Hilary Term

[2020] UKSC 6

On appeal from: [2019] NIQB 10

JUDGMENT

In the matter of an application by Deborah McGuinness for Judicial Review (Northern Ireland)

In the matter of an application by Deborah McGuinness for Judicial Review (No 2) (Northern Ireland)

before

Lady Hale

Lord Wilson

Lord Carnwath

Lord Lloyd-Jones

Lord Sales

JUDGMENT GIVEN ON

19 February 2020

Heard on 15 October 2019

Appellant/Intervener	Respondent
(Department of Justice)	(Deborah McGuinness)
Neasa Murnaghan QC	Ronan Lavery QC
Terence McCleave BL	Michael O'Brien BL
(Instructed by Departmental Solicitor's Office (Belfast))	(Instructed by McIvor Farrell Solicitors Ltd (Belfast))
Appellant/Intervener	Intervener
(Michael Stone)	(Attorney General for NI)
David A Scoffield QC	John F Larkin QC,
Richard McConkey BL	Attorney General for Northern Ireland
(Instructed by McConnell Kelly & Co (Ballyhackamore))	(Instructed by Office of the Attorney General for Northern Ireland (Belfast))

Interven
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Commissio
Peter Coll
Philip McAte
(Instructed
Carson McD
LLP (Belfa

LORD SALES: (with whom Lady Hale, Lord Wilson, Lord Carnwath and Lord Lloyd-Jones agree)

1.
Two appeals have been brought to this court from the judgment of the Divisional Court of the High Court in Northern Ireland in In re McGuinness's Application [2019] NIQB 10. The judgment was given in relation to judicial review proceedings relating to the treatment of Mr Michael Stone, who was convicted of serious offences, is currently in prison, and who maintains that his case should be referred by the Department of Justice for Northern Ireland ("the Department") to the Parole Commissioners for Northern Ireland for consideration whether he should be released on licence. The respondent, Mrs McGuinness, the sister of one of the victims of Mr Stone's crimes, brought these proceedings against the Department to challenge the lawfulness of its decision to refer Mr Stone's case to the Commissioners and was successful in the Divisional Court. The Department appeals and, by a second appeal, so does Mr Stone, who was joined as an interested party in the proceedings.

2.
The Attorney General for Northern Ireland has intervened in the appeals in order to raise an issue regarding the jurisdiction of this court to entertain the appeals. That issue concerns the interpretation of section 41(1) of the Judicature (Northern Ireland) Act 1978 ("section 41(1)" and "the 1978 Act", respectively). By virtue of section 41(1), subject to certain conditions, there may be an appeal to the Supreme Court "from any decision of the High Court in a criminal cause or matter". The Attorney General submits that the decision of the Divisional Court which is under appeal is not a decision "in a criminal cause or matter", on the proper interpretation of that phrase. The Attorney General says that, contrary to what the parties have assumed to be the position, the proper avenue of appeal from the Divisional Court in these judicial review proceedings is to the Court of Appeal in Northern Ireland, not to the Supreme Court.

Factual background

3.
On 16 March 1988 Mr Stone attacked a group of mourners at Milltown Cemetery, Belfast, killing several of them. One of them was the brother of Mrs McGuinness. On 3 March 1989 Mr Stone was sentenced to life imprisonment and certain concurrent terms of imprisonment, having been convicted of six counts of murder, five counts of attempted murder, three counts of conspiracy to murder and 21 further counts relating to the possession of explosive substances, the possession of firearms and ammunition, causing an explosion and wounding with intent. The trial judge recommended a tariff of 30 years' imprisonment.

4.
The Belfast Agreement of 1998 between the United Kingdom and Irish governments included provision for the introduction of an early release scheme for certain prisoners convicted of crimes

related to sectarian violence in the Troubles. The Northern Ireland (Sentences) Act 1998 ("the 1998 Act") gave effect to that part of the Belfast Agreement.

5.
Mr Stone made an application under the 1998 Act to the Sentence Review Commissioners ("the SRC"), seeking early release pursuant to that Act. On 17 February 1999, the SRC made a formal determination acceding to Mr Stone's application for a declaration of eligibility for early release. The SRC specified that such eligibility would take effect on 22 July 2000. On 24 July 2000 Mr Stone was released on licence pursuant to the 1998 Act.

6.
On 24 November 2006, Mr Stone committed further serious offences, on this occasion at Parliament Buildings, Stormont. He was arrested the same day and was remanded in custody the following day.

7.
On 25 November 2006 the Secretary of State for Northern Ireland suspended Mr Stone's licence under the 1998 Act. The SRC became seised of his case again. On 6 September 2007 the SRC informed Mr Stone that they were minded to revoke his licence.

8.
On 14 November 2008 Mr Stone was convicted of two counts of attempted murder, together with seven further counts, mainly in relation to firearms and explosives offences, in respect of the incident at Stormont. On 8 December 2008 Mr Stone received two determinate sentences each of 16 years' imprisonment in respect of his convictions for attempted murder and other determinate sentences of between one and ten years' imprisonment, all to run concurrently. Mr Stone's subsequent appeals against conviction were dismissed in January 2011.

9.
On 6 September 2011 the SRC revoked the licence granted to Mr Stone under the 1998 Act, pursuant to which he had spent the period from 24 July 2000 to 24 November 2006 on release.

10.
The Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564) ("the 2001 Order") introduced a new regime according to which a life prisoner's tariff period before he could be considered for release on licence should be determined by a judge, and not by the Secretary of State. On 29 July 2013, pursuant to the 2001 Order, the Lord Chief Justice of Northern Ireland determined that the tariff in respect of the sentence of life imprisonment imposed on Mr Stone in relation to the incident at Milltown Cemetery in 1988 should be 30 years' imprisonment.

11.
By letter dated 20 September 2017 the Northern Ireland Prison Service, an agency of the Department of Justice for Northern Ireland, referred Mr Stone's case to the Parole Commissioners and notified them that his tariff expiry date would be 21 March 2018. This was on the footing that the period during which Mr Stone had been on release from prison on licence ("the contested period") should count towards the 30 year tariff period. On the basis of the same assumption, the Parole Commissioners conducted a three year pre-tariff review of Mr Stone's case on 20 March 2015. In the event, pursuant to the notice given by the Department, the Parole Commissioners made a formal determination dated 16 April 2018 that he should not be released upon expiry of his tariff.

12.

Mr Stone has a right under the 2001 Order to seek a further hearing before the Parole Commissioners, to seek his release on licence. The next hearing was scheduled to take place on 15 January 2019.

13.
In the meantime, on 22 November 2018 Mrs McGuinness issued these judicial review proceedings to challenge the Prison Service's notification of a tariff expiry date of 21 March 2018. On her submission, the Prison Service erred in law in bringing into account the contested period of release on licence in calculating Mr Stone's tariff expiry date. Leaving the contested period out of the calculation, his tariff expiry date would be on or about 22 July 2024.

14.
Mrs McGuinness and the Department of Justice made written submissions to the effect that the judicial review was a criminal cause or matter, so that it should be heard by a Divisional Court of the High Court with any appeal being to the Supreme Court, according to section 41(1). As the court explained in its judgment, it was decided that a Divisional Court should hear the case, notwithstanding that the court harboured reservations about whether the case really was a criminal cause or matter; but in view of the need for expedition in a case concerning the liberty of the subject it was decided on a pragmatic basis to treat it as such (para 2).

15.
The logic of this was that if it turned out that this is not a criminal cause or matter, any appeal could proceed in the usual way to the Court of Appeal. By contrast if the case proceeded as a normal judicial review without a Divisional Court and it then transpired that it was properly to be classified as a criminal cause or matter, there would be no right of appeal to the Court of Appeal and the opportunity to appeal to the Supreme Court would have been lost as well. The court proceeded in this way because of uncertainty which it thought arose from the jurisprudence on what it described as "this troubled subject" of the meaning of "criminal cause or matter" in the statute, including the decisions in In re JR27 [2010] NIQB 12 ("JR27") and R (Belhaj) v Director of Public Prosecutions (No 1) [2018] UKSC 33; [2019] AC 593 ("Belhaj").

16.
Mrs McGuinness's application for judicial review was heard by the Divisional Court on an expedited basis on 10 January 2019. Its judgment, upholding Mrs McGuinness's challenge, was delivered on 15 January 2019. On the basis that the Divisional Court was prepared to proceed on the basis that the judicial review was "a criminal cause or matter" within the meaning of section 41(1), as all the parties were willing to accept, it certified a question of law of general public importance for the purposes of section 41(2) of the 1978 Act.

17.
Pursuant to section 41(2), the Supreme Court granted permission to appeal to the Department of Justice and to Mr Stone.

18.
However, having learned of this, the Attorney General issued an application to intervene to dispute the assumption that Mrs McGuinness's application for judicial review constituted "a criminal cause or matter" within the meaning of section 41(1) and to challenge the jurisdiction of this court to hear the appeals. According to the Attorney General, Mrs McGuinness's application for judicial review constitutes a civil cause or matter in relation to which an appeal lies from the High Court to the Court

of Appeal. The Supreme Court granted permission to the Attorney General to intervene in the appeals and at the hearing of the appeals it also heard full argument on the jurisdiction point raised by him.

