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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY DENNIS HUTCHINGS FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE DIRECTOR OF PUBLIC PROSECUTIONS SERVICE OF NORTHERN IRELAND MADE ON 20 APRIL 2016 AND COMMUNICATED ON 5 MAY 2017

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Before: Stephens LJ and Sir John Gillen

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SIR JOHN GILLEN (giving the judgment of the court)

Introduction

[1] The applicant Dennis Hutchings was in 1974 a serving soldier with the Life Guards Regiment. Two charges have been preferred against him – namely attempted murder and attempted grievous bodily harm with intent – relating to the death by shooting of John Patrick Cunningham ("the deceased") on 15 June 1974 near Benburb, County Armagh.

[2] Those proceedings are currently at an interlocutory stage before the Crown Court in Belfast.

[3] On 20 April 2016 the Director of Public Prosecutions ("DPP" or "the Director") issued a Certificate under section 1 of the Justice and Security (Northern Ireland) Act 2007 ("the 2007 Act") ("the Certificate").

[4] The effect of a Certificate is to prevent the applicant being tried by a jury and instead requires that he be tried by judge alone.

[5] The grounds of relief are set out at paragraph 5 of the Order 53 statement of the applicant and in terms are:

- That the Director erred in law and/or exceeded his jurisdiction by issuing the Certificate.

- That the Director acted in breach of his duty to act in a procedurally fair manner.

- That the decision was Wednesbury unreasonable.

- That the decision was in breach of the legitimate expectation of the applicant that the Director would conduct a rigorous scrutiny.(*The concept of legitimate expectation was not pursued by Mr Power QC at the hearing before this court)*

- That the Director misdirected himself as to the appropriate legal principles which applied.

[6] The applicant seeks to quash the decision of the Director together with an order that the Director reconsider the decision in accordance with any judgment or direction of this court.

[7] Mr Power QC appeared on behalf of the applicant with Mr Turkington. Mr Simpson QC appeared on behalf of the respondent. We are grateful for the assistance which both counsel gave to us in the course of the written skeleton arguments and the oral submissions.

Background facts

[8] The relevant background facts are those set out in paragraph 5.2 of the respondent's skeleton argument as follows:

(1) That in 1974 there was a sustained campaign of violence undertaken by members of a proscribed organisation, the Provisional IRA.

(2) This campaign involved, inter alia, attacks on security forces, which inevitably included members of the British Army.

(3) In addition, at that time attacks were also mounted against, inter alia, persons believed to be members of unlawful organisations on the Loyalist side.

(4) Those attacks were mounted by use of weapons and explosives.

(5) A detachment of the Life Guards, a unit of the British Army, was stationed in the area in question.

(6) In the first two weeks of June 1974 some 38% of the shooting incidents in the Life Guard's operational zone occurred in the area of Eglish.

(7) One of these attacks resulted in the death of a Life Guard soldier.

(8) Two days before the fatal shooting of the deceased members of the Life Guards, under the command of Hutchings, came upon a group of men loading material into a vehicle.

(9) Those members of the Life Guards were involved in a "firefight" with those men after the men had been challenged; some of the men were apprehended but, importantly, some escaped.

(10) As a follow up to that firefight, arms and explosives were seized from the vehicle.

(11) The group of men was suspected to be made up of members of the Provisional IRA.

(12) On the day of the fatal shooting a patrol of the Life Guards came across a person (the deceased) some 3½ miles away from the scene of the firefight.

(13) That person ran away when confronted by the soldiers.

(14) He was suspected of being a terrorist and there was a suspicion that he may have been armed.

(15) He was called upon to stop but did not.

[9] It is alleged that the Director had all these matters in mind when reaching his decision.

[10] The Historical Enquiries Team ("HET") – a body created in 2005 to re-examine all offences attributable to "the Troubles"- carried out a review of the death of John Patrick Cunningham. The conclusions of that report into the death of Mr Cunningham included the following paragraphs:

> "[Cunningham] had a mental age of between 6 and 10 and as such, was dependent on others to care for him. … [He] was easily confused and may have had an inherent fear of men in uniform and armoured vehicles. …. On 11.50 am on Saturday 15 June 1974 [Cunningham] was walking home from The Priory. He was walking along Carrickaness Road,

approximately a quarter of a mile from home when a ten man, two vehicle military patrol, heading towards Benburb, approached him. This patrol had been deployed in the area on follow up operations after a different Life Guard patrol had been involved in a shooting incident with Provisional IRA gunmen and an arms find two days previously.

