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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 AN APPLICATION BY TERENCE MARKS FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION OF THE MINISTER FOR JUSTICE**

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**John Larkin QC and Aoife Macauley (instructed by McNamee McDonnell, Solicitors) for the Applicant**
**Tony McGleenan QC and Philip McAteer (instructed by the Departmental Solicitor's Office) for the Respondent**
**Tony McGleenan QC and Philip McAteer (instructed by the Crown Solicitor's Office) for the Notice Party**

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**SCOFFIELD J**

## Introduction

[1] By this application for judicial review, the applicant, Terence Marks, seeks to challenge a decision of the Minister in charge of the Department of Justice in Northern Ireland ("the Minister") not to exercise the Royal Prerogative of Mercy (RPM) in his favour. The central ground of challenge is that the Minister has erred in law in considering that any exercise of the RPM in respect of the applicant is a matter for the Secretary of State for Northern Ireland ("the Secretary of State"), who has been joined as a notice party to these proceedings, rather than for her, the Minister. For his part, the Secretary of State agrees with the Minister's analysis. As presented, the application does not concern the substance of a decision on the exercise of the RPM in the applicant's case; but merely the question of who is the correct office-holder to consider the matter.

[2] Mr Larkin QC and Ms Macauley appeared for the applicant. Mr McGleenan QC and Mr McAteer appeared for both the Minister and the Secretary of State. I am grateful to all counsel for their helpful written and oral submissions.

**Criminal cause or matter**

[3] Since the key issue in contention is (what has been referred to as) the 'allocation' of the RPM, the applicant did not consider that this application was a criminal cause or matter for the purposes of RCJ Order 53, rule 2 or onward appeal rights under the Judicature (Northern Ireland) Act 1978. The respondent and notice party agreed with this analysis.

[4] If the issue in contention was the legality of a substantive refusal to exercise the RPM, further consideration may have had to be given to whether or not such a challenge was a criminal cause or matter. In *R v Secretary of State for Northern Ireland, ex parte Hannaway and Others (as the National Graves Association)* [1995] NI 159, it was assumed that such a challenge had a criminal character and the application was heard by a Divisional Court of the Queen's Bench. In contrast, in *Re McGeough's Application* [2012] NIQB 11 and [2012] NICA 28, the matter was treated as not constituting a criminal cause or matter. In light of the relatively recent guidance provided by the Supreme Court in *Re McGuinness' Application* [2020] UKSC 6, it seems to me likely that such a case would properly now be considered not to fall within the category which required to be heard by a Divisional Court, since the question of whether a penalty which had previously been imposed (either by a court or by operation of law) ought, by the exercise of the RPM, to be remitted would not be one "focused directly on the process for bringing and determining criminal charges" (see para [69] of the judgment of Lord Sales). For present purposes, however, that does not need to be determined; and I proceed on the basis of the position agreed between the parties, which appears to me to be correct.

**Factual Background**

[5] The applicant was one of six persons sentenced by Colton J on 13 November 2020. He was sentenced in respect of two charges, namely (1) belonging to or professing to belong to a proscribed organisation contrary to section 11(1) of the Terrorism Act 2000 ("the Terrorism Act" or "the 2000 Act"); and (2) receiving weapons training or instruction contrary to section 54(2) of the Terrorism Act. In respect of each count, the applicant received a sentence of four years' imprisonment, with the custodial period being specified as 50% of the pronounced term. The sentencing remarks are reported as *R v Morgan & Others* [2020] NICC 14. Both sentences were to run concurrently.

[6] Mr McGleenan took care to direct my attention to the sentencing remarks of the trial judge, which provide details of the applicant's offending behaviour. The prosecution arose from covert surveillance of a property in Newry, during which a

number of persons, including the applicant, were recorded. As Colton J noted at paras [7]-[8]:

> "The discussions reveal that the defendants belonged to a proscribed organisation, namely the Irish Republican Army and discussed matters relating to terrorist activities. Not all of the defendants were present at all of the discussions. Some of the counts rely on the totality of the conversations and other counts relate to specific conversations on specific dates.
>
> At their most serious the conversations relate to potential strategies for their organisation including how to deal with other "dissident" Republican organisations, the size and structure or their organisation, the identification of possible targets, training and sourcing of weapons and materials for pipe bombs and sources of funding for criminal activity including robbery."

