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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF APPLICATION BY KEVIN HEANEY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE MINISTRY OF JUSTICE, THE DEPARTMENT OF JUSTICE FOR NORTHERN IRELAND, THE EXECUTIVE COMMITTEE OF THE NORTHERN IRELAND ASSEMBLY AND THE EXECUTIVE OFFICE

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Ronan Lavery QC and Bobbie Rea (instructed by ML White Solicitors) for the applicant
Tony McGleenan QC and Philip McAteer (instructed by the Crown Solicitor's Office) for the Ministry of Justice and (instructed by the Departmental Solicitor's Office) for the remaining proposed respondents

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SCOFFIELD J

Introduction

[1] This is an application for leave to apply for judicial review and for interim relief which has been brought on with a degree of urgency because, at its root, the applicant is seeking relief which will give rise to his release from prison. The core of his complaint is that the custodial period of his sentence of imprisonment for a terrorist offence has been wrongly increased as a result of the amendments made by the Counter Terrorism and Sentencing Act 2021 (and in particular section 30 of, and Schedule 3 to, that Act). This contention is supported by a decision of the Court of Appeal, exercising its criminal appellate jurisdiction, in which the applicant and others were granted a declaration of incompatibility under section 4 of the Human Rights Act 1998 ("HRA") in respect of the relevant provisions of the 2021 Act.

[2] This application for leave to apply for judicial review was originally commenced in August 2021 but was stayed at that stage pending the outcome of the

criminal appeals touching upon the same issue which were to be heard by the Court of Appeal. The Court of Appeal gave judgment on 22 December 2021: see *R v Morgan, Marks, Lynch and Heaney* [2021] NICA 67. It considered what remedy, if any, it could provide in light of its conclusion that there had been a breach of the appellants' rights under Article 7 ECHR. It did not consider that the new statutory provisions could be construed compatibly with the appellants' Convention rights given the limitations inherent in section 3 of the HRA. Instead, it considered that it could and should only grant a declaration of incompatibility under section 4 of the HRA, which was specifically noted to "not affect the validity, continued operation or enforcement of the provision in respect of which it is made."

[3] The applicant now seeks to breathe fresh life into the judicial review proceedings and, through them, to secure further relief by forcing one of a number of public authorities to take some step or action in order to ameliorate his position. His Order 53 statement has been amended to claim relief, and name new respondents, which were not encompassed within the original claim.

[4] I heard the application for leave and interim relief last week and have endeavoured to provide this short judgment expeditiously thereafter in recognition of the urgency of the situation from the applicant's perspective.

Factual background

[5] The applicant is a sentenced prisoner currently detained in Her Majesty's Prison Maghaberry, having pleaded guilty to one count of membership of a proscribed organisation (the Continuity Irish Republican Army) contrary to section 11(1) of the Terrorism Act 2000. He was sentenced at~~in~~ Belfast Crown Court on 13 November 2020. The sentence imposed was one of three years and six months' imprisonment, a determinate custodial sentence, which was specifically apportioned in the form of 21 months' custody and 21 months on licence. The applicant therefore expected to be released in due course on 31 October 2021.

[6] In the meantime however, the provisions of the Counter Terrorism and Sentencing Act 2021 ("the 2021 Act") came into force. In particular, on 30 April 2021, section 30 of the 2021 Act, entitled 'Restricted eligibility for early release of terrorist prisoners: Northern Ireland', entered into force. It had the effect of introducing a new A~~a~~rticle 20A into the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"). This had the practical effect of increasing the custodial element of the applicant's sentence by some seven months, after which he would be referred to the Parole Commissioners in order for them to consider his suitability for release (rather than being automatically released after 21 months). The effect of these provisions is analysed in the decision of the Court of Appeal. The applicant is presently, therefore, due for release no earlier than 31 May 2022, at which point he will have served two thirds of the total sentence imposed upon him by the Crown Court, rather than the half of that sentence which the sentencing judge had fixed as the appropriate custodial element. It was the specific feature of Northern Ireland

sentencing legislation – which saw the trial judge fix the appropriate custodial element – which was crucial to the Court of Appeal's reasoning, distinguishing the decision of the English Divisional Court in *R (Khan) v Secretary of State for Justice* [2020] 1 WLR 3932, that a violation of Article 7 rights had occurred.

