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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY STEPHEN FAULKNER FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

BETWEEN:

STEPHEN FAULKNER
Applicant

and

DEPARTMENT OF JUSTICE
Respondent

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Mr Dessie Hutton KC with Mr Stephen McNicholl (instructed by Emmet J Kelly & Co, Solicitors) for the Applicant
Dr Tony McGleenan KC with Mr Philip Henry (instructed by the Departmental Solicitor's Office) for the Respondent

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COLTON J

Introduction

[1] I am obliged to counsel for their helpful written and oral submissions in this application.

The factual background

[2] The applicant was sentenced at Coventry Crown Court in England on 28 March 2008 for two offences of "threats to kill", contrary to section 16 of the Offences against the Person Act 1861.

[3] A sentence of Imprisonment for Public Protection (IPP) was imposed, with a tariff period of 12 months.

[4] He continued to be detained under that sentence until a release on licence was ordered in August 2011.

[5] In September 2011 he was initially transferred to Northern Ireland on a restricted basis with a view to the supervision of his licence being administered by the Probation Board for Northern Ireland.

[6] He was recalled to prison in England in November 2015.

[7] On 11 July 2019 his detention was transferred to Northern Ireland on a "restricted" transfer basis.

[8] On 6 August 2021 his transfer status was converted to "unrestricted." He has been an unrestricted transfer prisoner detained in Northern Ireland since that time.

[9] Thereafter, the Northern Ireland authorities have treated him as if he had been sentenced here to an Indeterminate Custodial Sentence (ICS). His case has been reviewed by the Parole Commissioners on 18 January 2022 (by a single commissioner); on 9 May 2022 (by a panel) and, again, most recently on 17 February 2023 (by a panel) and these decision-makers have proceeded on the basis that he is properly detained under an ICS.

[10] Release on licence has not been directed at those hearings.

The issue in this case

[11] The applicant challenges his continuing imprisonment at HMP Maghaberry and the continuing failure of the respondent to order his release.

[12] The case turns on a point of statutory interpretation as to the scope of the Department of Justice's (the DoJ) powers to detain the applicant on an ICS, following the transfer of his detention from England & Wales to Northern Ireland under an "unrestricted transfer."

[13] On the applicant's interpretation, the respondent has no power to detain the applicant under an ICS and the DoJ has been over-holding the applicant since the point in time when he was transferred to Northern Ireland on an unrestricted basis. It is argued that this over-holding continues and represents an ongoing unlawful detention.

The proceedings

[14] The applicant issued judicial review proceedings on 8 February 2023 and a writ of habeas corpus ad subjiciendum.

[15] At an early review the court was informed of the impending Parole Commissioners' hearing on 17 February 2023, which potentially could have an impact on the urgency of the application. It was agreed that the case would be dealt with as a "rolled-up hearing" on an expedited basis. The hearing was originally listed for 23 March 2023. After his unsuccessful application to the Parole Commissioners by the agreement of the parties and the court, the hearing was brought forward to 9 March 2023.

[16] The court is grateful for the assistance of counsel and their respective solicitors for enabling the matter to be dealt with on an expedited basis.

The applicable statutory scheme

[17] On 28 March 2008 the applicant was sentenced in England & Wales under the provisions of the Criminal Justice Act 2003 (the 2003 Act) and Chapter 5 thereof, which dealt with "Dangerous Offenders." That legislation introduced the concept of specified offences and serious offences.

[18] Section 224 provides:

> "**Meaning of "specified offence" etc**.
>
> (1) An offence is a "specified offence" for the purposes of this Chapter if it is a specified violent offence or a specified sexual offence.
>
> (2) An offence is a "serious offence" for the purposes of this Chapter if and only if—
>
> (a) it is a specified offence, and
>
> (b) it is, apart from section 225, punishable in the case of a person aged 18 or over by—
>
> (i) imprisonment for life, or
>
> (ii) imprisonment for a determinate period of ten years or more.
>
> (3) In this Chapter—
>
> "relevant offence" has the meaning given by section 229(4);

> "serious harm" means death or serious personal injury, whether physical or psychological;
> "specified violent offence" means an offence specified in Part 1 of Schedule 15;
>
> "specified sexual offence" means an offence specified in Part 2 of that Schedule."