As the Army patrol rounded a left hand bend in the road they saw [Cunningham] standing on their left looking into the hedge. He turned towards the patrol, appearing startled and he immediately ran across the road, in front of the vehicles, towards a gateway to a field. [Cunningham] climbed over this gate, entered the field and began to run parallel to the road in the general direction of his home, pursued by soldiers A and E who were shouting commands for him to stop and put his hands up. Evidence from soldier E suggests he believed [Cunningham] may have been armed.

Soldier B then ran from his vehicle and went to a second gateway, closer to where [Cunningham] was running. It is not clear from the evidence whether [Cunningham] had passed this gateway prior to the arrival of soldier B, but after several shouts from Soldier A for him to stop, a total of five shots was fired by both soldiers. [Cunningham] died where he fell, close to a metal strand fence used to separate two fields …..

[Cunningham's] death was an absolute tragedy that should not have happened. He was a vulnerable adult who was unarmed and shot as he was running away from soldiers. There is no evidence that he posed a threat to the soldiers or anyone else. The soldiers have declined to provide an account of what happened. Although HET cannot be critical of them for exercising their legal rights, the consequences of their decisions have resulted in the full facts of the case about [Cunningham's] death never being established."

The relevant legislation

[11] Where relevant section 1 of the 2007 Act provides as follows:

> **"1. Issue of certificate**
>
> (1) This section applies in relation to a person charged with one or more indictable offences ("the defendant").
>
> (2) The Director of Public Prosecutions for Northern Ireland may issue a certificate that any trial on indictment of the defendant (and of any person committed for trial with the defendant) is to be conducted without a jury if—
>
> (a) he suspects that any of the following conditions is met, and
>
> (b) he is satisfied that in view of this there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.
>
> (3) Condition 1 is that the defendant is, or is an associate (see subsection (9)) of, a person who—
>
> (a) is a member of a proscribed organisation (see subsection (10)), or
>
> (b) has at any time been a member of an organisation that was, at that time, a proscribed organisation.
>
> (4) Condition 2 is that—
>
> (a) the offence or any of the offences was committed on behalf of a proscribed organisation, or
>
> (b) a proscribed organisation was otherwise involved with, or assisted in, the carrying out of the offence or any of the offences.
>
> (5) Condition 3 is that an attempt has been made to prejudice the investigation or prosecution of the offence or any of the offences and—
>
> (a) the attempt was made on behalf of a proscribed organisation, or

(b) a proscribed organisation was otherwise involved with, or assisted in, the attempt.

(6) Condition 4 is that the offence or any of the offences was committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one person or group of persons towards another person or group of persons.

(7) In subsection (6) 'religious or political hostility' means hostility based to any extent on—

(a) religious belief or political opinion,

(b) supposed religious belief or political opinion, or

(c) the absence or supposed absence of any, or any particular, religious belief or political opinion.

(8) In subsection (6) the references to persons and groups of persons need not include a reference to the defendant or to any victim of the offence or offences."

[12] Section 7 of the Act provides:

"7 Limitation on challenge of issue of certificate

(1) No court may entertain proceedings for questioning (whether by way of judicial review or otherwise) any decision or purported decision of the Director of Public Prosecutions for Northern Ireland in relation to the issue of a certificate under section 1, except on the grounds of—

(a) dishonesty,

(b) bad faith, or

(c) other exceptional circumstances (including in particular exceptional circumstances relating to lack of jurisdiction or error of law).

(2) Subsection (1) is subject to section 7(1) of the Human Rights Act 1998 (c. 42) (claim that a public authority has infringed Convention right)."

[13] Under section 8(3) of the Act the provisions of sections 1-7 inclusive apply in relation to offences committed before the coming into force of the provisions of the Act.

[14] The Explanatory Notes to the 2007 Act state, inter alia:

> "3. The purpose of this Act is to deliver a number of measures which are necessary to deliver a commitment to security normalisation in Northern Ireland.
>
> 4. Under the Belfast ('Good Friday') Agreement the Government made a commitment to make as early a return as possible to normal security arrangements in Northern Ireland consistent with the level of threat. In April 2003 the Government set out proposals to normalise the security profile across Northern Ireland. In response to the IRA statement of 28 July 2005, on 1 August 2005, the Secretary of State Peter Hain announced a programme of security normalisation, subject to an enabling environment. A key part of the normalisation timetable is the repeal of counter-terrorist legislation particular to Northern Ireland (that is, Part VII of the Terrorism Act 2000) by July 2007.
>
> 5. Part VII of the Terrorism Act 2000 underpins the longstanding Diplock system. This is a system whereby certain offences ('known as scheduled offences') are tried without a jury unless the Attorney General exercises his discretion and directs that a case is to be tried before a jury (known as 'descheduling'). In exercise of his discretion, the Attorney General applies a non-statutory test that he will not deschedule a case unless he is satisfied that it is not connected with the emergency. ….
>
> 6. However, although Northern Ireland is in a process of security normalisation, some arrangements are necessary to ensure that jurors in Northern Ireland are protected from intimidation. This Act therefore makes provision to reform the jury system in Northern Ireland. sections 10 to 13 and Schedule 2 amend the Juries (Northern Ireland) Order 1996 to give effect to a number of reforms which it is considered will reduce the risk of juror intimidation