[7] As noted above, the Court of Appeal gave its judgment on 22 December 2021 and granted relief in terms which did not affect the operation of the applicant's sentence. The applicant therefore returned to this court in order to seek to force one or more public authorities to provide him with some additional relief, in light of the finding that his Article 7 rights had been violated. I hope it is not unfair to say that the approach adopted has been somewhat scattergun in nature: the applicant's representatives are plainly seeking to exhaust all available avenues to improve their client's position.

[8] In particular, the applicant's solicitor has written to the Department of Justice in Northern Ireland ("the Department") and to the Northern Ireland Prison Service (NIPS) asking that the applicant be granted temporary release from prison; that the 'additional' portion of his sentence be remitted through an exercise of the Royal Prerogative of Mercy; and/or that amending legislation is swiftly introduced in order to remove the effect of the new Aarticle 20A of the 2008 Order in his case. Responses on behalf of the Department and NIPS were received from the Departmental Solicitor's Office (DSO) on 31 January 2022, declining to take any of the steps which the applicant's solicitor had invited them to. A central thrust of those responses relied upon the limited relief afforded by the Court of Appeal.

[9] It is also relevant to note that the Ministry of Justice ("MoJ"), the Westminster Department of Government responsible for the 2021 Act, which was granted notice party status in the applicant's criminal appeal and participated fully in those proceedings, has sought leave to appeal to the United Kingdom Supreme Court against the Court of Appeal's decision that there was an Article 7 violation in this case. I was informed that the application for leave to appeal has been lodged with the court and served but that there hasve as yet been no determination of this application. I understand from the Appeals and Lists Office, however, that a ruling from the Court of Appeal is imminent.

The remedy granted by the Court of Appeal

[10] It seems clear to me that, when considering the issue of remedy in the appeal before it, the Court of Appeal was considering what remedy could be granted in respect of the offending provisions of the 2021 Act, which is an Act of the Westminster Parliament. The court was aware of the limitations of the remedy which it was granting in respect of the 2021 Act and, indeed, at paragraph [128] of the judgment of Maguire LJ for the court, pointed out not only that the remedy granted would not affect the validity, continued operation or enforcement of the 2021 Act but also that:

> "It follows that the relevant legislative provision will continue to have force and effect, notwithstanding its incompatibility with Convention rights, until such time as it may be amended."

[11] The court also recorded that this was a reflection of the doctrine of Parliamentary sovereignty. It is well known that the limited remedy which can be provided for breach of Convention rights in respect of an Act of the Westminster Parliament under the HRA is designed to strike a balance between court supervision and the protection of human rights on the one hand and the continuing sovereignty of Parliament on the other. Once a declaration of incompatibility has been made under section 4 of the HRA, section 10 provides a mechanism for swift amendment of the offending provision, as was also recognised by the Court of Appeal; but this is a matter for Parliament.

The applicant's case

[12] The Court of Appeal specifically mentioned its role as a court of criminal appeal and that it was not sitting as a judicial review court (see paragraph [139] of the judgment). It considered that the most obvious option for mounting a challenge to the provisions of which the appellants complained would have been to mount a judicial review. It noted that proceeding by way of an (out of time) appeal against sentence was an option which was "not without difficulty, principally related to the issue of obtaining a remedy, even if the appeal was otherwise successful." At paragraph [145], Maguire LJ continued:

> "However, it might reasonably be said, that even if a judicial review had been initiated similar, if not the same problems, might well have arisen."

[13] The proposed respondents rely on this observation as supporting the contention that the judicial review court can do little, if anything, more than the Court of Appeal could do (albeit that court was exercising its criminal jurisdiction). In contrast, the applicant relies on this observation as an indicator both that the High Court exercising its supervisory jurisdiction may have additional powers and that the Court of Appeal was not purporting to determine this.

[14] As I have observed above (see paragraph [10]), a reading of the Court of Appeal's decision clearly suggests that the court was at all times focused on what remedy could be granted in respect of the 2021 Act. A difficulty arises because the applicant now presents his case in a different way, which does not appear to have been advanced or argued by him or on his behalf (or indeed on any of the appellants' behalves) in the appeal before the Court of Appeal. The applicant now contends that, in fact, the offending provision which has given rise to his predicament – the "relevant legislative provision", in the words of Maguire LJ – is that set out in the 2008 Order, particularly the new Aarticle 20A. That is a piece of

subordinate legislation, in respect of which the court enjoys a much wider panoply of remedial powers than is the case where an Act of Parliament is concerned. True it is that the 2008 Order was amended by means of the 2021 Act; but it is the 2008 Order, the applicant submits, which is the proper focus of the quest for an effective remedy because it is the provisions of that Order which, as a matter of law, now govern his release date. Although not pleaded in this way, in the course of his submissions Mr Lavery QC invited the court to simply dis-apply the new Aarticle 20A. Indeed, he also submitted that a public authority itself would be free to do so on the authority of *RR v Work and Pensions Secretary* [2019] UKSC 52, at paragraphs [21]-[22] and [27]-[29].