[19] Part 1 of Schedule 15 listed "Specified violent offences" as including at para 5, offences under section 16 of the Offences against the Person Act 1861, that is, 'threats to kill.' That offence being a "specified violent offence" was accordingly a "specified offence" within the meaning of section 224(1) and (3).

[20] The offence of threats to kill under section 16 of the Offences against the Person Act 1861, carried a maximum determinate sentence of 10 years' imprisonment and was therefore a "serious offence" within the meaning of section 224(2)(b).

[21] Section 225 of the 2003 Act at that time provided for the sentence of IPP. It provided:

> **"Life sentence or imprisonment for public protection for serious offences**
>
> (1) This section applies where—
>
> (a) a person aged 18 or over is convicted of a serious offence committed after the commencement of this section, and
>
> (b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.
>
> (2) If—
>
> (a) the offence is one in respect of which the offender would apart from this section be liable to imprisonment for life, and
>
> (b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life,

the court must impose a sentence of imprisonment for life.

(3) In a case not falling within subsection (2), the court must impose a sentence of imprisonment for public protection.

(4) A sentence of imprisonment for public protection is a sentence of imprisonment for an indeterminate period, subject to the provisions of Chapter 2 of Part 2 of the Crime (Sentences) Act 1997 (c. 43) as to the release of prisoners and duration of licences."

[22] Turning to the applicant's circumstances, when sentenced in 2008 he had been convicted of a serious offence. The sentencing court was of the opinion that there was a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences. Thus, subsection (1) applied.

[23] He was not liable to a sentence of life imprisonment for such an offence and, therefore, subsection (2) did not apply.

[24] Therefore, subsection (3) applied, and the court was obliged to impose a sentence of IPP on the applicant.

[25] By way of a very interesting digression, Mr Hutton drew the court's attention to the widespread political and legal dissatisfaction with and criticism of the IPP regime which is well set out in a House of Commons Research Briefing dated January 2023.

[26] As a result, IPP sentences were abolished in 2012.

[27] Despite continued pressure for change (including a proposal from former Justice Secretary, Michael Gove, in 2016 that the government should use the power of executive clemency to release those IPP prisoners who had been in prison for much longer than their tariff), Parliament has declined to introduce any provision for prisoners to be resentenced. Therefore, anyone such as the applicant, sentenced to an IPP remains subject to a lawful sentence.

Transfer of prisoners

[28] The key issue in this case concerns the provision for inter-jurisdictional transfer of prisoners within the United Kingdom's jurisdictions. It has been long recognised that the ability of prisoners to maintain family ties whilst serving their sentences is an important factor. Thus, as a part of several measures to facilitate family contact, there has been provision for prisoners to transfer to another jurisdiction where they have close family members for a significant period of time.

[29] Previously, the Criminal Justice Act 1961 provided for inter-jurisdictional transfers to be made on either a permanent or a temporary basis. Because of the different rules applicable in England & Wales and Northern Ireland concerning remission for custodial sentences (50% in Northern Ireland, 33⅓ in England & Wales) there were a number of cases challenging decisions where permanent transfers were refused because of the consequences of differing early release provisions applying in the two jurisdictions as a reduction in time in custody would have been likely to result. Both parties argued that these cases supported their submissions in this case. However, the refusals were made under the predecessor to the 1997 Act. The applicants were not challenging the same type of decision as the applicant in this case, nor were they dealing with ICS/IPP regime or the particular issue that arises in this case.

[30] After consideration of a report and inter-departmental working groups recognising the particular difficulties posed in relation to the permanent transfer of long-term prisoners to Northern Ireland, the government introduced the Crime (Sentences) Act 1997 (the 1997 Act) which came into force on 1 October 1997.

[31] The new provisions provided for prisoners to be transferred to another jurisdiction on either an "unrestricted" or "restricted" basis.

[32] It is the interpretation of the provisions of this Act which is at the heart of this application.

The Crime (Sentences) Act 1997

[33] The key provisions are contained in Schedule 1, para 1 which deal with the general powers of transfer. It provides:

> "**Transfer of prisoners: general**
>
> 1(1) The Secretary of State may, on the application of—
> …
>
> (b) a person serving a sentence of imprisonment in any part of the United Kingdom,
>
> make an order for his transfer to another part of the United Kingdom … to serve the whole or any part of the remainder of his sentence, and for his removal to an appropriate institution there."