[7] The circumstances of the applicant's offending are specifically dealt with at paras [354] to [361] of the sentencing remarks. The key evidence against him related to his presence at a meeting on 15 October 2014, during the course of which one of the other defendants (Patrick Joseph Blair) was explaining to the applicant how to make a firebomb. Albeit the applicant was only present in the series of meetings for a short period of time, the trial judge said this:

> "On 15 October [Marks] engages with Blair specifically about the making of pipe bombs. Given his presence on that occasion and on two other occasions it can be inferred that the defendant was fully aware that those present belonged to a terrorist organisation and that he is someone who is trusted by them.
>
> His presence at the meeting on 15 October 2014 supports the charge of belonging to a proscribed organisation and attending the premises to receive training or instruction in the making or use of weapons."

[8] The applicant contends that, after having been sentenced in November 2020, his sentence was retrospectively increased by the Counter-Terrorism and Sentencing Act 2021 ("the 2021 Act"). Whether it is correct to say that the sentence was "increased" by the operation of that Act is, perhaps, a matter of semantics. For practical purposes, however, it is clear that the period of time which the applicant was required to spend in custody was increased. Under the new regime, he would no longer be automatically released at the conclusion of the judicially determined custodial period halfway through his sentence, at the 24 month point. Rather, he

would first have to serve two-thirds of his sentence, at which point (some 32 months into his sentence) he would become eligible for release subject to an assessment of his suitability for release by the Parole Commissioners for Northern Ireland (PCNI).

[9] On the best case scenario for the applicant therefore, his expected date of release from prison moved from 13 February 2022 to 13 October 2022. If he is not then deemed eligible for release by the PCNI, he might remain in custody until 14 February 2024.

[10] In light of this change in the law, Mr Marks (and others similarly affected) brought a late appeal against sentence, arguing that the 2021 Act was in breach of his Convention rights under Articles 5, 6 and 7 ECHR. The Court of Appeal agreed that there was a breach of Article 7: see *R v Morgan, Marks, Lynch & Heaney* [2021] NICA 67, at para [113]. However, the court further considered that section 3 of the Human Rights Act 1998 (HRA) did not permit the relevant provision (section 30 of the 2021 Act) to be read in a way which removed the effect of which the applicant complained; and that it was limited in terms of the remedy it could grant to the making of a declaration of incompatibility under section 4 of the HRA: see para [131] of the judgment. The court expressly recognised that the grant of such a remedy under the scheme of the HRA did not "affect the validity, continued operation or enforcement" of the new provisions, which remained operative. It was for Parliament to decide whether, and if so how, to amend the law in response to the court's finding of incompatibility.

[11] The Ministry of Justice (the department of the United Kingdom Government with responsibility for the 2021 Act) is presently appealing the decision of the court of Appeal in Northern Ireland to the United Kingdom Supreme Court under section 5(4) of the HRA; and the applicant has been given leave to cross-appeal on the question of remedy. In the meantime, however, section 30 of the 2021 Act (and Article 20A of the Criminal Justice (Northern Ireland) Order 2008, which it inserted) remain in force and the applicant remains in custody.

[12] This situation – with a declared breach of Article 7 ECHR but no practical remedy in the face of the will of Parliament as expressed in section 30 of the 2021 Act – has caused a number of those offenders affected (and their legal representatives) to think of other means by which a remedy may be pursued or potentially achieved. For instance, I dealt with a related application for judicial review in *Re Heaney's Application* [2022] NIQB 8.

[13] For the applicant's part, he has sought the exercise of the RPM from the respondent Minister in respect of that period of imprisonment which will go beyond the judicially determined custodial period. This application for judicial review was brought urgently, and heard during the Long Vacation, in recognition that – if the applicant was successful and the Minister was to then reconsider his request for the exercise of the RPM and grant it – he is losing his liberty in the meantime.

[14] The respondent's position is that she does not have power to exercise the RPM in the applicant's case as a result of the matter being a reserved matter pursuant to paragraph 9(1)(d) of Schedule 3 to the Northern Ireland Act 1998 (NIA), discussed further below.

