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*Judgment: approved by the Court for handing down (subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Corey's Application [2012] NIQB 56

AN APPLICATION BY MARTIN COREY FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] The applicant challenges the refusal of the Parole Commissioners to release him from prison primarily on the ground that it breaches his Art. 5(4) ECHR rights.

Background

[2] The Applicant was sentenced to life imprisonment for murder in 1973. He was released on license in 1992. On 16 April 2010 he was re-arrested pursuant to the Secretary of State's decision to revoke his license. The case was referred to the Parole Commissioners under Art 9(4) Life Sentences (NI) Order 2004. When considering the case under that section the Parole Commissioners must decide if the revocation of the license should remain in force. If not they must direct the prisoner's release. They should only direct the prisoner's release if they were satisfied that it was no longer necessary for the protection of the public from serious harm that he should be confined in prison (Art. - 9(5A) of the Parole Commissioners Rules). In order to make the decision the Parole Commissioners had to consider certain evidence and information.

[3] On 12 April 2010 the Minister of State (on behalf of the Secretary of State) certified some of the information relevant to the case as confidential under R. 9(1) of the Parole Commissioners Rules 2009. That meant that neither the prisoner nor his representatives could have sight of that information. On 22 June 2010 a single Parole

Commissioner decided that the certification of the information was appropriate. A Special Advocate was appointed under R. 9(1) and a panel of Commissioners was appointed to consider the case.

[4] On 16 April 2010 the applicant was served with the first open statement of evidence and on 2 July 2010 he made a written statement in response. On 3 November 2010 the applicant consulted with the Special Advocate based on the information he had seen at that time. This was his only consultation with the Special Advocate.

[5] Pursuant to a directions hearing, all open and closed material and exculpatory evidence was served on the Special Advocate. Sight of the closed material precluded the Special Advocate from having further 2 way communication with the applicant. However, the Special Advocate was not prevented from receiving further one way communication in writing from the applicant should further information have come to light.

[6] On 2 December 2010 the applicant made a further statement containing details of alleged approaches to the applicant by PSNI members asking him to become an informer. An exculpatory review was carried out by Counsel to the Secretary of State.

[7] On 3 December 2010 a second open statement was served in response to the applicant's representations. On 25 January 2011 there was a closed hearing in which submissions were made in relation to adequacy of disclosure. On 21 February 2011 the first and second amended open statements were served on the applicant and his legal representatives.

[8] The open statements of evidence represent all the information that the applicant was privy to. They include allegations in relation to his role, contacts and associations, and operational activity within CIRA.

[9] The Parole Commissioners hearings (open and closed) took place between 29 and 31 March 2011, and again between 23 and 24 May 2011. During the course of the open hearing, one witness, Witness A, a member of the security service, gave evidence. He also gave evidence in the closed sessions. At the outset of the evidence, an allegation as to the role that the applicant was alleged to have played in a planned attack on security forces was substantially amended by Witness A. Originally it was alleged that he would have been one of the attackers while the amended allegation stated that he would have planned the attack and/or procured weaponry.

[10] On 16 August 2011, the Parole Commissioners issued their judgment refusing the release of the applicant. The applicant challenges this refusal to release him on the grounds that it breaches his Art. 5(4) ECHR rights and that it is unfair and irrational.

Relief Sought

[11] Relief against the impugned decision is sought on the basis that the open materials consisted virtually exclusively of general assertions and the decision to uphold his detention was based solely or to a decisive degree upon closed materials and thus offended his Art. 5(4) rights.

[12] It is also contended that the decision was unfair and irrational on the same grounds as above and also because he was not able to consult the Special Advocate after the Special Advocate had seen the closed material and because Witness A was allowed to avoid answering non-contentious questions in a manner that prevented the applicant from challenging the witness effectively.

Statutory Framework

[13] Section 23 of the Prison Act (NI) 1953 provides:

> "(1) Subject to compliance with such conditions, if any, as the Minister may from time to time determine, the Minister may at any time if he thinks fit release on license a person serving a term of imprisonment for life.
>
> (2) The Minister may at any time by order recall to prison a person released on license under this section, but without prejudice to the power of the Minister to release him on licence again; and where any person is so recalled his licence shall cease to have effect and he shall, if at large, be deemed to be unlawfully at large."

