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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY STEPHEN JAMES McCLEAN FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE SENTENCE REVIEW COMMISSIONERS

COGHLIN J

[1] In this case the applicant, Stephen James McClean, seeks judicial review of a decision by the Sentence Review Commissioners ("the Commissioners") communicated to the applicant by correspondence dated 23 April 2002 granting the application by the Secretary of State to revoke their declaration that the applicant was eligible for release in accordance with the terms of the Northern Ireland (Sentences) Act 1998 ("the 1998 Act").

[2] The applicant was represented by Mr Treacy QC and Miss Quinlivan while Mr Larkin QC and Mr Torrens appeared on behalf of the Commissioners and the notice party, the Secretary of State for Northern Ireland was represented by Mr Morgan QC and Mr Grant. I am indebted to all sets of counsel for the preparation of their skeleton arguments and the clear and concise manner in which they presented their submissions.

Factual background

[3] On 2 February 2000 the applicant, together with another individual, was convicted of the sectarian murder of Damien Trainor and Philip Allen at the Railway Bar, Poyntzpass as well as 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 in respect of each of the counts of attempted murder and 15 years in respect of the count relating to the possession of firearms and ammunition with intent. The applicant appealed against both the convictions and sentences but his appeal was dismissed on 28 June 2001.

[4] The applicant applied to the Commissioners for a declaration that he was eligible for release in accordance with the provisions of Section 3 of the 1998 Act and, after a preliminary indication dated 14 April 2000, which was not challenged either by the applicant or by the Secretary of State for Northern Ireland, the Commissioners substantively determined the applicants application on 2 May 2000 declaring that he was eligible to be released in accordance with the provisions of the 1998 Act and indicating that they considered the 12 November 2008 to be the date which marked the completion of the period specified in Section 6(1) of the 1998 Act. In accordance with Section 10 of the 1998 Act the applicant was assigned an accelerated release date of 28 July 2000.

[5] On 5 July 2000 the applicant was released on pre-release home leave and on 6 July he was arrested in Banbridge County Down and charged with the attempted murder of Keith Butler and causing grievous bodily harm to Keith Butler contrary to Section 18 of the Offences Against the Person Act 1861. The applicant was acquitted of these charges on 27 November 2001 after a trial before Girvan J.

[6] On 10 July 2000 the Secretary of State for Northern Ireland applied to the Commissioners to revoke the applicant's declaration of eligibility for release in accordance with the provisions of Section 8 of the 1998 Act indicating, when doing so, that he believed that an applicable condition in Section 3 of the 1998 Act was no longer satisfied because of a change in the applicant's circumstances and/or the emergence of evidence or information not available to the Commissioners when they made their original declaration. The change in circumstances/additional information was the charging of the applicant with the offences of attempted murder and causing grievous bodily harm alleged to have been committed in Banbridge and the condition which the Secretary of State believed was no longer satisfied was the condition set out in Section 3(6) of the 1998 Act, namely, that, if he were immediately released, the applicant "would not be a danger to the public."

[7] On 26 July 2000 the Commissioners indicated that they were minded to give a preliminary indication to the effect that the Secretary of State's application for the revocation of the declaration should be granted stating that they believed that the information now available suggested that a qualifying condition in Section 3(6) was not satisfied for the following reasons:

(1) The applicant had been charged with an offence of grave violence.

(2) The alleged offence occurred very shortly after the applicant had been released on pre-release home leave.

(3) While noting the applicant's claim that the incident leading to the charge involved self-defence, the Commissioners also noted that a High Court application for bail had been refused on 21 July 2000. The Commissioners confirmed that, if their preliminary indication became a substantive determination the declaration previously granted to the applicant under Section 6 of the 1998 Act would be revoked.

[8] On 4 August 2000 the applicant appealed against the preliminary indication of the Commissioners and, on 24 January 2001, the Commissioners commenced a hearing of the Secretary of State's application to revoke the declaration. Upon that occasion, the presiding Commissioners were Mr Dunbar, Mr Adrian Grounds and Dr Duncan Morrow. This hearing was adjourned by the Commissioners in order to take legal advice and to obtain further information.

[9] A further hearing date was set for 1 May 2001 but this had to be vacated because it clashed with the hearing of the applicant's appeal against his original conviction. The hearing could not proceed upon two further suggested dates, 18 June and 19 July 2001, due to the unavailability of the applicant's counsel. Furthermore, it was not possible to arrange for a resumption of the hearing during the months of September or October 2001 because the applicant's trial was the "standby" case in the Crown Court list.