[15] The parties' respective positions were clarified by means of correspondence throughout the early part of this year. The applicant's solicitors sought an exercise of the RPM in his favour from the Minister. However, that request was responded to by the Crown Solicitor's Office on behalf of the Secretary of State, who had considered the request and determined that it should be refused. Pre-action correspondence followed, in the course of which the Minister indicated her view that she had no power to exercise the RPM in this case (which is why the request had been passed to the Secretary of State). Notwithstanding further correspondence, the respondent maintained her position, in the teeth of opposition from the applicant, that his request was not a matter for her in the circumstances of his case; and that the Secretary of State was the correct decision-maker.

[16] It is an agreed position that the appropriate relief at this point, should the applicant be successful in his claim, is merely an order quashing the Minister's previous decision and remitting the applicant's request to her for further consideration. It is not contended that the court should seek to dictate the result of such reconsideration (although the applicant has raised an argument that the effect of section 24(1)(a) of the NIA is such that the Minister would have no power to refuse his request for the exercise of the RPM). That would be an issue for another day.

**The 2021 Act and 2008 Order**

[17] The 2021 Act received Royal Assent on 29 April 2021 and, by virtue of section 50, section 30 of the Act (with which the applicant is chiefly concerned) entered into force on the day after the Act was passed, that is to say on 30 April 2021. Section 30 introduced Article 20A into the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"). Article 20A is entitled, 'Restricted eligibility for release on licence of terrorist prisoners', and, insofar as material, provides as follows:

> "(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

(b) it 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.

…

(9) For the purposes of this Article—

…

"commencement date" means the date on which section 30 of the Counter-Terrorism and Sentencing Act 2021 comes into force;

"relevant part of the sentence" means—

(a) in relation to an extended custodial sentence or an Article 15A terrorism sentence, two-thirds of the appropriate custodial term;

(b) in relation to any other sentence, two-thirds of the term of the sentence."

[18] The applicant is a fixed-term prisoner who is serving a sentence imposed in respect of offences within Article 20A(2) and who had not been released on licence before the commencement date of the 2021 Act. The result of the application of the above provisions, therefore, is as described at paras [8]-[9] above.

**Relevant provisions of the Northern Ireland Act 1998**

[19] The basic structure of the devolution settlement was briefly summarised in *Re SEAT & Woods' Application* [2021] NIQB 93, at paras [40]-[48], in the context of the legislative competence of the Northern Ireland Assembly. What are commonly referred to as 'devolved matters' are legally termed "transferred matters"; and transferred matters consist of everything that is neither an "excepted matter" nor a "reserved matter" (see section 4(1) of the NIA). The list of excepted matters is set out in Schedule 2 to the NIA; and the list of reserved matters is set out in Schedule 3. These distinctions and classifications are key to the resolution of the present proceedings.

[20] Section 23(2) of the NIA provides as follows:

> "As respects transferred matters, the prerogative and other executive powers of Her Majesty in relation to Northern Ireland shall, subject to subsections (2A) and (3), be exercisable on Her Majesty's behalf by any Minister or Northern Ireland department."

[21] In principle, therefore, the prerogative powers of Her Majesty in relation to Northern Ireland – including the exercise of the RPM in this jurisdiction – are exercisable on Her Majesty's behalf by a minister of the devolved administration. When it comes to the RPM, by virtue of section 23(2A), to which section 23(2) is subject, *that* prerogative power is exercisable *only* by the Minister in charge of the Department of Justice. Crucially for present purposes however, section 23(2) only gives power to local ministers to exercise prerogative powers in relation to Northern Ireland "as respects transferred matters." The question is therefore whether the exercise of the RPM which the applicant seeks is as respects a transferred matter.

[22] The respondent and notice party contend that the exercise of the RPM in this case would be in respect of a reserved matter. That is because paragraph 9(1)(d) of Schedule 3 identifies the following as a reserved matter: "in relation to terrorism, the

exercise of the Royal prerogative of mercy." In construing this phrase, Mr McGleenan asked me to consider by way of context the full text of paragraph 9(1) of Schedule 3, which I therefore set out below for completeness:

> "The following matters —
>
> (a) the subject-matter of Parts 2 and 3 of the Regulation of Investigatory Powers Act 2000, so far as relating to the prevention or detection of crime (within the meaning of that Act) or the prevention of disorder;
>
> (aa) the subject-matter of the following provisions of the Investigatory Powers Act 2016, so far as relating to the prevention or detection of serious crime (within the meaning of that Act)—
>
> (i) sections 3 to 10 and Schedule 1,
>
> (ii) Part 2, and
>
> (iii) Chapter 1 of Part 6;
>
> (ab) the subject-matter of section 11, Parts 3 and 4 and Chapter 2 of Part 6 of the Investigatory Powers Act 2016, so far as relating to the prevention or detection of crime (within the meaning of that Act) or the prevention of disorder;
>
> (ac) the subject-matter of section 12 of, and Schedule 2 to, the Investigatory Powers Act 2016, so far as relating to the prevention or detection of crime (within the meaning of that Act);
>
> (b) in relation to the prevention or detection of crime, the subject-matter of Part 3 of the Police Act 1997;
>
> (c) the operation of—
>
> (i) sections 21 to 40 of, and Schedules 3 and 4 to, the Justice and Security (Northern Ireland) Act 2007, and
> (ii) section 102 of, and Schedule 12 to, the Terrorism Act 2000;
>
> (d) in relation to terrorism, the exercise of the Royal prerogative of mercy;

(e) the operation of sections 1 to 8 of, and Schedule 1 to, the Justice and Security (Northern Ireland) Act 2007 and the operation of Part 1 of the Criminal Procedure and Investigations Act 1996 where a certificate under section 1 of the 2007 Act has been issued;

(f) in relation to the regulation of drugs or other substances through the criminal law (including offences, exceptions to offences, penalties, powers of arrest and detention, prosecutions and the treatment of offenders) or otherwise in relation to the prevention or detection of crime—

(i) the subject-matter of the Misuse of Drugs Act 1971;
(ii) the subject-matter of sections 12 and 13 of the Criminal Justice (International Co-operation) Act 1990;

(g) the National Crime Agency;

(h) in relation to prisons, the accommodation of persons in separated conditions on the grounds of security, safety or good order."

**Summary of the parties' respective positions**

[23] For the applicant, Mr Larkin contended that the word "terrorism" in paragraph 9(1)(d) of Schedule 3 to the NIA is to be given the same definition as is provided for in section 1(1) of the Terrorism Act 2000. It provides as follows:

> "In this Act "terrorism" means the use or threat of action where –
>
> (a) the action falls within subsection (2),
>
> (b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and
>
> (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause."

[24] More particularly, the applicant relies upon the restrictive definition of the "action" the use or threat of which is required to satisfy the definition of terrorism. That is set out in section 1(2) of the 2000 Act in the following terms:

> "Action falls within this subsection if it –
>
> (a) involves serious violence against a person,
>
> (b) involves serious damage to property,
>
> (c) endangers a person's life, other than that of the person committing the action,
>
> (d) creates a serious risk to the health or safety of the public or a section of the public, or
>
> (e) is designed seriously to interfere with or seriously to disrupt an electronic system."

[25] The circumstances of the applicant's offending do not, he submits, meet the requirements of this definition since any relevant action on his behalf did not involve serious violence against a person, serious damage to property, or the other danger, risks or interference contemplated by section 1(2). His offending was not therefore "terrorism" within the relevant definition for the purposes of the 2000 Act or Schedule 3 to the NIA, such that the use of the RPM in respect of the penalty for that offending is not a reserved matter (and, so, is a transferred matter).

[26] The applicant accepts that his offending, although not amounting to "terrorism" on his case, amounted to "subversion" within the meaning of that term in paragraph 17 of Schedule 2 to the NIA. Thus, he contends, the Northern Ireland Assembly would not be entitled to legislate to amend the provisions of the Terrorism Act under which he was convicted. That is because paragraph 17 of Schedule 2 defines the following as an excepted matter:

> "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; …"

[27] In this way, the applicant's argument offers reassurance that, if his primary contention is correct, it would not open the way for the devolved Assembly to legislate in relation to large portions of the Terrorism Act, since much if not all of what might ordinarily be thought to relate to terrorism will be covered by the term "subversion." Only the narrower category of terrorism is excluded from the Justice Minister's potential exercise of the RPM by Schedule 3 of the NIA, he asserts.