[14] Section 9 of the Life Sentences (NI) Order 2001 provides:

> "Recall of life prisoners while on licence
>
> 9.-(1) If recommended to do so by the Commissioners, in the case of a life prisoner who has been released on licence, the Secretary of State may revoke his licence and recall him to prison.
>
> (2) The Secretary of State may revoke the license of any life prisoner and recall him to prison without a

recommendation by the Commissioners, where it appears to him that it is expedient in the public interest to recall that person before such a recommendation is practicable.

(3) A life prisoner recalled to prison under this Article –

(a) on his return to prison, shall be informed of the reasons for his recall and of his right to make representations; and

(b) may make representations in writing to the Secretary of State with respect to his recall.

(4) The Secretary of State shall refer the case of a life prisoner recalled under this Article to the Commissioners.

(5) Where on a reference under paragraph (4) the Commissioners direct the immediate release of a life prisoner on licence under this Article, the Secretary of State shall give effect to the direction.

(5a) The Commissioners shall not give a direction under paragraph (5) unless they are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined.

(6) On the revocation of the licence of any life prisoner under this Article, he shall be liable to be detained in pursuance of his sentence and, if at large, shall be deemed to be unlawfully at large.

[15] The Parole Commissioners Rules (NI) 2009 provide:

"Non-Disclosure of Confidential Information

9.-(1) This rule applies where the Secretary of State certifies as confidential information any information, document or evidence which, in the Secretary of

State's opinion, would, if disclosed to the prisoner or any other person be likely to:

(a) adversely affect the safety of any individual;

(b) result in the commission of an offence;

(c) facilitate an escape from lawful custody or the doing of any act prejudicial to the safe keeping of persons in custody;

(d) impede the prevention or detection of offences or the apprehension or prosecution of suspected offenders;

(e) be contrary to the interests of national security;

(f) otherwise cause substantial harm to the public interest;

And any such information, document or evidence is referred to in these rules as confidential information.

Neither the Commissioners nor a special advocate shall in any circumstances disclose to or serve on the prisoner, the prisoner's representative, any witness appearing for the prisoner or any other person, any confidential information and shall not allow the prisoner, the prisoner's representative, any witness appearing for the prisoner or any other person to hear argument or the examination of evidence which relates to any confidential information.

Where the Secretary of State has certified information as confidential, the Secretary of State shall, within 7 days of doing so, serve on the prisoner and on the Commissioners, whether by way of inclusion with the case papers or otherwise, written notice of this stating, so far as the Secretary of State considers it possible to do so without causing harm of the kind referred to in paragraph (1) the gist of the

information withheld and the reasons for withholding it.

Special Advocates

19.-(1) On receiving a certificate of confidential information under rule 9, the single commissioner or chairman of the panel dealing with the case shall inform the Advocate General for Northern Ireland of the proceedings before the panel, with a view to the Advocate General for Northern Ireland, if the Advocate General for Northern Ireland thinks fit to do so, appointing a special advocate to represent the interests of the prisoner.

(2) The function of the special advocate is to represent the interests of the prisoner, as mentioned by paragraph (1), by:

(a) making written submissions to the single Commissioner;

(b) making submissions to the panel in any oral hearings from which the prisoner and the prisoner's representative are excluded;

(c) cross-examining witnesses at any such hearings; and

(d) making written submissions to the panel.

(3) Except in accordance with paragraph (4) a special advocate may not communicate directly or indirectly with the prisoner whose interests the special advocate has been appointed to represent on any matter connected with the case before the panel.

(4) A special advocate may seek directions from the single Commissioner or chairman of the panel dealing with the case authorising the special advocate to seek information in connection with the

case from the prisoner whose interests the special advocate has been appointed to represent.

[16] Art. 5(4) ECHR states:

"4. Everyone who is deprived of his liberty by arrest or detention shall be entitles to take proceeding by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

[17] Art. 6 ECHR states:

"Right to a Fair Trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) To have adequate time and facilities for the preparation of his defence;

(c) To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

(e) …."