[34] The applicant's final transfer to Northern Ireland in August 2021 is a transfer in accordance with para 1(1)(b) as he was, at that time, serving a sentence in England & Wales and transferred to serve the remainder of his sentence in Northern Ireland.

[35] Schedule 1, para 5 provides for such transfers to be subject to conditions. It provides:

> "**Conditions of transfers**
>
> 5(1) A transfer under this Part … shall have effect subject to such conditions (if any) as the Secretary of State may think fit to impose.
>
> (2) Subject to sub-paragraph (3) below, a condition imposed under this paragraph may be varied or removed at any time.
>
> (3) Such a condition as is mentioned in paragraph 6(1)(a) below shall not be varied or removed except with the consent of the person to whom the transfer relates.
> …"

[36] Schedule 1, para 6 provides for conditions determining transfers as "restricted" or "unrestricted" transfers. It provides:

> "**Preliminary**
>
> 6(1) For the purposes of this Part of this Schedule, a transfer under Part I of this Schedule—
>
> (a) is a restricted transfer if it is subject to a condition that the person to whom it relates is to be treated for the relevant purposes as if he were still subject to the provisions applicable for those purposes under the law of the place from which the transfer is made; and
>
> (b) is an unrestricted transfer if it is not so subject.
>
> (2) In this Part of this Schedule "the relevant purposes" means—
>
> (a) …
>
> (b) in relation to the transfer of a person under paragraph 1(1)(b) … above, the purposes of his detention under and release from his sentence and, where applicable, the purposes of his supervision, possible recall following release and any supervision default order; and

(c) …"

[37] Schedule 1, para 9 deals with the meaning of the standard "restricted" transfer conditions for transfers from England & Wales to Northern Ireland.

[38] Under para 9(2):

> "(2) Where a person's transfer under paragraph 1(1)(b), … above from England and Wales to Northern Ireland is a restricted transfer—
>
> (a) sections 241, 243A, 244, 244A, 246A, 247 to 252, 254 to 264B, 267A and 267B, and Schedules 20A and 20B to, the 2003 Act (fixed-term prisoners) or, as the case may require, sections 241, 242 and 247 of, and paragraphs 2 and 3 of Schedule 12 to, the Sentencing Code (Detention and Training Orders) or sections 28 to 34 of this Act (Life Sentences) shall apply to him in place of the corresponding provisions of the law of Northern Ireland;
> …
>
> (b) subject to that, to sub-paragraph (3) below and to any conditions to which the transfer is subject, he shall be treated for the relevant purposes as if his sentence had been an equivalent sentence passed by a court in Northern Ireland."

[39] Schedule 1, para 15 explains the general effect of "unrestricted" transfers. It provides:

> "**Unrestricted transfers: general**
>
> 15(1) ...
>
> (2) Subject to sub-paragraph (3) below, where a person's transfer under paragraph 1(1)(b) … above to any part of the United Kingdom or … is an unrestricted transfer, he shall be treated for the relevant purposes as if his sentence had been an equivalent sentence passed by a court in the place to which he is transferred."
> (Emphasis added)

[40] For the sake of completeness Schedule 1, para 16 provides for cases, as here, where a prisoner's detention transfer is converted from restricted to unrestricted:

> "(16) Where a transfer under Part I of this Schedule ceases to be a restricted transfer at any time by reason of the removal of such a condition as is mentioned in paragraph 6(1)(a) above, paragraph 15 above shall apply as if the transfer were an unrestricted transfer and had been effected at that time."

The ICS sentence in Northern Ireland

[41] To complete the legislative framework it is necessary to consider the introduction of the ICS sentence in Northern Ireland. It was legislated in the Criminal Justice (Northern Ireland) Order 2008 (the 2008 Order). Articles 12-15 of the 2008 Order which provided for "Dangerous Prisoners" were commenced on 15 May 2008.

[42] Whilst there are important differences, the provisions mirrored the relevant provisions of the 2003 Act in providing sentences for prisoners who were deemed to be "dangerous."

[43] Thus, Article 12 of the 2008 Order, provided for "specified offences" which were either "specified violent offences" or "specified sexual offences." A specified violent offence was an offence as listed in Part 1 of Schedule 2. A threat to kill was a specified violent offence in accordance with that Schedule.