[15] The applicant has a further strand of argument, which itself consists of two elements. The basic thrust of the further argument is that, the Court of Appeal having identified an incompatibility with his Article 7 rights, there are a number of public authorities which can and must now act to remedy or mitigate that breach, even assuming that the strict legal position is that he remains liable to be detained in custody until 31 May this year. In the first instance, and most immediately, he contends that that can be done by the exercise of some statutory or prerogative power to secure his release from prison. The primary target in this regard presently appears to be NIPS (an agency of the Department) which, the applicant submits, ought to grant him temporary release from prison. Alternatively, he submits that the Department could exercise the Royal Prerogative of Mercy in his favour (which must be exercised by the Minister in charge of that Department: see section 23(2A) of the Northern Ireland Act 1998).

[16] The second element of this strand is that the law in Northern Ireland should be urgently amended to remove the incompatibility which has been identified by the Court of Appeal's judgment and that the failure to legislate in this regard is a relevant act within the meaning section 6(6) of the HRA. There was some debate about whom the appropriate respondent might be for this aspect of the challenge. On one view it might be the Ministry of Justice, as the department with policy responsibility for the 2021 Act and, therefore, the making of any remedial order under section 10 of the HRA. On another view, it may be the Department of Justice in Northern Ireland, which is the department with policy responsibility for the 2008 Order. However, as previous authority has observed, the Department itself is not a law-making body and is in certain circumstances subject to the constraints of Executive decision-making. For that reason, the applicant has also included within the scope of the challenge the Executive Committee of the Northern Ireland Assembly and the Executive Office (also foreseeing that the amendment might be considered to be a significant or controversial matter requiring Executive discussion and agreement).

The respondents' submissions

[17] The proposed respondents raise a number of objections to the application for leave to apply for judicial review. In the first instance, they contend that this court is bound by the approach set out in the Court of Appeal's judgment, namely that a section 4 declaration of incompatibility is all that can be granted in this case. Insofar as this issue was not fully or properly explored in argument before the Court of Appeal, the respondents contend that the applicant and his representatives are in part responsible for this failure. Although a new senior counsel now appears for the applicant, the remainder of his legal team assisted him in the Court of Appeal. The respondent submits, therefore, that the applicant must accept the consequence of his case not being put in the Court of Appeal as he now seeks to put it before this court; and that, if he wishes to now change his argument, he should do so by means of seeking to reopen the Court of Appeal judgment or by way of appeal (or cross-appeal) against that judgment.

[18] There are a range of reasons why the respondents oppose the grant of interim relief; but they focus on the fact that to grant such relief would fly in the face of the clear and conscious Parliamentary intention behind the new regime introduced by the 2021 Act. As to the suggestion that the Northern Ireland administration can and should urgently amend the provisions of the 2008 Order, it is argued that this is not permissible because the change in treatment of terrorism sentences is an excepted matter under the Northern Ireland Act 1998 ("NIA").

The challenge to the 2008 Order

[19] It is disappointing, to say the least, that the case which is now mounted on behalf of the applicant was not fully and fairly put before the Court of Appeal when it was considering the issue of remedy in the applicant's partially successful appeal against sentence. It is clear that the Court of Appeal proceeded on the basis that the proper 'target' of the appellants' Convention challenge was the 2021 Act and that this was *not* focused on the provisions of the 2008 Order as being those which had legal effect in this jurisdiction and which were the operative provisions governing the appellant's sentence. If the argument was to be advanced that Aarticle 20A of the 2008 Order is subordinate legislation and that the Court of Appeal could and should have gone further in terms of the relief it would grant, having heard full argument on the Article 7 grounds, that should have been raised in the course of the appeal.

[20] I consider it to be arguable that, if the focus had been on the 2008 Order, the Court of Appeal may have been (as this court would be) empowered to grant more intrusive relief than a declaration of incompatibility under section 4 of the HRA. The Court of Appeal's powers under the Criminal Appeal (Northern Ireland) Act 1980 are limited to an extent; but that Act contains provisions – such as sections 43(1) and 26(2) – designed to ensure that the court can do justice in the case before it.