The 1978 Act regime

19.
Section 35 makes provision regarding the jurisdiction of the Court of Appeal to hear appeals from the High Court. It provides in relevant part as follows:

"(1) Subject as otherwise provided in this or any other statutory provision, the Court of Appeal shall have jurisdiction to hear and determine in accordance with rules of court appeals from any judgment or order of the High Court or a judge thereof.

(2) No appeal to the Court of Appeal shall lie -

(a) except as provided by the following provisions of this Part from any judgment of the High Court in any criminal cause or matter;

…"

20.
Section 39 made provision for appeals to the Court of Appeal in respect of convictions before and sentences imposed by the Crown Court (see now Part I of the Criminal Appeal (Northern Ireland) Act 1980, "the 1980 Act"). Section 40 made provision for appeals to the House of Lords from the Court of Appeal in respect of such matters (see now Part II of the 1980 Act, as amended by the Constitutional Reform Act 2005 to take account of the transfer of jurisdiction from the House of Lords to the Supreme Court).

21.
Section 41 (as amended) provides in relevant part as follows:

"41. Appeals to Supreme Court in other criminal matters

(1) Subject to the provisions of this section, an appeal shall lie to the Supreme Court, at the instance of the defendant or the prosecutor, -

(a) from any decision of the High Court in a criminal cause or matter;

(b) from any decision of the Court of Appeal in a criminal cause or matter upon a case stated by a county court or a magistrates' court.

(2) No appeal shall lie under this section except with the leave of the court below or of the Supreme Court; and, subject to section 45(3), such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the Supreme Court, as the case may be, that the point is one which ought to be considered by the Supreme Court.

…

(6) In this section, … -

(a) any reference to the defendant shall be construed -

(i) in relation to proceedings for an offence, and in relation to an application for an order of mandamus, prohibition or certiorari in connection with such proceedings, as a reference to the person who was or would have been the defendant in those proceedings;

(ii) in relation to any proceedings or order for or in respect of contempt of court, as a reference to the person against whom the proceedings were brought or the order was made;

(iii) in relation to a criminal application for habeas corpus, as a reference to the person by or in respect of whom that application was made,

and any reference to the prosecutor shall be construed accordingly;

(b) 'application for habeas corpus' means an application for a writ of habeas corpus ad subjiciendum and references to a criminal application or civil application shall be construed accordingly as the application does or does not constitute a criminal cause or matter;

(c) 'leave to appeal' means leave to appeal to the Supreme Court under this section;

…"

22.
Section 42 (as amended) provides in relevant part as follows:

"42. Appeals to Supreme Court in civil cases

(1) Subject to the provisions of this section and to any restriction imposed by any statutory provision which has effect by virtue of subsection (6), an appeal shall lie to the Supreme Court from any order or judgment of the Court of Appeal in any civil cause or matter.

(2) No appeal shall lie under this section except with the leave of the Court of Appeal or the Supreme Court.

…"

23.
Section 120 is the interpretation provision. Subsection (1) provides in relevant part as follows:

"(1) In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:-

'action' means a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of court, but does not include a criminal proceeding by or in the name of the Crown;

…

'cause' includes any action, suit or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by or in the name of the Crown;

…

'defendant' includes any person served with any writ of summons or process or served with notice of, or entitled to attend, any proceedings;

…

‘matter’ includes every proceeding in court not in a cause;

‘party’ includes every person served with notice of or attending any proceeding, although not named on the record;

‘plaintiff’ includes every person asking any relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding, whether the proceeding is by action, suit, petition, motion, summons or otherwise;

…”

The use of the phrase “a criminal cause or matter”

24.
The phrase has been used in two different statutory contexts. It was first used in 1873 in the context of a provision governing rights of appeal, and it has been used in later statutes in that context, including now in the 1978 Act in Northern Ireland and equivalent legislation in England and Wales. It has also been used in a different context in section 6 of the Justice and Security Act 2013 (“the JSA 2013”), in a provision concerned with determining the availability of a special closed procedure for dealing with secret intelligence material relevant to determination of judicial review and other proceedings. Belhaj was concerned with the meaning and effect of the phrase in this latter context. Caution is required in working out the extent to which the judgments in Belhaj provide guidance regarding the meaning of the phrase in the context of rights of appeal. The principle of consistent interpretation of statutory words and phrases across statutes, as referred to in Barras v Aberdeen Steam Trawling and Fishing Co Ltd [1933] AC 402 (“Barras”) at p 411, only applies where the language and context of the statutory provisions being compared is the same. In Belhaj, all the justices accepted that, for the purposes of the Barras principle, the statutory context of section 6 of the JSA 2013 is different from the statutory context of section 41(1) and its equivalent in England and Wales.

25.
In order to understand the contexts in which the phrase “a criminal cause or matter” has been used, it is relevant to trace briefly the historical background. In the 19th century, English law allowed very little scope for appeals in criminal cases: see Holdsworth, A History of English Law, vol I, p 217. Instead, in 1848 the Court for Crown Cases Reserved was created as a court constituted by a panel of judges to which a judge in a trial on indictment could refer questions of law for authoritative ruling. Where it emerged that a conviction was unsafe, recourse had to be made to the exercise of the prerogative of mercy. However, in addition, the Court of Queen’s Bench was a superior court which had jurisdiction to control the exercise of jurisdiction by magistrates and other inferior courts in criminal cases, as well as in civil matters, by means of the issue of the prerogative writs and by declaratory and other relief in what are in modern times categorised as judicial review proceedings.

26.
By section 4 of the Supreme Court of Judicature Act 1873 (“the 1873 Act”) the Supreme Court was constituted in two divisions:

“one of which, under the name of ‘Her Majesty’s High Court of Justice’ shall have and exercise original jurisdiction, with such appellate jurisdiction from inferior courts as is hereinafter mentioned, and the other of which, under the name of ‘Her Majesty’s Court of Appeal’ shall have and exercise appellate jurisdiction, with such original jurisdiction as hereinafter mentioned …”

27.
By section 16 of the 1873 Act, the High Court was designated a superior court of record and the original jurisdiction of a range of specified courts, including the Court of Queen's Bench, was transferred to it. By section 19, the Court of Appeal was given jurisdiction to hear appeals from the High Court, save as set out later in the Act. By section 47, the judges of the High Court were given jurisdiction to hear Crown cases reserved, as follows:

"The jurisdiction and authorities in relation to questions of law arising in criminal trials which are now vested in the justices of either Bench and the Barons of the Exchequer by the Act of the session of the 11th and 12th years of the reign of Her present Majesty, Chapter 78, intituled 'An Act for the further amendment of the administration of the Criminal Law', or any Act amending the same [that is, the Court for Crown Cases Reserved], shall and may be exercised after the commencement of this Act by the judges of the High Court of Justice, or five of them at the least, of whom the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, or one of such chiefs at least, shall be part. The determination of any such question by the judges of the said High Court in manner aforesaid shall be final and without appeal; and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges …" (Emphasis added)

28.
Section 71 of the 1873 Act provided that:

"the practice and procedure in all criminal causes and matters whatsoever in the High Court of Justice and in the Court of Appeal respectively, including the practice and procedure with respect to Crown Cases Reserved, shall be the same as the practice and procedure in similar causes and matters before the passing of this Act."

29.
Section 100 of the 1873 Act provided definitions of relevant terms equivalent to those in section 120 of the 1978 Act.

30.
The 1873 Act included provision (section 20) to abolish the appellate jurisdiction of the House of Lords, but that was never brought into effect. Its implementation was postponed until 1875 by section 2 of the Supreme Court of Judicature (Commencement) Act 1874 and then until 1876 by section 2 of the Supreme Court of Judicature Act 1875 ("the 1875 Act"), before being repealed by section 24 of the Appellate Jurisdiction Act 1876.

31.
Section 71 of the 1873 Act was replaced by section 19 of the 1875 Act, which made similar provision.

32.
It was established early on that the last clause of section 47 of the 1873 Act was intended simply to freeze the pre-existing position in relation to appeals in criminal cases, both as regards the High Court sitting in place of the Court for Crown Cases Reserved (from which there had been no appeal) and in relation to the other aspects of jurisdiction in criminal cases which were transferred to it; "the general intention of the section being not to take away any right of appeal which already existed, but, on the other hand, not to give any new right of appeal" in such cases (as Lord Coleridge CJ explained in R (Hargraves) v Steel (1876) 2 QBD 37, p 40; see also pp 41-42 per Mellish LJ and p 42 per Brett

JA; and this view was confirmed in R v Fletcher (1876) 2 QBD 43, pp 44-45 per Mellish LJ and pp 46-47 per Brett JA).