[44] Article 12 further provided for a specified offence to be a "serious offence" if it was specified in Schedule 1. Threats to kill were again specified by that Schedule as serious offences.

[45] Article 13 provided for the imposition of either life sentences or indeterminate custodial sentences for "serious offences" stating, inter alia:

> "13.—(1) This Article applies where—
>
> (a) a person is convicted on indictment of a serious offence committed after the commencement of this Article; and
>
> …
>
> (c) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences.
>
> (2) If—

(a) the offence is one in respect of which the offender would apart from this Article be liable to a life sentence, and

(b) the court is of the opinion that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of such a sentence,

the court shall impose a life sentence.

(3) If, in a case not falling within paragraph (2), the court considers that an extended custodial sentence would not be adequate for the purpose of protecting the public from serious harm occasioned by the commission by the offender of further specified offences, the court shall—

(a) impose an indeterminate custodial sentence; and

(b) specify a period of at least 2 years as the minimum period for the purposes of Article 18, being such period 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.

…

(4) An indeterminate custodial sentence is—

(a) where the offender is aged 21 or over, a sentence of imprisonment for an indeterminate period,

(b) where the offender is under the age of 21, a sentence of detention for an indeterminate period at such place and under such conditions as the Secretary of State may direct,

subject (in either case) to the provisions of this Part as to the release of prisoners and duration of licences.

(5) A person detained pursuant to the directions of the Secretary of State under paragraph (4)(b) shall while so detained be in legal custody.

> (6) An offence the sentence for which is imposed under this Article is not to be regarded as an offence the sentence for which is fixed by law.
>
> (7) Remission shall not be granted under prison rules to the offender in respect of a sentence imposed under this Article."

The applicant's case

[46] In essence, this case turns on the statutory interpretation of what is meant by the phrase in Schedule 1, para 15(2) of the 1997 Act: "he shall be treated for the relevant purposes as if his sentence had been an equivalent sentence passed by a court in the place to which he is transferred." It is the applicant's case that had the DoJ, at the point of unrestricted transfer in August 2021, treated the sentence that the applicant had received in England as if his sentence had been passed by a court in Northern Ireland, and had done so, properly, it could not have come to a view that the proper "equivalent sentence" was a sentence by way of ICS.

[47] It is argued that this is so for two fundamental reasons.

[48] Firstly, it is argued that there had been no power to impose an ICS at the time the applicant was sentenced in England on 28 March 2008, as an ICS sentence only became available to the courts in this jurisdiction on 15 May 2008.

[49] Secondly, if the applicant is wrong about this, he says that an ICS would not in any event have been imposed for an offence of this nature – rather an Extended Custodial Sentence (ECS) would have been imposed. He argues that that would be the "equivalent" sentence.

IPP and ICS – equivalent sentences?

[50] I propose to deal with the second submission first. Paragraph 15(2) of Schedule 1 is a "deeming provision."

[51] The Supreme Court addressed the concept of deeming provisions in *R(Fowler) v Commissioner for Revenue and Customs* [2020] UKSC 22. At para [27] of the unanimous judgment, the court stated:

> "**Deeming provisions**
>
> 27. There are useful but not conclusive dicta in reported authorities about the way in which, in general, statutory deeming provisions ought to be interpreted and applied. They are not conclusive because they may fairly be said to point in different directions, even if not actually

contradictory. The relevant dicta are mainly collected in a summary by Lord Walker in *DCC Holdings (UK) Ltd v Revenue and Customs Comrs* [2011] 1 WLR 44, paras 37-39, collected from *Inland Revenue Comrs v Metrolands (Property Finance) Ltd* [1981] 1 WLR 637, *Marshall v Kerr* [1995] 1 AC 148; 67 TC 56 and *Jenks v Dickinson* [1997] STC 853. They include the following guidance, which has remained consistent over many years:

(1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.

(2) For that purpose, the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.

(3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.

(4) A deeming provision should not be applied so far as to produce unjust, absurd, or anomalous results, unless the court is compelled to do so by clear language.

(5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real. As Lord Asquith memorably put it in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109, at 133:

> 'The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.'"

[52] These passages are also reflected in *Bennion, Bailey and Norbury on Statutory Interpretation* (Eighth Edition, December 2022). At section 17.8 under the heading "Deeming provisions of statutory hypotheses" the author says the following:

"Although a useful drafting device, deeming can be problematic because 'it is always difficult to foresee all the possible consequences of the artificial state of affairs that the deeming brings into being.' Where an act is silent as to the limits to the operation of a deeming provision, the interpreter is left to grapple with the consequences.