[10] On 27 November 2001 the applicant was acquitted after a trial by Girvan J of the charges arising out of the incident which had occurred at Banbridge during the course of his pre-release leave. A new date for the resumed hearing was set for 11 December 2001 but the Secretary of State sought, and was granted, an adjournment in order to further study the judgment of Girvan J. On 21 December 2001 the Secretary of State made an application to admit further evidence in accordance with Rule 12(1) of the Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 ("the Rules") and served a notice in accordance with Rule 22(3) confirming that a certificate of damaging information had been signed. The applicant applied to call certain persons as witnesses at the resumed hearing. Further interlocutory applications and appeals took place and, following a decision by the Commissioners to admit the report certified as "damaging information" a Special Advocate was appointed by the Attorney General to represent the interests of the applicant in relation to the portion of the hearing concerned with that information.

[11] On 19 March 2002 the resumed oral hearing took place and, on 23 April 2002, the Commissioners issued a decision granting the Secretary of State's application to revoke the declaration that the applicant was eligible for early release in accordance with the provisions of the Northern Ireland (Sentences) Act 1998.

[12] On behalf of the applicant Mr Treacy QC challenged both the specific decision of the Commissioners to admit the "damaging information" as well as the general procedure adopted by the Commissioners in relation to the substantive hearing.

The admission by the Commissioners of "damaging information"

[13] By letter dated 21 December 2001 the Secretary of State forwarded to the Commissioners in support of his application to revoke the declaration a secret intelligence summary together with a certificate of damaging information pursuant to Rule 22(1) of the Rules. The body of the certificate provided as follows:

> "1 The withheld information relates 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 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)* above, their families and property;
> >
> > *(c)* Impede the prevention or detection of offences or the apprehension or prosecution of suspected offenders; and
> >
> > *(d)* Be contrary to the interests of national security."

Rules 22(2) provides that 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.

[14] The applicant sought to challenge the admission of the "damaging information" and appealed the decision of a single Commissioner on 11 January 2002 in favour of admission to a panel of Commissioners which rejected the appeal after a hearing on 12 February 2002. In rejecting the applicant's appeal the panel accepted the view of the single Commissioner that the intelligence information was correctly certified and concluded that "… the reference to the content of the Intelligence report in the Secretary of State's certification indicated that it was likely to be relevant in that it placed the events of the 5th of July 2000 in a relevant wider context. This information would be germane to the Commissioners task of explaining and evaluating the events with regard to the question of danger to the public."

With regard to the applicant's argument that admission of the damaging information, the exclusion of the applicant and his representatives and the special advocate procedure failed to comply with the fair hearing requirements of Article 6(1) of the European Convention on Human Rights ("the Convention") the Commissioners observed that:

> "The panel considered that they were not in a position to adjudicate on the major issues of principle relating to compliance with the ECHR. In relation to this appeal, however, the panel decided that the submissions on behalf of the Secretary of State were sufficient to persuade them that they could not accept the respondent's argument that the procedures in the Rules should be disregarded in the absence of a clear High Court Judgment to that effect."

[15] At the substantive hearing on 19 March 2002 the representatives of the applicant 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 "the damaging information" was admitted and the applicant's interests were represented by a special advocate appointed by the Attorney General.

[16] In the course of the 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."

[17] Mr Treacy QC, on behalf of the applicant, attacked the decision by the Commissioners to receive the "damaging information" as being contrary to the applicant's right to a fair trial guaranteed by Article 6(1) of the Convention upon a number of grounds:

(1) The independence and impartiality of the Commissioners as a tribunal was undermined by the Rule 22 procedure which permitted a party to the proceedings, namely, the Secretary of State, by certificate to place before the Commissioners material which could not be considered or challenged by the applicant or his representative.

(2) The combination of Rule 22 and Schedule 2 paragraph 7 of the Northern Ireland (Sentences) Act 1998 had produced a procedure which had resulted in the applicant being denied his right to a hearing in his presence in breach of Article 6(1).

(3) The admission of the "damaging information" by the Commissioners resulted in an inevitable "tainting" of their decision thereby rendering the hearing unfair in breach of Article 6(1).

(4) As a result of the same procedure the applicant had been denied "equality of arms".

(5) It was also argued that there had been a number of breaches of Article 6(3) of the Convention in that the applicant had been denied adequate time and facilities to prepare for his defence, he had been deprived of the right to defend himself through legal assistance of his own choosing and that he had been prevented from exercising his right to examine and cross-examine witnesses.