[21] In particular, it is plainly arguable that the 2008 Order is simply subordinate legislation for the purposes of the HRA (see the definitions of "primary legislation"

and "subordinate legislation" respectively at section 21(1) of the HRA); and that, when dealing with subordinate legislation, the superior courts have powers both to strike down or dis-apply such legislation when it is in violation of Convention rights.

[22] Albeit this contention is arguable, it is not straightforward. That is because the new provisions in the 2008 Order of which the applicant complains exist, and are in the terms in which they are in, only because of the intervention of the Westminster Parliament in the 2021 Act exercising (the respondents submit) its power to legislate for excepted matters.

[23] The applicant contends that the Northern Ireland Assembly could amend or repeal Aarticle 20A, or indeed the relevant provisions of the 2021 Act, on the basis of its legislative competence as set out in sections 5 and 6 of the NIA: see section 5(6) of the NIA and the commentary on these provisions in paragraphs [43] and [44] of the court's judgment in *Re SEAT & Woods* [2021] NIQB 93). That turns on whether the provisions deal with an excepted matter or not. In my view, it is clear that the provision made in respect of sentences for terrorist offences is an excepted matter. Schedule 2 of the NIA sets out a list of excepted matters including, at paragraph 17, the following:

> "National security (including the Security Service, the Secret Intelligence Service and the Government Communications Headquarters); special powers and other provisions for dealing with terrorism or subversion; the Technical Advisory Board provided for by section 245 of the Investigatory Powers Act 2016; …"
>
> [underlined emphasis added]

[24] Article 20A of the 2008 Order is entitled, 'Restricted eligibility for release on licence of terrorist prisoners.' Section 30 of the 2021 Act is entitled, 'Restricted eligibility for early release of terrorist prisoners: Northern Ireland.' The new provisions apply to the applicant because he was convicted of a terrorism offence under the Terrorism Act 2000 which falls within the category of offences specified in article 20A(2)(a) of the 2008 Order. It seems plain to me, therefore, that the legislation which the applicant wishes to be amended is a "provision for dealing with terrorism." A specific sentencing or licensing regime which applies to terrorist offenders plainly falls within that definition, in my view. Accordingly, the Northern Ireland Assembly could not amend the provision, save in the limited circumstances contemplated by section 6(2)(b) of the NIA (which is not what the applicant proposes) and with the consent of the Secretary of State under section 8(a) of the NIA (in circumstances where the Secretary of State for Justice's department is seeking to appeal the relevant finding of the Court of Appeal).

[25] But the courts are not constrained by the dichotomy between devolved and non-devolved matters. Even accepting that the amended provisions of the 2008 Order deal with excepted matters, in principle the High Court would have power to

strike down an offending provision: unless, that is, the offending provision is to be treated in the same manner as a provision of primary legislation pursuant to section 4(3) and (4) of the HRA. This appears unlikely in the present case, as Aarticle 20A was not "made in the exercise of a power conferred by primary legislation" but, rather, by direct insertion by a provision of primary legislation itself. Nonetheless, an argument might well be made that, properly construed, Aarticle 20A enjoys a cloak of protection as having been introduced in such a way that "the primary legislation concerned prevents removal of the incompatibility." That, in turn, raises the question of whether section 30 of the 2021 Act is to be viewed as continually speaking or as having simply, in a once-off event, effected an amendment to the 2008 Order which only has continuing legal effect through that Order (with the relevant provisions of the 2021 Act falling away once they have served that purpose). Those are both complex and interesting issues.

[26] I would ordinarily, therefore, have granted leave on the merits in relation to a challenge to the legislation. However, I cannot ignore the fact that the Court of Appeal has recently – in proceedings which are still ongoing to the extent that the MoJ is seeking leave to appeal to the Supreme Court – clearly determined that a declaration of incompatibility under section 4 of the HRA in respect of the 2021 Act was the (only) appropriate remedy to grant in relation to the legislation in this applicant's case and that, as a result, the legislation would continue to have effect. In light of that, I consider that the appropriate course is to refuse leave to apply for judicial review.

[27] It seems to me to have been a necessary step in the Court of Appeal's reasoning in relation to remedy that there was nothing more that could be done than the granting of a section 4 declaration of incompatibility (at least as far as any challenge to the legislation itself was concerned). Ordinarily, I would consider myself bound by that conclusion and reasoning.