33.
In the Steel case, an order for costs against a prosecutor in a criminal case made by a master in the Crown Office of the High Court, on the basis of a statutory provision which stipulated that costs should follow the event, was held to be "part of the procedure in a criminal matter" (p 41 per Lord Coleridge CJ). Therefore, according to section 47 no appeal lay to the Court of Appeal, just as there had been no appeal from such an order when made before the 1873 Act (p 42).

34.
In the Fletcher case, the issue was whether the Court of Appeal had jurisdiction in an appeal from the decision of the High Court (Queen's Bench Division) by which it had dismissed a claim for a writ of certiorari (now called a quashing order) to quash a summary conviction of the appellant by local magistrates for the offence of trespass in pursuit of game. The High Court had thus affirmed the conviction. The Court of Appeal held that the last clause of section 47 had the effect that it had no jurisdiction to entertain the appeal, because this was a proceeding in a criminal matter. As Brett JA said, the High Court's ruling was "in effect a judgment or decision on the question whether a man shall be fined or imprisoned or not" (p 47). Mellish LJ was careful to explain that the limitation on the jurisdiction of the Court of Appeal set out in the last clause of section 47 did not extend to all matters on the Crown side of the Queen's Bench Division (ie matters relating to habeas corpus and the issue of the prerogative writs), as "[T]here are cases on the Crown side which are really civil cases" (pp 44-45). In their reasoning regarding Parliament's intention in relation to the last clause of section 47, Mellish LJ and Amphlett JA both emphasised that Parliament could not have intended to have created a regime in which there could be an appeal in a petty criminal matter not just to the Court of Appeal, but onwards to the House of Lords (p 45 and p 47, respectively). The judges accordingly recognised that a material aspect of the context relevant for interpreting the phrase "any criminal cause or matter" in relation to a provision governing routes of appeal was the effect which any particular interpretation might have on the distribution of business within the appellate courts. The proceedings before the High Court constituted in substance an appeal against the conviction by the magistrates, so what was in issue was whether there should be a second appeal to the Court of Appeal and the possibility of a third appeal to the House of Lords.

35.
The Supreme Court of Judicature Act (Ireland) 1877 followed the scheme of the 1873 and 1875 Acts. Section 50 followed the drafting of section 47 of the 1873 Act.

36.
In Ex p Woodhall (1888) 20 QBD 832 a magistrate committed the appellant to prison under section 10 of the Extradition Act 1870 with a view to her extradition to the USA to face trial there. The appellant applied to a Divisional Court of the Queen's Bench Division of the High Court for a writ of habeas corpus on the ground of a procedural error by the magistrate, who had refused to postpone the hearing of the case to allow time for the appellant to adduce more evidence. The High Court refused the application and the appellant sought to appeal to the Court of Appeal. That court held that by virtue of section 47 of the 1873 Act it had no jurisdiction to entertain the appeal, as it was a "criminal cause or matter". Lord Esher MR (as Brett JA had become) said that the case "which helps one most to the true construction" of that phrase was Fletcher, following Steel (p 835). He said that the decided cases showed that this phrase in section 47

“should receive the widest possible interpretation. The intention was that no appeal should lie in any ‘criminal matter’ in the widest sense of the term, [the Court of Appeal] being constituted for the hearing of appeals in civil causes and matters.” (p 835)

In context, what he meant by this was that the phrase should be given a wide interpretation in order to secure the object of the 1873 Act as identified in the earlier cases, which he confirmed, by quoting from the judgment of Mellish LJ in Fletcher referring to his judgment in Steel, was “to leave the procedure in criminal cases substantially unaltered” (p 836). Lord Esher MR recapitulated the position in this way: “I think that the clause of section 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject-matter of which is criminal, at whatever stage of the proceedings the question arises” (p 836). The decision of the High Court in refusing habeas corpus was a decision by way of judicial determination of a question raised in or with regard to the proceedings before the magistrate, and the subject-matter of those proceedings was criminal in nature; so the Court of Appeal had no jurisdiction. Lindley LJ and Bowen LJ agreed, though expressing themselves in different language. Lindley LJ, like Lord Esher MR, said that the true construction of the phrase was that given by Mellish LJ in Steel (pp 837-838) and likewise held that the proceedings in the High Court were a criminal cause or matter, since the object of the extradition was for the appellant to be sent for trial in the USA (p 837). Bowen LJ emphasised that the questions upon which the application for a writ of habeas corpus depended, which in view of the double criminality rule in extradition cases included whether or not there was evidence sufficient according to English law to justify the appellant being committed for trial, were criminal in nature (p 838). Lord Esher MR and Lindley LJ indicated that there were other habeas corpus proceedings which were civil in nature in which an appeal would lie.

37.
In 1908 the Court of Criminal Appeal was created pursuant to the Criminal Appeal Act 1907 (“the 1907 Act”) to hear appeals from superior courts exercising criminal jurisdiction outside the Crown side of what was then the King’s Bench Division. The Court of Criminal Appeal was not part of the Supreme Court of Judicature and the jurisdiction of the Court of Appeal to deal with all civil matters was unaffected. The jurisdiction for Crown Cases Reserved was transferred from the High Court to the Court of Criminal Appeal. The experience of the Court of Criminal Appeal in reviewing criminal cases and finding a significant number of errors in criminal trials quickly dispelled any scepticism about the value of having a regular and accessible appellate jurisdiction in this area: Holdsworth, A History of English Law, vol I, pp 217-218; Glover Alexander, The Administration of Justice in Criminal Matters (in England and Wales) (1915), pp 128-129; Cornish et al, Law and Society in England 1750-1950, 2nd ed (2019), pp 601-602. Section 1(6) of the 1907 Act provided that a decision of the Court of Criminal Appeal should be final, save that there could be an appeal to the House of Lords if a party obtained the certificate of the Attorney General that the decision raised a point of law of exceptional public importance and that it was desirable in the public interest for there to be a further appeal. Again, Parliament’s concern to ensure a coherent and principled distribution of business between appellate courts is evident.

38.
The effect of the final clause of section 47 of the 1873 Act was preserved in section 31(1)(a) of the Supreme Court of Judicature (Consolidation) Act 1925 (“the 1925 Act”), which stated: “No appeal shall lie - (a) except as provided by the Criminal Appeal Act 1907 or this Act, from any judgment of the High Court in any criminal cause or matter”. The general jurisdiction of the High Court was continued: section 18. Section 27 continued the general jurisdiction of the Court of Appeal to hear and

determine appeals from the High Court, "[s]ubject as otherwise provided in this Act". Section 225 re-enacted equivalent definitions of relevant terms as in section 100 of the 1873 Act.

39.
By the time of the leading decision of the House of Lords in relation to this provision in Amand v Home Secretary [1943] AC 147 ("Amand"), a considerable body of case law had developed. This was reviewed in Amand. That case concerned a soldier in the Netherlands army in Great Britain during World War II who was arrested as being absent without leave and taken before a magistrate with a view to being handed over to the Netherlands military authorities pursuant to the Allied Forces Act 1940 for punishment according to military law. He applied to the High Court for a writ of habeas corpus, which was refused. The Court of Appeal held that the judgment of the High Court was in "a criminal cause or matter", with the result that by virtue of section 31(1)(a) of the 1925 Act it had no jurisdiction to hear the appeal. The House of Lords upheld that ruling. As the headnote accurately summarises the decision, the distinction between cases in which the Court of Appeal has jurisdiction to entertain an appeal from a refusal to grant a writ of habeas corpus and those in which it does not turns on the nature and character of the proceeding in which the writ is sought: "If the matter is one, the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal" and there can be no appeal to the Court of Appeal.

40.
The appellate committee emphasised that the wide application of section 31(1)(a), following R v Fletcher and Ex p Woodhall, was required to avoid an unduly narrow focus on the nature of the particular proceedings before the High Court (which could in some respects be regarded as civil) and instead to require a focus on the nature of the underlying proceedings in relation to which the High Court was asked to intervene. As Lord Wright said, looked at in this way, the situation in Amand was closely similar to a case in which the High Court was invited to intervene in extradition proceedings, as in Ex p Woodhall (p 162: "It only differs from an extradition case in that the foreign authority which has power to try and punish, exercises that power in England, in virtue of the special provisions of the Allied Forces Act …").

41.
At pp 159-160 Lord Wright explained:

"The words 'cause or matter' are, in my opinion, apt to include any form of proceeding. The word 'matter' does not refer to the subject-matter of the proceeding, but to the proceeding itself. It is introduced to exclude any limited definition of the word 'cause'. In the present case, the immediate proceeding in which the order was made was not the cause or matter to which the section refers. The cause or matter in question was the application to the court to exercise its powers under the Allied Forces Act and the order, and to deliver the appellant to the Dutch military authorities. It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law."

42.
At p 162 Lord Wright referred to the speech of Viscount Cave in In re Clifford and O'Sullivan [1921] 2 AC 570, 580 (a case in which the underlying proceeding was held not to be criminal in nature):

"Viscount Cave said there must be two conditions fulfilled to satisfy the word 'criminal'. There must be the consideration of some criminal offence charged under criminal law, and the charge must be preferred or about to be preferred before some court or judicial tribunal having or claiming

jurisdiction to impose punishment for the offence or alleged offence. What I think Viscount Cave was particularly emphasizing was the latter condition. In his opinion, the military officers who purported to try the men and pass sentence, were in no possible sense a court martial or a court of any kind.

