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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY STEPHEN McCLEAN FOR JUDICIAL REVIEW AND IN THE MATTER OF A DECISION OF THE SENTENCE REVIEW COMMISSIONERS

Before: Nicholson LJ, McCollum LJ and Higgins J

NICHOLSON LJ

INTRODUCTION

[1] This is an appeal by Stephen McClean ("the appellant") from the judgment of Coghlin J delivered on 15 May 2003 whereby he dismissed the appellant's application for judicial review of a decision of the Sentence Review Commissioners ("the Commissioners") granting the application by the Secretary of State for Northern Ireland to revoke their declaration that the appellant was eligible for release in accordance with the terms of the Northern Ireland (Sentences) Act 1998 ("the 1998 Act").

[2] The declaration had been made by the Commissioners on 2 May 2000. On 10 July 2000 the Secretary of State applied to the Commissioners to revoke the declaration which would otherwise have enabled the appellant to be released on 28 July 2000. That date was the "accelerated release day", determined under Section 10 of the 1998 Act (as amended). The Commissioners issued a decision granting the application of the Secretary of State on 23 April 2002. As a result of the application the appellant remained in prison after 28 July 2000 and has remained in prison since the decision of the Commissioners.

BACKGROUND FACTS PRIOR TO 2 MAY 2000

[3] On the evening of 3 March 1998 there were eight customers in the public bar of the Railway Bar (also known as Canavan's Bar), Poyntzpass, County Down. At 9.00pm approximately, the door of the public bar was kicked open and two masked gunmen burst in. They ordered those who were in the bar to lie down. When the gunmen had the occupants of the bar in a position of complete vulnerability they opened fire. It is clear that they intended to kill as many people as possible, irrespective of their age or gender. Damien Trainor and Philip Allen sustained fatal injuries. Stephen Williamson, who had been shielding his daughter, suffered wounds to the upper arm. Clarence Frazer suffered gunshot wounds to his right shoulder, right elbow and left leg. Altogether twelve shots were fired from two handguns. The gunmen sprayed the interior of the public bar with bullets. Either the appellant was one of the gunmen or actively assisted the gunmen in their murderous enterprise in full knowledge of their intent. Accordingly, he was found guilty of the murder of Philip Allen and of Damien Trainor. He was also found guilty of the attempted murder of Clarence Frazer and Stephen Williamson and of possession of firearms with intent to endanger life. He was sentenced to life imprisonment on two counts of murder, determinate sentences of twenty years' imprisonment on two counts of attempted murder and of fifteen years' imprisonment on the count of possession of firearms and ammunition with intent to endanger life. In the course of his sentencing remarks the Lord Chief Justice (Kerr J as he then was) said:-

> "The murder of Mr Traynor and Mr Allen, and the attack on the others … will live in infamy as being among the most heinous offences in the history of Northern Ireland. There can be little doubt that this evil attack was carried out by a Loyalist terrorist group and it also seems clear that the bar was targeted because those who attacked it believed that it contained only Catholic customers. In that belief the gunmen could not have been more mistaken … I think it is highly likely that you, McClean and McCready, were the actual gunmen … It mattered not to you that the persons who were the victims of that attack would be, as they certainly were, innocent, honourable and decent members of society."

[4] The appellant's appeal against conviction was dismissed by the Court of Appeal on 28 June 2001. The Belfast (or Good Friday) Agreement was signed on 10 April 1998 and, in furtherance of it, the Northern Ireland

(Sentences) Act 1998 (the 1998 Act) was passed. It provided (inter alia) for an "accelerated release day" for prisoners who had committed serious crimes of terrorism, such as the appellant's offences.

THE STATUTORY FRAMEWORK

[5] The 1998 Act provided for the appointment of Sentence Review Commissioners under Section 1 which reads:-

> "1.(1) The Secretary of State shall appoint Sentence Review Commissioners.
>
> (2) The Secretary of State shall so far as reasonably practicable ensure that at any time
>
> (a) at least one of the Commissioners is a lawyer, and
>
> (b) at least one is a psychiatrist or psychologist.
>
> (3) In making appointments the Secretary of State shall have regard to the desirability of the Commissioners as a group, commanding widespread acceptance throughout the community in Northern Ireland.
>
> (4) Schedule 1 (which makes further provision about the Commissioners) shall have effect.
>
> (5) At subsection (2)(a) `lawyer' means a person who holds a legal qualification in the United Kingdom."

Section 2 provides:-

> "Schedule 2 (which makes provision about the procedure to be followed in relation to the Commissioners' functions) shall have effect."

Section 3 provides:-

> "(1) A prisoner may apply to Commissioners for a declaration that he is eligible for release in accordance with the provisions of this Act.

(2) Commissioners shall grant the application if (and only if)

(a) the prisoner is serving a sentence of imprisonment for a fixed term in Northern Ireland and the first three of the following four conditions are satisfied, or

(b) the prisoner is serving a sentence of imprisonment for life in Northern Ireland and the following four conditions are satisfied.

(3) The first condition is that the sentence

(a) was passed in Northern Ireland for a qualifying offence, and

(b) is one of imprisonment for life or for a term of at least five years.

(4) The second condition is that the prisoner is not a supporter of a specified organisation.

(5) The third condition is that, if the prisoner were released immediately, he would not be likely

(a) to become a supporter of a specified organisation, or

(b) to become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland.

(6) The fourth condition is that, if the prisoner were released immediately, he would not be a danger to the public.

(7) A qualifying offence is an offence which

(a) was committed before 10 April 1998;

(b) was when committed a scheduled offence …

(8) A specified organisation is an organisation specified by order of the Secretary of State and he shall specify any organisation which he believes

(a) is concerned in terrorism connected with the affairs of Northern Ireland or in promoting or encouraging it, and

(b) has not established or is not maintaining a complete and unequivocal ceasefire."

Section 4(1) provides:-

"If a fixed term prisoner is granted a declaration in relation to a sentence he has a right to be released on licence (so far as that sentence is concerned) on the day on which he has served:-

(a) one-third of his sentence."

Section 4(4) provides:-

"If a prisoner is released on licence under this section his sentence shall expire (and the licence shall lapse) at the time when he could have been discharged on the ground of good conduct under prison rules."

Section 6 provides:-

"(1) When Commissioners grant a declaration to a life prisoner in relation to a sentence they must specify a day which, they believe, marks the completion of about two-thirds of the period which the prisoner would have been likely to spend in prison under the sentence.

(2) The prisoner has a right to be released on licence (so far as that sentence is concerned) -

(a) on the day specified under subsection (1), or

(b) if that day falls on or before the day of the declaration by the end of the day after the day of the declaration."

Section 8 provides:-

"(1) The Secretary of State shall apply to Commissioners to revoke a declaration under section 3(1) if, at any time before the prisoner is released under section 4 or 6, the Secretary of State believes that

(a) … as the result of a change in the prisoner's circumstances, an applicable condition in section 3 is not satisfied, or

(b) that evidence or information which was not available to Commissioners when they granted the declaration suggests that an applicable condition in section 3 is not satisfied.

(2) The Commissioners shall grant an application under this section if (and only if) the prisoner has not been released under section 4 or 6 and they believe -

(a) that as the result of … a change in the prisoner's circumstances, an applicable condition in section 3 is not satisfied, or

(b) that evidence or information which was not available to them when they granted the declaration suggests that an applicable condition in section 3 is not satisfied."

Section 9 deals with prisoners released on licence. Section 10 provides for an accelerated release day and that the Secretary of State may by order amend subsections (4) to (7) of Section 10. Subsection (7) as amended provides:-

"(7) Nothing in this section shall permit the release of a prisoner following a declaration under Section 3(1) -

(a) before he has served two years of the sentence to which the declaration relates; or

(b) at any time when an application under Section 8(1) for revocation of the declaration has yet to be finally determined;

and for the purposes of (a) any period of custody by which the sentence is treated as reduced in accordance with Section 26 of the 1968 Act shall be treated as served as part of the sentence."

Section 11 provides:-

"(1) …

(2) If Commissioners grant an application under Section 3 they must

(a) give notice of their decision to the prisoner and to the Secretary of State, and

(b) include in a notice a statement of the day specified under Section 6(1), if the prisoner is a life prisoner.

(3) If Commissioners revoke a declaration under Section 8 they must give notice of the revocation and the reasons for it to the prisoner and to the Secretary of State."

Section 19 provides for the making of Orders and Rules under the Act. Schedule 1 of the 1998 Act provides for the role of Commissioners. Schedule 2 provides for the Commissioners' procedure and empowers the Secretary of State to make rules prescribing the procedure to be followed in relation to proceedings of the Commissioners under the Act. Paragraph 5 provides that the rules may make provision about evidence and information including provision for evidence or information about a prisoner not to be disclosed to

anyone other than the Commissioners if the Secretary of State certifies that the evidence or information satisfies conditions specified in the Rules. Paragraph 6 provides that the Rules may provide for proceedings to be held in private except where Commissioners direct otherwise. Paragraph 7 provides that the Rules may permit Commissioners to hold proceedings in specified circumstances in the absence of any person including the prisoner concerned and any representative appointed by him and where a prisoner and any representative appointed by him are excluded from proceedings by virtue of subparagraph (1) "the Attorney General for Northern Ireland may appoint a person to represent the prisoner's interests in those proceedings." Paragraph 9 provides that the rules may allow Commissioners to award a prisoner money for legal advice or representation.

[6] The Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 ("the 1998 Rules") were made on 30 July 1998 and came into force on 31 July 1998. Rule 2 defines "applicant" in relation to a case as meaning the person who has made the application and is (a) a person concerned in relation to applications made under Section 3(1) of the Act, (b) the Secretary of State in relation to applications made under Section 8(1) of the Act and "application" means an application made under Section 3(1) or 8(1) of the Act: "respondent" is defined as meaning the person responding to the application and is the person concerned in relation to applications made under Section 8(1) of the Act and the Secretary of State in relation to applications made under Section 3(1) of the Act.