Arguments

[18] The applicant argues that at the time of consultation with the Special Advocate he did not have sufficient information to give effective instructions. It is submitted that this deficiency came about because the open material was not evaluated for compliance with A v UK [(2009) 49 EHRR 625] prior to the consultation. Being incapable to give effective instructions to the Special Advocate prevented the Special Advocate from providing an effective safeguard against the lack of full disclosure which thus rendered the proceedings unfair and the decision a breach of Art. 5(4).

[19] The applicant further submits that even in its totality, the open evidence fell short of the level of specificity required by A v UK. Three allegations which the Parole Commissioners regard as being sufficiently specific are outlined. The Applicant then contends that these three issues ought to have been the only allegations on which the Parole Commissioners relied in their decision. It was not open to the Parole Commissioners to rely in their judgement on allegations which were not gisted in the open materials to the appropriate level of particularity. However, they submit (see paras71-76 PCNI decision) that the Parole Commissioners in fact relied extensively on the closed material.

[20] Finally the applicant submits that even the specific allegations which the Parole Commissioners have assessed to be sufficiently particularised are not in fact so and therefore do not comply with the standard of disclosure set in ***A v UK***. Further it is submitted that in allowing Witness A to refuse to answer relevant questions the applicant could not challenge the case against him and that this is another basis for impugning the decision.

[21] The respondent contended that the kernel of unfairness in the A v UK case is found at the final sentence of para. 220 "Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Art. 5(4) would not be satisfied". The respondent submits, in contrast to A v UK, the open material in the present case is not 'purely' general.

[22] The respondent draws attention to the findings of that case particularly in respect of the seventh applicant where no violation of Art. 5(4) was found. They submit that the allegations in the open evidence and gist in this case are sufficiently similar to the 7th Applicants case to justify a similar outcome.

[23] The respondents point to the Special Advocates note of 1 April 2012 in submitting that the failure of Witness A to answer certain questions did not preclude the applicant from challenging the case as this role would have been performed by the Special Advocate. The respondent does not accept that the fairness of open material must be assessed before the Special Advocate views the closed material and therefore that disclosure thereafter cannot assist in a fair trial. They stress that further instructions based on additional information are in fact permitted and the applicant could have provided further written instructions to the Special Advocate at any time. Also, there is limited provision for the Special Advocate to seek further consultation with the applicant further to the Court's permission.

[24] The respondents outline the procedure taken in producing the gists at paras22-24 of the decision and draw attention to the observation of the PCNI that if an allegation was not sufficiently gisted it could not be relied upon. The gisting process is further described at paras27-31of the decision.

[25] The respondent submits that the open material does not consist **purely** of general assertions. This is supported at para33 of their decision where the three allegations believed to be of sufficient specificity can be located. Thus the respondent notes that the applicant got what he was entitled to: a statement of allegations [not disclosure of evidence]. They note also that the Special Advocate made no submission that the gisting was inadequate.

[26] The respondent invites the court to remember that the Commissioners were in the best position to decide if the proceedings afford a sufficient measure of procedural protection. They also invite the court to consider the steps taken by the Commissioners to ensure a balance.

[27] The respondent does not accept that the information in the open statements was too general. They support this by observing that neither the Commissioners nor the Special Advocate believed this. They note that the Special Advocate felt he had adequate instructions upon which to challenge the case.

[28] The Secretary of State ("SoS") also made submissions. He submitted that in A the first essential is that as much information as possible is disclosed without compromising national security and then that secondly if full disclosure is not possible, this is counterbalanced so as to enable the prisoner to challenge the allegations against him.

[29] At para15 the SoS says that it is impossible to tell whether a closed allegation is sufficiently gisted from the open material. They say this is why the emphasis is placed on the court of first instance as they have sight of both the open and closed material and will therefore be best placed to determine the 'sufficiency' of the open material as against the closed. For example, it is not necessary to gist a general allegation more specifically. To decide on 'sufficiency' one must see the closed allegations.

[30] Finally the SoS submits that further specifics would not advance the applicants ability to give specific instructions in the face of his complete denial.