> and partisan juries by achieving greater anonymity for jurors and by promoting greater randomness in jury selection.
>
> 7. Despite the proposed jury reforms, it is not yet possible for Northern Ireland to operate entirely without the fall-back of some special arrangements for a small number of exceptional cases. This Act therefore provides for a new system of non-jury trial. The new system provides the Director of Public Prosecutions for Northern Ireland with discretion to issue a certificate stating that a trial is to take place without a jury if certain conditions which are set out in the Act are met. This means that the presumption will be for jury trial in all cases, while the small number of exceptional cases requiring non-jury trial will still be able to be treated appropriately. Such a system is necessary to ensure that trials continue to be fair in Northern Ireland and that the quality of justice remains high."

The background to the relevant statutory provisions in the 2007 Act

[15] Both counsel in this case drew attention to the promotion of the Bill in Parliament and addresses to Parliament given by the promoter of the Bill Peter Hain MP and Paul Goggins MP.

[16] Before turning to these assertions, we draw attention to an important authority in the context overall of this case namely *Arthurs' (Brian and Paula) Application* [2010] NIQB 75 in which a Divisional Court in Northern Ireland addressed this legislation. ("the *Arthurs'* case").

[17] The background to the relevant statutory provisions in the 2007 legislation was outlined by Girvan LJ at paragraph [16]-[18] as follows:

> "[16] The use of non-jury courts to try scheduled offences connected with the Northern Ireland troubles represented an exceptional measure necessitated by the widespread use of threats and violence which threatened to undermine the integrity of the criminal justice system. With security considerations improving the view was taken by Government that it was possible and desirable to return to the normal legal process with jury trials taking place in relation to trials on indictment, wherever possible. The

Government, accordingly, issued a consultation paper 'Replacement Arrangements for the Diplock Court System' in August 2006. It proposed a new approach whereby the presumption would be that there would be trial by jury but with scope for non-jury trial available when it was considered necessary to ensure that a fair trial could be provided where there are paramilitary or community based pressures on a jury. The paper recognised a continuing legacy of terrorism that had to be taken into account when considering future arrangements. There was a recognised residual risk from those dissident Republicans and Loyalist paramilitaries who still engaged in planning acts of terrorism and who continued to raise funds for their organisations. Ministers concluded that some form of non-jury trial would be necessary in Northern Ireland for exceptional cases. However, it was considered that the time was right for the presumption to shift in favour of jury trial. The consultation paper concluded that the Director was best placed to make the decision for non-jury trials. He should make his decision against a defined test. A statutory test would be more transparent and give the Director clear guidance about his decision-making. The consultation paper recognised the existence of the provisions of the Criminal Justice Act 2003 section 44 of which enables the prosecution to apply in any case for a non-jury trial where there is a clear and present danger of jury tampering.

[17] Following the consultation process the Government brought before Parliament draft legislation. Under its proposals the decision whether a trial should be conducted without a jury was to be made by the Director. The test to be applied was whether he *suspected* that any of the specified conditions were met and, if so, whether he was satisfied that in view of this there was a *risk* that the administration of justice might be impaired if the trial were to be conducted with a jury. Section 1 of the 2007 Act was duly enacted so as to specify that test.

[18] One provision of the draft legislation was a matter of particular contention, namely that relating

> to a limitation in respect of a legal challenge to the issue of a Director's certificate."

(The court then set out the wording of the *original* draft)

> "Concerns were expressed about this wording by the Joint Committee on Human Rights and by the House of Lords' Select Committee on the Constitution. In due course Clause 7 of the Bill was modified and section 7 ultimately emerged in its final form. In its present form a judicial review is limited to grounds of dishonesty bad faith or 'other exceptional circumstances (including particular exceptional circumstances relating to lack of jurisdiction or error of law)'."