[18] Dr Duncan Morrow, who acted as the single Commissioner for the purpose of ancillary applications has confirmed in his affidavit 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 deciding in favour of the introduction of damaging information has confirmed that, during the ancillary hearing on 12 February 2002, the applicant'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. Mr Grounds confirmed that the Commissioners had received extensive training in relation to the Convention and the Human Rights Act 1998, referring to an extract from the Sentence Review Commissioners' Annual Report of 2002, and also stated that, after careful consideration, the Commissioners had come to the view that the damaging information procedure afforded the best possible safeguard to the applicant in the circumstances.

[19] For many years the Strasbourg Court has recognised the special problems faced by democracies engaged in the investigation and control of terrorism. In Brogan v United Kingdom [1988] 11 EHRR 117 and O'Hara v United Kingdom [2001] ECHR 37555/97 the court accepted that, in relation to terrorist offences, the police may be called upon in the interest of public safety to arrest a suspected terrorist on the basis of information which is reliable but which cannot be disclosed to the suspect or produced at court without jeopardising an informant or endangering the lives of others and, 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.

[20] In Rowe and Davis v United Kingdom [2000] 30 EHRR 1, a case in which, at first instance, the prosecution withheld certain relevant evidence on the ground of public interest both from the court and the defence, the European Court said, at paragraph 61 of its judgments:

> "61 However, as the applicants recognise, the entitlement to disclosure of relevant evidence 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 reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. 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). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.
>
> 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 courts 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."

These principles were affirmed in the decision in Jasper v United Kingdom [2000] 30 EHRR 441 in which the court also noted the existence of a special counsel procedure in the following manner:

> "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."

[21] In this case the applicant was entitled to and did retain a solicitor and counsel of his choice. He and his legal advisors were furnished with the gist of the damaging information set out in the notice of 21 December 2001 which indicated that the information related to his involvement in paramilitary activities on behalf of the LVF both before committal to prison and subsequent to release. The information required to be certified by the Secretary of State in accordance with Rule 22 and the applicant's legal advisors were entitled to and did object to the admission of the information before the Commissioners. It is clear from the notice of 21 December 2001 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 applicant 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 Northern Ireland (Sentences) Act 1998. The panel of Sentencing Commissioners had each received extensive training in relation to the ECHR and the Human Rights Act 1998 and the Commissioners Annual Report of 2002 clearly confirms their acute concern about the fairness of the damaging information procedure and the need to provide maximum protection for the interests of the prisoner. As the report indicates the Commissioners had engaged in dialogue with the Legal Secretariat to the Law Officers in order to satisfy themselves with regard to the briefing given to each special advocate upon appointment at a particular hearing and, as a consequence, fresh guidelines for special advocates were subsequently promulgated by the Legal Secretariat. Taking into account their independence and training, I am satisfied that the Commissioners were able to reach a decision without taking into account the damaging information and that there is no substance in the criticism that, in attempting to do so, they must inevitably have been biased by having seen the damaging information. In R (DPP) v Acton Youth Court [2001] 1 WLR 1828 a divisional court, comprised of Lord Woolf CJ and Bell J considered an application by the DPP for judicial review from a decision of a district judge disqualifying himself from further hearing a case relating to an alleged possession of drugs. The district judge had decided to disqualify himself after ruling ex parte in favour of non-disclosure of material attracting public interest immunity upon the ground that to continue with the trial after such an application had taken place would be likely to give rise to a perception of unfairness which might appear to deny the accused trial by an impartial and independent tribunal. Lord Woolf CJ reviewed the relevant authorities including Rowe and Davis v United Kingdom [2000] 30 EHRR 1, Jasper v United Kingdom[2000] 30 EHRR 441, Fitt v United Kingdom [2000] 30 EHRR 480 and Gregory v United Kingdom [1997] 25 EHRR 577 recognising that the position in the Magistrates

Court was complicated by the fact that justices or district judges are judges of fact as well as law. The learned Lord Chief Justice remarked upon the long tradition of trial by justices and a judge sitting alone at summary trial and noted that was why both justices and district judges receive extensive training as to their responsibilities in relation to the conduct of a trial. After referring to the case of R v Stipendiary Magistrate for Norfolk ex parte Taylor (161 JP 773) Wolff CJ said, at page 1837:

> "The guidance which is given in that case draws attention to the inherent responsibility of a judge, whether the judge is a district judge or a magistrate to ensure that justice is done. That, it seems to me, can best be achieved by the same tribunal hearing applications for non-disclosure of documents on the ground of PII and the trial being heard by the same tribunal."