Discussion

[31] It is agreed by all parties that the test which must be applied in relation to the sufficiency of disclosure and its relation to a fair trial is that which is found in ***A*.** In ***A*** the applicants had been detained under Part 4 of the Anti-Terrorism Act 2001 on the basis that the SoS had a reasonable belief that they were involved in international terrorism. Each applicant appealed to the Appeals Board, SIAC. SIAC upheld each of the applicants' certificates. It used a procedure which considered both open and closed materials. The procedure also employed Special Advocates who had access to the closed materials and could make representations on the prisoners' behalf in relation to procedural matters, disclosure and the substance and reliability of the material. The applicants there, as here, alleged a breach of their Art. 5(4) as well as Art. 6 rights.

[32] If this court is satisfied that the conditions essential for the lawful detention of the applicant under Art. 5(4) are not met it must intervene.

[33] It is necessary therefore to consider what the conditions essential for lawful detention of the applicant are. He is a life prisoner who was released on license in June 1992 under s. 23 of the Prison Act (NI) 1953. The significance of this is that he was and is

a convicted man whose liberty was conditional only, and conditional upon such rules as may be enacted in relation to same.

What is the status of a convicted person's right to liberty under Art5(1) and his procedural rights under Art5(4) in these circumstances?

[34] The applicant's licence was revoked on 15 April 2010 by the Minister of State, pursuant to Art. 9(1) of the Life Sentences (NI) Order 2001 under which provision the SoS may revoke a life prisoners license upon recommendation from the Parole Commissioners. It is common case that any decision of the Parole Commissioners must be compliant with Art. 5(4).

[35] The procedure leading up to the revocation of the license was as follows:

- On 13 April the SoS requested a recommendation to revoke the applicant's life license 'on the basis of intelligence which indicates that the applicant is involved in dissident republican activity and presents a risk of serious harm to the public at this time'.
- A recommendation to revoke his licence was sought consequently from the Commissioners under Life Sentences (NI) Order Art. 9(1)'.
- With this request a dossier of background information and the intelligence considered by the Minister was enclosed.
- In that letter it was also noted that some information had been classified as confidential.
- The SoS, in making the request, reminded the Parole Commissioners that when considering the case (ie when considering whether or not to make such recommendation) they should have regard to Art3(4) of the Life Sentences Order 2001 which states:

> "(4) In discharging any functions under this Order the Commissioners shall—
>
> (a) Have due regard to the need to protect the public from serious harm from life prisoners; and
>
> (b) Have regard to the desirability of—
>
> (i) Preventing the commission by life prisoners of further offences; and

(ii) Securing the rehabilitation of life prisoners.

It observed at this point that the purpose of the life sentence commissioners is:

(3) The Commissioners shall—

(a) advise the Secretary of State with respect to any matter referred to them by him which is connected with the release or recall of life prisoners; and

(b) have the functions conferred by Part III."

[36] On 14 April 2010 a Single Commissioner recommended the revocation of the applicant's license. He stated:

> "This request was based on the suspected dissident republican activity of this licensee. Having perused the confidential file supplied by the security services, I am satisfied that for the protection of the public from serious harm and for the prevention of the commission of further offences, the life licence of Martin Joseph Corey should be revoked."

[37] The revocation was issued on the 15 April by the Minister of State acting on behalf of the SoS. The 1992 license was thereby revoked and the applicant was recalled to prison. On the same date the recommendation and the Notice of Revocation was sent to the applicant, along with a statement of evidence on behalf of the SoS – this is to satisfy the requirement of Art. 9(3) of the Life Sentence Order as set out above.

[38] The letter states the reason for the revocation is that information exists which suggests that the applicant presents a risk of serious harm to the public. It continues:

> "You are being detained again therefore in pursuance of your life sentence and will be returned to prison where you will resume the status of a life sentence prisoner."

[39] The applicant is then advised that the case will be referred to the Parole Commissioners for review of the decision to revoke the license and a dossier of

information in relation to the case will be served on the applicant and his representatives in this regard. Finally he is advised of his right to make representation to the Secretary of State and the Commissioners.

