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IN THE HIGH COURT OF NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY DAVID BROWN

AND IN THE MATTER OF A DECISION TAKEN BY THE SECRETARY OF STATE FOR NORTHERN IRELAND DATED 28 MARCH 2008

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AND IN THE MATTER OF THE LIFE SENTENCES (NORTHERN IRELAND) ORDER 2001

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Before: Higgins LJ and Coghlin LJ

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HIGGINS LJ

[1] This is an application for judicial review of a decision by the Secretary of State to consult with the trial judge, now retired, prior to the issue of a certificate of opinion as to the part of the sentence to be served by the applicant before the release provisions of the Life Sentences (Northern Ireland) Order 2001 should apply to him.

[2] The applicant was born on 28 April 1966 and is 43 years of age. On 10 October 1995 at Belfast Crown Court before Nicholson LJ he pleaded guilty to the murder of Roberta St Clair Gunn on or about 27– 28 May 1994 and was sentenced to imprisonment for life. The applicant was charged with this offence on 2 June 1994 and remanded in custody from that date. He has remained in custody ever since.

[3] The Life Sentences (NI) Order 2001 (the 2001 Order) established a new regime for setting release dates for life sentence prisoners with effect from 8 October 2001. Under the 2001 Order a court which passes a life sentence after 8 October 2001 is required, in certain circumstances, to specify that part of the sentence to be served by the offender which it considers appropriate to satisfy the requirements of retribution and deterrence, before the release provisions

of the Order shall apply to him. That part of the sentence is known as the minimum term or tariff. In specifying the minimum term to satisfy the requirements of retribution and deterrence, the trial judge shall have regard to the seriousness of the offence (or the combination of offences). Article 5 of the 2001 Order provides -

> "Determination of tariffs
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> 5. - (1) Where a court passes a life sentence, the court shall, unless it makes an order under paragraph (3), order that the release provisions shall apply to the offender in relation to whom the sentence has been passed as soon as he has served the part of his sentence which is specified in the order.
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> (2) The part of a sentence specified in an order under paragraph (1) shall be such part as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it.
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> (3) If the court is of the opinion that, because of the seriousness of the offence or of the combination of the offence and one or more offences associated with it, no order should be made under paragraph (1), the court shall order that, subject to paragraphs (4) and (5), the release provisions shall not apply to the offender.
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> (4) If, in a case where an order under paragraph (3) is in force, the offender was aged over 18 when he committed the offence, the Secretary of State may at the appropriate stage direct that the release provisions shall apply to the offender as soon as he has served the part of his sentence which is specified in the direction.
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> (5) If, in a case where an order under paragraph (3) is in force, the offender was aged under 18 when he committed the offence, the Secretary of State shall at the appropriate stage direct that the release provisions shall apply to the offender as soon as he has served the part of his sentence which is specified in the direction.

> (6) The appropriate stage, for the purposes of paragraphs (4) and (5), is when the Secretary of State has formed the opinion, having regard to any factors determined by him to be relevant for the purpose, that it is appropriate for him to give the direction.
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> (7) An offence is associated with another for the purposes of this Article if -
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> > (a) the offender is convicted of it in the proceedings in which he is convicted of the other offence, or (although convicted of it in earlier proceedings) is sentenced for it at the same time as he is sentenced for that offence; or
> >
> > (b) the offender admits the commission of it in the proceedings in which he is sentenced for the other offence and requests the court to take it into consideration in sentencing him for that offence.
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> (8) This Article has effect in relation to life sentences passed after the appointed day."

The appointed day is 8 October 2001.

[4] As soon as the prisoner has served that part of the sentence specified in the order of the court (Article 5(1), (or in the direction of the Secretary of State – Article 5(4) and (5)) he shall be released (on licence), provided his case has been referred to the Life Sentence Review Commissioners and they are satisfied that it is no longer necessary for the protection of the public that the prisoner be confined – see Article 6 of the 2001 Order. After release of the prisoner on licence the Secretary of State may revoke the licence and recall the prisoner to prison – see Article 9 of the 2001 Order.