Rule 3 provides:-

> "(1) The Chairman, or a Commissioner acting on his behalf, shall allocate each case to a Commissioner who shall act as the single Commissioner for that case.
>
> (2) The single Commissioner may take ancillary decisions on behalf of the Commissioners."

Rule 4 provides:-

> "(1) The Chairman … shall allocate each case to a panel of three Commissioners.
>
> (2) The panel shall …
>
> …
>
> (b) determine ancillary appeals

…

(d) give the preliminary indication; and

(e) make the substantive determination."

Rule 5 provides:-

"(1) … the person concerned may appoint any person to act as his representative.

…

(5) The Secretary of State may be represented by any person appointed by him for that purpose."

Rule 6 provides:-

"(1) Subject to the provisions of these Rules, the Commissioners may regulate their own procedure …"

Rule 11 provides:-

"(1) The Commissioners may take any ancillary decision they consider appropriate including:

…

(b)(iv) the submission and production of evidence.

…

(2) The Commissioners may take ancillary decisions of their own motive …"

Rule 13 provides:-

"(1) A party may appeal against an ancillary decision taken by a single Commissioner …"

Rule 14 deals with the preliminary indication:-

"…

(d) where the person concerned is a recalled prisoner, a statement as to whether the recalled prisoner's licence has been confirmed or revoked, and a statement of the reasons for this."

Rule 15 provides:-

"(4) The substantive determination shall be made by being recorded in a written notice, signed and dated by or on behalf of the members of the panel.

(5) The Commissioners shall serve a copy of the written decision notice on the parties as soon as is practicable after making the substantive determination and this shall contain, subject to Rule 22, the following –

(c) where an application made under Section 8(1) of the Act has been granted, a statement of the reasons for this and a statement that any declaration previously granted to the person concerned under Section 4 or 6 of the Act is thereby revoked; and

(d) …"

Rule 16 provides:-

"(1) The panel shall hold a hearing as soon as is reasonably practicable after the duty to determine an ancillary appeal under Rule 13(5), or to make a substantive determination under Rule 15(3), has arisen.

(2) After consulting the parties, the Commissioners shall list a hearing by way of a direction specifying the date, time and place of the hearing."

Rule 17 provides:-

"(1) Subject to Rule 28(7), hearings shall be held at the prison where the person concerned is detained.

(2) Hearings shall be held in private except in so far as the Commissioners may otherwise direct."

Rule 19 provides:-

"(1) …

(2) …

(3) Subject to paragraph (4) and (7) the parties shall be entitled to appear and be heard at the hearing and take such part in the proceedings as the Commissioners consider appropriate …

(4) …

(5) …

(6) The Commissioners may receive in evidence any document or information notwithstanding that such document or information would be inadmissible in a court of law.

(7) The Commissioners shall require the person concerned, his representative, any witness appearing for him and any other person they think appropriate, to leave the hearing where argument is being heard or evidence is being examined which includes or relates to any damaging information.

(8) Where the person concerned and his representative are required to leave the hearing pursuant to paragraph (7), the Commissioners shall adjourn the proceedings so that consideration can be given to appointing a person to represent the interests of the person concerned in accordance with paragraph 7(2) of Schedule 2 to the Act."

Rule 22 provides:-

"(1) This rule applies where the Secretary of State certifies as `damaging information' any information, document or evidence which, in his opinion, would, if disclosed to the person concerned or any other person be likely to

(a) adversely affect the health, welfare or safety of the person concerned or any other person;

(b) …

(c) …

(d) …

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

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

and any such information, document or evidence is referred to in these Rules as `damaging information'.

(2) The Commissioners shall not in any circumstances disclose to or serve on the person concerned, his representative or any witness appearing for him any damaging information and shall not allow the person concerned, his representative or any witness appearing for him to hear argument or the examination of evidence which relates to any damaging information.

(3) Where the Secretary of State has certified information as damaging he shall within seven days of doing so serve on the person concerned and on the Commissioners, whether by way of inclusion with the application or response papers or otherwise, written notice of this stating, so far as he considers it possible to do so without causing damage of the kind referred to in paragraph (1), the gist of the information he has thus withheld and his reasons."

Part VII provides, inter alia, for legal aid.

Part VIII applies to Recalled Prisoners. Schedule 3 provides in relation to Section 3 applications that, where applicable, the previous convictions, sentences, parole history … and release and recall history of the person concerned and (where available, the comments of the trial judge in passing sentence on the person concerned) shall be made available by the Secretary of State. Where the person concerned is serving a sentence of imprisonment for life information by the Secretary of State may include information as to the likelihood of the person concerned being a danger to the public if released immediately.

THE COMMISSIONERS' DECLARATION

[7] On 2 May 2000 the Commissioners made a declaration that the appellant was eligible for accelerated release under the 1998 Act. The Commissioners substantively determined that the application of the appellant for early release under Section 3(1) of the 1998 Act had been granted and that he was accordingly eligible to be released in respect of the two sentences of life imprisonment, of 20 years' imprisonment and of fifteen years' imprisonment in accordance with the provisions of the Act. The Commissioners stated that they considered 12 November 2008 to be the day which marked the completion of the period specified in Section 6(1) of the Act.

THE EVENTS LEADING TO THE REVOCATION OF THE DECLARATION

[8] On 5 July 2000 the appellant was released on pre-release home leave and on 6 July was arrested for the attempted murder of and for unlawfully and maliciously causing grievous bodily harm to Keith Butler following an incident in Banbridge, County Down. On 10 July 2000 the Secretary of State applied to the Commissioners for the revocation of their declaration of eligibility for the early release of the appellant under the 1998 Act. On 19 July 2000 the Secretary of State made an ancillary application to the Commissioners inviting them to take account of the imminence of the present date for release on licence. On 21 July 2000 the appellant was refused bail in the High Court on the charges of attempted murder and grievous bodily harm with intent. On 26 July 2000 the Commissioners made a preliminary indication of its decision to revoke its declaration that the appellant was eligible for early release. The appellant took issue with the preliminary indication and objected to any determination with regard to revocation until such time as a fair and public hearing had been conducted into his guilt or innocence of the charge of attempted murder and submitted that any decision with regard to revocation should be deferred until the outcome of any

criminal trial. The Commissioners sought further information from the Secretary of State regarding the circumstances in which the appellant and another person (also convicted of the offences of which the appellant was convicted) were charged. These were provided by the RUC and forwarded on behalf of the Secretary of State to the Commissioners.

[9] The circumstances of the incident, as provided by the RUC, were that at approximately 2.30pm on 5 July 2000 a number of persons were in the process of removing UVF flags from lamp posts in the Newry Road/Fort Street areas of Banbridge. Whilst removing a flag in Fort Street Mr Butler who lived nearby confronted them. They alleged that he was armed with a hatchet. He was knocked to the ground and at least three of the five persons involved in removing the flags kicked and beat him using unknown weapons. Medical examination later revealed that he had received at least 22 blows. He was knocked down, was barely conscious; his left femur, left arm, jaw and cheekbone were broken and he had severe head and facial injuries. Three persons were arrested and admitted assaulting Butler but in subsequent interviews stated that the appellant and the other person were the main assailants and that they had been instructed by the appellant not to disclose his presence and to make up a story about the incident. He was then arrested outside Banbridge Police Station at about 4.00pm on 6 July 2000 and in interviews stated that he was present during the times that Butler was attacked but that he acted in self-defence. A statement recorded after caution from Butler the injured party, was provided, naming the appellant and the other person as being two of his attackers.

[10] On 24 January 2001 there was an oral hearing at HM Prison, Maghaberry in respect of the application by the Secretary of State. After a full day's hearing it was adjourned in order that the Commissioners might seek legal advice. By letter dated 8 February 2001 the Commissioners wrote to the appellant stating that in the view of the Commissioners the substantive determination of his case required that the substance of the evidence produced must be consistent with the requirements of Article 6(1) of the Convention and that an application must be proved to the civil standard of proof. They stated that they were adjourning the hearing until such time as sufficient information had become available to make a substantive determination with a view to reconvening at the earliest possible date. On 8 March 2001 the Commissioners asked the Northern Ireland Police Service for a copy of the preliminary inquiry papers in relation to the offences of attempted murder and grievous bodily harm with intent, served on the appellant on 1 March 2001 and again advised his solicitor that it would be improper to proceed without sufficient disclosure of facts. On 23 March 2001 the Commissioners advised the appellant's solicitor that the case was now ready to proceed and the reconvened hearing was scheduled for 10 April 2001. On 13 March 2001 the appellant's solicitor advised the Commissioners by telephone that the date was not suitable as his barrister was on holiday.

The panel of Commissioners was changed to expedite a hearing which was rescheduled for 1 May 2001. On 12 April 2001 the appellant's solicitor advised the Commissioners that this date was not suitable as the appeal against the original convictions for murder, attempted murder etc was to be heard on 30 April 2001. On 15 May 2001 the Commissioners sought to reconvene the hearing on 18 June 2001. On 25 May 2001 the appellant's solicitor advised that the date was not suitable as his barrister was not available. Various dates in June were suggested by the appellant's solicitor but the Commissioners were unable to convene a panel on any of the dates suggested as there was no psychiatrist available. On 31 May 2001 they scheduled the reconvened hearing for 9 July 2001. The appellant's solicitor advised that there was no date suitable in July or August (the lawyers would be on holiday). On 22 June 2001 the Commissioners asked the appellant's solicitor to suggest suitable dates in September. On 21 August 2001 the appellant telephoned stating that he would not wish for a hearing to be held before the hearing of the Court case. On 30 October 2001 the LVF became a specified organisation under Section 3(8) of the 1998 Act.