[40] None of the above is challenged. The lawfulness of the detention is only at issue ***after*** the decision of the Parole Commissioners not to direct the release of the applicant. It is that decision which is impugned, inter alia, as a breach of Art5 (4) ECHR.

[41] This court cannot substitute its discretion for that of the Parole Commissioners in its review and decision of the applicant's case. It must confine itself to a consideration not of the correctness of the determination, but of whether the conditions essential for the lawful detention of a person have been met. The conditions essential for a lawful detention in this case are that the Commissioners must not direct immediate release "**unless they are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined"**(Art. 9(5A) Life Sentences (NI) Order 2001**)** *and* that the procedure used to come to this determination is Art 5(4) compliant.

[42] The Strasbourg Court in ***A*** noted at para203 that 'The requirement of procedural fairness under Art. 5(4) did not impose a uniform, unvarying standard to be applied irrespective of ... context.' There, as here, the applicants right to procedural fairness under Art. 5(4) must be balanced against the public interest. At para217 it was noted "Moreover, in the circumstances of the case, and given the dramatic impact of the lengthy and at the time, apparently indefinite, deprivation of liberty on the fundamental rights of the applicants, Art. 5(4) was to be regarded as importing the same fair trial guarantees as Art. 6(1)."

[43] The applicant, upon revocation of his license, also faces indeterminate imprisonment.

[44] The court noted at para 204 that: 'In remand cases … the persistence of a reasonable suspicion that the accused person had committed an offence was an essential pre-condition for the lawfulness of continued detention'. In this case the Parole Commissioners must be 'satisfied' that it is necessary for the protection of the public from serious harm that the prisoner should be confined. They must be satisfied of this on a balance of probabilities. The procedure used to make this determination must be fair and in line with Art6. In this connection, the Strasbourg court noted that the detainee had to be given the opportunity effectively to challenge 'the basis' (at para204) of the allegations against him. In ensuring a fair trial, the applicants were to receive as much information about the allegations as possible without compromising the Public Interest.

[45] Importantly the court noted that if full disclosure was not possible, there would have to be counterbalancing measures to ensure that the applicants had the ***possibility to effectively challenge the allegations against him.*** Therein is the nub of this case. Since full disclosure not being possible was this sufficiently counterbalanced by safeguards which allow Martin Corey the possibility to effectively challenge the allegations against him?

[46] The Court noted in ***A*** that SIAC, "a fully independent court... and which could examine all the relevant evidence, both closed and open, was best placed to ensure that no material was unnecessarily withheld from the detainee. In this connection, the special advocate could provide an important, additional safeguard through questioning the State's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure." (para219). This is a counterbalance or safeguard. The Parole Commissioners in the instant case are also a fully independent court and are best placed to ensure that no material in relation to Mr Corey was unnecessarily withheld. It is clear that a fully independent court can only act as a safeguard/ counterbalance if it has directed itself correctly on the tests relating to disclosure and fair trial rights *and* applied them correctly

[47] Another safeguard/counterbalance that was identified in ***A*** was the role of the Special Advocate. The Special Advocate could counterbalance the lack of full disclosure and of an open adversarial hearing, by testing the evidence and putting arguments on behalf of the detainee during closed hearings. However, it was noted that this counterbalance would *only* be effective if ***the <u>detainee</u> was provided with*** *sufficient information to give effective instructions* ***to the special advocate. This is a question that was to be decided on a case by case basis. (para220)*** Turning again now back to the nub of this case, we can extend the question to be asked:

Full disclosure was not possible in this case – was this sufficiently counterbalanced to allow Martin Corey the possibility to effectively challenge the allegations against him.

a. Was counterbalance 1 effective? Did the fully independent court properly direct itself as to the applicable law and test and apply it?

b. Was counterbalance 2 effective? Did the detainee have ***sufficient information*** *to give* ***effective*** *instructions* to the Special Advocate?

[48] In ascertaining the level of disclosure that would be necessary to make the procedure fair in the absence of full disclosure the court described what was essentially a scale of disclosure. On this scale, they placed 3 examples and examined the fairness or lack thereof in each of the examples given. The described points on the scale where:

Scenario 1:

[para 220} "Where open material played the predominant role in a determination, a detainee could not be said to have been denied an opportunity effectively to challenge the reasonableness of the Secretary of States suspicion....