[5] Prior to the implementation of the 2001 Order a different regime existed for offenders serving a sentence of imprisonment for life for the offence of murder. The Secretary of State established the Life Sentence Review Board to advise him as to when (if at all) to release such prisoners on licence. Prisoners released on licence were subject to recall by the Secretary of State. In Re Whelan's Application 1990 N.I. 48 it was held that the exercise of the power to release on licence by the Secretary of State and the giving of advice by the Board on the prospect of release, were administrative functions and not judicial or quasi-judicial functions. Following various decisions of the

European Court of Human Rights it was considered that this regime did not satisfy the requirements of the European Convention on Human Rights. As a consequence the 2001 Order was brought into effect. Under the 2001 Order Life Sentence Review Commissioners were appointed. Their function, inter alia, is to determine whether it is necessary for the protection of the public that a prisoner serving a life sentence should be confined after he has served the minimum term set by the trial judge. However prisoners sentenced to imprisonment for life prior to 8 October 2001 did not have a minimum term set by the trial judge. Consequently it was necessary to make provision for them in the 2001 Order . Two categories of prisoner were identified – transferred prisoners and existing prisoners. Transferred prisoners are those sentenced outside Northern Ireland and transferred under specified legislation to serve their sentence in a prison in Northern Ireland. Existing prisoners are those sentenced to imprisonment for life by a court in Northern Ireland prior to 8 December 2001 and serving that sentence in a prison in Northern Ireland after that date.

[6] Article 10 of the 2001 Order makes provision for prisoners transferred to serve their sentence in a prison in Northern Ireland. In their case the minimum term required to be served is certified by the Secretary of State, after consultation with the Lord Chief Justice. Article 10 provides -

> "10. - (1) This Article applies where, in the case of a transferred life prisoner, the Secretary of State, after consultation with the Lord Chief Justice, certifies his opinion that, if -
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> (a) the prisoner's offence had been committed after the appointed day; and
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> (b) he had been sentenced for it in Northern Ireland, the court by which he was so sentenced would have ordered that the release provisions should apply to him as soon as he had served a part of his sentence specified in the certificate.
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> (2) This Article also applies where, in the case of a transferred life prisoner, the Secretary of State certifies his opinion that, if -
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> (a) the prisoner's offence had been committed after the appointed day; and
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> (b) he had been sentenced for it in Northern Ireland, the Secretary of State would have directed that the release provisions should apply to him as

soon as he had served a part of his sentence specified in the certificate.

(3) In a case to which this Article applies, this Order shall apply as if -

(a) the transferred life prisoner were a life prisoner to whom Article 6 applies; and

(b) the relevant part of his sentence within the meaning of Article 6 were the part specified in the certificate.

(4) In this Article "transferred life prisoner" means a person -

(a) on whom a court in a country or territory outside Northern Ireland has imposed one or more sentences of imprisonment or detention for an indeterminate period; and

(b) who has been transferred to Northern Ireland, in pursuance of -

(i) an order made by the Secretary of State under section 2 of the Colonial Prisoners Removal Act 1884; or

(ii) a warrant issued by the Secretary of State under the Repatriation of Prisoners Act 1984, or

(iii) an order made by the Secretary of State under paragraph 1 of Schedule 1 to the Crime (Sentences) Act 1997 where the transfer is an unrestricted transfer for the purposes of Part II of that Schedule,

there to serve his sentence or sentences or the remainder of his sentence or sentences.

(5) A person who is required so to serve the whole or part of two or more such sentences shall not be treated as a life prisoner to whom Article 6 applies unless the requirements of paragraph (1) or (2) are satisfied as respects each of those sentences; and the

> release provisions shall not apply in relation to such a person until after he has served the relevant part of each of those sentences."

Under this provision the Secretary of State, after consultation with the Lord Chief Justice, certifies his opinion as to the minimum term which would have been ordered if the transferred prisoner's offence had been committed after 8 October 2001 and he had been sentenced by a court in Northern Ireland. Thereafter he is treated in the same way as a prisoner sentenced in Northern Ireland.