[18] Inter alia, Mr Power drew attention to an extract from Hansard which cited comments from Mr Goggins the Parliamentary Under-Secretary of State for Northern Ireland during the course of the Bill as follows:

> "In response to her questions about why we include a fourth condition in the first limb about religious or political hostility, we do so because incidents, events and crimes might reflect the religious and political hostility that has, I am sad to say, been a feature of Northern Ireland for far too long, and there could be evidence of that but no evidence that the perpetrators were involved in a proscribed organisation. The Hon. Lady might say that that is not likely, and perhaps it is not, but if the Director of Public Prosecutions had evidence that people or a defendant were involved in political or religious hostility, but could not show that they were members of a proscribed organisation, it would be wrong if the option of the non-jury trial was prevented in such circumstances.
>
> Let me take the example of Whiterock. If there was evidence that a defendant was involved in the kind of hostility that marked that dreadful event in Northern Ireland—related as it clearly was to political and religious hostility—but it was not possible to show that they were a member of a proscribed organisation, the fourth test in the first limb would enable the DPP to issue a certificate. Our motivation is to ensure that all eventualities are covered in relation to the conflict

and criminality with which we are trying to deal, which is the most serious criminality in Northern Ireland."

The Director's response to the challenge of the applicant

[19] On 28 September 2017 the Director filed an affidavit which included the following relevant paragraphs:

> "5. I can confirm that there are two aspects to the decision taken by me. In the exercise of my discretion I must firstly:
>
> (a) Suspect that (Condition 4) is met, and
>
> (b) Be satisfied that in view of this there is a risk that the administration of justice might be impaired if the trial were to be conducted by the jury.
>
> 6. I suspected that Condition 4 was met.
>
> 7. Condition 4 requires that (*thereafter the condition is set out*) …
>
> 8. I respectfully contend that the wording suggests it was the intention of Parliament to provide that this sub-section should be broadly interpreted.
>
> 9. There is no suggestion that the soldier is any part of the 'sectarian divide', nor is he involved in any proscribed organisation. Indeed paragraph 8 of the legislative framework makes it clear that references to persons and groups of persons need not include the defendant.
>
> 10. I suspected that the offence was committed to any extent (whether directly or indirectly) as a result of or in connection with or in response to the political hostility of one person or group of persons towards another person or group of persons; namely in connection with or in response to the political hostility of members

(or suspected members) of the Provisional IRA towards those who believe that Northern Ireland should remain a part of the United Kingdom.

11. As stipulated above and in the legislation the object of the political hostility need not be either the defendant or the victim of the offence.

12. The following factors were relevant in my decision to suspect that Condition 4 was satisfied (*hereinafter the Director set out the detail contained in paragraph 8 of this judgment).*

13. It is my contention that in light of the aforementioned factors, the section is worded sufficiently widely for me to have reasonably suspected that Condition 4 was met having considered these factors.

14. The second limb of section 1(2) relates to my satisfaction that there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury. In arriving at my conclusion I was mindful of judicial consideration of such matters as articulated in *Re Jordan's Application*, both in the High Court and Court of Appeal and in *Re McParland's Application*. I was satisfied that in the circumstances of this case there was such a risk as is provided for in section 1(2)(b).

15. In consideration of all the material before me and in a careful analysis of the facts, circumstances and senior counsel's opinion, I was properly satisfied that in view of this there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.

16. The applicant suggests that the issuing of a certificate in this prosecution is a statement that no member of the security forces can have a trial by jury. I can confirm that that my

decision to issue a certificate is a decision that I take in a case by case basis and only upon application.

17. The issuing of a certificate in this case is by no means a pronouncement as to the mode of trial in future cases involving members of the security forces or the police."

[20] In response to the applicant's pre action -protocol letter, the Director's office has set out the reasoning behind the decision in a letter of 10 May 2017 from Amanda Doherty, Senior Public Prosecutor. It contained the following paragraphs, inter alia:

> "I can advise you that the Director suspected that Condition 4 in section 1 of the 2007 Act was satisfied on the basis of information provided by the police coupled with a commentary and assessment of that information, and analysis of the facts and circumstances of this case and the advice of senior counsel. In this way the Director formed the requisite suspicion.
>
> In view of the suspicion which he formed in relation to Condition 4, the Director was satisfied that there was a risk that the administration of justice might be impaired if the trial were to be conducted with a jury. This risk arises from the possibility of a biased juror or jury having regard to the particular circumstances of this case.
>
> The Director further considered whether the risk to the administration of justice could be mitigated by application to the court to screen the jury, sequester the jury or transfer the trial to a different venue. The Director was satisfied that there remained a risk that the administration of justice might be impaired on the basis that, even if granted, these measures might not be sufficiently effective in preventing or significantly reducing the potential risk posed to the administration of justice in this case.
>
> In reaching this decision, the Director had regard to the views of police, the analysis of the circumstances

> of this case, the evidence to be led at trial and the advice of senior counsel."