Scenario 2:

... Even if all or most of the underlying evidence remained undisclosed, *so long as the allegations contained in the open material were sufficiently specific,* it was possible for a detainee to provide his representatives and the Special Advocate with information with which to *refute* them, without knowing the detail or sources of the evidence which formed the basis of the assertions...

Scenario 3:

...However, if the open material consisted purely of general assertions and a decision by SIAC to uphold the certification and continued detention were based solely or to a decisive degree on closed material, the procedural requirements of Art 5(4) would not be satisfied."

[49] Therefore, Art. 5(4) is affected by at least 2 distinct but related issues, and their interplay with one another, in a procedure involving partially undisclosed evidence:

(a) The quality/specificity of the open material;

(b) The extent to which any determination was based on closed material

[50] It would seem that the second criterion is the dominant criterion in relation to fairness, while the first criterion can mitigate any unfairness caused by the second. So the questions to ask here are:

(a) To what extent is the Parole Commissioners' determination based on closed material?

(b) To what extent does the quality of the open evidence correct the lack of full disclosure?

[51] The reason for this interplay is that in order to effectively challenge the case against him the applicant must know sufficient contours of that case. The closed evidence is completely opaque to him. The disadvantage that this necessarily imposes can be sufficiently counterbalanced only as long as the allegations contained in the open material are sufficiently specific to enabling the detainee to provide his lawyers and the Special Advocate with information to refute them. The open evidence should shed enough light on the case to illuminate features which can be effectively grappled with by disproving, or discrediting or throwing sufficient doubt on to, if sufficient, tip the scales in the applicant's favour. Given what is at stake for the detainee, in this case potentially indefinite deprivation of liberty, the Strasbourg courts insists on such safeguards to avoid arbitrary and unfair detention.

[52] It is illuminating to analyse how this test was actually applied in ***A.*** In relation to the 1st and 10th applicants there was open evidence which supported the allegation that they were involved in fundraising for terrorist groups. However in each case the ***evidence providing the link between the money raised and terrorism was not disclosed*** such that they ***were not able effectively to challenge the allegation against them.*** The two applicants asserted that the money raised was for charitable purposes. The issue with the evidence/information was that there was no *challengeable* information which provided a link between the existence of money which had been raised by the applicants and terrorist groups. There was only a general assertion of the existence of such a link.

[53] The allegations against the 3rd and 5th applicants had been of a general nature, namely that they were members of an extremist group. SIAC had acknowledged that this evidence was insubstantial and that the evidence that it had relied upon in dismissing the appeals had largely been in the closed material. As a result they had not been able to challenge the allegations.

[54] In relation to the 6th, 7th, 8th, 9th and 11th applicants it was held that there was sufficient open evidence to effectively challenge the allegations. The sufficiency of the allegations rested upon the *detail* therein. The detail in the allegations referred to the purchase of specific telecommunications equipment, the possession of documents linked to terrorist suspects and meetings with terrorist suspects on specific dates and in specific places.

[55] This outline merely serves to illustrate how the general principles enunciated in *A* applied in that case. Whether the level of disclosure in an individual case is sufficient

will be case specific but the courts approach provides some assistance as to where the line drawn by Art. 5(4) rests. Clearly its precise location will be fact-specific but the 'substantial measure of procedural fairness' which it guarantees should be similar in every case. It now falls to assess whether the allegations contained in the open material were sufficiently specific to make it possible for the applicant to provide his legal representatives and the Special Advocate with information with which to refute them.

Decision

[56] The questions which must be asked of the procedure in the instant case are as follows:

(a) To what extent was the Parole Commissioner's determination based on the closed material?

(b) To what extent does the quality of the open evidence remedy the lack of full disclosure?

(c) Did the extent of the open material allow the Special Advocate to provide a sufficient counterbalance and ensure the fairness of the proceedings?

(d) Was the independent court effective in providing a safeguard?