[22] The use of "damaging information", as defined in Rule 22 of the Rules, was recently included among a number of additional measures put in place by the Secretary of State and termed "additional safeguards" for persons whose licences have revoked under the provisions of the Northern Ireland (Remission of Sentences) Act 1995. That procedure, in accordance with Section 1(4)*(b)* of the Northern Ireland (Remission of Sentences) Act 1995, was considered by Carswell LCJ in Re Adair [2003] NI QB 16. One of the grounds upon which the applicant in that case relied for the purpose of seeking to establish that the procedure was unfair was his exclusion from that part of the hearing during which the damaging information was received although, as in this case, his interests were represented by a Special Advocate. In delivering his judgment Carswell LCJ emphasised the importance of having regard to the whole process under consideration and, having done so, he reached the conclusion that the procedure complied both with the requirements of fairness in domestic law and, upon the assumption that it was engaged, Article 6(1). There does not appear to be any material distinction between that case and the present in so far as the procedure relating to the damaging information is concerned. I respectfully agree with the views expressed by the learned Lord Chief Justice and, accordingly, I am satisfied that no breach of Article 6(1) has been established.

Article 6(3)

[23] In R (West) v Parole Board [2002] EWCA Civ 1641 the Court of Appeal in England held that the procedure set out in Section 39 of the Criminal Justice Act 1991 in accordance with which the Parole Board determined whether to recommend the re-release of a prisoner whose licence had been revoked did not involve the determination of a criminal charge and, therefore, did not attract the safeguards afforded by Article 6(3) of the Convention. That

decision has been followed in this jurisdiction by Carswell LCJ in Re Adair and I respectfully intend to adopt a similar course.

Burden of proof

[24] Section 3(6) of the 1998 Act requires the Commissioners to be satisfied that, inter alia, the applicant "would not be a danger to the public" if he were immediately released. The Commissioners, having been so satisfied, issued a final determination granting the applicant's application for a declaration that he was eligible for early release on 2 May 2000. On 10 July 2000 the Secretary of State applied to the Commissioners in accordance with Section 8(1) of the 1998 Act seeking a revocation of the declaration made in accordance with Section 3(1) upon the ground that the applicant being charged with the criminal offences arising out of the incident in Banbridge during his pre-release home leave constituted both a change in circumstances and new information which had not been previously available to the Commissioners. Section 8(1)*(a)* requires the Secretary of State to make such an application if he believes that, as a result of the relevant change in the applicant's circumstances, an applicable condition in Section 3, in this case the condition that the applicant would not be a danger to the public if immediately released, is not satisfied while Section 8(1)*(b)* requires the Secretary of State to make such an application if he believes that the evidence or information not previously available to the Commissioners "suggests" that the same condition is not satisfied. Section 8(2) requires the Commissioners to grant such an application by the Secretary of State if they believe that, as a result of a change in the applicant's circumstances the applicable condition is not satisfied or if they believe that the evidence or information which was not available to them previously suggests that the relevant condition is not satisfied.

[25] On behalf of the applicant Mr Treacy QC referred to paragraph 3 of the affidavit sworn by Dr Duncan Morrow in which the latter said:

> "For the Commissioners considering the Secretary of State's application for a revocation of declaration, the issue was whether they believed, in the light of the new evidence and information presented to them, that an applicable condition for release under Section 3 of the 1998 Act was no longer satisfied. It was for the Secretary of State to satisfy the Commissioners on the balance of probabilities of the facts upon which he relied while it was for the applicant to satisfy the Commissioners also on the balance of probabilities that the applicable Section 3 conditions were still satisfied."

Mr Treacy QC submitted that, in placing a persuasive burden of proof on the applicant the Commissioners erred in law in that such a burden was contrary to Article 6 of the Convention.

[26] I think that it is extremely important to bear in mind the general shape and function of the 1998 Act when considering this issue. The Act of 1998 affords prisoners who have been 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 is able to satisfy the Commissioners that, inter alia, he or she would not be a danger to the public. While there is no doubt that, the Strasbourg jurisprudence generally rejects the placing of a persuasive burden of proof on a defendant as being contrary to the presumption of innocence, it is important to remember that the applicant for a declaration of eligibility for release will already have been convicted and the procedure established by the 1998 Act seeks to achieve a balance between providing an opportunity of release for those who have been quite clearly proved to be a danger to the community in the past and establishing adequate safeguards in relation to their future behaviour. In this context the fundamental concept is that of risk rather than guilt. In R v Lichniak [2002] 4 All ER 1122 a case concerned with the preventative aspects of mandatory life sentences, when referring to the task of the Parole Board, Lord Bingham said, at page 1129:

> "I doubt whether there is in truth a burden 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. There is, inevitably, a balance to be struck between the interests of the individual and the interests of society, and I do not think it is objectionable, in the case of someone who has once taken life with the intent necessary for murder, to prefer the latter in case of doubt."

