Article 20A.

[24] The second aspect to this argument relates to whether or not this applicant comes within Article 20A due to the nature of the offence for which he was convicted. In short compass, the point made is that the applicant was convicted of an offence under section 11(1) of the Terrorism Act 2000 which is a membership offence and that that was not a specified offence at the date when he either committed the offence or was sentenced. Therefore, the argument goes that Article 20A has no application. Mr Larkin articulates this by maintaining that Article 20A is "an imperfectly retrospective provision." However, it is clear that the list of scheduled offences was amended.

[25] The wording of Article 20A refers to the offence being relevant if the applicant is a fixed term prisoner. The sentence can be imposed before or after the commencement date and the prisoner must not have not been released. All of these conditions apply to the applicant. Also, the section 11(1) offence for which the applicant was convicted is an offence now specified in Schedule 2A. The wording of Article 20A (2) is that an offence is within this paragraph whenever it was committed

if it is specified in Parts 2, 4, 5 or 7 of Schedule 2A. Therefore, on the basis of statutory interpretation we do not consider that the applicant's arguments can succeed.

Question (ii): Application of Section 3 of the Human Rights Act 1998.

[26] We now turn to the second argument which enjoins us to consider Convention rights pursuant to Article 3 of the Human Rights Act 1998 ("the Human Rights Act") which states that:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights."

At the outset we acknowledge the argument that the Convention is relevant and that there are arguments to be made in relation to a number of Convention provisions. First, Article 5 of the Convention which is the right to liberty, and in particular, the requirement that the conditions for deprivation of liberty under domestic law be clearly defined and meet a quality of law test.

[27] Article 6 is also raised and again we consider that arguments have validly been made in relation to this Article of the Convention, namely whether or not rights are infringed by the enactment of retrospective legislation, see *Scoppola v Italy No.2* [2010] 51 EHRR 12.

[28] The other Convention argument centres on Article 7. This is a significant right which has obvious application and is worth reciting in full. Article 7 of the ECHR provides that:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

[29] We have been referred to considerable authority in this area not least a decision of the Grand Chamber in *Del Rio Prada v Spain* [2013] 58 EHRR 37. In particular we note paragraph [89] of that decision which refers to the fact that:

> "The Court does not rule out the possibility that measures taken by the legislature, the administrative authorities or the courts after the final sentence has been imposed or

> while the sentence is being served may result in the redefinition or modification of the scope of the "penalty" imposed by the trial court. When that happens, the Court considers that the measures concerned should fall within the scope of the prohibition of the retroactive application of penalties enshrined in Article 7(1) in fine of the Convention. Otherwise States would be free-by amending the law or interpreting the established regulations, for example to adopt measures which retrospectively redefined the scope of the penalty imposed, to the convicted person's detriment, when the latter could not have imagined such a development when the offence was committed or the sentence was imposed."

[30] We have also been referred to some domestic authority by Dr McGleenan which is drawn in aid of the argument that this legislation is Convention complaint. In particular Dr McGleenan has referenced the House of Lords decision *Uttley* [2004] 1WLR 38 which rejected an argument that licence conditions imposed after sentence amounted to a further penalty. Also Dr McGleenan referenced *R (Abedin) v SS* [2015] EWHC 782 in which another court relied upon the distinction between the penalty imposed and the administration of the penalty to reject an Article 7 argument.

[31] In addition we have been referred to the recent case of *R (Khan) v Secretary of State for Justice* [2020] 1 WLR 3932. In *Khan* the applicant sought to advance a challenge to section 247A of the equivalent legislation in England and Wales on the grounds that it was incompatible with Articles 5, 7 and 14 of the ECHR and as a corollary sought a declaration pursuant to section 4 of the Human Rights Act 1998. A central ground of challenge was based on Article 14 of the ECHR in terms of difference in treatment between similarly placed groups of prisoners. The challenge failed on this ground. The court also dismissed the Article 7 claim and said at paragraph [105]:

> "In the present case the changes wrought by the 2020 Act were changes in the arrangements for early release that were not changes to the sentence imposed by the sentencing judge. In the absence of a fundamental change of the sort described in *Del Rio Prada* 58 EHRR 37, a redefinition of the penalty, itself, the principle is clear: an amendment by the legislature to the arrangements for early release raise no issue under Article 7. A change to those arrangements does not amount to the imposition of a heavier penalty than that applicable at the time the offence was committed. In those circumstances we reject the claim under Article 7."

As we understand it leave to appeal in *Khan* has been refused.

[32] In relation to this aspect of the case we are enjoined by section 3 of the Human Rights Act to read legislation so far as is possible to do so in a way that is to give effect to Convention rights. The legislation at issue here is primary legislation. Section 3 is of course designed to add an additional level of protection to fundamental rights in a domestic context. The importance of this interpretative technique was emphasised in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 and reiterated in subsequent courts. We pause at this stage to note that the court is specifically not being asked to go on to consider whether or not to make a declaration of incompatibility pursuant to the section 4 route provided in the Human Rights Act 1998. We therefore make no assessment of that and so the court is left to conduct an exercise under section 3 alone.