[28] For the respondent, Mr McGleenan was inclined to accept that the applicant's offending did not fall within the strict definition of terrorism contained in section 1 of the Terrorism Act. The central plank of his submissions was that the phrase "terrorism" in paragraph 9 of Schedule 3 to the NIA did not require to be read, and indeed was not intended to be read, as importing that narrow definition. Had that been intended, the draftsman of the NIA – or, more accurately, the draftsman of the Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010 (SI 2010/977) ("the 2010 Order") which inserted the relevant provisions at the time of devolution and policing and justice – would have made as much clear. Rather, the phrase "terrorism" in that context was to be given a more natural meaning, which would comfortably include the offences of which the applicant was convicted and the behaviour underpinning them. In Mr McGleenan's submission, the particularity and precision with which other sub-paragraphs of paragraph 9(1) of Schedule 3 were expressed was to be contrasted with the simple and broad sweep of the wording of paragraph 9(1)(d).

**The correct approach to the definition of "terrorism" in paragraph 9(1)(d)**

[29] For my part, I have some doubt about the correctness of the concession on the part of the respondent and notice party that, if the section 1 definition of "terrorism" from the 2000 Act applied, the applicant's offending would not fall within that definition. The applicant's submissions understandably focused on the nature of the "action" which is at issue and which is defined in section 1(2) of that Act. However, terrorism for the purposes of the Terrorism Act includes not merely the *use* of such action but also the *threat* of such action. To my mind, the receipt of training in relation to firebombs or pipebombs inherently involves the threat of later use of those devices by the recipient of the training (at least in the circumstances of the applicant's conviction). Why else would the training be given? In turn, the use of such explosive devices inherently involves the creation of a serious risk to health and safety. Moreover, section 1(3) of the 2000 Act provides that "the use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied", that is to say, whether or not the threat of such action involving explosives is designed to influence government or to intimidate the public or a section of the public. The parties also did not focus on section 1(5) of the Terrorism Act which provides that, "In this Act a reference to action taken *for the purposes of terrorism* includes a reference to *action taken for the benefit of a proscribed organisation*" [italicised emphasis added]. In that context, the 'actions' referred to are not merely those types of action falling within subsection (2), which is relevant only for the purposes of subsection (1)(a). Relevant action within subsection (5) is subject only to the inclusive definition of "action" in subsection (4)(a). Viewed in this way, the applicant's offending – which appears clearly to have been taken for the benefit of the proscribed organisation of which he was a member – may be considered to be action taken "for the purposes of terrorism".

[30] Nonetheless, I proceed on the basis that the key issue in the case, on which it turns, is whether the NIA imports the definition of "terrorism" contained in section 1 of the Terrorism Act for the purpose of interpreting its schedules. I do not consider that it does, for the reasons summarised below.

[31] When the NIA was enacted in 1998, it plainly could not have had the definition of "terrorism" in the later 2000 Act in mind. The word "terrorism" was used in the original text of the NIA in paragraph 17 of Schedule 2. It could not have been referring to the definition of terrorism upon which the applicant relies in these proceedings. It is true that the NIA, as enacted, might be argued to have imported the earlier (shorter and more restrictive) definition of "terrorism" contained in section 58 of the Northern Ireland (Emergency Provisions) Act 1996; but I see no reason why it should be thought to have done so.

[32] When Schedule 3 was amended by the 2010 Order upon the devolution of policing and justice, the word "terrorism" might then have been used in the same technical sense as it is used in section 1 of the 2000 Act. However, I find persuasive Mr McGleenan's submission that, if that had been the legislative intention, it could and would have been made clear in the wording inserted into Schedule 3 (or in some other amendment to the NIA). That is particularly the case where this would involve some change to the meaning of the existing use of the same term in Schedule 2, assuming (as I do) that "terrorism" is to be construed in the same way in each schedule. I also consider it significant that many of the other sub-paragraphs of paragraph 9(1) of Schedule 3 descend to considerable particularity – both in terms of specifying particular provisions of earlier Acts which remain reserved and, where necessary, providing or expanding a definition relevant to the understanding of the nature of the reserved matter in question (such as the definition of "prisons" in sub-paragraph (1)(h) at paragraph 9(2)). The Terrorism Act is itself referenced in sub-paragraph (c)(ii). Had the draftsperson wished to incorporate the technical definition of "terrorism" contained in section 1 of that Act, they could readily have done so. The failure to do so appears to me to be indicative of an intention that the phrase "terrorism" in paragraph 9(1)(d) should have its own meaning in the context of the NIA.