[11] On 27 November 2001 the appellant was acquitted of the charges of attempted murder and causing grievous bodily harm with intent. Girvan J, the learned trial judge, in the course of delivering his judgment stated that the court was left with a reasonable doubt as to whether the appellant and his co-accused were involved in the assault on Butler as part of a joint enterprise. He stated that he accepted the thrust of the Crown case that the appellant and the other man were much more involved in the business of flag removal than they admitted and rejected certain parts of the evidence of the appellant, stating that he was satisfied that the appellant was an active participant in the removal of the flags.

[12] On 28 November 2001 the Commissioners arranged for a hearing to be reconvened on 11 December 2001. It was indicated on behalf of the Secretary of State that time was required to study the judgment of Girvan J and they agreed to postpone the hearing until 17 January 2002. On 21 December 2001 an ancillary application was lodged to introduce "damaging information" in accordance with the Rules. By letter dated 21 December 2001 the appellant was informed of the gist of the information in accordance with the Rules. This is set out in the judgment of Coghlin J at paragraph 17 of this judgment. Mr Duncan Morrow, acting as single Commissioner was shown intelligence information by the head of Special Branch of the Police Service for Northern Ireland and was satisfied that, prima facie, the information would, if disclosed, adversely affect the welfare or safety of certain persons and that it would cause substantial harm to the public interest and was satisfied that the procedure relating to "damaging information" was appropriate in this case. The single Commissioner's decision about damaging information was appealed to the Commissioners by the appellant and they upheld the decision of the single Commissioner. On 14 January 2002 the Commissioners

requested the Attorney General to appoint a Special Advocate to represent the appellant at the reconvened hearing in order to deal with the "damaging information". The reconvened hearing was scheduled for 19 March 2002 and the Attorney General appointed John Orr QC as Special Advocate. The reconvened hearing was held in HMP Maghaberry on 19 March 2002 and the decision of the Commissioners was published on 23 April 2002.

[13] It is apparent from the affidavits of Dr Duncan Morrow (filed on 14 August 2002 and 22 January 2003) who was a member of the panel of Commissioners that heard the substantive application, that the Commissioners approached their task on the basis that it was for the Secretary of State to satisfy the Commissioners on the balance of probabilities of the facts on which he wished to rely, whilst it was for the appellant to satisfy the Commissioners on the balance of probabilities that the applicable Section 3 condition was still satisfied ie that he was not a danger to the public.

[14] It is apparent from the affidavit of Adrian Grounds filed on 28 August 2002 (Chairperson of the panel responsible for determining the ancillary appeal of the appellant against the decision of the single Commissioner and of the panel responsible for the substantive determination of the Secretary of State's application) that the panel decided that they would examine the material at the earliest appropriate opportunity against statutory criteria for certification and if they were not satisfied that the criteria had been met would refer it back to the Secretary of State with a request that he reconsider the need for certification. In the event the Commissioners were satisfied following such examination that the statutory criteria had been met. They were also concerned to ensure that the "Special Advocate" arrangements provided the maximum safeguards for the interests of the prisoner and, accordingly, they engaged in dialogue with the legal secretariat to the Law Officers of the Crown in order to satisfy themselves in regard to the briefing given to each Special Advocate when he or she was appointed to act at a particular hearing.

THE DECISION TO REVOKE THE DECLARATION

[15] The Commissioners issued their substantive determination to revoke their Declaration of Eligibility with reasons for their decision on 23 April 2002. The reasons were, inter alia, as follows:-

1. The original decision of the Commissioners that the appellant met the criteria for release was finely balanced. They were concerned about the nature of the offence for which he was sentenced and its proximity in time to the application for release. There had been very little time for evidence to emerge that the appellant would not be a danger to the public. They granted the application because they had to base their decision on the information

then before them and because the Secretary of State raised no objection to early release.

2. In order to revoke that decision the Commissioners must be persuaded that in the light of changed circumstances, new evidence or information, an applicable condition in Section 3 of the Act is no longer satisfied. In this particular instance, are the Commissioners still able to say that if released immediately, the respondent would not be a danger to the public?

3. …

4. …

5. …

6. Given the time of year, the week around Drumcree protests, and in an area of ongoing serious feuding between the LVF and the UVF, it is likely that the appellant knowingly entered a situation of high risk in which violence could follow. In the circumstances it is not possible for the Commissioners to say that, if released immediately, the appellant would not be a danger to the public.

7. Even if the Commissioners were to accept the appellant's version, there would still be a problem with danger to the public. Assuming for the sake of argument that the appellant did not enter a situation of risk knowingly, then he did so out of naivety and lack of foresight and poor judgment. If the appellant is incapable of avoiding situations of obvious risk and potential violence, even then the Commissioners would not be able to say that, if released immediately, he would not be a danger to society.

APPLICATION FOR JUDICIAL REVIEW OF THE COMMISSIONERS' DECISION

[16] The appellant applied to Coghlin J for judicial review of the Commissioners' Decision arguing, inter alia, that the reception of "damaging information" and the use of Special Counsel were in breach of Article 6(1) of the Convention and that the burden of proof that he was not a danger to the public was wrongly placed on the appellant.

JUDGMENT OF COGHLIN J

[17] It would appear that Coghlin J assumed for the purposes of his judgment that Article 6(1) of the Convention applied to the hearing before the Commissioners who were of this opinion before and at the time of the hearing. But he did approve of and follow the decision of Carswell LCJ (as he then was) in *Re Adair* in which the latter held that Article 6 did not apply.

He dealt first with the admission by the Commissioners of "damaging information". He referred to the certificate of the Secretary of State forwarded to the Commissioners by letter dated 21 December 2001 pursuant to Rule 22(1). The certificate which was also sent to the appellant, stated:-

> "1. The withheld information related to intelligence to the effect that if you were released immediately you would be a danger to the public. In particular that you have been involved in paramilitary activities on behalf of the Loyalist Volunteer Force (LVF) both before committal to prison in 1998 and in the period since; that you have sought to retain an involvement in the affairs of the group; and that you will become re-involved in the LVF activity upon release from prison.
>
> 2. I am withholding the information for the reasons that disclosure would be likely to –
>
> (a) adversely affect the health, welfare or safety of other persons, namely the sources of the information drawn upon in order to compile the intelligence summary;
>
> (b) result in the commission of offences, namely, offences against the sources of the information referred to at (a), their families and properties;
>
> (c) impede the prevention or detection of offences or the apprehension of prosecution of suspected offenders; and
>
> (d) be contrary to the interests of national security."

[18] He stated that the appellant had appealed the decision of the single Commissioner on 11 January 2002 in favour of admission of this information to a panel of Commissioners which rejected the appeal after a hearing on 12 February 2002. They accepted the view of the single Commissioner that the intelligence information was correctly certified and concluded that information would be germane to the Commissioners' task of explaining and

evaluating the events of 5 July 2000 with regard to the question of danger to the public.

[19] He further stated that at the substantive hearing on 19 March 2002 the representatives of the appellant again objected to the "damaging information" being admitted in their absence but the Commissioners ruled against this submission and a closed hearing took place during which "damaging information" was admitted and the appellant's interests were represented by a special advocate appointed by the Attorney General. He recalled that in the course of their decision published on 23 April 2002 the Commissioners stated:-

> "Mr Lamont was called as a witness to substantiate certain *damaging information*. By the nature of this evidence, due to statutory provisions, the hearing had to proceed in the absence of both the respondent and his legal representative. During this closed session the respondent was represented by Mr J Orr QC, special advocate appointed by the Attorney General for Northern Ireland.
>
> In making a decision in this application the Commissioners have taken no account whatsoever of the damaging information evidence submitted by the applicant because it was not necessary to do so to reach a decision in this case."

[20] The judge further recalled that Dr Duncan Morrow who acted as the single Commissioner for the purpose of determining that the "damaging information" was correctly certified, had confirmed in his affidavit to the Court, that prior to the substantive hearing the Commissioners made a conscious decision that, initially, they would seek to resolve the issues without taking into account the "damaging information" and would resort to the latter only in the event that it became necessary to do so. Adrian Grounds, the chairperson of the reviewing panel responsible for the decision in favour of the introduction of "damaging information" confirmed in his affidavit that during the hearing of the appeal on 12 February 2002, the appellant's representatives argued against the admission of the information and the use of the special advocate procedure as being contrary to the requirements of Article 6.

[21] The judge stated that for many years the European Court had recognised the special problems faced by democracies engaged in the investigation and control of terrorism. In *Murray v United Kingdom* [1995] 19 EHRR 193 at paragraph 58 the Court said "the Court would firstly reiterate its

recognition that the use of confidential information is essential in combating terrorism and the threat that organised terrorism poses to the lives of citizens and to democratic society as a whole". The Court added that this did not mean that the investigating authorities had carte blanche under Article 5 to arrest suspects for questioning free from effective control by the domestic courts or by the Convention supervisory institutions.

He further cited a passage from the judgment of the European Court in *Rowe & Davis v United Kingdom* [2000] 30 EHRR 1:-

> "61. However, as applicants recognise, the entitlement to disclosure of relevant evidence is not an absolute right … In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6(1) …
>
> 62. In cases where evidence has been withheld from the defence on public interest grounds it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since as a general rule it is for the national court to assess the evidence before them. Instead the European Court's task is to ascertain whether the decision-making procedure applied in each case complied as far as possible with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused."

He then referred to *Jasper v United Kingdom* [2000] 30 EHRR 441 in which the Court stated at paragraph 55:-

> "The court is satisfied that the defence were kept informed and permitted to make submissions and participate in the above decision-making process as far as was possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds. While it is true that in a number of different contexts the United Kingdom has introduced or is introducing a `special counsel' the court does not accept that

> such a procedure was necessary in the present case. The court notes, in particular, that the material which was not disclosed in the present case formed no part of the prosecution case whatever and was never put to the jury."