[33] Helpfully, Mr Larkin has set out the three propositions that he says the court can use as the least intrusive interpretative techniques applying section 3 of the Human Rights Act 1998 in order to read the legislation in a Convention compliant way. He describes these as follows:

(i) To hold that if a determination is made under Article 8(2) of the Criminal Justice (Northern Ireland) Order 2008 then Article 20A(1) of that Order does not apply;

(ii) To hold that Part IV of Schedule 2A to the Criminal Justice (Northern Ireland) Order 2008 only operates prospectively; that it applies only to offences committed after that part of that schedule has come into force;

(iii) To read in the words "after the commencement date" after committed in Article 20A (2) of the Criminal Justice (Northern Ireland) Order 2008.

[34] The court has considered this argument carefully and, of course, bears in mind that this exercise requires some close attention particularly given that this case engages Article 5 and that the liberty of the applicant is at issue. This obligation is an important one and has been applied in various contexts to interpret legislation in a Convention compliant way. However, we also bear in mind that the obligation upon the court has limits. That is because Parliament has expressly preserved the principle of Parliamentary sovereignty in the Human Rights Act as sections 3(2)(b) and (c) highlight. That is why the section 4 declaration of incompatibility route is available in the circumstances where a provision of legislation cannot be read compatibly to require remedial action by government if an incompatibility is found by the court.

[35] Given the foregoing it will be plain this case brings into sharp focus the different roles of the court and the Executive. In simple terms, the making of law is reserved to Parliament, the interpretation of law is for the courts. Section 3 of the Human Rights Act cannot be used to produce a result which substantially departs

from or goes against the grain of the Act of Parliament. It seems to us that this is the nub of the case. We therefore ask the question what is the grain of this legislation?

[36] In our view it is clear and unambiguous that the legislative intention was to change the regime for serving terrorist offenders. This finds expression in the policy documents which preceded the Act. This piece of legislation was designed to have retrospective effect. It was designed to extend to Northern Ireland. This was a new approach which some may view as problematic but nonetheless a new approach based on policy considerations, enacted by Parliament. So whilst robust arguments have been made regarding the potential offence caused by such an approach to Convention rights we must act according to law. Even if all of the human rights based arguments made by Mr Larkin are correct we cannot take a course that would fundamentally conflict with the purpose and intention behind this legislation. We are of the view that this primary legislation cannot be rewritten as Mr Larkin asserts as that would go against the grain of the legislation and is beyond the court powers.

[37] As we have not been asked to consider a declaration of incompatibility pursuant to section 4 of the Human Rights Act there is nothing further we say on that. Given that this issue may return in this case or other related judicial review cases or pending appeals it would not be appropriate to express any further view as we may ourselves have to consider this point and we have not heard from all the relevant parties who may be affected and who may have a perspective on this legislation.

Conclusion

[38] In light of the foregoing we have decided that this application must be dismissed. We also make some final comments in conclusion. First, we note the points raised by Dr McGleenan in his final argument drawing from *Muboyayi* [1991] 1 QB 244 .This case and others such as *Cheblak* [1991] 1 WLR 190 refers to the difference between habeas corpus and judicial review. We note that these are pre-human rights cases and we have not taken a restricted approach to this habeas corpus application given the very significant and important arguments raised and our obligation under section 3 of the Human Rights Act.

[39] Secondly, we note that an argument has been raised about the nature of the amended committal warrant in this case. The parties have helpfully indicated that there is no statutory provision which guides the issue of a committal warrant. In a case such as this it is clear to us that the change in law is found in the legislation and so whilst there are some arguments about the wording of the amended committal warrant and the process these are not, we consider, sufficient to invalidate the lawful detention in this case. Clearly, the contemplation of the legislature was that this procedure would be administrative rather than judicial.

[40] Third, we note that there are different sentencing provisions in England and Wales however we do not consider that this in itself leads to the Writ of Habeas

Corpus being made out for the reasons we have given. We note that a Northern Ireland sentencing judge is in a different position by virtue of Article 7 and 8 of the 2008 Order. However, it seems to us that the subsequent stage in relation to release is now governed by Article 20A and that that was the intention of the legislation.

[41] Finally, we have raised some concern that this extremely important issue is now being dealt with in a variety of courts in a variety of cases. We observe that all of these cases have at their heart the same point which is the effect and compatibility of the relevant legislation and we consider that the parties should think carefully about combining these cases and raising with any judges the fact that there are other cases so that there can be proper and effective case management and efficient decision making.

[42] Accordingly, to recap, our conclusion is as follows:

(i) Section 20A of the Criminal Justice (Northern Ireland) Order 2008 applies to the applicant.

(ii) By virtue of this provision of law he is lawfully detained.

(iii) It is not possible for the court to read the legislation in any other way which would allow the court to issue a Writ of Habeas Corpus. The court reaches this conclusion having undertaken the interpretative obligation contained in section 3 of the Human Rights Act 1998.

(iv) Accordingly, this application must be dismissed.

(v) The court has concluded that this is not a criminal cause or matter.