[33] The kernel of the applicant's case was based on the principle of construction set out in *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edition, LexisNexis) ("Bennion"), at section 18.9, as follows:

> "Where a term is used without definition in one Act, but is defined in another Act which is in pari materia with the first Act, the definition may be treated as applicable to the use of the term in the first Act…"

[34] In its commentary on this approach to construction, Bennion goes on to say this:

> "An Act often defines a term for the purposes of that Act only. Where the same term is used in a later Act that is *in* pari materia and no definition is included, the meaning of the term in the first Act may shed light on its meaning in the later Act. This is a particular application of the principle discussed in Code 21.5 that Acts in pari materia are, as a general rule, to be read as a whole. Whether it is appropriate to adopt a definition in one Act for the purposes of a later Act that is *in* pari materia will, however, ultimately depend on the context having regard to other interpretative criteria."

[35] Section 1(1) of the Terrorism Act specifically defines the word "terrorism" only for the purpose of *that* Act. That is no bar to the definition being incorporated into a later Act which is in pari materia with – that is to say, upon the same subject matter as – the Terrorism Act; albeit the starting point is that the definition is relevant for the purpose of the 2000 Act only. In my view, the NIA is not in para materia with the Terrorism Act. The latter is a penal statute applying across the United Kingdom. The former is a constitutional statute making provision for the government of Northern Ireland, in the particular context of the Belfast Agreement and 'the Troubles' which preceded it. The NIA is to be construed "generously and purposively" bearing in mind the values which the constitutional provisions were intended to embody (see *Robinson v Secretary of State for Northern Ireland* [2002] NI 390, at para [11], *per* Lord Bingham).

[36] In the 2000 Act "terrorism" is defined in a technical way to provide clarity in respect of the use of that term in the context of the creation of a variety of offences. It is defined for the purpose of that area of criminal law with which that Act is specifically and almost exclusively concerned. In contrast, the NIA is not concerned with terrorism in the same way. The term is used in the NIA only on a small number of occasions and in a different context, namely as a limited part of the devolution architecture whereby responsibilities are shared out between the Northern Ireland administration and the UK Government. There is no reason why the term should be used in the same way in the two statutory schemes. They are not schemes which would ordinarily be read together as two statutes which are in pari materia.

[37] The reason for listing excepted and reserved matters is because there were areas of policy which were judged as not (or not yet) suitable for consideration at devolved level but, rather, as more appropriate to be addressed at the UK level of government. The rationale for the respective allocations of responsibility will differ across the range of excepted and reserved matters. In the case of special powers and other provisions for dealing with terrorism, and the exercise of the RPM in relation to terrorism, there are likely to have been two broad reasons for this. First, these matters overlap with the protection of national security, which is generally excepted or reserved to the UK Government. Second, and more relevantly for present purposes, the history of the Troubles, and how terrorist offenders should be treated,

still remains a contentious issue in Northern Ireland which, it appears, it was thought best not to leave to the contestations of local politics.

[38] In this context, I see no reason why the word "terrorism" in either Schedule 2 or Schedule 3 of the NIA should be given the restricted and technical meaning set out in section 1 of the Terrorism Act. Rather, it is appropriate to give it a more ordinary and natural meaning.

[39] As careful consideration of the Terrorism Act itself shows, the word "terrorism", and the related word "terrorist", may be used in a number of ways which denote a wider sense of those terms than one tethered to the strict definition in section 1. For instance, there is a cross-heading in Part VI of the Terrorism Act, covering sections 54-58A, describing them as 'Terrorist offences.' That is so even though some of those offences – for instance, the collecting of information of a kind likely to be useful to a person committing or preparing an act of terrorism contrary to section 58(1) – may well not fall within the more restricted definition of terrorism contained in section 1. The offence of which the applicant was convicted under section 54 falls under this heading. In addition, pursuant to section 54(5), it would have been a defence for him to show that his involvement in the instruction or training which was provided was wholly for a purpose other than assisting, preparing for or participating in terrorism. It is not a necessary element of the offence, which requires to be proven by the prosecution, that a defendant's involvement is for such a purpose; but the offence is clearly considered to be a terrorist offence in a wider sense of that term than that used in section 1.