[22] Coghlin J stated that in this case the applicant was entitled to and did retain a solicitor and counsel of his choice. He and his legal advisers were furnished with the gist of the damaging information set out in the notice of 21 December 2001. It was clear from the notice that the "damaging information" consisted of the type of information which, the European Court has accepted, may be withheld in the interests of the safety of other members of the public and national security. During that part of the substantive hearing when the damaging information was considered by the Commissioners the appellant was represented by senior counsel instructed on behalf of the Attorney General in accordance with the statutory procedure contained in Schedule 2 paragraph 7 of the 1998 Act.

Taking into account the independence and training of the Commissioners he was satisfied that the Commissioners were able to reach a decision without taking into account the "damaging information" and that there was no substance in the criticism that in attempting to do so they must inevitably have been biased by having seen the damaging information. He followed the decision of the English Divisional Court in *R (DPP) v Acton Youth Court* [2001] 1 WLR 1828 and the decision of Carswell LCJ (as he then was) in *Re Adair* [2003] NIQB 16. Accordingly he was satisfied that no breach of Article 6(1) had been established.

[23] He held that the procedure did not involve the determination of a criminal charge and therefore did not attract the safeguards afforded by Article 6(3) of the Convention (see *R (West) v Parole Board* [2002] EWCA Civ 1641) and *Re Adair.*

[24] On the issue of the burden of proof he stated that the 1998 Act afforded prisoners who were lawfully convicted and, therefore, found guilty beyond reasonable doubt of scheduled offences (including, as in this case, sectarian murders and attempted murders) an opportunity to apply for accelerated release provided the applicant was able to satisfy the Commissioners that, inter alia, he or she would not be a danger to the public. While there was no doubt that the Strasbourg jurisprudence generally rejected the placing of a persuasive burden of proof on a defendant as being contrary to the presumption of innocence it was important to remember that the applicant for a declaration of eligibility for release would already have been convicted and the procedure established by the 1998 Act sought to achieve a balance between providing an opportunity of release for those who had been quite clearly proved to be a danger to the community in the past, by

establishing adequate safeguards in relation to their future behaviour. In this context the fundamental concept was that of risk rather than guilt. He stated that it was clear from paragraph 7 of the affidavit sworn by Dr Duncan Morrow that when reaching a decision as to whether the applicant would be a danger to the public the Commissioners took the evidence of the appellant into account in addition to the observations of Girvan J when reaching a decision as to whether the applicant would be a danger to the public and it seemed to him that they were quite entitled to reach the substantive determination that they did. Accordingly he dismissed the application.

THE HEARING BEFORE THE COURT OF APPEAL

[25] I need not set out the grounds of appeal from the decision of Coghlin J given on 15 May 2003 as they were expanded in the written skeleton argument and oral submissions of the appellant. It was submitted on his behalf that the "damaging information" procedure was incompatible with Article 6. It was contended that the Commissioners were not independent and impartial because they could not consider whether the interests of fairness should lead to disclosure to the appellant of the "damaging information". Special counsel could not argue for disclosure or for other than a private hearing. Rule 22(2) of the 1998 Rules tied the hands of everyone. The Secretary of State could have the adverse material disclosed to the Commissioners and this was beyond the control of the Commissioners. Accordingly this prevented them from being independent or impartial. Rule 22 should have been disapplied as it was not Convention compliant. Reference was made to Lester & Pannick at 4.6.52, 4.6.53, and 4.6.54 and to *Rowe & Davis v United Kingdom* 30 EHRR 1 at 2(e) and paragraphs 64 and 65, to *Jasper v United Kingdom* 30 EHRR 441 at 442(d), to *Fitt v United Kingdom* and *Tinnelly v United Kingdom* and *Edwards & Lewis v United Kingdom* at paragraphs 56-58. In *Edwards and Lewis* the material was seen by the judge on a voire dire and not by the jury but in this case the material was part of the case and was seen by the Commissioners.

[26] It was submitted that the Rule 22 procedure permitted a party to the proceedings, namely, the Secretary of State, to place before the Commissioners material which could not be considered or challenged by the appellant or his representative and the combination of Rule 22 and Schedule 2 paragraph 7 of the 1998 Act resulted in a procedure which denied to the appellant his right to a hearing in his presence in breach of Article 6(1). The decision to admit the "damaging information" by the Commissioners resulted in an inevitable "tainting" of their decision. The appellant had been denied "equality of arms" and had been prevented from exercising his right to examine and cross-examine witnesses.

[27] It was further contended that if the practice of the Commissioners was to determine the Secretary of State's application without reference to the

"damaging information" in the first place, a safer procedure would be to determine it without having seen or received the "damaging information". Only in the event that the application for revocation was unsuccessful in the first instance would it have been necessary to consider whether or not to admit the "damaging information". This procedure would have the advantage of ensuring that at least this stage of the decision-making process was untainted by the "damaging information" and would clarify the extent to which the "damaging information" influenced the final decision. The Commissioners were, in effect, dictated to by the Secretary of State as to the disclosure of relevant information and the conduct of its own proceedings. The Commissioners could not satisfy the independence required by Article 6 in circumstances where it was subject to instruction by a party to the proceedings, namely the Executive. They did not have full jurisdiction since they did not have control over vital aspects of their own proceedings, namely disclosure and conduct of the hearing. A body subject to Rule 22 did not satisfy these requirements. Rule 22 could not survive incorporation of the Convention under the Human Rights Act. The Commissioners were receiving the sensitive material and deciding the issue to which that sensitive material related. The non-disclosed material might bear upon their minds in favour of the Secretary of State. Even if he learnt of the existence of the material the appellant would be unable to present counter arguments. It was not argued on the appellant's behalf either before Coghlin J nor before this court that the procedure in front of the Commissioners was a criminal trial. The appellant's civil rights were at issue. The appellant submitted that the provisions of Article 6(3) of the Convention were relevant to the determination of the issue because they could be regarded as guidance as to whether the procedures adopted in these proceedings, where the issue at stake was the liberty of the subject, were fair. The decision of the Commissioners should be quashed, the matter should be remitted to a fresh set of Commissioners, they should be directed that they did not take into account damaging information unless disclosed to the appellant. The Secretary of State should not rely on damaging information.

[28] It was further argued that it was a breach of natural justice for the Commissioners to take into account what they claimed to be a finely balanced decision to make the declaration in May 2000, preventing the appellant from meeting that case.

[29] In an application under Section 8(1) of the 1998 Act to which the appellant was the respondent, the onus of proving that the respondent would be a danger to the public lay on the applicant. The Commissioners had conceded that they regarded the onus of proving the relevant facts as resting on the Secretary of State but that thereafter the onus lay on the prisoner to prove that he would not be a danger. In addition there had been a breach of Article 5(4) in that there had not been a speedy hearing of the application. The Secretary of State had applied on 10 July 2000 for a revocation of the

Commissioners' determination and the Commissioners did not publish their decision until 23 April 2002. The grounds supporting the decision to revoke were flimsy and did not provide an evidential basis for a determination that the appellant was a danger to the public. For all these reasons the appeal should be allowed.

ARGUMENTS IN RESPONSE ON BEHALF OF THE COMMISSIONERS AND SECRETARY OF STATE (NOTICE PARTY)

[30] It was submitted that Article 6 of the Convention did not apply as it applied only to the determination of a person's civil rights and obligations or any criminal charge against him: see *A v Austria* 16266/90. A right to be released on probation was as such not included among the rights and freedoms guaranteed by the Convention and Article 5(4) did not apply in this respect. The right to be released under Section 10(2) of the 1998 Act was not a civil right nor did it give rise to a civil obligation: see *R (on the application of Giles) v Parole Board* [2003] 4 All ER 429.

[31] Reliance was placed on *R (on the application of Sim) v Parole Board and Anor* [2003] EWCA Civ 1845. It was submitted that the appellant was not a "victim" under HRA. The procedure relating to "damaging information" was appropriate. Arrangements were made for the provision of a special advocate in compliance with requirements set out in *Chahal v UK* [1997] 23 EHRR 413 paragraphs 25, 124, 140, 144 and 145. See also *Jasper v UK* 30 EHRR 441 at paragraph 51. In so far as it was alleged that there was delay this had to be viewed in context. The appellant was not ready for a hearing uptil November 2001. If there was delay it could have been subject to judicial review. In fact there was no delay. The burden of proving that he was not a danger to the public rested with the appellant.

ARGUMENTS ON BEHALF OF THE APPELLANT IN REPLY

[32] It was apparent that Article 6 was engaged as could be seen from the correspondence between the Commissioners and the appellant. The Commissioners were given training on the Convention. The 1998 Act had the effect of eliminating the punitive element in the sentences. The right to be released under Section 10(2) was a statutory right acquired in May 2000. It broke the link in relation to the effect of the original sentence.

MY CONCLUSIONS

[33] On 2 February 2000 the appellant together with another man was convicted of what were described by the trial judge as the sectarian murders of Damien Trainor and Philip Allen. The appellant was also convicted on two counts of attempted murder and one count of possessing firearms and ammunition with intent. He was sentenced to life imprisonment in respect of

each of the counts of murder, 20 years' imprisonment in respect of each of the counts of attempted murder and 15 years' imprisonment in respect of the count relating to the possession of firearms and ammunition with intent. His appeal was dismissed by the Court of Appeal on 28 June 2001. He would have spent a minimum of 16 years' imprisonment under the Life Sentences (Northern Ireland) Order 2001 and 10 years in respect of the determinate sentences under the Prison Act (Northern Ireland) 1953 but for the provisions of the 1998 Act which was passed following the Belfast (or Good Friday) Agreement of 10 April 1998. This Act provided that the appellant could apply to Commissioners set up under the Act for a declaration that he was eligible for release in accordance with the provisions of Section 3 of the Act and the Commissioners determined his application in his favour on 2 May 2000. In accordance with Section 10 of the 1998 Act he had the right to an accelerated release day of 28 July 2000, subject, inter alia, to sub-section (7). On 5 July 2000 he was out of prison on a pre-release scheme and became involved in a violent incident as a result of which he was charged with the attempted murder of and causing grievous bodily harm with intent to another man. Under Section 10(7) of the 1998 Act the Secretary of State applied on 10 July to the Commissioners for the revocation of their declaration that he was eligible for release on 28 July 2000. As a result of this application he was lawfully detained in HM Prison Maghaberry until the Commissioners determined the application of the Secretary of State in accordance with Section 10(7) as amended. They decided to revoke their determination that he was eligible for release. The decision was published on 23 April 2002.