[7] Article 11 makes provision for existing prisoners. In their case the Secretary of State certifies the minimum term which a court in Northern Ireland would have ordered if the 2001 Order had been in operation at the time the offender was sentenced. For an existing prisoner the Secretary of State certifies the minimum term after consultation with the Lord Chief Justice and the trial judge, if available (my emphasis). Article 11 provides -

> "11. - (1) This Article applies where, in the case of an existing life prisoner, the Secretary of State, after consultation with the Lord Chief Justice and the trial judge if available, certifies his opinion that, if this Order had been in operation at the time when he was sentenced, the court by which he was sentenced would have ordered that the release provisions should apply to him as soon as he had served a part of his sentence specified in the certificate.
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> (2) This Article also applies where, in the case of an existing life prisoner, the Secretary of State certifies his opinion that, if this Order had been in operation at the time when he was sentenced, the Secretary of State would have directed that the release provisions should apply to him as soon as he had served a part of his sentence specified in the certificate.
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> (3) In a case to which this Article applies, this Order shall apply as if -
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> (a) the existing life prisoner were a life prisoner to whom Article 6 applies; and
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> (b) the relevant part of his sentence within the meaning of Article 6 were the part specified in the certificate.

(4) In this Article "existing life prisoner" means a life prisoner serving one or more life sentences passed before the appointed day but does not include a life prisoner -

(a) who had been recalled to prison under section 23 of the Prison (Northern Ireland) Act 1953 and who is not an existing licensee; or

(b) whose licence has been revoked under Article 46(2) of the Criminal Justice (Children) (Northern Ireland) Order 1998 and who is not an existing licensee.

(5) Paragraphs (3) to (5) of Article 9 shall have effect as if any life prisoner -

(a) who has been recalled to prison under section 23 of the Prison Act (Northern Ireland) 1953 and is not an existing licensee; or

(b) whose licence has been revoked under Article 46(2) of the Criminal Justice (Children) (Northern Ireland) Order 1998 and who is not an existing licensee, had been recalled to prison under Article 9 on the appointed day.

(6) An existing life prisoner who is serving two or more life sentences passed before the appointed day shall not be treated as a life prisoner to whom Article 6 applies unless the requirements of paragraph (1) or (2) are satisfied as respects each of those sentences: and the release provisions shall not apply in relation to such a person until after he has served the relevant part of each of those sentences.

(7) In this Article "existing licensee" has the same meaning as in Article 12(1)."

[8] In both the case of a transferred prisoner and an existing prisoner the Lord Chief Justice makes recommendations to the Secretary of State as to the minimum term which would have been specified, if the 2001 Order had been in force at the time of sentence by the trial judge. In order to do so the Lord Chief Justice invites written submissions from the prisoner (or his legal representatives) and if requested will convene an oral hearing following which he will make his recommendation to the Secretary of State as to the minimum term that would have been set. Where the trial judge is available he

will be consulted as well. In a case in which an oral hearing is convened the trial judge may sit along with the Lord Chief Justice.

[9] On 8 December October 2001 the applicant was an existing prisoner to whom Article 11 applied and in respect of whom the Secretary of State was required to certify the minimum term which he should serve before the release provisions of the 2001 Order would apply to him. In furtherance of this process written submissions were tendered by legal representatives on behalf of the applicant and a request made for an oral hearing before the Lord Chief Justice. On the date fixed for the oral hearing an application was made on behalf of the Secretary of State to adjourn the hearing to enable the Secretary of State to receive the views of the trial judge, who was not able to sit on the day the case was listed. The trial judge, now the Rt Hon Sir Michael Nicholson, had by then retired from judicial office. Following the adjourned hearing an issue arose as to whether the trial judge, now retired, was "available" under Article 11 of the 2001 Order. At a reconvened hearing before the Lord Chief Justice it was decided that the proper venue to consider the issue relating to the "availability " of the trial judge was the Queen's Bench Division of the High Court on application for judicial review of the decision by the Secretary of State to seek the views of the trial judge. The Secretary of State indicated by correspondence that he proposed to prepare papers for submission to the trial judge and to include a record of the representations made to the Lord Chief Justice at the oral hearing. In the correspondence he stated –

> "I would advise that papers are being assembled for submission to the trial judge. It is proposed including in this material a record of the representations made to the Lord Chief Justice at the oral tariff hearing once same is available."