[40] Looking outside the 2000 Act, it is clear that "terrorism" is a term used in other statutory contexts in a wider sense also. As the respondent highlighted in her submissions, the phrase "terrorist prisoners" is used in the 2021 Act and the 2008 Order – that is to say, in the statutory provisions giving rise to the penalty the applicant wishes to be remitted by use of the RPM – to cover his case. That is because the offences of which he was convicted are both "*terrorism offences* punishable with imprisonment for life or more than two years" [italicised emphasis added] which are specified in Parts 2 and 4 of Schedule 2A of the 2008 Order. In addition, these offences are also viewed as "terrorism offences" for the purposes of the Counter-Terrorism Act 2008, so that Colton J made clear that the applicant was subject to the counter-terrorism notification requirements established by that Act: see para [387] of his sentencing remarks; and section 41(1)(a) of the 2008 Act.

[41] The applicant referred to and relied upon the Privy Council case of *Lennon v Gibson and Howes Ltd* [1919] AC 709 as authority for the proposition that a statutory definition from one enactment could be read across to another where the legislature has used the same words "in a similar connection" in each statute. The Privy Council held that, where this has been done, in the absence of any context indicating a contrary intention, the same meaning attaches to the words in the latter as in the former statute. I do not consider that this authority avails the applicant. Even assuming that the test is whether the term is used "in a similar connection", rather

than the two statutes being *in* pari materia, for the reasons given above I do not consider that the relevant term is used in a similar connection in each context in this case. Put another way, I consider that the differing statutory contexts are such as to displace any presumption that the legislature intended the definition in the 2000 Act to apply to the relevant term in the Schedules to the NIA. The context in which the term is used in Schedule 3 to the NIA seems to me to import a wider and more natural meaning – similar to that used in the later statutes dealing with the post-conviction treatment of terrorist offenders – than the specific definition used in section 1 of the Terrorism Act for the purposes of that Act.

[42] I did not find any particular assistance in the authorities cited in the applicant's written submissions dealing with the definition of "terrorism" contained in article 2 of the Criminal Injuries (Compensation) (Northern Ireland) Order 1977. That statutory scheme has a yet further definition of terrorism, for another statutory purpose entirely.

[43] It is unnecessary for present purposes for me to seek to set out a more lengthy, definitive description of what is embraced by the term "terrorism" in para 9(1)(d) of Schedule 3 to the NIA; and I do not purport to do so. It is sufficient for me to hold, as I do, that the offending of which the applicant was convicted – membership of a proscribed organisation and weapons training in the circumstances found by Colton J – falls within that categorisation. This is consistent with the wider use of the term "terrorism" in some of the other statutory contexts to which I have referred. I consider it also to fall within the natural meaning of the term in its context. I would venture that members of the public would be surprised to hear that convictions for membership of a terrorist organisation and the receipt of weapons training in that context were not considered to be terrorism for this purpose. Moreover, looking at the purpose and scheme of the NIA, these appear to me to be matters which were highly likely to have been intended to have been reserved to the UK authorities, rather than transferred to the devolved administration, for decision-making.

[44] I would also add that much of the respondent's written case – focussing on the use of the words "*in relation to* terrorism" in paragraph 9(1)(d) – did not really advance matters (as Mr McGleenan was disposed to accept in the course of his submissions). That is because those words govern the strength of the link between "terrorism" on the one hand and the RPM on the other; but say nothing about the breadth of the term "terrorism", which is really the key issue in this case. For the reasons given above, I nonetheless consider that the respondent was correct in law to consider that the exercise of the RPM in this case did relate to offending which constituted "terrorism" within the meaning of that term in the schedules to the NIA.

**Conclusion**

[45] By reason of the foregoing, I propose to dismiss the applicant's application for judicial review.

[46] I will hear the parties on the issue of costs; but provisionally consider that the usual orders should follow, namely that the applicant should bear the respondent's reasonable costs of these proceedings (such costs to be taxed in default of agreement), with such order not to be enforced without further order of the court in view of the fact that the applicant is a legally assisted person; that the notice party should bear his own costs; and that the applicant's costs should be taxed in accordance with Schedule 2 to the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981.