[34] In my view he has been held in prison since he was convicted on 2 February 2000 on foot of the sentences imposed by a competent court and for which he has not yet served the minimum period fixed by law. In respect of the life sentences he will be eligible for release on 8 November 2008 (see Section 6(1) of the 1998 Act) and, in respect of the determinate sentences, after he has served one-third of his sentence. These periods are subject to the validity of the decision of the Commissioners to revoke their Declaration of Eligibility and to the terms of the 1998 Act which enable the appellant to make further applications under Section 3.

[35] I am satisfied that the causal link between the sentences imposed by Kerr J (as he then was) and the detention of the appellant has not been severed by the Declaration of Eligibility of the Commissioners under Section 3 of the 1998 Act, by Section 10 of the same Act or any sub-section thereof, including Section 10(7) as amended or by the application of the Secretary of State to the Commissioners to revoke their Declaration under Section 10(7) as amended. The 1998 Act provided expressly or implicitly that the sentences remained in effect, save that the release date was affected by Sections 4, 6 and 10. Sections 3, 4, 6, 9 and 10 illustrate that Parliament intended that the original sentences should remain in force, subject only to qualifications about release and recall.

[36] I consider that the Sentence Review Commissioners fulfil a role akin to the Parole Board in England and Wales. They are appointed under Section 1 of the 1998 Act as an independent and impartial group. The independence and impartiality were not challenged in these proceedings, subject to the argument advanced on behalf of the appellant about Rule 22 of the 1998 Rules to which I will return. I share the view of Girvan J *in the Matter of an Application by Neil Sheridan for Leave to Apply for Judicial Review* (Unreported) in the course of which he upheld their independence and impartiality by reference to the statutory framework under which they are appointed and which is set out at paragraph [5] of this judgment.

> "The Commissioners are appointed by the Secretary of State under Section 1 of the 1998 Act. At least one must so far as possible be a lawyer and at least one must so far as possible be a psychiatrist or a psychologist. In making appointments the Secretary of State shall have regard to the desirability of the Commissioners as a group commanding widespread acceptance throughout the community. It is evident that Commissioners are to be people of standing in the community … in view of their background and training can be taken to fulfil their functions in an independent way and the suggestion that they might be indirectly influenced by a desire to keep themselves right with the Secretary of State in case they might ever need to call for compensation does not really bear scrutiny. The reference to compensation is a reference to remuneration, fees allowances and compensation under Schedule 1, paragraph 4 of Schedule 1 of the 1998 Act."

[37] The Parole Board of England and Wales was set up under Section 59 of the Criminal Justice Act 1967. Sub-section (3) of that section set out its duties under the Act and sub-section (4) made provisions in respect of the proceedings of the Board on any case referred to it by the Secretary of State and for the making of rules with respect to the proceedings of the Board on cases referred to it: see also sub-section (5) and Schedule 2 to the Act which made provision for the composition of the Board. Section 32(1) of the Criminal Justice Act 1991 replaced Section 59 of the 1967 Act and Schedule 5 replaced Schedule 2 of the 1967 Act. The Criminal Justice and Public Order Act 1994 amended Section 32 of the 1991 Act and substituted a new Schedule 5. Sections 28 to 30 of the Crime (Sentences) Act 1997 deals with release on licence of life prisoners and the role of the Parole Board was set out at sub-sections (5) to (7) of Section 28, Section 29, 31 and 32. Parole Board Rules were

made in 1997 (revoking the 1992 Rules) and provisions for the conduct of proceedings in relation to a prisoner's case are set out in Part II of the 1997 Rules. Rule 5(1) deals with information and reports by the Secretary of State served on the Board and subject to paragraph (2) the prisoner or his representative. Under Rule 5(2) any part of the information or reports referred to in (1) which in the opinion of the Secretary of State should be withheld from the prisoner on the ground that its disclosure would adversely affect the health or welfare of the prisoner or others are required to be recorded in a separate document and served only on the Board together with the reasons for believing that its disclosure would have that effect.

Under Rule 5(3) where a document is withheld from the prisoner in accordance with paragraph (2) it should nevertheless be served as soon as practicable on the prisoner's representative if he is –

(a) a barrister or solicitor,

(b) …

(c) …

provided that no information disclosed in accordance with this paragraph shall be disclosed either directly or indirectly to the prisoner or to any other person without the authority of the Chairman of the panel. Part III deals with the oral hearing of the prisoner's case. Rule 12(2) provides that the hearing shall be held in private. Rule 13(6) empowers the Chairman to require the prisoner or any witness appearing for the prisoner to leave the hearing where evidence is being examined which the Chairman of the panel previously directed should be withheld from the prisoner. Schedule 19 of the Criminal Justice Act 2003 replaces Schedule 5 of the 1991 Act (as substituted by the 1994 Act).

A comparison of the legislation governing the Parole Board in England and Wales with the 1998 Act and a comparison of the Parole Board Rules 1997 with the 1998 Rules indicate that the 1998 Act and Rules were modelled on the legislation and Rules governing the Parole Board.

[38] The only difference in procedure relates to Rule 22 of the 1998 Rules set out at paragraph [6] of this judgment. The Commissioners have made provision for the inspection of "damaging information" by a single Commissioner in order that he may satisfy himself that the criteria required for the introduction of same by the Secretary of State have been fulfilled and he makes a decision as to that. There is an appeal from his decision to the panel. The Commissioners do not act on the certificate of the Secretary of State. They decide for themselves whether they will receive "damaging information" and cannot be compelled by the Secretary of State to admit it in

evidence. He has to make an ancillary application to them in order to enable them to decide whether he is entitled to introduce it. If they decide in his favour, then they must get the Attorney-General to appoint a Special Advocate to act on behalf of the prisoner. They have also been concerned to ensure that the "Special Advocate" procedure arrangements provide the maximum safeguards for the interests of the prisoner and have engaged in dialogue with the legal secretariat to the law officers of the Crown in order to satisfy themselves in regard to the briefing given to each special advocate: see paragraphs [12] to [14] of this judgment; see also exhibit PD 26 to the affidavit of Paul Downey, a solicitor in the firm of solicitors acting for the appellant and the letters of 22 January 2002 from Kevin McGinty to the solicitors for the appellant contained therein.

In addition the Secretary of State is required by Rule 22 (3) to serve on the prisoner the gist of the damaging information which he has withheld from him. In this case the gist of the information was served on the appellant: see the certificate of the Secretary of State of 21 December 2001 set out at paragraph 17 of this judgment. A Notice setting out the terms of the Certificate was sent to the appellant in accordance with the Rules.

Mr John Orr QC, as Special Advocate for the appellant, was able to consult with the appellant after the gist of the damaging information had been served, and was present when a witness or witnesses were called in secret session before the Commissioners and was able to cross-examine on behalf of the appellant.

I realise that, as a result of the procedure, information was given in the absence of the appellant and his chosen legal representative and that he did not have an opportunity of consulting with the Special Advocate during the secret session. Nor was he or his legal representative informed of the details of the information afterwards.

The issue which the panel had to decide or would have had to decide if they had relied on the damaging information was whether the appellant was a danger to the public and in particular whether he had been involved in paramilitary activities on behalf of the LVF, both before committal to prison in 1998 and in the period since. The LVF became a `specified organisation' on 30 October 2001. I do not consider that Article 6 or Article 5 of the Convention apply to such a decision. I share the view of Coghlin J at first instance and of Girvan J in *Neil Sheridan's* case that in any event Rule 22 is Convention compliant. To this issue I will return.

[39] Article 6(1) of the Convention states in part:-

> "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. Judgment 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 democratic society … to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

[40] I consider that decisions of the English courts in relation to the Parole Board may be applied to the Commissioners. I hold that a decision by the Commissioner does not involve the determination of a criminal charge within the meaning of Article 6(1). I am content to follow the reasoning of the majority of the Court of Appeal in *R (on the application of Justin West) v Parole Board* 2002 [EWCA] Civ 1641 in which it was held that a decision under Section 39(5) of the Criminal Justice Act 1991 as amended whether to recommend the re-release on licence of determinate sentence prisoners recalled to prison upon the revocation of the licences does not involve "the determination of a criminal charge".

[41] Simon Brown LJ (as he then was) set out what he stated to be the three criteria applied by the Strasbourg Court in determining this issue; see *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, 678 at para 81, as analysed by Potter LJ in *Han v Commissioners of Customs and Excise* [2001] 1 WLR, 2253 at 2260. These are (a) the classification of the proceedings in domestic law; (b) the nature of the offence; and (c) the nature and degree of the severity of the penalty that the person concerned risks incurring. The Strasbourg Court does not in practice treat these three requirements as analytically distinct or as a three-stage test. Factors (b) and (c) carry substantially greater weight than factor (a).

The first criterion, stated Simon Brown LJ, presented no difficulty. The recall procedure was not classified as criminal under domestic law but this was a consideration of little weight. At paragraph [23] he stated:-

> "… when a parole licence is revoked and its revocation is subsequently confirmed this is solely with a view to the prevention of risk and the protection of the public and not at all by way of punishment."