The principle which I deduce from the authorities I have cited and the other relevant authorities which I have considered, is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a 'criminal cause or matter'. The person charged is thus put in jeopardy. Every order made in such a cause or matter by an English court, is an order in a criminal cause or matter, even though the order, taken by itself, is neutral in character and might equally have been made in a cause or matter which is not criminal. The order may not involve punishment by the law of this country, but if the effect of the order is to subject by means of the operation of English law the persons charged to the criminal jurisdiction of a foreign country, the order is, in the eyes of English law for the purposes being considered, an order in a criminal cause or matter, as is shown by Ex p Woodhall … and Rex v Brixton Prison (Governor of), Ex p Savarkar [1910] 2 KB 1056."

43.
Viscount Simon LC (with whom Lord Atkin and Lord Thankerton agreed) likewise emphasised the similarity with extradition proceedings, in which no appeal would lie to the Court of Appeal. He went on (p 156):

"It is the nature and character of the proceeding in which habeas corpus is sought which provide the test. If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal. This is the true effect of the 'two conditions' formulated by Viscount Cave in In re Clifford and O'Sullivan."

44.
Lord Porter's speech was to similar effect. An appeal from the High Court would not lie in a case in which the magistrate in the proceedings under review there "purported to be exercising criminal not civil jurisdiction, and the decision of the High Court was given in that matter" (p 164), and:

"The proceeding from which the appeal is attempted to be taken must be a step in a criminal proceeding, but it need not itself of necessity end in a criminal trial or punishment. It is enough if it puts the person brought up before the magistrate in jeopardy of a criminal charge: see Ex p Pulbrook [1892] 1 QB 86, and Rex v Brixton Prison (Governor of), Ex p Savarkar.

If these principles be sound, and I believe they are, the only remaining question is whether the appellant, when he was brought before the magistrate, was put in peril of trial and punishment upon a criminal charge."

45.
Amand remains the leading decision at the highest level regarding the meaning of the phrase "criminal cause or matter" in the context regarding rights of appeal. Three points may be made about it. First, the "wide" interpretation of the phrase is required to direct attention to the nature of the underlying proceedings in which the High Court is asked to intervene, rather than focusing on the abstract categorisation of the proceeding in the High Court itself. Secondly, as Lord Wright put it, "the word 'matter' does not refer to the subject-matter of the proceeding, but to the proceeding itself." It is not sufficient for the underlying proceeding to relate to a subject-matter which might be described as "criminal" in a broad sense; the proceeding itself has to be criminal in nature. Thirdly, in order for the proceeding (in respect of which an application is made to the High Court to intervene) to be a criminal

matter the two conditions identified by Viscount Cave must be satisfied, so that it can be said that the applicant is put in jeopardy of criminal punishment by the proceeding; and such jeopardy has to be "the direct outcome" of the proceeding (p 156 per Viscount Simon LC). Although the House of Lords in Amand was not giving an exhaustive definition of the phrase, it identified the paradigm type of case which is covered by it. Any extension beyond that type of case would require to be clearly justified.

46.
Section 1(1)(a) of the Administration of Justice Act 1960 ("the 1960 Act") created a right of appeal to the House of Lords "at the instance of the defendant or the prosecutor, - (a) from any decision of a Divisional Court of the Queen's Bench Division in a criminal cause or matter; (b) from any decision of the Court of Criminal Appeal on an appeal to that court". Section 1(2) provided:

"No appeal shall lie under this section except with the leave of the court below or of the House of Lords; and such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the House of Lords, as the case may be, that the point is one which ought to be considered by the House of Lords."

47.
Section 18 of and the Second Schedule to the 1960 Act made parallel provision in respect of appeals in relation to Northern Ireland. Again, as with section 1(6) of the 1907 Act, Parliament's concern that the time of the House of Lords, as the highest court within the legal system, should not be unduly taken up with routine appeals in criminal matters (however meritorious such appeals might be with reference to the particular facts) is clear. Accordingly, the scope for an appeal from the High Court in a criminal cause or matter (in an application for certiorari or other public law relief and in those cases where an appeal in a criminal case lay to the High Court) was far more restricted than in a civil matter.

48.
The reference in section 1(1) of the 1960 Act to the application being made at the instance of the defendant or the prosecutor in relation to a decision within sub-paragraph (a) shows Parliament's understanding, in line with the decision in Amand, that for a proceeding to qualify as a "criminal cause or matter" a person had to be placed in jeopardy of criminal trial and punishment as the direct outcome of that proceeding, such that it was possible to identify "the defendant" and "the prosecutor" in respect of it. The same point applies in relation to section 41(1) of the 1978 Act.

49.
The 1960 Act also made new provision in relation to appeals in habeas corpus proceedings (section 15 and, for Northern Ireland, section 18(3)) and in cases of contempt of court. Section 17(1) provided:

"In this Act any reference to the defendant shall be construed -

(a) in relation to proceedings for an offence, and in relation to an application for an order of mandamus, prohibition or certiorari in connection with such proceedings, as a reference to the person who was or would have been the defendant in those proceedings;

(b) in relation to any proceedings or order for or in respect of contempt of court, as a reference to the person against whom the proceedings were brought or the order was made;

(c) in relation to a criminal application for habeas corpus, as a reference to the person by or in respect of whom the application was made,

and any reference to the prosecutor shall be construed accordingly."

This provision reinforces the inference that Parliament intended the phrase "criminal cause or matter" to refer to proceedings in which an individual, "the defendant", is directly in jeopardy pursuant to a process potentially leading to his punishment under the criminal law in this jurisdiction or abroad.

50.
The Court of Criminal Appeal continued to have jurisdiction to hear appeals in criminal cases other than from the High Court. It seems that this distribution of routes of appeal was chosen because the High Court was a court of co-ordinate jurisdiction with the Court of Criminal Appeal. Both were constituted of High Court judges (or in the case of the Divisional Court, often a Lord Justice of Appeal and High Court judges). The Court of Criminal Appeal regularly sat as a court of three High Court judges.

51.
The Criminal Appeal Act 1966 abolished the Court of Criminal Appeal and transferred its jurisdiction to the Court of Appeal. Thereafter, the Court of Appeal operated as a court with a civil division and a criminal division.

52.
The 1978 Act for Northern Ireland, which is in issue in this appeal, replicated with relevant adjustments the basic appeal structure which existed in England and Wales and re-enacted for Northern Ireland equivalent provisions governing appeals from the High Court to the Court of Appeal and to the House of Lords.

53.
What is now called the Senior Courts Act 1981 ("the 1981 Act") preserved this distribution of appellate jurisdictions for England and Wales. The general jurisdiction of the Court of Appeal for appeals from the High Court is preserved by sections 15 and 16, but subject to other provision in the 1981 Act or other specified legislation. Section 19 preserves the general jurisdiction of the High Court as before. Section 18(1)(a) provides: "No appeal shall lie to the Court of Appeal - (a) except as provided by the Administration of Justice Act 1960, from any judgment of the High Court in any criminal cause or matter."

54.
Section 151 of the 1981 Act enacted similar definitions to those used in the 1873 Act and the 1978 Act.

55.
By section 31, the 1981 Act also modernised the procedure for seeking relief pursuant to the prerogative writs by introducing the application for judicial review, which is now the relevant procedure to be used in proceedings in respect of control of public bodies according to rules of public law.

56.
A somewhat tangled jurisprudence regarding the meaning of the relevant phrase in the context of the creation of rights of appeal continued to develop after the 1960 Act and the 1981 Act. It was reviewed in detail by the Court of Appeal in R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court [2011] EWCA Civ 1188; [2011] 1 WLR 3253 ("Guardian News"). In that case, Lord

Neuberger of Abbotsbury MR said that “any sort of final coherence in relation to the scope and effect of section 18(1)(a) [of the 1981 Act] can only be provided by the Supreme Court …” (para 43).

The Justice and Security Act 2013 and Belhaj

57.
By contrast with the statutory provisions referred to above, section 6 of the JSA 2013 is not concerned with routes of appeal. Rather, it makes provision for a court “seised of relevant civil proceedings” to make a declaration that they are proceedings in which a closed material application may be made to the court. Section 6(11) states that “‘relevant civil proceedings’ means any proceedings (other than proceedings in a criminal cause or matter) before - (a) the High Court, (b) the Court of Appeal, (c) the Court of Session, or (d) the Supreme Court.” The closed material procedure allows for the presentation to the court in those proceedings of sensitive material the disclosure of which would be damaging to the interests of national security, with the material being withheld from the opposing party but subjected to review by the court in private session with the benefit of submissions from a special advocate to represent the interests of that party in the closed session. When use of the closed material procedure is authorised under this provision, the effect is that there is a limited departure, where justified, from usual standards of openness of justice and equality of arms.