(e) Bearing in mind all these elements, was the lack of disclosure sufficiently counterbalanced to allow the applicant to effectively challenge the allegations against him?

[57] In answering these questions it is clear that the court is not concerned with the correctness of the Parole Commissioners determination. Decisions on the facts must obviously be based on the evidence in the closed material to which this court is not party.

[58] This court is concerned only with the fairness of the determination and the process used to come to it, specifically whether, in light of the decision in ***A***, there has been a breach of Art5 (4). The content of the closed evidence in this case would not (could not) affect the basis of the decision to which the court has come. It does not bear on whether the allegations were sufficiently specific to enable the applicant to provide information with which to refute them. They are two separate issues.

To what extent was the parole commissioner's determination based on closed material?

[59] I can deal with this in relatively short compass. At para51 the decision of the panel states:

> "The Panel does not believe that the Secretary of State's case against Mr Corey was particularly advanced one way or another by the open evidence. There was simply not enough evidence to enable it to conclude that any of the allegations of dissident membership, association, leadership and/or involvement were proven on the balance of probabilities"

[60] It is thus plain that the determination was made solely or decisively on the closed material.

[61] Applying the test in ***A***, the applicant's case falls within the second category ie the procedural requirements of Art. 5. (4) will be satisfied 'so long as the allegations contained in the open material were sufficiently specific, [that is] it was possible for a detainee to provide his representatives and the Special Advocate with information with which to refute them, without knowing the detail or sources of the evidence which formed the basis of the assertions'.

[62] The term 'allegation' is an unfortunate one in this context. That term can attach to **any** accusatory statement. For example 'I believe you are up to no good' is an allegation, though an unspecific one. 'I believe you are the OC of Craigavon/Lurgan CIRA' is no doubt a specific allegation, but does it make it possible for the detainee to refute it beyond a general denial?

[63] To my mind, the type of specificity that would render an allegation sufficient to allow the possibility of rebuttal must be one that reveals *some* factual nexus. It must be a statement with probative value going beyond mere assertion. A wholly threadbare accusation incapable of being tested or refuted other than by bare denial is unlikely to be sufficient. There must be *challengeable* information.

[64] The fact that it may in some cases be difficult to make such an allegation without revealing something of the detail does not sound on the objective determination as to whether the allegations deployed in the open material satisfy the quality threshold identified in *A*. The function of this court is only to ensure that a fair balance between the applicant's Art. 5 (4) rights and the public interest was reached in the instant case.

[65] The Parole Commissioners are of course fully entitled and indeed required to consider the closed evidence in its fullness when reaching a determination on the facts on the balance of probabilities, but they are not entitled to reach that determination, regardless of the cogency of the case presented in closed hearings, if the applicant has not been in receipt of his Art. 5(4) rights. The Parole Commissioners have two distinct responsibilities in relation to their analysis of the evidence and their operation as a safeguard: one is to make sure that no material is left out unnecessarily, and the other is that the open material satisfies the A test.

[66] The Parole Commissioners agree at para33 that there is 'much by way of general assertion' in the amended open statements. Those general assertions are not in this courts judgment sufficient to counterbalance the lack of full disclosure. They lack the required specificity required by Art 5(4) as envisaged in A.

[67] The three specific allegations which the Parole Commissioners believe to be sufficiently sufficient are also found at para33. These are:

i. The allegation that the applicant was involved with Brendan Magill in recruitment activities and procuring weaponry up until the time of his revocation;

ii. The allegation about the prearranged meeting at a filling station with Malachy Maguire on the evening of 9 September 2009;

iii. The allegation that on the same date Mr Corey drove to Eddie Breens house and remained there for a period of time.

[68] In relation to the first allegation I do not consider that it is sufficient to allow a rebuttal. It does not reveal any factual nexus. It does not have probative value. It is an unsubstantiated, unparticularised accusation. No meaningful specifics are furnished. It is insufficiently specific to make it possible for the applicant to provide his legal representatives and the Special Advocate with information with which to refute it.