He cited a passage from Lord Bingham CJ's judgment in *R v Sharkey* [2000] 1 Cr App R 409:-

> "… the Parole Board monitors the propriety of the revocation and the recall. It is not necessary that the person shall have committed, or be suspected of having committed any further offence, for these powers to be revoked. It is no part of the Parole Board's remit to decide what punishment any defendant should undergo. Its concern is with protection of the public against risk."

[42] At paragraph 25 he stated:-

> "As to the third criterion, although undoubtedly the high point of the appellant's case, this too in my judgment properly invites consideration of the purpose for which a licence is revoked and the prisoner's recall confirmed. That purpose being entirely the prevention of risk, the further detention involved cannot properly be characterised as a sanction or penalty."

He cited the decision in *R (McCann) v Manchester Crown Court* [2002] 3 WLR 1313 in support, citing passages from the opinion of Lord Hope at paragraphs 72 and 76. At paragraph 30 he stated:-

> "Unlike the position in *Ezeh and Connors* (2002) 35 EHRR 691 the same sentence is being served and it is being served for the same offence."

At paragraph 31 he referred to *Aldrich v Austria* (Application No 16266/90) on which counsel for the Parole Board relied, especially the following passage:-

> "The Commission recalls its constant case-law according to which proceedings concerning the execution of a sentence imposed by a competent court, including proceedings on the grant of a conditional release, are not covered by Article 6(1) of the Convention. They concern neither the determination of a `criminal charge' nor of `civil rights and obligations' within the meaning of this provision …".

At paragraph 32 he stated:-

> "It seems to me, however, one thing in the exercise of a discretionary power to refuse a prisoner release on licence; another, as here, having been

> compelled by law to release him at the half way stage of his sentence, then to recall him to prison. Although, as already indicated, I accept that recall does not involve the determination of a `criminal charge', I say nothing as to whether it involves the determination of `civil rights and obligations' (that question not being argued before us)."

See also Sedley LJ at paragraph 43 and the dissenting judgment of Hale LJ (as she then was). At first instance Turner J rejected the argument that the process involved the determination of "civil rights and obligations".

[43] The argument before this court was confined to the issue whether the decision of the Commissioners involved the determination of "civil rights and obligations", as contrasted with the determination of a criminal charge. In my view it does not. I am grateful for the assistance which I have gleaned from the text books, such as Clayton & Tomlinson and Harris, O'Boyle and Warbrick. The relevant passages are to be found at Chapter 11.160 to 11.173 and Chapter 6 pp 174-195 respectively. The most recent examination of civil rights and obligations to which we were referred is *Begum (FC) v London Borough of Tower Hamlets* [2003] 1 All ER 731. It is unnecessary to do more than refer to the opinion of Lord Bingham at pp. 736-738, paragraphs [5], [6], [8] and [11], the opinion of Lord Hoffman at pp. 742-744, paragraphs [27] to [35], the opinion of Lord Millett at pp. 753-756, paragraphs [78] to [90] and the opinion of Lord Walker at pp. 760-762, paragraphs [109] to [114]. If the Secretary of State had not applied to the Commissioners to revoke their declaration of eligibility and the applicant had been detained in custody beyond the accelerated release day, the remedy of *habeas corpus* would have been available and a claim in tort for false imprisonment could have been brought. But the right referred to in Section 10(2) of the 1998 Act is not a "civil right" under Article 6(1) The right to bail is not a civil right: see *Neumeister v Austria* A8 p43 (1968) and *Harris, O'Boyle and Warbrick* at p174 n 10. As I consider that the appellant is in prison following conviction and sentence by a competent court and that the decision of the Sentence Review Commissioners concerns neither the determination of a "criminal charge" nor "civil rights" of the appellant, there is no need to embark on a detailed analysis of "civil rights". The appellant had not even reached the stage of release on licence on foot of the Commissioners' declaration of eligibility, as the events giving rise to the application for revocation of their declaration and the application occurred before the accelerated release day. If an argument can be advanced that a decision to revoke a licence involves a "civil right", it does not arise in this case. The appellant is not being detained without trial or held awaiting trial.

DOES ARTICLE 5(1) OR (4) OF THE CONVENTION APPLY TO THE COMMISSIONERS' DECISION?

[44] Article 5(1) provides:-

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court …"

Article 5(4) provides:-

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

In *R (on the application of Giles) v Parole Board* [2003] 4 All ER 429 the House of Lords held that the general rule whereby detention in accordance with a determinate sentence imposed by a court was justified, as lawful detention, under Article 5(1)(a) of the Convention, without the need for further reviews under Article 5(4), applied to determinate sentences imposed under Section 2(2)(b) of the Criminal Justice Act 1991. Under that sub-section, a court had passed a custodial sentence for such longer term than that commensurate with the seriousness of the offence as was necessary in the opinion of the court to protect the public from serious harm from the offender. It was contended on behalf of Giles that once the commensurate term had been served – he had served half of his sentence and became eligible for release on the recommendation of the Parole Board – his detention should be the subject of review, to ensure that he was no longer detained on the ground that he was a danger to the public, when in fact he had ceased to be a danger to the public. He relied on Article 5(4) of the Convention.

At paragraph [3] of his opinion Lord Bingham stated:-

> "… No one is to be detained arbitrarily or (other than very temporarily) at the direction of the Executive."

At paragraph [10] he stated:-

> "That brings one back to consideration of the core rights which art 5(4), read with art 5(1), is framed to protect. Its primary target is deprivation of

> liberty which is arbitrary, or directed or controlled by the Executive. In the present case there was nothing arbitrary about the sentence. The sentence left nothing to the executive, since the Parole Board, whose duty it is to consider release at the half-way stage of the sentence, is accepted to be a judicial body."

At paragraph [11] he stated:-

> "I conclude that the sentence passed on the appellant fell squarely within art 5(1) of the convention and did not attract the operation of art 5(4). On the review of his case by the Parole Board he was entitled to the same rights as any other long-term prisoner serving a determinate sentence, but no other or greater rights. In considering his release at the half-way stage the board was bound to apply the same criteria to him as to any other long-term prisoner serving a determinate sentence."

See also Lord Hope at paragraphs [17] to [19] at paragraph [21] and at paragraphs [25] and [26]. He dealt with the Strasbourg jurisprudence, inter alia, at paragraphs [27] and at paragraph [40] in which he analysed the decisions of the Strasbourg Court in *Van Droogenbroeck v Belgium*, *E v Norway* and *de Wilde v Belgium*. See also paragraphs [50], [51] and [52].

[45] As I have indicated I consider that the appellant is serving sentences imposed by Kerr J (as he then was). His release date for the two life sentences has been fixed (by reference to Section 6 of the 1998 Act) at 8 November 2008.

Even if an argument could be advanced about life sentences based on *Sim* referred to below, the appellant is serving determinate sentences of which one-third has not expired. Under Section 4 of the 1998 Act he would be eligible for release on parole, having served one-third of his determinate sentence of 20 years' imprisonment for the attempted murders.

The 1998 Act is analogous with the Prison Act (Northern Ireland) 1953 and the Rules made thereunder and with Section 28 of the Treatment of Offenders Act (Northern Ireland) 1968. The sentences imposed by Kerr J (as he then was) remain in force but there are opportunities for the prisoner to take advantage of Sections 3 and 10 to obtain an earlier release date than he otherwise would, provided that he complies with the conditions laid down in Section 3 and that an application under Section 8 is not activated. As a result of the decision of the Commissioners to revoke their declaration of eligibility the appellant is in a similar situation to a prisoner who had not made an

application under Section 3 or has been refused a declaration of eligibility under Section 3. The 1998 Act empowered Commissioners akin to the Parole Board to make a declaration of eligibility which in turn could have led to the accelerated release of the appellant but for his conduct before 28 July and section 10(7) of the Act (as amended).

[46] In *R (on the application of Sim) v Parole Board & Another* [2003] All ER (D) 368 the Court of Appeal in England and Wales was considering how Article 5 of the Convention affected the detention of an offender who has been recalled to prison while on licence under an extended sentence passed under Section 85 of the Powers of Criminal Courts (Sentencing) Act 2000. The prisoner had served the custodial part of his sentence because he had served one-half of the period imposed by the court, once the time spent in custody prior to trial had been taken into account. The terms of his licence placed him under supervision until his licence expired. One of the conditions was that he be of good behaviour, not commit any offence and not take any action which would jeopardise the objective of the supervision which was, inter alia, to protect the public. His licence was revoked by the Secretary of State under Section 39 of the Criminal Justice Act 1991. Provision was made by that Act for an oral hearing before the Parole Board to decide whether they would direct his release. Elias J made a declaration that the decision to continue to detain a prisoner who had been subject to recall during an extended licence period was a decision which attracts the safeguards of Article 5.

At paragraph 11 of the judgment of Keene LJ he stated:-

> "11. There is an obvious inter-relationship between Article 5(1) and Article 5(4) which has been recognised for very many years. Article 5(1) embodies the right to liberty and security of person and Article 5(4) creates the necessary associated right for any person who is under some for of detention to be able to challenge the lawfulness of that detention, both under domestic law and under Strasbourg jurisprudence. That review of the lawfulness of the detention must be by a court, that it is to say by a body which is judicial in character, and the review must be speedy, as was emphasised by the European Commission of Human Rights in *Zamir v United Kingdom* [1983] 40 DR 42. But there are a number of exceptions to the right to liberty and security of person, of which the first is "the lawful detention of a person after conviction by a competent court": Article 5(1)(a). As was said by Lord Hope in *R*

(Giles) v Parole Board [2003] UKHL 42; [2003] 3 WLR 736 at 745, paragraph 25:

> `The general rule is that detention in accordance with a determinate sentence imposed by a court is justified under Article 5(1)(a) without the need for further reviews of detention under Article 5(4).'

As the European Court of Human Rights has itself put it, in such a case the supervision required by Article 5(4) is incorporated in the decision made by the sentencing court: *De Wilde, Ooms and Versyn v Belgium (No 1)* [1971] 1 EHRR 373, 407 at paragraph 76."