The oral hearing before the Lord Chief Justice has not been concluded, but it was apparent that the Secretary of State intended to consult the trial judge. In those circumstances the applicant sought judicial review of the decision of the Secretary of State to consult the trial judge. He was granted leave by Gillen J and in his Order 53 Statement he seeks the following relief –

> "(a) a declaration that the decision of the Secretary of State dated 28th March 2008 whereby he decided to proceed to consult with a retired judge in the context of a consultation under Article 11(1) of the Life Sentences (Northern Ireland) Order 2001 was unreasonable, unlawful and void.
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> (b) a declaration that the reference in Article 11(1) of the Life Sentences (Northern Ireland) Order 2001 to

> 'the trial judge if available' does not require consultation with the said trial judge if that judge had in fact retired from office.
>
> (c) an order for interim relief restraining the Secretary of State from taking steps or any further steps in terms of consultation with the retired judge in the context of the Article 11(1) consultation required in the applicant's case."

[10] The grounds on which the relief is sought are that the words " the trial judge if available" should be read as meaning "the trial judge if available as a judge ". The following reasons were put forward – the use of the word "judge" indicates that it was intended that the person consulted was in fact a judge; consultation with a person not a judge would not provide the necessary guarantees of independence and impartiality required by Article 6 of the European Convention on Human Rights (ECHR); that consultation with a person not a judge would equate to a tribunal not established by law as required by Article 6 of the ECHR and that the context and legislative history of the phrase "trial judge" indicated that it was not the intention of Parliament to include consultation with retired judges.

[11] The Judicial Pensions and Retirement Act 1993 (the 1993 Act), which came into effect on 31 March 1995, set retirement ages for different categories of judicial office holders. A Lord Justice of Appeal in Northern Ireland cannot continue to hold judicial office after the day on which he attains the age of 75 – section 26(7) of the 1993 Act. While a judge may retire from full- time judicial office at any time and before his compulsory retirement age he may be invited to and can sit as a judge after retirement. Section 7 of the Judicature Act 1978 permits a judge of the High Court or a Lord Justice of Appeal to sit and act as a judge of the High Court or the Court of Appeal, if requested to do so. However Section 26(7)(f) of the 1993 Act does not permit him to do so after he attains the age of 75. The relevant parts of section 26 provide –

> "26(7) After the day on which a person attains the age of 75, he shall not hold any relevant office nor shall he –
> (e) sit and act as a judge under or by virtue of section 7 of the Judicature Act (Northern Ireland) 1978."

Schedule 5 of the 1993 Act specifies the office of Lord Justice of Appeal in Northern Ireland as a relevant office. However section 27 empowers a judge in certain circumstances to continue with proceedings after he has vacated office. I shall refer to this section later in this judgment.

[12] The Rt. Hon. Sir Michael Nicholson was appointed a judge of the High Court of Judicature in Northern Ireland in 1986 and a Lord Justice of Appeal in Northern Ireland on 24 April 1995. He retired from the office of Lord Justice of Appeal in Northern Ireland on 21 December 2006. He attained the age of 75 on 4 February 2008 and continues to enjoy retirement. On appointment as a Lord Justice of Appeal he ceased to be a judge of the High Court of Judicature. On his appointment as a Lord Justice of Appeal he swore the oath of that office which included the words "I swear I will well and faithfully serve in the office of Lord Justice of Appeal and do right to all manner of persons without fear or favour, affection or ill-will according to the laws and usages of this realm".