[28] The applicant now contends that the Court of Appeal reached that decision without a full consideration of the issue, or of his case as it is now presented. As I have already said, the argument which the applicant seeks to advance now could, and should, have been squarely raised with the Court of Appeal. I find it hard to see how he can take the benefit of a failure to do so, particularly when the new line of argument might yet be raised in those proceedings either by way of appeal or cross-appeal on the issue of remedy or, if the Court of Appeal permitted, by way of reconsideration of the issue before its orders in the appeal proceedings were finalised (on the assumption that that has not happened). In terms of the assertion that the relevant provision of the 2008 Order should be struck down or dis-applied, or declared to have no effect, the appeal proceedings which were expressly brought to examine the Convention compatibility of the new sentencing regime represent an appropriate alternative remedy which could have been, or might yet be, invoked in this regard. For the moment, I ought to proceed on the basis that the Court of Appeal judgment is correct.

The remaining challenges to the proposed respondents' failure to act

[29] Different considerations potentially arise in relation to the challenge to the various public authorities which the applicant contends should now be compelled to take some corrective action. That case can be made even assuming the Court of Appeal was correct in holding that the only remedy which could be granted in relation to the legislation itself was a section 4 declaration. The applicant faces a number of substantial hurdles in respect of this aspect of his case, however.

[30] First, if one proceeds on the basis that the Court of Appeal's decision in the criminal appeal ~~ia~~s correct, the context for all of the applicant's arguments is a position whereby Parliament has introduced a new regime for the treatment of terrorist prisoners and its will is to be respected. The Court of Appeal recognised that, if only a section 4 declaration of incompatibility was granted, the impugned legislation would continue in full force out of respect for the will of Parliament on this matter, reflecting the risk presented by prisoners convicted of serious terrorist offences and the gravity of their offending.

[31] Second, I accept the respondents' argument that the relevant provisions of the 2008 Order deal with an excepted matter: see paragraphs [23] and [24] above. Even though in principle there might be a challenge under the HRA to a failure to introduce legislation in the Assembly (see paragraph [72] of *Re NIHRC's Application* [2018] UKSC 27; and paragraph [34] of *Re Sterritt's Application* [2021] NICA 4), there can be no complaint with a reasonable prospect of success that the Northern Ireland administration is acting unlawfully in failing to amend the legislation in this case. If it is an excepted matter, it has no competence to do so. A failure on the part of the MoJ to take remedial steps under section 10 of the HRA is also not an 'act' for the purposes of section 6: see section 6(6). Moreover, the section 10 mechanisms are engaged only after it is clear that no appeal is to be pursued or pending (see section 10(1)(a)), which does not presently apply in this case. The applicant's challenge to the failure to introduce amending legislation has no reasonable prospect of success, therefore, in my view.

[32] Third, I also accept that there is nothing irrational in the Department of Justice failing to exercise the Royal Prerogative of Mercy, or NIPS failing to grant temporary release, in the present circumstances of this case. The MoJ is currently seeking to appeal the decision of the Court of Appeal. If leave to appeal is granted, it is to be hoped that the matter might be dealt with expeditiously in the Supreme Court. In the meantime, the Court of Appeal has stated clearly that the only remedy which has been granted is one which will see the impugned provisions continue to have effect and be enforced. The Department and NIPS are entitled to take this into account and it sets the context for their decision-making.

[33] The pleaded grounds of challenge against the Department and NIPS are simply that the failure to take any measures to immediately remedy the Article 7 breach "constitutes an ongoing and further breach of Article 7 ECHR." However, it

is the legislation which has given rise to the Article 7 breach; not the subsequent actions of the Department. The bar for establishing an unlawful failure to exercise the Royal Prerogative of Mercy is extremely high (see, for instance, *Re McGeough's Application* [2012] NICA 28, at paragraph [14]). A grant of temporary release would also not, in fact, remove the detriment of which the applicant complains, since he would still be liable to detention in pursuance of the custodial element of his sentence (and liable to be recalled even without breaching the conditions of his release: see rule 27(3) of the Prison and Young Offenders' Centre Rules (Northern Ireland) 1995 ("the Prison Rules")). Temporary release would not remove the effects of the Article 7 breach but merely improve his situation in the meantime. As noted above, it is not the refusal to grant temporary release which gives rise to the Article 7 breach but the new legislative provisions; and I do not consider that there is a free-standing obligation on the part of other public authorities to seek to improve the applicant's position in the face of a breach of his rights arising under the 2021 Act, particularly where the Court of Appeal has ruled that the only available remedy is declaration of incompatibility which does not affect the operation of the relevant provisions in light of the HRA's inbuilt respect for the principle of Parliamentary sovereignty.