He dealt with the decision in *Giles* and in *R (Smith) v Parole Board* [2003] EWCA Civ 1269. At paragraphs 33 and 34 he stated:-

> "33. One can readily understand the outcome of both *Giles* and *Smith*. In both cases the original court had passed a determinate sentence of imprisonment for a term of years which it clearly thought appropriate, albeit that in Giles it was longer than a commensurate term. The issues which arose about Article 5(4) all related to decisions being made about the offender during that term of years for which the court had sentenced him to imprisonment. The same position does not obtain with an extended sentence under Section 85, once the custodial term has passed. At that stage no court has sentenced the offender to imprisonment. It has of course `authorised' him to be imprisoned if his licence is properly revoked but that authorisation was a feature which existed in the *Van Droogenbroeck* case. The European Court of Human Rights in that case expressly distinguished between the situation with which it was dealing there and a system of early release of prisoners from a sentence of imprisonment imposed by a court (my emphasis). The court under Section 85 also fixes the ultimate duration of the whole sentence, but that too was a characteristic present in *Van Droogenbroeck*, where the power of the Minister of

> Justice to release or detain the offender was limited to 10 years.
>
> 34. The purpose of an extended sentence is also of relevance. Section 85(1) indicates that the court may in effect add an extension period on licence where that is required
>
> > `for the purpose of preventing the commission by him of further offences and securing his rehabilitation.'
>
> The punitive aspect of the sentence has clearly been dealt with in such cases by the custodial term. As it was put by the Sentencing Advisory Panel in its Advice on Extended Sentences:
>
> > `the length of the extension period is not designed to reflect the seriousness of the offence for which the offender has been sentenced. It is a measure designed to provide greater protection for the public from the commission of further offences by the offender.' (paragraph 44).
>
> 35. This very much put the extension period in the category of cases in which there is a substantial period in the sentence for the protection of the public, during which period there may need for further assessments of the degree of risk which the offender still represents …
>
> 36. In short, when an offender is detained during the extension period of a section 85 sentence, such detention must be subject to review by a judicial body … I conclude that Elias J was right in the conclusion which he reached on this issue."

[47] There are several features of the present case which distinguish it from *Sim's* case. I have set out the significant ones at paragraph [45] of this judgment and need not repeat them. Although provision has been expressly made under the 1998 Act for the reception of "damaging information" I propose to say something more about the use of "damaging information" and

the appointment of "special advocates" before I come to the question of the burden of proof. I have already referred to the fact that at the hearings of the Parole Board in England and Wales such information is made available to specified persons acting for the prisoner, although it is not made available to the prisoner. In the small jurisdiction of Northern Ireland where terrorist activity has continued for the past 34 years, the UK Parliament has not been prepared to make available to legal representatives of prisoners (or other specified persons) such information, on the grounds that it cannot be satisfied that it will not reach the prisoner, thereby endangering the source of the information. Parliament has concluded that members or supporters or sympathisers of paramilitary groups have or are likely to have links with the law over the past number of years. Moreover intimidation of individuals and their families is rife. If damaging information was given to lawyers, paramilitaries would go to any lengths to extract it. Parliament must have taken the view that in such circumstances "damaging information" cannot be disclosed in the same limited way as in England and Wales: hence the device of using "special advocates". In my view this is a proportionate response to the problem which has been created. I regard it as a measure restricting the rights of the defence which is strictly necessary in this democratic society.

[48] In the recent case of *R v H* and *R v C* (Conjoined Appeals) [2004] UKHL 3 Lord Bingham stated at paragraph 21:-

> "21. The years since the decision in *R v Davis* and enactment of the CPIA have witnessed the introduction in some areas of the law of a novel procedure designed to protect the interests of a party against whom an adverse order may be made and who cannot (either personally or through his legal representative), for security reasons, be fully informed of all the material relied on against him. The procedure is to appointment a person, usually called a "special advocate", who may not disclose to the subject of the proceedings the secret material disclosed to him, and is not in the ordinary sense professionally responsible to that party, but who, subject to those constraints, is charged to represent that party's interests. This procedure was first introduced by section 6 of the Special Immigration Appeals Commission Act 1997 and rule 7 of the Special Immigration Appeals Commission (Procedure) Rules 1998 (SI 1998/1881), in proceedings concerned with exclusion or removal of a person as conducive to the public good or in the interests of national security. Similar provision was made by section

> 91(7) and (8) of the Northern Ireland Act 1998 in relation to national security certificates issued under section 42 of the Fair Employment (Northern Ireland) Act 1976, although no appointment has yet been made under section 91. Similar provision was again made by section 5 of the Terrorism Act 2000 and rule 10 of the Proscribed Organisations Appeal Commission (Procedure) Rules 2001 (SI 2001/443); section 70 of the Anti-Terrorism, Crime and Security Act 2001 and rule 8 of the Pathogens Access Appeal Commission (Procedure) Rules 2002 (SI 2002/1845); and by the Northern Ireland (Sentences) Act 1998, Schedule 2, paragraph 7(2) and the Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564), Schedule 2, paragraph 6. The courts have recognised the potential value of a special advocate even in situations for which no statutory provision is made. Thus the Court of Appeal invited the appointment of a special advocate when hearing an appeal against a decision of the Special Immigration Appeals Commission in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, paragraphs 31-32, and in *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247 paragraph 34, the House recognised that this procedure might be appropriate if it were necessary to examine very sensitive material on an application for judicial review by a member or former member of a security service."

[49] I fully appreciate the distinction to be drawn between evidence seen by the judge but not disclosed to the defence, not forming part of the prosecution case and not put to the jury on the one hand and evidence relied on by the tribunal of fact, only the gist of which is disclosed to the defence and which is dealt with by a special advocate on his behalf.

But it is essential to remember that the issue which the Commissioners have to decide is whether the prisoner will be a danger to the public, if released immediately. When this is the issue, the safeguards imposed by the 1998 Rules and the procedure of the Commissioners themselves appear to me to be compliant with our common law, taking account of the Strasbourg jurisprudence as Section 2 of the HRA enjoins us to do and to be Convention compliant.

I have rejected the appellant's argument that the Secretary of State controls the Commissioners in respect of "damaging material", relying on the matters set out at paragraph [38]. I reject the argument that the panel should recuse themselves, having examined the "damaging material", as they stated that they would decide the case, first of all, on the basis of the evidence and information placed before them and which was available to the appellant present at the oral hearing and properly represented. I agree with Coghlin J that, taking into account the independence and training of the Commissioners, they are able to reach a decision without taking into account the "damaging information". I have noted the remarks of Lord Bingham in *R v H* and *R v C* and the references to comments made in the course of judgments by the Strasbourg Court about occasions on which a judge will (or may) be obliged to recuse himself. But I remain firmly of the view that, just as a jury is accepted to be capable of considering a case against an accused, ignoring the admissions of a co-accused which implicate the former, the Commissioners are capable of ignoring the "damaging information" and will not be subconsciously biased against the prisoner when they reach a decision without recourse to the "damaging information". In any event they would have been entitled to use the "damaging information". I also reject the argument that the Commissioners were wrong to take into account that their original decision to grant the declaration of eligibility was a finely balanced one. The appellant will have been aware, for example, that the Commissioners were entitled to read the sentencing remarks of the trial judge and he was entitled to make submissions and give evidence, as he did before the Commissioners, stating his regret that the deaths and injuries had occurred.

THE BURDEN OF PROOF

[50] I have set out the relevant sections of the 1998 Act at paragraph [5] and the relevant Rules at paragraph [6] of this judgment. "Application" is defined by Rule 2 as is "Applicant" and "Respondent" and "person concerned". A distinction is drawn between applications under Section 3 and Section 8. I am satisfied that, in so far as there is a burden of proof, it is for the person concerned to satisfy the Commissioners that he complies with the conditions set out in Section 3 when he makes his application for a declaration of eligibility and I can find no basis for imposing a higher standard of proof than "balance of probabilities", that is to say, the civil standard of proof. I take note that Lord Bingham in *R v Lichniak* [2002] UKHL 47; [2003] 1 AC 903 said at paragraph 16:-

> "I doubt whether there is in truth a burden of proof on the prisoner to persuade the Parole Board that it is safe to recommend release, since this is an administrative process requiring the Board to

> consider all the available material and form a judgment."

Keene LJ in *Sim* after referring to this passage, stated at paragraph 42:-

> "Like Elias J I accept that the concept of a burden of proof is inappropriate where one is involved in risk evaluation …"

At paragraph 44 he stated:-

> "As a matter of domestic law, it has long been established that the burden of justifying a person's detention lies on the person detaining as one would expect … A similar approach is embodied in Article 5 of the Convention."

This does not apply, of course to Section 3 of the 1998 Act. In Section 8(2) the word "believe" was used but was ignored by the parties and the Commissioners. It seems to me that in this particular case the Commissioners should adopt the formula of proof on the balance of probabilities, if only for the sake of consistency.

[51] When the Commissioners are dealing with an application by the Secretary of State under Section 8(1), they are required to grant such an application if (and only if) the prisoner has not been released under Section 4 or 6 and they <u>believe</u> (my underlining) –

(a) that as a result of an order under Section 3(8), or a change in the prisoner's circumstances, an applicable condition in Section 3 is not satisfied; or

(b) that evidence or information which was not available to them when they granted the declaration <u>suggests</u> (my underlining) that an applicable condition in Section 3 is not satisfied.

It is not clear whether they decided to revoke their declaration of eligibility under Section 8(2)(a) or (b) or both. The words "believe" and "suggests" are unusual words in this context. But I consider that the Commissioners should not have placed on the appellant the onus of proof that he would not be a danger to the public, if released immediately. They did. Accordingly in my opinion their decision cannot stand.