Again, in Comerford v UK (Application No 29193/95, 9 April 1997) a prisoner, detained at Her Majesty's pleasure, complained to the European Commission of Human Rights that it was a breach of Article 5.1 for the domestic legislation to require the Parole Board to be satisfied that he did not continue to represent a risk to life or limb whereas the presumption ought to have required that it be positively satisfied that he did. This submission was rejected by the Commission in the following terms:

> "Whilst a test which in terms requires the Parole Board to satisfy itself that the applicant no longer

> represents a danger to the life or limb of the public gives rise to a different presumption from a test which in terms requires the Parole Board to release the applicant unless it is established that he continues to represent a danger, namely in the former case that the applicant is to be considered to represent a risk unless the contrary is proved, the Commission does not consider that such a test may be said to be based on grounds inconsistent with the objectives of the sentencing court so as to constitute a violation of Article 5 para (1)*(a)* of the Convention."

The fact that the Commissioners are concerned with risk assessment is reinforced by Section 8(2)*(b)* which requires the Commissioners to grant an application to revoke a declaration if they believe that evidence or information not previously available "suggests" that an applicable condition in Section 3 is not satisfied. In this case, on 2 February 2000, the applicant was convicted of being one of two masked gunmen who burst into a public house, ordered the customers to lie down and then, when they had the occupants of the bar in a position of complete vulnerability, opened fire upon them intending to kill as many people as possible. In such circumstances, in my opinion, when applying for an accelerated release date under the provisions of the 1998 Act, it was neither unfair nor disproportionate to require the applicant to establish on the balance of probabilities that he would not be a danger to the public.

The substantive decision by the Commissioners

[27] Mr Treacy QC advanced two criticisms of the basis upon which the Commissioners reached their substantive decision:

(1) That they failed to inform the applicant and his representatives that their original decision that the applicant met the criteria for release in accordance with the 1998 Act was "finely balanced". This was explained by the Commissioners at paragraph 1 of their substantive decision in the following terms:

> "The Commissioners were concerned about the nature of the index offence, and its proximity in time to the application for release. There had been very little time for evidence to emerge that the respondent (applicant) would not be a danger to the public. Essentially, the Commissioners had to base their decision on the information then before them, and granted the application because the

> Secretary of State raised no objection to early release."

Assuming that the standard of proof in relation to establishing the fourth condition set out in Section 3(6) of the 1998 Act is the balance of probabilities it is clear that the Commissioners could have reached a decision in favour of the applicant upon a finely balanced basis. Such a finding would have been perfectly consistent with the circumstances of the offence committed by the applicant and the recent date of his conviction. This must have been apparent to the applicant and his advisors and it does not seem to me that either the common law or the Convention required the Commissioners to spell out in mathematical terms the degree of probability with which they had reached their original decision. Accordingly, I reject this submission.

[28] In support of his second submission Mr Treacy QC emphasised that Girvan J had acquitted the applicant of the serious criminal offences with which he had been charged arising out of the incident in Banbridge. In delivering his judgment Girvan J confirmed that, in the absence of compelling evidence proving the clear involvement of the applicant and his co-accused, he was left with a reasonable doubt as to whether he had been involved in the assault. However, he went on to observe that:

> "I do accept the thrust of the Crown case that McClean and McCready were much more involved in the whole business of flag removal than they admitted. Having seen and heard McClean in giving evidence I reject his evidence that the initial meeting with Harrison was a chance meeting and that they went off in the car without prior arrangement. I am satisfied that McClean and McCready were active participants in the removal of the flags. I reject McClean's evidence that McClean and McCready distanced themselves from the taking down of the flags or that they walked away country wards."

There is no doubt that, in reaching their substantive decision, the Commissioners, in addition to the acquittal of the applicant, took these words into account. However, the Commissioners did not rely solely upon the observations of Girvan J and, during the hearing, they had the opportunity to consider the direct evidence of the applicant on this issue. Having done so, the Commissioner framed their conclusions in the following terms:

> "5 The evidence of the respondent in the Hearing went no way in removing that doubt. On the contrary, the Commissioners came to the same

> conclusions as Mr Justice Girvan; namely that the respondent was more involved in flag removal than he admitted. It is, in the Commissioner's view, improbable beyond belief that the respondent did not know or at least suspect that they were embarking on a flag removal expedition.
>
> 6 Given the time of the 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 respondent (the applicant) 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 respondent (applicant) would not be a danger to the public."

It is 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 this evidence into account in conjunction with the circumstances of the applicant's original offence and, having done so, it seems to me they were quite entitled to reach their substantive determination. Therefore, I also reject this submission.

[29] Accordingly, the application will be dismissed.