[13] It was submitted by Mr Macdonald, who with Mr Hutton appeared on behalf of the applicant, that the power of the Secretary of State to consult the trial judge, can only be exercised in circumstances in which not only is the trial judge physically available, but available to act in a judicial capacity. It was arguable that in advising the Secretary of State as to an appropriate minimum term, a trial judge (not retired) and the Lord Chief Justice would be acting in a judicial capacity and in a judicial manner in relation to the circumstances of the case. Central to his submission was the status of the fixing of the minimum term by the Secretary of State. While for the purposes of domestic law this was regarded as an administrative function (following Re King's Application 2002 NICA 48 and R (Anderson) v Home Secretary 2002 4 AER 1089), under European Convention law it was regarded as part of the sentencing process to which all the safeguards and rights under the Convention would apply. This was particularly so as the purpose of the 2001 Order was to provide a life sentence regime which was compliant with the European Convention. Unless the trial judge was able to act in a judicial capacity he would lack the necessary independence and impartiality envisaged by the European Convention and may not constitute a court established by law as required by Article 6. It was submitted that as the trial judge was no longer in office the judicial oath no longer applied. In addition satisfying the reasonable time requirement in Article 6(1) might be difficult. It was submitted that if the trial judge is not available to act in a judicial capacity, he is not available within the terms of Article 11. For the Secretary of State to certify his opinion as to the minimum term without consulting the trial judge who was properly available, would render the certification unlawful. Equally for the Secretary of State to certify having consulted a trial judge who was not 'available' within the terms of Article 11, would be equally unlawful. Mr Macdonald highlighted the use of the word 'judge' which implied that the judge should be available as a judge. He contrasted this word with the word 'court' which appears later in Article 11(1) and also in Article 5(1). This suggested recognition of the significant differences between the words; a court has permanence whereas a trial judge does not. After retirement a trial judge's situation may be entirely different. He may have gone to live in another country or be in a position (in prison or in other

employment were postulated) which would make his involvement in the case unsuitable or inappropriate. The regime for the release of life sentence prisoners prior to the 2001 Order involved the trial judge (and the Lord Chief Justice) after the prisoner had served many years in prison. It was thus envisaged that the Secretary of State would come to certify his opinion many years after the involvement of the trial judge. The word 'available' had to be interpreted in that context; that his unavailability might arise from his retirement or from ageing. While it was accepted that the trial judge in this case was otherwise fit to advise the Secretary of State, there was a statutory presumption that a person over 75 years was not. Having retired from judicial office the trial judge was now a private citizen and the court should be slow to endorse the decision of the Secretary of State to seek advice on the appropriate minimum term from a private citizen. Mr Macdonald submitted that section 27 of the 1993 Act did not assist the respondent. This applied to a situation in which a judge had commenced but not completed proceedings before he reached the compulsory retirement age and it enabled him to complete them after he had attained that age. Section 27 permitted a retired judge to deal with ancillary matters after retirement. Advising the Secretary of State in 2008 on the minimum term to be served by a prisoner sentenced in 1995 was not a matter ancillary to the original case before the trial judge.

[14] Mr Maguire QC who appeared on behalf of the respondent submitted that the expression 'the trial judge if available' embraced a Judge in office and a retired judge. He stressed the important role that the trial judge could play in advising the Secretary of State about the appropriate minimum term. The trial judge's understanding of the case at the time of sentencing would be significant in this regard. Mr Maguire submitted that the role of the trial judge and the contribution he could make to the advice offered to the Secretary of State should inform the interpretation of the words 'if available'. The purpose in consulting the trial judge is to enable him to bring his knowledge of the case to bear on the decision to be made by the Secretary of State. Thus the interpretation should be purposive to enable this to occur. It was inevitable that in the case of a prisoner sentenced to imprisonment for life that any consultation would take place long after the sentence had been passed. Therefore Parliament must have contemplated that by the time the Secretary of State would be considering any case, the trial judge may have long since retired. The use only of the words 'if available' left open that possibility. If Parliament wished to exclude the trial judge or a retired judge it could have done so easily. By the use of the words 'if available' the issue was not whether he had retired but whether he was available in the sense of having the capacity to assist the process. A judge would not be available if he were deceased, suffered from impairment of health or if his whereabouts were unknown and retirement in itself does not give rise to unavailability. It was submitted that availability implies a willingness and ability to advise the Secretary of State whether the trial judge is retired or otherwise. If the trial judge is willing to do so it would be sufficient if his views were made

available in written form. Of course his availability would not mean that he must participate in the process. It was accepted that advising the Secretary of State on the minimum term is a sentencing exercise and a judicial function for the purposes of the European Convention but the participation of a retired judge would not be a breach of it. 'Independent' in Article 5 of the European Convention means independent of the Executive which a retired judge would be and 'impartiality' (in the same Article) would be guaranteed by the judge's legal training and experience. He contrasted the position of a retired judge with that of the role of the Life Sentence Commissioners or Parole Commissioners in the process, not all of whom are required to have legal training or judicial experience. However the expression should be interpreted, Section 27 of the 1993 Act empowered a retired judge to continue to act in a judicial capacity in order to complete a judicial process. The language of section 27 was wide enough to include that part of the criminal process involving a life sentence in which a trial judge advises the Secretary of State about the appropriate minimum term.