DELAY

[52] I have set out the chronology relating to the Commissioners' Declaration and the events leading to the revocation of the Declaration at paragraphs [7] to [12] of this judgment. I am satisfied that the hearing was as soon as reasonable practicable on the part of the Commissioners in view of the facts set out at that part of this judgment.

RETROSPECTIVITY

[53] No argument was addressed to us on this aspect of the case, namely, whether the Convention is applicable since the events which led to the application by the Secretary of State to revoke and the decision of the Commissioners to revoke their Declaration of Eligibility occurred on 5 July 2000. The decision to revoke was published on 23 April 2002 and the substantive hearing was completed on 19 March 2002. The Commissioners are a public authority. Section 6(1) makes it unlawful for a public authority to act in a way which is incompatible with a Convention right and Section 7(1)(a) provides a remedy, if a claimant is a victim of the unlawful act (or omission). The LVF was made a "specified organisation" on 30 October 2001. the "damaging information" was the subject of an ancillary application by the Secretary of State in November 2001. The substantive decision of the Commissioners was made in 2002. They had to decide that at that time the appellant would be a danger to the public, if released immediately. Therefore, I consider that an argument on behalf of the Secretary of State based on *McKerr v UK* would fail.

[54] As I have held that the Commissioners were wrong to place the burden of proof on the appellant to prove that he would not be a danger to the public, if released immediately, I would quash their decision and direct that the application by the Secretary of State should be referred back to a differently constituted panel of Commissioners, if practicable; that they should seek to decide the application without reference to the "damaging information" in the first place. Another panel has already decided that such information is admissible but, if practicable, the fresh panel should be unaware of that information. If they are unable to accede to the application of the Secretary of State on the evidence and information presented to them without reliance on the damaging information, they will be entitled to take into account the damaging information before reaching their substantive decision.

IF ARTICLE 6 AND/OR ARTICLE 5(1) AND (4) APPLY

[55] I have already set out the relevant parts of Article 6. It appears to be common case that no criminal charge is involved. I am satisfied that this concession was properly made. Accordingly Article 6 must be assumed to

apply to the civil rights of the appellant. The only applicable right is the right to liberty to which Hale LJ (as she then was) referred in *West's* case. Under Article 6(1) the appellant is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The Commissioners' Rules provide for a private hearing except in so far as the Commissioners may otherwise direct. If Article 6(1) applies, then the Commissioners must direct that the hearing is in public, unless the appellant requests otherwise, save that the public may be excluded in the interests of national security. I can see no reason why the hearing should not be in public, subject to the qualifications contained in Article 6(1). I have already held that the Commissioners are an independent and impartial tribunal established by law.

I do not consider that the procedure of the Commissioners contravenes Article 6(1). The reception of hearsay evidence requires them to weigh it with greater care than direct evidence but does not invalidate the proceedings. The prisoner is provided with an oral hearing. He is legally represented and provided with legal aid. He has had the right to make submissions, hear the evidence presented on behalf of the Secretary of State and the submissions made on his behalf. He is entitled to put questions to the representative of the Secretary of State, call any evidence which the Commissioners have authorised, put questions to any witnesses appearing at the hearing. Before the hearing he will have seen the statements of witnesses and the documents on which the Secretary of State relies. After all the evidence, an opportunity is given to him to make closing submissions. The Commissioners serve a copy of the written decision notice on him as soon as is practicable after making the substantive determination and this shall contain, subject to rule 22, where an application made under Section 8(1) is granted, a statement of the reasons for this decision.

[56] In *Rowe and Davis v UK* (2000) 30 EHRR 1 the applicants were convicted of murder. Subsequently their cases were referred back to the Court of Appeal by the Criminal Cases Review Commission. During the original criminal proceedings the prosecution withheld certain evidence from the defence on the ground of public interest. Later the Court of Appeal in an ex parte hearing in the absence of the defence decided in favour of non-disclosure.

It was held that it was a fundamental aspect of the right to a fair trial that criminal proceedings should be adversarial and that there should be equality of arms between the prosecution and defence. Both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. The prosecution authorities should disclose to the defence all material evidence in their possession for and against the accused.

The entitlement to disclosure is not an absolute right. In any criminal proceedings there may be competing interests such as national security or the need to protect witnesses at risk of reprisal. However only such measures restricting the rights of the defence which are strictly necessary are permissible.

At paragraph 46 the role of special counsel was discussed. At paragraph 62 the court stated that its task was to ascertain whether the decision-making procedure complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.

In *PG and JH v United Kingdom* (4 September 2001, unreported, application no. 44787/98 the court held at paragraph 71:-

> "The court also notes that the material which was not disclosed in the present case formed no part of the prosecution case whatever, and was never put to the jury. The fact that the need for disclosure was at all time under assessment by the trial judge provided a further, important safeguard in that it was his duty to monitor throughout the trial the fairness or otherwise of the evidence being withheld. It has not been suggested that the judge was not independent and impartial within the meaning of Article 6(1). He was fully versed in all the evidence and issues in the case and in a position to monitor the relevance to the defence of the withheld information both before and during the trial."

I conclude that in a criminal trial it would be a breach of Article 6(1) to permit the prosecution to rely on evidence of which neither the accused nor his representative had knowledge and in respect of which the accused or his representative could not call evidence or make submissions to the tribunal of fact. That is to say "damaging information" cannot be used in respect of a criminal charge in the way provided by Rule 22 unless the Government avails itself of the right to derogation conferred by Article 15(1) of the Convention.

[57] I do not think, however, that it necessarily follows that this principle applies to "civil rights" in all contexts. The right to liberty, all else being equal, is a fundamental right. But the context in which the right is being asserted is all-important.

The context of this case is that the appellant has been deprived of his liberty by a properly constituted court which heard evidence in open court and

convicted him, giving reasons for the decision and the decision was upheld by the Court of Appeal in open court, giving reasons. He was duly sentenced to life imprisonment and determinate sentences of imprisonment. By the 1998 Act a special right or privilege was conferred on him. To enable him to avail of that right an independent and impartial tribunal was set up which was empowered to grant him a declaration of eligibility for release if he satisfied specified conditions. The Act provided for an accelerated release day, years earlier than he would have been released if the ordinary principles applicable to sentenced prisoners applied. One of the qualifications for this right or privilege was that he had been convicted of a serious terrorist offence.

[58] The decisions which the Commissioners have to take under Sections 3 and 8 of the 1998 Act include a determination that (a) the prisoner is or is not a supporter of a specified organisation, (b) if released immediately, he would or would not be likely to become a supporter or become involved in acts of terrorism … (c) if sentenced to life imprisonment, he would or would not be a danger to the public, if released immediately.

In *Amuur v France* (1996) 22 EHRR 533 the Strasbourg Court stated at paragraph 50:-

> "Where the `lawfulness' of detention is in issue, including the question whether `a procedure prescribed by law' has been followed, the Convention refers essentially to national laws and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness. If Article 5(4) applies, review must be by a `court' but a tribunal which exhibits the necessary judicial procedures and safeguards appropriate to the kind of deprivation of liberty in question, including most importantly independence of the executive and of the parties will suffice: *Benjamin and Wilson v UK*(2003) 36 EHRR 1 at paragraph 33. The tribunal must have the power to order release if detention is found to be unlawful."

The Commissioners have this power. There is the availability of a process to enable the detention to be reviewed at reasonable intervals since applications may be made by a prisoner under Section 3 of the 1998 Act at any time: see *Bezicheri v Italy* (1989) 12 EHRR 210. Proceedings should to the largest extent possible meet the basic requirements of a fair trial.

[59] The concept of `equality of arms' requires a fair balance between the parties involved. Rule 22 arguably stretches this principle to breaking point. The Rule provides that the gist of the "damaging information" is given to the prisoner. In a case such as the present case it involves intelligence material. The `special advocate' can cross-examine the person who supplies the `intelligence' information. The European Court will be slow to uphold the reception of such information: *Fisher v Austria* [2002] ECHR 33382/96; *Dombo Beheer BV v Netherlands* (1993) 18 EHRR 213 at paragraph 33. But this is not civil litigation involving opposing private interests between the citizen and the State. The public have an interest to be protected as well; so do witnesses at risk of reprisal. I have not ignored the authorities referred to, where bail is in issue. But as I have stated, the right to bail is not a civil right.

[60] The issue can be debated at length. I have decided that in the context of Northern Ireland and having regard to the nature of the decisions which the tribunal has to make, the departure from full disclosure of the information on which the Secretary of State relies is justified in the interests of this democratic society and the appellant is provided with as fair a hearing as is possible. A right is conferred on him which is, of necessity, not absolute, under Section 8(2). Accordingly I hold that the procedure of the Commissioners, including the use of damaging information under the statute and the rules is compliant with the Convention.

[61] As the majority of the Court consider that the Commissioners have misapplied the `burden of proof', to that extent the appeal will be allowed. The decision of the Commissioners issued on 23 April 2002 will be quashed. The application by the Secretary of State made on 10 July 2000 will be remitted to the Commissioners with directions (i) that, if practicable, another panel shall hear and determine the application (ii) that, if practicable, they shall, if the appellant consents, hear and determine it without hearing the damaging information, (iii) that if they are unable to reach a determination in favour of the Secretary of State without hearing the damaging information, they shall then do so, having arranged for a special advocate to act for the appellant (it will not be necessary for them to go through the procedure which has already taken place of ensuring that the certificate of the Secretary of State about the damaging information complies with the 1998 Act and the Rules), (iv) that they shall require the Secretary of State to prove on the balance of probabilities that the appellant, if released immediately, would be a danger to the public, (v) if so satisfied, they shall accede to the application and revoke the declaration of eligibility made in May 2000, (vi) if not so satisfied, they shall order the release of the appellant on licence in accordance with the Act and the Rules. This, of course, is subject to any pending application by the Secretary of State. We were told that he had made a further application in 2001.