[34] I accept that, but for the change in legal position, the applicant would have been released on licence by now. But the new legal provisions governing the applicant's sentence presently remain unaffected by the Court of Appeal's order. For the purpose of the challenge to the Department, therefore, the applicant is to be viewed as detained in pursuance of a sentence lawfully passed by a competent court. The Court of Appeal made no finding in relation to a breach of Article 5 ECHR and considered it unnecessary to do so in the circumstances of the case, likely in part because of the failure on the part of the applicant to advance before it the new contention on which he now relies about the status of the legislation. For these reasons, whilst the Court of Appeal's decision stands, I also do not consider the applicant to have established an arguable case with a reasonable prospect of success against the various respondents.

Interim relief

[35] In light of my conclusion in relation to the grant of leave, the issue of interim relief does not arise. Had this case come before me in the absence of the Court of Appeal's determination on remedy, but with the benefit of a finding in relation to the Article 7 violation, I would have considered the application for interim relief difficult to determine. On the one hand, the applicant has been convicted of a terrorist offence and there are genuine public interest concerns about release of such offenders in the absence of a determination by the Parole Commissioners that it is no longer necessary for the protection of the public that they be confined. On the other hand, pursuant to the sentencing disposal determined and as envisaged by the trial judge, the applicant would have been released on licence by now. In addition, on the one hand, if the applicant were to be successful in his new argument (and the MoJ unsuccessful in its appeal), the applicant should not have been detained after

31 October 2021. On the other hand, if the MoJ is successful in its intended appeal, the applicant should not have been afforded a windfall period of release by means of an order for interim relief.

[36] Mr Lavery urged me to grant bail in the exercise of the High Court's inherent jurisdiction to do so, but did so without relying on any authority which indicated that this would be permissible or appropriate. For my part, I do not consider it would be appropriate to grant bail when the applicant is a sentenced prisoner.

[37] Had I been granting leave in the circumstances described in paragraph [35] above, I would likely have concluded that damages were not an adequate remedy. In relation to the balance of convenience or balance of injustice, provided the case could be determined expeditiously – and there is no reason why it ought not to be, given that the new issue is essentially a question of law – I would have been inclined to refuse interim relief in the public interest.

[38] If, for some reason, it was clear that the issue could not be determined expeditiously, the balance might then shift. I have considered whether in those circumstances, on balance and erring on the side of protection of the individual's liberty, it may then have been appropriate to make an order requiring the applicant's temporary release for a "special purpose" under rule 27 of the Prison Rules (a) subject to strict conditions; and (b) with a suspension of the currency of the sentence whilst he was on release (which appears permissible pursuant to section 13(1)(c) of the Prison Act (Northern Ireland) 1953). Although not without some difficulty, including for the reason mentioned at paragraph [33] above amongst others, release on such terms might possibly hold the ring so that, if the applicant was unsuccessful in his new challenge or the MoJ successful in its appeal, the applicant's release could be revoked and his sentence recommenced without his having secured an unwarranted advantage. I make these observations in deference to the arguments which were made before me in relation to interim relief and on the basis that they may fall to be considered again if the applicant pursues his case elsewhere.

Conclusion

[39] In light of the above, I refuse the applicant's application for leave to apply for judicial review. His arguments in relation to the status of the legislation could and should have been, or should now be, raised with the Court of Appeal. This is either fatal to his claim in this court as a matter of precedent or in the exercise of the court's discretion, given his failure to date to pursue his new case in the criminal appeal proceedings. Whilst the Court of Appeal's earlier decision on remedy remains as it does, I do not consider the remaining aspects of the applicant's case to warrant the grant of leave on the merits.

[40] If, as I anticipate may be the case, the applicant chooses to appeal this decision or renew his application for leave to apply for judicial review before the Court of Appeal, it would in my view be of assistance if the same constitution of that court as

considered his criminal appeal could deal with the further application or appeal in these proceedings. Indeed, such a course may be the most expeditious means of securing the Court of Appeal's ruling on the new argument on which the applicant now relies, particularly if the Court determined that leave should be granted and then went on to consider the substantive application pursuant to RCJ Order 53, rule 5(8). That is, of course, not a matter for me but for the Lady Chief Justice in the first instance and for the Court of Appeal itself in the second. I also record for this purpose that both parties agreed that the present application was not a criminal cause or matter for the purposes of RCJ Order 53, rule 2 and the available appeal rights under the Judicature (Northern Ireland) Act 1978.

[41] I will make no order as to costs between the parties; but make an order for legal aid taxation of the applicant's costs.