[15] Section 9(1) of the Criminal Justice Act (Northern Ireland) 1966 decreed that no person in Northern Ireland would be liable to suffer death for the offence of murder, which was not capital murder. Instead an offender who, but for section 9(1), would be liable to suffer death should be sentenced to imprisonment for life – Section 9(2). Section 9(2) continued –

> "…no person convicted of murder shall be released by the Minister of Home Affairs on licence under Section 23 of the Prison Act (Northern Ireland) 1953, unless the Minister of Home Affairs has prior to such release consulted the Lord Chief Justice together with the trial judge (if available)."

Section 9 was replaced by Section 1 of the Northern Ireland (Emergency Provisions) Act 1973 (the 1973 Act) which abolished capital murder and retained imprisonment for life as the sentence for murder (whether capital or otherwise within the 1966 and 1973 Acts). Section 1(3) of the 1973 Act retained the restriction on the Minister of Home Affairs (and later the Secretary of State for Northern Ireland) from releasing on licence a person convicted of murder and serving a sentence of imprisonment for life, except after consultation with the "Lord Chief Justice of Northern Ireland together with the trial judge, if available". (The parenthesis was removed). Section 1(3) was repealed by the 2001 Order. Thus since 1966 there has been a consistent legislative history of consultation with the Lord Chief Justice and the trial judge, if available. The earlier legislation required consultation with the Lord Chief Justice together with the trial judge, (which implies a joint consultation) and the words 'if available' were in parenthesis. Corresponding legislation has existed in England and Wales since 1965.

[16] Any interpretation of Article 11 of the 2001 Order and the words 'the trial judge, if available' must take into account the legislative intent behind the consultation process. It is to provide that the minimum term certified is informed judicially and by an independent source other than the executive. This heightens the significance of seeking the views of the trial judge. After all he is the person of authority with carriage of the case at the time of trial and who imposed the sentence after a hearing or hearings, whether the conviction was by way of a plea of guilty (as in this case) or a jury's verdict. By contrast the Lord Chief Justice comes fresh to the case by way of the written material, though that does not underestimate his role due to his experience in other cases. Therefore the input of the trial judge ought to be very significant. Should that contribution be ignored simply because the trial judge has retired, but is otherwise available? The applicant argues that the words 'if available' must be read so as to mean available to act as a judge or judicially. That once he has retired he is no longer a judicial figure and is incapable of acting judicially. The word 'available' in this context means 'able to aid or be of assistance' in which 'able' means that he has the capacity to do so. It has not been suggested that the trial judge is unable to do so or that he is not capable in fact of acting judicially and impartially. The challenge is that he no longer holds judicial office and that he cannot thereby act judicially. It seems to me that is a somewhat artificial argument. He will be able to act judicially, that is, act justly based on his judicial training and experience. What seems to be argued is that as he is retired he is out of judicial office and thereby not empowered to act. Thus it seems the crux of the applicant's argument is that as the trial judge is retired, he is not empowered to act. The legislation does not say that he can only be consulted if he is empowered to act; it requires only that he is 'available'.