58.
In Belhaj, the claimants brought judicial review proceedings against the Director of Public Prosecutions (“DPP”) to challenge his decision not to bring prosecutions in respect of alleged criminal offences said to have been committed by an officer of the Secret Intelligence Service in respect of unlawful “rendition” of the claimants from Thailand to Libya, made on the grounds that there was insufficient evidence for there to be any realistic prospect of conviction. The Secretary of State for Foreign and Commonwealth Affairs applied for a declaration under section 6 of the JSA 2013 to allow the use of the closed material procedure. The claimants contended that the judicial review proceedings constituted a “criminal cause or matter” for the purposes of section 6, so that the court had no power to authorise the use of that procedure. The Divisional Court of the High Court (Irwin LJ, and Popplewell J who agreed with his judgment) rejected that contention, holding that the proceedings were civil in nature: [2017] EWHC 3056 (Admin); [2019] AC 593. Irwin LJ distinguished the position as regards the use of the phrase in the different context of setting out routes of appeal.

59.
The appeal to this court was allowed by a majority of three to two. However, all the justices agreed that the context of the JSA 2013 and the context of the statutory provisions regarding routes of appeal were very different, with the result that the Barras principle was not applicable so as to require the transposition of the case law on the meaning of the phrase “criminal cause or matter” in the latter context into the former: see para 19 (Lord Sumption, with whom Baroness Hale of Richmond and Lord Mance agreed, although Lord Mance also gave a concurring judgment) and paras 44-51 (Lord Lloyd-Jones, with whom Lord Wilson agreed). Instead, all the justices considered the ordinary meaning of the phrase, as read in the light of the mischief or rationale for the introduction of the closed material procedure in the JSA 2013 as set out in the preceding Justice and Security Green Paper (October 2011) (Cm 8194) (albeit they came to opposing conclusions on that basis): paras 20-24 (Lord Sumption), paras 26-37 (Lord Mance) and paras 52-57 (Lord Lloyd-Jones).

60.
Lord Sumption noted that the DPP and the Secretary of State accepted that an application for judicial review of the prosecutorial decision at issue in Belhaj was a proceeding in a criminal cause or matter

for the purpose of any right of appeal: para 18. He said that his view about the natural meaning of the words was in line with the view of Lord Esher MR in Ex p Woodhall and Lord Wright in Amand: para 20. Lord Sumption observed that counsel for the Secretary of State had accepted that judicial review of an extradition order would be a proceeding in a criminal cause or matter and continued:

“On that footing it seems to me to be impossible to contend that this judicial review was anything else. The reality of the appellants’ application is that it is an attempt to require the Director of Public Prosecutions to prosecute [the officer]. That is just as much a criminal matter as the original decision of the Director not to prosecute him.”

61.
Lord Lloyd-Jones agreed that in the context of the provisions regarding routes of appeal, judicial review both of decisions to prosecute and of decisions not to prosecute would qualify as decisions in a criminal cause or matter, so that an appeal would lie to the House of Lords or, now, the Supreme Court: para 47(5).

Discussion

62.
In what follows I discuss (1) the statutory scheme; (2) the position of the present case in the statutory scheme; and (3) recent authority.

(1) The statutory scheme

63.
It is unsatisfactory that there should be uncertainty regarding the meaning of the important procedural provisions in section 41(1) of the 1978 Act (for Northern Ireland) and section 18(1) of the 1981 Act (for England and Wales: “section 18(1)”). The phrase a “criminal cause or matter” as employed in those provisions defines a legal category of cases before the High Court for which there is only a highly circumscribed possibility of appeal to the Supreme Court, involving specified procedural hurdles; and outside which there is the usual right of appeal to the Court of Appeal, involving different procedural hurdles. Parties in a matter before the High Court need to be able to understand into which category their case falls, so that if they want to appeal they can know what their right of appeal is and how it may be exercised. Parliament intended that these procedural provisions should have a reasonably fixed and readily comprehensible effect.

64.
By the time of the enactment of section 41(1) (for Northern Ireland) and section 18(1) (for England and Wales), the original rationale of freezing rights of appeal as they stood in 1873 was long in the past and provides no sound guide to the interpretation of the relevant phrase. There have been substantial changes in the relevant context both in procedural terms and in terms of substantive law. There are considerably wider rights of appeal in criminal cases and the value of appeal rights has come to be recognised as it was not in 1873. The substantive law of judicial review to control the activities of public authorities and inferior courts when exercising administrative discretions in dealing with the public continued to grow throughout the 20th century and is recognised as a major protection for the rights and liberty of citizens. The direct link back to the legal position in 1873 has been broken not once but twice, by the enactment of a consolidation Act in 1925 (which is a factor which reduces the relevance of the fine detail of preceding law: see Farrell v Alexander [1977] AC 59) and by the revision of the law by the 1978 Act and the 1981 Act in light of the 1960 Act regarding appeals in a criminal cause or matter to the House of Lords.

65.
The Divisional Court described the jurisprudence on this subject as “troubled”. It is true that over the years since the first introduction of the phrase in the 1873 Act there has been a fairly steady trickle of cases about it, but in my view the true position should be regarded as settled, albeit that difficulties sometimes arise in marginal cases. In my opinion, for reasons which appear below, the present case is not a marginal case. According to the relevant criteria established in the case law, the present proceedings do not constitute a criminal cause or matter.

66.
In the procedural context in which section 41(1) and section 18(1) apply, two basic features of the regime of appeal rights are important. First, the appeal rights in relation to a decision by the High Court in a criminal cause or matter are directed primarily to maintaining the coherence of the legal system, rather than to rectifying errors which are made by courts in individual cases. An appeal is to the Supreme Court and is only possible if a point of law of general public importance has been certified, and even then only if permission is granted. These restrictive conditions reflect the need to ration access to the highest court, which has to deal with appeals across the whole range of cases in the three jurisdictions in the United Kingdom. However, there will be many cases in which an appellant may have a meritorious complaint about a decision made by the High Court which is not corrected because it happens not to raise of point of law of general public importance.

67.
Secondly, in contrast, in all other cases appeal rights from the High Court to the Court of Appeal are directed to ensuring that errors at first instance in individual cases can be rectified. Generally, in these cases, an appellant only needs to show that they have an arguable case with a real prospect of success to be able to appeal. They do not need to show in addition that their appeal gives rise to a point of general public importance.

68.
Accordingly, an overly expansive interpretation of the phrase “a criminal cause or matter” in section 41(1) and section 18(1) would have the effect of reducing to an unacceptable degree parties’ access to justice at appellate level, leaving pockets of unchallengeable, potentially erroneous first instance decisions.

69.
The importance of appeal rights to rectify errors in individual cases, including when no point of law of general public importance is in issue, has long been recognised across the legal system in both the civil sphere and the criminal sphere (in the latter case, in particular since the success of the 1907 Act and the prevalence of worrying errors by first instance courts which the implementation of that Act revealed). The former acceptance that there should be an emphasis on finality of disposal in criminal cases which underlay the position prior to 1873 and was to some degree encapsulated in section 47 of the 1873 Act has, since the early 20th century, been greatly eroded. Therefore, in construing the intended meaning and effect of the “criminal cause or matter” phrase in the context of the operation of the modern statutes which define rights of appeal, namely the 1978 Act and the 1981 Act, it is to be inferred that the intention is that the phrase defines a reasonably tightly drawn category of case focused directly on the process for bringing and determining criminal charges.

70.
At the same time, Parliament obviously intended that cases with a direct bearing on that process should be captured by the phrase, without drawing subtle and ultimately unsustainable distinctions

depending on the precise nature of the procedure by which a matter concerning the process for bringing and determining criminal charges might be brought before the High Court. This was the point emphasised in the early case law, as reviewed above, as justifying “the widest possible interpretation” of the phrase (see Ex p Woodhall). That is to say, the phrase was to be given the widest possible interpretation in order to catch those cases with a clear and direct connection to the process for bringing and determining criminal charges, by contrast with the narrow interpretation urged by counsel in those cases which sought rather to focus on the nature of proceedings in the High Court (where a claim for habeas corpus or for the prerogative writs might be classified as a civil claim). Although a claim in the High Court for habeas corpus or for one of the prerogative writs could not itself readily be described as a criminal “cause”, as defined, the significance of the words “or matter” is to widen the meaning of the phrase so as to create a category defined, in effect, by reference to the criminal nature of the underlying proceedings in respect of which the decision under review in the High Court was taken (see Amand at pp 159-160 per Lord Wright and Belhaj, paras 17 and 20 per Lord Sumption).