In determining the precise scope of a deeming provision, the court must, as with any other question of construction, attempt to discover the legislative intention from the words used and the other relevant interpretive criteria. The effect of the authorities discussed below may be summarised as being that the intention of a deeming provision, in laying down hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further."

The following general guidance on how deeming provisions should be approached, was given by Peter Gibson J in *Marshall (Inspector of Taxes) v Kerr*:

> 'For my part, I take the correct approach in construing a deeming provision to give the words used an ordinary and natural meaning, consistent, so far as possible, with the policy of the Act and the purposes of the provisions so far as such deeming and incorporation of provisions by reference policy and purpose can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and instances inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so.'

This statement in principle has been cited with approval in many subsequent cases."

[53] For the purposes of this submission, I proceed on the basis that an ICS would have been available to a Northern Ireland court when the applicant was sentenced to

the IPP. In that event, I consider that the DoJ is correct in its determination that an ICS should be deemed to be an equivalent sentence under para 15(2). The statute is clear. It does not provide for "the equivalent sentence." It does not provide for "an identical sentence." Equivalence requires an element of evaluative judgment.

[54] True it is that there are differences between an ICS and an IPP. Under the 2003 Act sentencing regime, once a court determines the applicant has been convicted of a serious offence and meets the "dangerousness" provision then the sentencer must impose an IPP. Under the 2008 Act in this jurisdiction, the court in those circumstances has the option of imposing an Extended Custodial Sentence (ECS), something which is not available to the sentencer in England. (The 2003 Act does provide for a form of extended sentence under Section 227 but the circumstances do not apply in the applicant's case.)

[55] Thus, Mr Hutton argues that a sentencing judge in Northern Ireland, had the option been available to him, would have, in fact, imposed an ECS rather than an ICS. He says so with reference to the other significant difference between an ICS and an IPP in that an ICS can only be imposed when a 24-month tariff is the minimum period appropriate to satisfy the requirements of retribution and deterrence. In the applicant's case the sentencing judge considered that a 12-month tariff was appropriate. In such circumstances, Mr Hutton argues that an ECS would be the appropriate equivalent sentence (subject at all times to his argument based on the fact that an ICS was not available to the sentencing judge at the relevant time).

[56] Notwithstanding these differences, as indicated, (subject to the "availability" argument) I conclude that an ICS would be an equivalent sentence to an IPP for the purposes of the relevant statutory provision. "Equivalent" etymologically means something like equal in value, force, or effect – which is an apt description of the relationship between both disposals. The sentencing judge concluded that the applicant posed a significant risk of serious harm through future offending. In those circumstances, the court imposed a sentence in accordance with the statutory scheme, that ensured that the applicant would not be released until he was considered no longer to present such a risk. The core of an IPP was that someone previously assessed by the court as dangerous would only be released if he or she satisfied the Parole Board in England & Wales (the Parole Commissioners in this jurisdiction) that they no longer posed such a risk. An ECS does not carry the same release regime as an IPP, whereas an ICS does.

The key issue – must the "equivalent sentence" have been available in the receiving jurisdiction at the time of the original sentence?

[57] Having come to that conclusion this case turns on whether or not the applicant is correct in his submission that an ICS (or even an ECS) cannot be treated as an equivalent sentence because at the time the applicant was sentenced there was no power in any court in this jurisdiction to impose such a sentence. In that event, the applicant argues that the only sentence that could have been imposed was an

ordinary fixed term sentence under the pre-2008 regime, which would have applied the statutory maximum of 10 years for the particular offence of threats to kill. The applicant argues that the "equivalent" sentence should be determined without reference to the 2008 Order at all.

[58] I return to the principles of statutory interpretation in relation to deeming provisions referred to earlier in this judgment.

[59] The starting point is the meaning of the words themselves. The wording of para 15(2) is couched in the past tense:

> "… as if his sentence had been an equivalent sentence passed by a court …"
> (Emphasis added)

[60] In similar vein, Article 13 of the 2008 Order makes it clear that an ICS is only available for "a serious offence committed after the commencement of this Article. (Emphasis added)

[61] Dr McGleenan argues that para 15(2) does not contain any temporal reference of the kind relied upon by the applicant. He argues that there is no temporal constraint.