[17] The nature of the penalty imposed for the offence of murder will inevitably involve a substantial time lapse before release is considered. Most judges are appointed in their late forties or early fifties, though some are appointed earlier. A judge can retire immediately on full pension after he has completed fifteen years service and has reached the age of 65 years. Under the earlier legislation a significant number of years would have elapsed before the Secretary of State, in contemplation of release, would have consulted the Lord Chief Justice and the trial judge. Re Whelan's Application discloses the time scales involved. In practice the earlier legislation would have involved trial judges near or after retirement. Under the regime introduced by the 2001 Order the Secretary of State will be obliged to consider recent cases as well as those prisoners sentenced many years ago. In using the same language there is a strong case for saying that Parliament must have contemplated that the point in time at which the Secretary of State is obliged to consider certifying a minimum term after consultation with the Lord Chief Justice and the trial judge under the 2001 Order, would include cases in which the trial judge had retired. Yet the words 'if available' were not qualified in any way and this

provides strong support for the view that the words were intended to mean that the trial judge should be consulted if he was present, willing and capable of acting and not that he could only be consulted if he was at the time empowered to hold judicial office. If Parliament wished to exclude a retired judge from the consultation process it could have done so easily. It should be remembered that the role of the trial judge would be to provide advice but to do so in conjunction with the Lord Chief Justice, who undoubtedly is empowered to hold judicial office and act judicially. Therefore I consider the words should be interpreted as they stand – available to be consulted even though retired from judicial office. Therefore under Article 11 the Secretary of State is entitled to seek the views of the trial judge, now retired, if in fact the trial judge is present, willing and capable so to do. The word 'available' is not restricted to a trial judge who is available and remains in judicial office.

[18] Section 27(1) of the 1993 Act is entitled 'Completion of proceedings after retirement'. Section 27 provides -

> "(1) Notwithstanding that a person has vacated or otherwise ceased to hold an office to which this section applies—
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> (a) he may act as if he had not ceased to hold the office for the purpose of continuing to deal with, giving judgment in, or dealing with any ancillary matter relating to, any case begun before him before he ceased to hold that office; and
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> (b) for that purpose, and for the purpose of any proceedings arising out of any such case or matter, he shall be treated as being or, as the case may be, as having been a holder of that office;
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> but nothing in this subsection shall authorise him to do anything if he ceased to hold the office by virtue of his removal from it."

The relevant office includes the office of Lord Justice of Appeal in Northern Ireland. The first point to note about section 27 is that it applies to a person who has vacated or otherwise ceased to hold judicial office and would encompass those who have retired before the compulsory retirement age and thus who have passed that age. Notwithstanding that such a person no longer holds the office he may nonetheless act in that office in defined circumstances. He may do so to continue a case begun before him before he ceased to hold that office. He may give judgment in a case begun before him before he ceased to hold office; and he may deal with any ancillary matter relating to a case begun before him before he ceased to hold office. It was contended on

behalf of the applicant that once the trial judge had sentenced the applicant to imprisonment for life he was *functus officio* in relation to the criminal case. This cannot be correct. Since the abolition of the death penalty judges have been consulted about the release of prisoners sentenced to imprisonment for life for murder. If the trial judge was *functus officio* immediately after sentence then he could not in any circumstances provide advice to the Secretary of State or the Home Secretary about a release date even though the trial judge was still the holder of judicial office. Yet Parliament has decreed that he could. In providing advice to the Secretary of State on the appropriate minimum term the former trial judge would not be continuing with the case or giving judgment. The question is whether, in doing so, he would be dealing with a matter ancillary to the original case. 'Ancillary' includes such things as are subsidiary, supplemental, and additional to the main issue. The sentence of imprisonment for life was a major issue at the trial. The length of the minimum term to be served by the applicant before the release provisions of the 2001 Order would apply to him, is clearly ancillary to that sentence. Therefore I would hold that the trial judge although no longer holding office is entitled under section 27 of the 1993 Act to advise the Secretary of State on the minimum term to be served by the applicant before the release provisions apply to him.

[19] I would therefore hold that the Secretary of State is entitled to seek the views of the trial judge as to the minimum term. The trial judge now retired may decline to do so for good reason, for example, the case occurred so long ago that he no longer retains a memory or sufficient memory of what was involved. On the other hand he may recall the case in detail and be in a position to disclose information that may be of assistance to the Secretary of State and/or of benefit to the applicant. If he is available he can clearly assist the Secretary of State as to the seriousness of the offence and the requirements of retribution and deterrence. Therefore I decline to grant either of the declarations sought in paragraph 2 of the Statement Pursuant to Order 53 and the application for judicial review is dismissed.