71.
Over the years, the courts have settled on an interpretation of the phrase which accommodates both these points. The process for bringing a criminal charge against a person under domestic law begins with a decision to prosecute. It was authoritatively established by the decision of the House of Lords in Provincial Cinematograph Theatres Ltd v Newcastle-upon-Tyne Profiteering Committee (1921) 90 LJ (KB) 1064, in reliance on Ex p Woodhall, that a resolution by the committee to authorise their clerk to take steps to bring a prosecution for a criminal offence was an inherent part of the process for bringing a criminal charge, so that a decision on judicial review of that resolution in the High Court was a decision in a criminal cause or matter within the meaning of the final clause of section 47 of the 1873 Act and no appeal lay to the Court of Appeal. As Lord Sumner put it at p 1068, “It seems to me that the commencement of those proceedings by passing the resolution was itself the commencement of a criminal matter, because in one unbroken proceeding, although no doubt by various steps and processes, the termination of the whole matter was fine or imprisonment”. Similarly, steps taken to institute extradition proceedings against a person with a view to the bringing and determination of criminal charges in a foreign jurisdiction are an inherent part of the process of bringing and determining a criminal charge, so it has long been recognised, as established in Ex p Woodhall and affirmed in Amand, that an application in the High Court for habeas corpus or for one of the prerogative writs on judicial review to interrupt that process is a criminal cause or matter.

72.
Although the early cases were concerned with judicial review in the High Court of decisions to prosecute (or to allow extradition to proceed), it is now established that judicial review of a decision in an individual case not to bring forward a criminal charge in relation to a particular matter is of the same character and qualifies as a decision by the High Court in a criminal charge or matter within the meaning of section 41(1) and section 18(1), so that again no appeal lies to the Court of Appeal. This was assumed to be the position in R (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening) [2001] UKHL 61; [2002] 1 AC 800 (“Pretty”) (judicial review challenge to the refusal of the DPP to undertake not to prosecute the claimant’s husband if he assisted her to commit suicide) and R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE intervening) [2008] UKHL 60; [2009] AC 756 (“Corner House Research”) (judicial review challenge to the decision of the Director not to commence a prosecution against a potential defendant). There is a strong case for the assimilation of such cases concerning decisions not to prosecute a person with cases concerning decisions to prosecute. A prosecution authority might at the

same time have to consider whether to bring prosecutions against two defendants in respect of the same matter and based on the same evidence, and decide in the one case to proceed and in the other not to proceed; if judicial review challenges were brought, it would be very contrived to place the two cases in different categories for the purposes of section 41(1) and section 18(1) (see also Belhaj, para 20, per Lord Sumption). The position was put beyond doubt by the judgments in Belhaj, a case concerning judicial review of a decision not to prosecute, which state in terms that this was a proceeding in a criminal cause or matter for the purpose of any right of appeal: paras 18 and 20 (Lord Sumption) and para 47(5) (Lord Lloyd-Jones). See also R (Thakrar) v Crown Prosecution Service [2019] EWCA Civ 874; [2019] 1 WLR 5241.

73.
Two comments may be made about the limits of the "criminal cause or matter" phrase regarding the commencement of (or decision not to commence) criminal proceedings. First, the decision has to relate to the question of prosecution of a specific person in relation to a particular criminal offence, as in Pretty and Corner House Research. Those cases may be contrasted with R (Purdy) v Director of Public Prosecutions [2009] UKHL 45; [2010] 1 AC 345, which concerned a judicial review of the refusal of the DPP to publish details of his policy as to the circumstances in which a prosecution would be brought for the offence of aiding or abetting suicide contrary to section 2(1) of the Suicide Act 1961. This was not directly concerned with a decision whether to prosecute an individual and all counsel and all the courts involved assumed, rightly, that the proceedings were not "a criminal cause or matter" and hence should proceed by appeal from the High Court to the Court of Appeal and from there to the House of Lords, as they did. See also R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening) [2014] UKSC 38; [2015] AC 657 ("Nicklinson"), concerning claims for a declaration of incompatibility of section 2(1) with Convention rights under the Human Rights Act 1998 ("the HRA") and regarding the content of the DPP's policy in relation to commencement of prosecutions for offences under that provision, which also proceeded by appeal to the Court of Appeal; and R (Conway) v Secretary of State for Justice (Humanists UK intervening) [2018] EWCA Civ 1431; [2020] QB 1 ("Conway") (another claim for a declaration of incompatibility in relation to section 2(1) of the 1961 Act).

74.
Secondly, the tort of malicious prosecution is concerned with the malicious preferment of an unreasonable criminal charge against the claimant (see Clerk & Lindsell on Torts, 22nd ed (2018), ch 16). However, proceedings in the High Court concerning the tort are not categorised as proceedings in a criminal cause or matter. This is because the proceedings themselves have no bearing on the determination of a criminal charge against a person. The simple fact that, as a matter of language, without regard to context, one might describe a decision in such a case as "a criminal cause or matter" is not sufficient to engage section 41(1) or section 18(1).

75.
The next stage of the criminal process is the trial of a person on a criminal charge. Where the High Court is invited to exercise its judicial review powers in relation to this, the proceedings in that court are directly related to the trial and qualify as "a criminal cause or matter", as the Fletcher case made clear. However, various matters can arise for decision in the course of a criminal trial which are collateral to the criminal process and which have stronger affinities with civil cases regarding compliance by a public authority (including a court) with its general obligations under public law. Judicial review proceedings in the High Court in relation to these matters are not categorised as "a criminal cause or matter", so normal rights of appeal to the Court of Appeal apply. This is the type of

case discussed in the judgment of Lord Neuberger MR in the Court of Appeal in the Guardian News case. He there discusses in detail many of the authorities bearing on the application of the phrase in relation to review in the High Court of various steps taken or orders made by criminal courts in the course of conducting criminal proceedings. Examples include a decision by a judge in a criminal trial whether to order disclosure to a newspaper of documents relating to that trial (as in Guardian News itself) and a decision in criminal proceedings to make an order estreating a recognisance (R v Southampton Justices, Ex p Green [1976] QB 11). For present purposes, it is not necessary to traverse the same ground. This is not the occasion to try to resolve every uncertainty and to rule upon every marginal case that has arisen.

76.
Finally, there is the type of case of which the Steel decision is illustrative, where an order is made (either by the High Court or the court which conducted the trial of a person on a criminal charge) which is directly consequential upon the outcome of the criminal process. In Steel, the order made by the High Court was identified as being part of the criminal process and hence was likewise categorised as “a criminal cause or matter”. The limit to this principle is illustrated by R v Secretary of State for the Home Department, Ex p Dannenburg [1984] QB 766. In that case, the Court of Appeal held that a decision of the Divisional Court refusing to quash a recommendation for deportation made by justices after the conviction of the defendant for several offences was a decision in a criminal cause or matter (since the recommendation for deportation formed an integral part of the criminal proceedings in which it was made). But it was also held that the Divisional Court’s decision on judicial review of the subsequent decision of the Secretary of State to deport pursuant to that recommendation was not a criminal cause or matter, so that the ordinary right of appeal to the Court of Appeal was applicable in relation to that decision.

77.
The speeches in Amand, in the passages set out above, explain how to identify what counts as a decision in “a criminal cause or matter” for the purposes of knowing which appeal rights apply. This involves asking the question in relation to the proceedings which underlie those in the High Court: are they proceedings “the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so” (p 156 per Viscount Simon LC) and “which, if carried to [their] conclusion, might result in the conviction of the person charged and in a sentence of some punishment” (p 162 per Lord Wright)? If so, the proceedings in the High Court to challenge such criminal process will be categorised as “a criminal cause or matter”, taking their character from the nature of those underlying proceedings. This guidance strikes a coherent and principled balance regarding rights of appeal, giving appropriate but not excessively wide content to the phrase “a criminal cause or matter” in the present statutory context.

(2) The position of the present case in the statutory scheme

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

decision was not in “a criminal cause or matter”. The relevant right of appeal is to the Court of Appeal, not to the Supreme Court.

79.
That conclusion gains further support from a number of matters. First, since the 1873 Act the relevant statutes have provided for a general right of appeal from the High Court to the Court of Appeal. The “criminal cause or matter” category operates as an exception to that general right. It is appropriate that it should be construed in a way which is focused with some precision on an underlying criminal process which is under review in the High Court, so that it does not improperly undermine the general right of appeal which the relevant statutes confer.

80.
Secondly, the decision-making process of the Department is not at all like a judicial criminal process against a defendant on a charge. Therefore the judicial review proceedings in the High Court here are not equivalent to an appeal in relation to a judicial proceeding, as in cases like Fletcher, Ex p Woodhall and Amand. Accordingly, the aspect of the underlying rationale for section 41(1) and section 18(1) which is to limit the scope for what can in substance be regarded as a second appeal does not apply. The Divisional Court’s decision in this case is the first judicial decision in relation to the matter at issue, and it is desirable that it should be capable of being tested on appeal by whichever side is aggrieved at the outcome, according to the usual merits-based right of appeal to the Court of Appeal. It is true that in cases involving judicial review of the exercise of prosecutorial discretion (eg the Provincial Cinematograph Theatres Ltd case) or the award of costs (eg Steel’s case) there is no element of a second appeal, but that is an argument for focusing the interpretation of the “criminal cause or matter” rubric in relation to them quite tightly, as has happened.