[62] Importantly, he argues that the deeming provision in para 15(2) has a defined and limited scope. It is limited to "the relevant purposes." These purposes are defined in para 6(2)(b) (infra) as:

> "… the purposes of his detention under and release from his sentence and, where applicable, the purposes of his supervision, possible recall following release and any supervised default order."

[63] Dr McGleenan argues that the applicant conflates a sentencing exercise with the administration/operation of his sentence.

[64] He argues that the statutory intention is clear. The intention was for a prisoner to be treated in the receiving jurisdiction as he or she would have been in the sending jurisdiction. The intention was not to enable a prisoner to benefit from a significant reduction in sentence or a significant relaxation of the regime governing release as a result of a transfer.

[65] In assessing the competing submissions, I consider the drafting of para 15(2) in the past tense referring to the applicant's sentence is significant. I consider that the proper interpretation of para 15(2) is that there must be a temporal point of reference in relation to the purported equivalent disposals. The plain meaning of the

words points to that temporal point being at the time the applicant's sentence was imposed.

[66] If Parliament had intended the equivalent offence to be that applicable at the time of the unrestricted transfer, I consider that it would have said so.

[67] The distinction between a restricted transfer and an unrestricted transfer is significant. Clearly, Parliament anticipated a scenario where a prisoner subject to an unrestricted transfer will be treated differently from one subject to a restricted transfer. Thus, in deciding to grant an unrestricted transfer the Secretary of State is in a position to consider whether as a consequence of such a transfer there was likely be any effect on the length of time which the prisoner would be required to serve. This addresses the difficulty that arose in the Northern Ireland cases under the previous regime where transfers were refused because of the difference in remission provisions.

[68] Dr McGleenan says that, in this case, the difference between a restricted prisoner and an unrestricted prisoner is that in the former the applicant's release would be considered by the Parole Board in England whereas as an unrestricted prisoner his release would be considered by the Parole Commissioners here.

[69] One issue that was not argued before me is what would be "an equivalent sentence passed by a court in Northern Ireland" in the case of a prisoner subject to a restricted transfer – see para 9(2)(b) of the First Schedule to the 1997 Act. It does not form part of the applicant's case and, therefore, I leave that issue open.

[70] I consider that there is a significant difficulty about making an equivalent sentence – and therefore, the now governing sentence, out of a statutory disposal that was unavailable in this jurisdiction at the time of imposition of the sentence. I do not consider that the "relevant purposes" wording in paragraph 6(2)(b) of Schedule 1 has the effect contended for by Dr McGleenan. That wording defines the purposes as "his detention under and release from his sentence." The sentence remains the starting point. The purposes include all issues arising from the sentence including his release, his supervision, possible recall following release and any supervised default order.

[71] Returning to the concept of the fiction which the deeming provision deals with, the DoJ argument envisages a further fiction that the equivalent sentence here does not need to be one that could have been passed at the time of commission of the offence, but merely needs to be operative at the time of transfer.

[72] I consider that this is a step too far. In my view, the proper interpretation of the provisions is that the equivalent sentence must be one that was available to the receiving jurisdiction at the time of the sentence.

[73] I also take into account the principle that in the context of a criminal statutory provision when the law is unclear or ambiguous the court should apply the law in a manner that is most favourable to the defendant.

[74] I am not blind to the potential consequences of this decision. If the court finds for the respondent, it will mean that the applicant remains in custody way beyond the 12-month tariff period that was originally imposed. If the court finds for the applicant, someone who is deemed by the Parole Commissioners to continue to represent a significant risk of significant harm to the public will be released from custody. Recognising those consequences, the court is compelled under the principles of statutory construction to come to the conclusion it has. In the words of the Supreme Court:

> "The court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real."

Conclusion

[75] For the reasons set out above I am satisfied that an ICS is not an equivalent sentence as defined under Schedule 1, para 15 of the 1997 Act, from the time the applicant was subject to an unrestricted transfer.

[76] In that event, I agree with Mr Hutton's submission that the equivalent sentence would be a fixed term sentence under the pre-2008 regime, which would have applied the statutory maximum of 10 years for the particular offence of threats to kill committed by the applicant.

[77] I will hear the parties on the appropriate order/relief that the court should make in light of its findings.