[69] In relation to the other allegations some factual nexus is provided. It does have probative value. It could weigh on the balance of probabilities. However, the information contained in the allegations does not provide a link to any specific CIRA activities. I would draw attention to the outcome in ***A*** in relation to the 1st and 10th applicants. While there was evidence of large sums of money in their bank accounts, and general assertions of a terrorist link, those two elements together did not add up to sufficiently challengeable information. The applicant's case is comparable with that determination.

[70] In relation to the 7th Applicant in *A*, to whom the respondent has referred, I would note that the evidence in relation to that individual included details of the purchase of specific telecommunications equipment, the possession of documents linked to terrorist suspects and meetings with terrorist suspects on specific dates and specific places. Looked at in the round that would appear to be a great deal more specific information than is available in the open material in relation to the applicant.

[71] Looking at the open material in the round in the present case it is conspicuously lacking in specificity as to membership of, leadership of, or activity within CIRA Craigavon/Lurgan relating to the applicant. The open material in this case comprises a cacophony of allegations which may tend to overwhelm. The Parole Commissioners must be aware in cases such as these of the level of rigour that an allegation must possess. Any allegation which does not reach that level of rigour should not be relied upon.

[72] The allegations contained in the open material were insufficiently specific to make it possible for the applicant to provide his lawyers and the Special Advocate with information to refute them. No sufficient factual nexus has been revealed to allow challenge. No opportunity has been given to the applicant to provide information of a probative nature to rebut the case against him and thus no opportunity has been given to him to tip the balance of probabilities.

Was the independent court an effective safeguard? Did it direct itself correctly on the appropriate law and its application?

[73] The Parole Commissioners state in their skeleton argument that no misdirection in the law can be discerned from their judgement, in particular at paras22-23 of same. In those paragraphs the Parole Commissioners accept that the principles in ***A*** and ***AF*** applied to the hearing. They outline their summary of their understanding of those principles:

> "[22] These principles were summarised by Lord Phillips in AF at paragraphs 59 and 65 and it followed that where the open material consists purely of general assertions and the case against the recalled lifer is based solely or to a decisive degree on closed materials the requirements of a fair trial would not be satisfied, however cogent the case based on the closed material would be ... Paragraph 220 (in A v UK) requires that a detainee be provided with sufficient information about the allegations against him to give

> effective instructions to the special advocate and concludes with the statement that where the open material consisted purely of general assertions and the decision to uphold detention is based solely or to a decisive degree on closed material the procedural requirements of Art. 5(4) of the ECHR would not be satisfied...
>
> [23] The panel accepts that these principles apply in this case ... The allegations summarised at para14 above are based on evidence that has been largely undisclosed to Mr Corey and the question is therefore whether the allegations contained in the gisted open material are sufficiently succinct."

[74] While this is a correct statement of the law to be applied the Parole Commissioners have misdirected themselves as to the *application* of this law.

[75] I do not accept that the three allegations adumbrated at para33 of their decision were sufficiently specific to meet the standard in *A*.

[76] For this reason I must find that the Parole Commissioners did not provide a sufficient safeguard against the lack of full disclosure in the applicant's case.

Second Ground of Challenge: Consultation with Special Advocate

[77] I do not consider that in the instant case any greater deal of fairness could have been achieved by evaluating the standard of disclosure before the consultation with the Special Advocate.

[78] While the information at that time was insufficient, it could have been remedied by appropriate disclosure at a time after the consultation via the two stage process undertaken by the Parole Commissioners and Special Advocate. I have no doubt that that process is a proper one and had it been properly applied would have been capable of leading to further disclosure or abandonment of the issue despite any cogent case presented in the closed materials.

[79] Therefore it is accepted that a correct procedure was followed and that the timing of the evaluation of disclosure did not of itself cause unfairness.

Third Ground of Challenge: Witness A

[80] The testimony given by Witness A formed part of the totality of the case against the applicant. I have already made clear my decision of the standard of disclosure of the case. The testimony of Witness A added little to the capacity of the applicant's legal representatives to challenge the case and thus this ground of argument can be subsumed into the broader argument without further discussion.

Conclusion

[81] For the above reasons I hold the decision of the Parole Commissioners was reached in breach of the applicant's Art. 5(4) rights to procedural fairness. I will hear the parties as to the appropriate remedy.