81.
Thirdly, application of the guidance in Amand ensures that overall coherence regarding the availability of the right of appeal to the Court of Appeal is maintained in relation to cases which raise similar issues. R v Governor of Brockhill Prison, Ex p Evans (No 2) [2001] 2 AC 19 (“Evans (No 2)”) was a case in which the governor had to calculate the claimant’s due date for release on licence in respect of a determinate prison sentence according to a statutory formula. The governor followed guidance in a series of cases to delay the claimant’s release, but the claimant brought judicial review proceedings to challenge this calculation of the release date and to claim damages for false imprisonment (see the account of the proceedings given by Lord Hope of Craighead at p 30). The Divisional Court held that, on proper construction of the statutory provisions, the claimant should have been released on an earlier date and granted her declaratory relief accordingly, and her claim for damages was adjourned to be decided on a later occasion. In due course that claim was dismissed, and she appealed successfully to the Court of Appeal (and the governor’s further appeal to the House of Lords was dismissed). Counsel and all the courts involved understood the claim to be civil in nature. It would have made no sense to separate out the claim in respect of calculation of the claimant’s release date and her claim for damages for false imprisonment, as the latter was predicated on the former and might well have been dealt with at a single hearing. It would have been obviously undesirable, and cannot have been the intention of Parliament, that different appeal rights should apply in relation to different but inherently related aspects of the reasoning leading to the outcome of the proceedings. Similarly, in the present case, if the Department of Justice had initially decided that on proper construction of the statutory provisions the calculation of the date for reference of Mr Stone’s case to the Parole Commissioners for consideration of whether he should be released on licence was as the Divisional Court determined it to be, Mr Stone could have brought

judicial review proceedings to challenge that calculation and in those proceedings he could have sought to claim damages for false imprisonment (if he could show that he would have been released on licence promptly by the Parole Commissioners upon such a reference). Again, application of the guidance in Amand in this case gives a sensible and coherent result, according to which all aspects of such a claim would be regarded as ordinary civil proceedings. There would be no scope for bifurcation of rights of appeal.

82.
In R v Board of Visitors of Hull Prison, Ex p St Germain [1979] QB 425, following a riot at a prison the board of visitors heard charges against a number of prisoners for disciplinary offences contrary to the Prison Rules, found them guilty and imposed punishments including loss of remission. The prisoners applied to the Divisional Court for orders of certiorari to quash the decisions of the board, but their applications were refused. They sought to appeal to the Court of Appeal and the board objected to that court hearing the appeals, on the grounds that the proceedings in the Divisional Court concerned a "criminal cause or matter". The Court of Appeal applied the guidance in Amand and dismissed that objection, holding instead that it had jurisdiction to hear the appeal. The charges related to disciplinary offences, not offences against the public criminal law, and Amand was distinguished on that basis. None of the judges or counsel involved suggested that the fact that the loss of remission meant that the prisoners' release dates would be put back made this a case concerning a criminal cause or matter. That was simply an aspect of the implementation of the sentences of imprisonment which had been imposed on the prisoners long before.

83.
For these reasons, I would hold that this court has no jurisdiction to hear the appeals by the Department and Mr Stone. They should challenge the decision of the Divisional Court by way of appeal to the Court of Appeal.

(3) Recent authorities

84.
Having obtained a hearing date and prepared for the hearing of the appeals to this court, the Department, Mr Stone and Mrs McGuinness were understandably reluctant to accept that the hearing before us should be lost for this jurisdictional reason. They submitted that the decision of the Divisional Court is properly to be categorised as one in a criminal cause or matter within section 41(1). They relied in particular on Belhaj, the decision of the Court of Appeal for England and Wales in R (McAtee) v Secretary of State for Justice [2018] EWCA Civ 2851; [2019] 1 WLR 3766 ("McAtee") and the decision of the Divisional Court in Northern Ireland in JR27 [2010] NIQB 12. In my judgment, these authorities cannot be taken to determine the matter.

85.
I have already referred to Belhaj. The judgments in that case do not support the argument that the decision of the Divisional Court in this case was in a criminal cause or matter within section 41(1). Although both Lord Sumption (paras 17 and 20) and Lord Lloyd-Jones (para 50) refer to Ex p Woodhall and Lord Lloyd-Jones (para 50) referred to reasons for giving the relevant phrase a comparatively wide meaning in the context of the 1873 Act and the question of routes of appeal, both judgments are consistent with the analysis set out above. In so far as the reasoning in the case touches in specific detail on the law in relation to rights of appeal, the justices were simply in agreement that judicial review proceedings to challenge a prosecutorial decision were "a criminal cause or matter", as

previous authority made clear. The present judicial review proceedings are not concerned with such a decision, nor with any other decision falling within the guidance given in Amand.

86.
McAtee's case was concerned with the implementation of a sentence of imprisonment for public protection ("IPP") under section 225 of the Criminal Justice Act 2003. The effect of the Crime (Sentences) Act 1997 was that a prisoner sentenced to an indeterminate term by way of IPP and then released on licence could, after a qualifying period of ten years after release, seek an order from the Parole Board to require the Secretary of State for Justice to order that the licence should cease to have effect (ie that his release should become unconditional). One prisoner subject to IPP (Mr Lee) commenced judicial review proceedings, as a test case, to seek a declaration under the HRA that the relevant statutory provision requiring him to wait for the expiry of ten years before applying to be free from licence conditions was incompatible with his article 8 Convention rights under the HRA. A Divisional Court of the High Court dismissed that claim. Mr Lee applied to the Court of Appeal for permission to appeal and was granted such permission. Mr Lee then dropped out of the proceedings and an application was made for his place to be taken by Mr McAtee to continue the appeal. On consideration of that application, Irwin LJ considered that an issue arose regarding the jurisdiction of the Court of Appeal to entertain the appeal and directed that the issue be argued in open court.

87.
In a judgment of the court (Sir Brian Leveson P, Davis and Lewison LJJ), it was held that the appeal was in respect of a criminal cause or matter, so that no appeal lay to the Court of Appeal. I respectfully disagree with that conclusion. In my opinion, the court read too much into the decision of this court in Belhaj and treated it (see paras 33 to 35, 41, 50 and 51) as indicating that a broad meaning is to be given to the phrase "criminal cause or matter" as it appears in section 18(1), thereby limiting the availability of ordinary rights of appeal to the Court of Appeal to a degree which is not warranted by the section. But all the justices in the Supreme Court in Belhaj held that the Barras principle did not apply, so it was not appropriate for the Court of Appeal to approach the case on the basis that there should be a direct reading across of the meaning of the relevant phrase in the JSA 2013 into the statutes dealing with routes of appeal. The Court of Appeal also seems to have thought that the question whether an appeal was in relation to a "criminal cause or matter" was a matter of impression from the words used (para 43). However, I do not think that is a satisfactory approach, given the overlap between civil and criminal matters in some cases. Clearer criteria are needed to provide guidance in this procedural context so parties can know where they stand, and to avoid the risk of courts reaching decisions as a matter of impression which are hard to reconcile.

88.
In my view, there was no good reason to conclude that section 18(1) was applicable in relation to the claim for a declaration of incompatibility which was in issue in McAtee's case, and good reason to think that it was not applicable. The proceedings had nothing to do with the bringing of criminal charges against the appellant. Those charges had been brought and dealt with in criminal proceedings in court a long time previously, including by the sentence the appellant had been given. Claims under the HRA for declarations of incompatibility in respect of statutory provisions are a familiar feature of the legal landscape and are generally treated as civil claims in relation to which an appeal lies to the Court of Appeal in the usual way. Only the High Court (or a court above that) can issue a declaration of incompatibility, not some other court such as one exercising criminal jurisdiction: section 4(5) of the HRA. Further, if a claim is made for such a declaration, notice has to be given to the government so that it has the opportunity to appear and resist the claim (section 5).

The debate about whether a declaration of incompatibility should be granted is an exercise in review of the statute book against human rights standards and is distinct from the criminal process itself. These provisions indicate that an application for a declaration of incompatibility in the High Court is not “a criminal cause or matter”, and the appeal routes which have been followed in the leading cases (albeit on the basis of assumptions made by counsel and the courts) confirm this. In each of Nicklinson’s case and Conway’s case the appeal lay to the Court of Appeal; so also in R (Anderson) v Secretary of State for the Home Department [2002] UKHL 46; [2003] 1 AC 837 (declaration of incompatibility in relation to the Home Secretary’s involvement in setting the tariff for a life prisoner in relation to his sentence); R (Stott) v Secretary of State for Justice [2018] UKSC 59; [2018] 3 WLR 1831 (application for declaration of incompatibility regarding the statutory regime governing early release from prison of those serving extended determinate sentences for sexual offences, by way of a leap-frog appeal pursuant to section 12 of the Administration of Justice Act 1969, ie on the basis that the usual route of appeal would be to the Court of Appeal); and R (Miranda) v Secretary of State for the Home Department (Liberty intervening) [2016] EWCA Civ 6; [2016] 1 WLR 1505 (declaration of incompatibility in relation to stop and search powers under the terrorism legislation and the article 10 Convention right in the HRA, as regards protection of journalists).

89.
The possibility of overlap with criminal proceedings cannot be ruled out. An application for a declaration of incompatibility may emerge from a failed argument, which is available in a criminal court below the High Court, that pursuant to section 3 of the HRA a statutory provision which defines a criminal offence should receive some modified interpretation in light of Convention rights. In such a case, it may be that the association of the application for a declaration of incompatibility in the High Court with the underlying criminal proceedings is so strong that they are to be taken together as “a criminal cause or matter” in the High Court. Pretty’s case is another example. The need to avoid bifurcation of the rights of appeal in relation to what, in the particular circumstances, are closely related dimensions of the same proceedings points towards this result. But what is important in such cases is that the usual procedural position in relation to applications for a declaration of incompatibility is strongly outweighed in the particular circumstances by the close association of that claim with underlying proceedings which are clearly criminal in nature. The interpretation of the phrase is necessarily informed by the context in which it falls to be applied.

90.
However, the Court of Appeal in McAtee’s case did make some highly pertinent comments with which I agree and which support the analysis above. In particular, I endorse what they said at para 42:

“It is, in our view … salutary that there should not be an over-expansive interpretation of the phrase ‘criminal cause or matter’ and neither should there be an over-expansive approach to addressing the jurisdictional issue. After all, while some cases in the Divisional Court or Administrative Court are at a second level of judicial decision making - for example, appeals by way of case stated - many are not (the present case is an example). If a case is a criminal cause or matter then the only route of appeal is to the Supreme Court. Not only is that complex and expensive for litigants but also (and importantly) such an appeal is only possible if the court has first certified that a point of law of general public importance arises. That is a high bar to cross; many, indeed most, cases are not likely to be able to cross it. Moreover, for those relatively few cases which do raise an important point of law, the Supreme Court will then be required to deal with them without what one would hope would be considered the benefit of the decision and reasoning of a three-judge constitution of the Court of Appeal.”

See also R (Thakrar) v Crown Prosecution Service at para 41 per Davis LJ.

91.
I also agree with observations of the court in McAtee's case in para 52 regarding the view reached in relation to the decision of the Divisional Court in Gilbert (Michael) v Secretary of State for the Home Department [2005] EWHC 1991 (Admin). That concerned a judicial review challenge, not to a sentence imposed by a criminal court but to a decision of the prison authorities in calculating the date on which the claimant was to be released and the date on which his licence expired. The case was thus similar to Evans (No 2), referred to above. Permission to appeal to the Court of Appeal was refused by Smith LJ after a brief oral argument, on the basis that the judgment was "in a criminal cause or matter" within section 18(1). In McAtee's case, the Court of Appeal expressed reservations about this conclusion. They were right to do so. In my view, section 18(1) did not apply. As the Court of Appeal observed:

"… it certainly would seem surprising that, for example, a decision on a consequential claim by any person for damages for wrongful detention (on the footing that the release date had been miscalculated) which is a claim of a kind not infrequently ultimately assigned to a Queen's Bench master or to the County Court, could only attract an appeal, on certification, to the Supreme Court."

The court also referred at para 27 to authority which I consider is directly supportive of the analysis above:

"… it was assumed, without discussion, that the Court of Appeal had jurisdiction to decide an appeal relating to a prisoner's asserted rights of notification of the judicial decision on the tariff term for a mandatory life sentence before (as was then the procedure) the Secretary of State set the ultimate tariff term: R v Secretary of State for the Home Department, Ex p Doody [1993] QB 175. Jurisdiction was also assumed in a case concerning the entitlement (or otherwise) to unconditional release on licence in the light of subsequently introduced legislation: R (Stellato) v Secretary of State for the Home Department [2007] 1 WLR 608. The same assumption was made in a case (in which a declaration of incompatibility was claimed) involving the absence of review procedures for indefinite notification requirement under the provisions of the Sexual Offences Act 2003: R (F) (A Child) v Secretary of State for Justice (Lord Advocate intervening) [2011] 1 AC 331. Finally, in R (Minter) v Chief Constable of Hampshire Constabulary [2014] 1 WLR 179 it had been held that an issue as to whether the extended licence period in an extended sentence was to be taken into account for the purpose of assessing the period of the notification requirements under the Sexual Offences Act 2003 was not a criminal cause or matter: see per Laws LJ, at para 2."

I do not find the court's attempt later in its judgment to distinguish these cases persuasive.

92.
The court's reasoning (in particular at paras 43 to 51) depended on their view that no distinction could be drawn in this context between the imposition of a sentence by the criminal court and the working out of what that sentence means in light of the relevant statutory regime. I do not accept this. The imposition of a sentence by a court at the end of criminal proceedings is an inherent part of a "criminal cause or matter" for the purposes of section 18(1). But in my view proceedings in relation to decisions by non-judicial actors regarding the effect of such a sentence are not; nor are judicial decisions regarding the human rights compatibility of the regime according to which such effect is determined. As to the former category, it is unfortunate that the court's attention was not drawn to a case such as Evans (No 2); and to the other authorities to which I have referred in relation to the latter.

93.
Finally, I turn to recent authority from Northern Ireland on the meaning of section 41. The Northern Ireland Divisional Court embarked upon a lengthy examination of the meaning of the relevant phrase in section 41 in JR27. That concerned a judicial review of the refusal of the police to destroy certain data relating to the claimant collected under the Police and Criminal Evidence (Northern Ireland) Order 1989 with a view to a possible prosecution, though in the event charges were not brought. McCloskey J, with whom Weatherup J agreed, reviewed a number of authorities and concluded that the primary test (from Amand) focused on whether the underlying proceedings could place an individual in jeopardy of criminal proceedings or punishment. Although no investigation was underway, an investigation and potential prosecution of the claimant for a criminal offence on some future date was nevertheless a possible and foreseeable outcome. As a result, the impugned measure was to be considered a step in the criminal proceedings that put the claimant in jeopardy (albeit slight) of a criminal charge. Sir Declan Morgan LCJ dissented. In his view the proceedings did not constitute a criminal cause or matter because the possibility of criminal proceedings was too remote to satisfy the need for proximity between the application before the court and the matter putting the individual in jeopardy. As will be clear from what has been said above, I consider that Sir Declan Morgan LCJ was correct about this. The jeopardy principle as adumbrated in Amand is much more tightly focused on court proceedings in relation to a specific criminal charge than the majority thought. Issues regarding the holding and use by public authorities of information relating to an individual are firmly in the sphere of civil public law, and there was no close connection with the bringing of a criminal charge in this case to change that position. The relevant route of appeal was to the Court of Appeal, as in the closely similar case of R (S) v Chief Constable of the South Yorkshire Police [2004] UKHL 39; [2004] 1 WLR 2196: see para 49 per Sir Declan Morgan LCJ. As he rightly observed at para 50, “The requirement to appeal directly to the Supreme Court now seems anomalous”. Similar comments have been made recently by the Court of Appeal in England and Wales: see R (Thakrar) v Crown Prosecution Service at para 41 (Davis LJ) and para 55 (Irwin LJ). Accordingly, there are strong arguments against reading section 18(1) and section 41(1) expansively.

94.
I would, however, enter one note of caution about Sir Declan Morgan LCJ’s judgment. At para 46 he said that cases in which, after the imposition of a sentence by a court in criminal proceedings, there is a challenge concerning the number of days the applicant has to serve in custody as a result of the sentence imposed involve proceedings in a criminal cause or matter (citing In re Montgomery’s Application [2008] NIQB 130). I do not agree. There is a clear distinction between proceedings leading up to the imposition by a court of a sentence in relation to a criminal charge, which fall within the relevant phrase according to the guidance in Amand, and proceedings brought to challenge some non-judicial body, such as a prison governor or a minister, which has to calculate the date of release in relation to such a sentence in the exercise of their administrative functions under public law, which does not. In my view, procedural clarity regarding rights of appeal requires that this distinction should be respected.

95.
In In re McGuinness (No 3) [2019] NIQB 76, the Divisional Court in Northern Ireland (McCloskey J and Keegan J) gave a judgment in which it held that related judicial review proceedings brought by Mrs McGuinness to challenge the exercise of jurisdiction by the SRC in relation to Mr Stone to consider his application for early release did not constitute a criminal cause or matter within section 41(1). As will be clear, I agree with that conclusion. However, the court’s reasoning proceeded by reference to the majority judgment in JR27, Belhaj and McAtee’s case, and I would not endorse it. In

my view, the conclusion is correct because the SRC's decision related to the exercise of their administrative functions, arising in the light of a sentence previously imposed and involving the working out of the effects of that sentence in the context of their public law duties under the relevant statutory regime.

Conclusion

96.
For the reasons given above, I would hold that the present proceedings do not constitute "a criminal cause or matter" for the purposes of section 41, with the result that this court does not have jurisdiction to entertain these appeals. That being so, and because this court is likely to be assisted by consideration of the Northern Ireland Court of Appeal of the operation of the special prisoner regime in that jurisdiction under the Northern Ireland (Sentences) Act 1998 and pursuant to the Belfast Agreement, should the case come back for consideration by this court, I do not think it is appropriate to say anything about the merits of the appeals.