[21] We pause to set out two additional issues that arose in the course of this hearing. First, in the skeleton argument of the Director it was asserted that the deceased "was suspected of being a terrorist and there was a suspicion that he may have been armed". Counsel on behalf of the applicant took issue with this assertion given that he contended that before the Crown Court judge the prosecution had not made the case that it was accepted that the applicant suspected the person was a terrorist or that he believed the deceased was armed.

[22] Mr Simpson on behalf of the DPP, who was not instructed in the Crown Court hearing, evinced some uncertainty as to what had been said on behalf of the prosecution in this regard. Hence, for clarification purposes, we invited a further affidavit from the DPP on this matter. Such an affidavit was subsequently filed on behalf of the DPP dated 14 November 2017. This affidavit included the following paragraphs:

> "2. I am informed by senior counsel who is retained to prosecute the case against the applicant, and believe, the evidence to be adduced by the prosecution indicates that the applicant thought the deceased was acting suspiciously. In interview with police after the death of the deceased, the applicant did not make a case that he suspected that the deceased was a terrorist, although that is one interpretation of the answers which he provided.
>
> 3. I am further informed by counsel, and believe, the evidence to be adduced by the prosecution does not include evidence that the applicant suspected that the defendant was armed. There is evidence available that another soldier present at the scene believed that the deceased had a concealed weapon.
>
> 4. I am further informed by counsel, and believe, that evidence to be adduced by the prosecution indicates the deceased was called upon to stop by soldiers but failed to do so."

[23] Mr Power objected to the admission of this affidavit. In a further skeleton argument from him, citing a number of well-trodden authorities which included *Commissioner of Customs and Excise v Mukesh Permchand Sah* CO 4003/1998, *The Queen on the Application of CD, AD (By his Litigation and Friend the Official Solicitor) v The Secretary of State for the Home Department* [2003] EWHC 155 Admin, *The Queen on the*

Application of London Fire and Emergency Planning Authority v The Secretary of State for Communities and Local Government [2007] EWHC 1176 amongst others, Mr Power contended that this additional DPP affidavit was an explanation after the original decision letter and to permit it into evidence was wrong in principle. This was all the more so where, he argued, no contemporaneous document whatsoever was produced to justify or record the decision-making process. In short it was his assertion that when counsel during the application in court is tested by the court on inadequate reasoning it is wrong in principle to allow reasons tailored to give an answer to that testing.

[24] Secondly, we noted that in correspondence from the applicant to the Public Prosecutions Service on 4 October 2017, the applicant specifically requested disclosure of all material that the Director considered in making his decision to issue a certificate. Without limiting the generality of the request, that letter specifically sought disclosure of: the facts, the analysis and counsel's opinion referred to in paragraph 15 of the Director's affidavit.

[25] By way of letter dated 12 October 2017 Ms Cromwell from the High Court and International Section of the Public Prosecution replied to the effect that the material requested had been considered and in light of the decision arising in the case of *Tweed v Parades Commission* [2006] UKHL 53; [2007] 1 AC, it was not considered a disclosure of the material sought was necessary in order to resolve the matters fairly and justly.

Discussion

[26] In construing section 1 of the 2007 Act we recognise, as Mr Power contended, that in principle there is a need to narrowly and strictly construe Section 1 of the 2007 Act.

[27] In *Arthurs' (Brian and Paula) Application* [2010] NIQB 75 Girvan LJ said at paragraph [32]:

> "Bearing in mind the need to narrowly and strictly construe section 1 of the 2007 Act it is necessary to determine the true effect of the conditions which, if satisfied, justify the withholding of a defendant's right to a jury trial. The statutory conditions, expressed in clear and unambiguous terms, justifying the exercise of the Director's power to issue a certificate for a non-jury trial necessitate formation of a *suspicion* that one or more of the conditions under section 1 are met. If that suspicion is formed the Director must reach an evaluative conclusion whether in the view of that suspicion there is a risk that the

> administration of justice might be impaired if the trial were to be conducted with a jury. The tests of suspicion and risk to justice are set at a modest level. They are tests to be considered by the Director and call for a personal judgment reached by him in the light of the information available to him."

[28] The rationale behind the need to narrowly construe section 1 was the strong presumption that a right to jury trial is not intended to be taken away and that in itself leads to a strict construction of any statutory restriction or limitation on the right to a jury trial. (See also *A v Secretary of State* [2004] EWCA Civ 1123 per Laws LJ at para 233).

[29] However, equally, it is absolutely clear that the purpose of the 2007 legislation is to take away the right to jury trial in the circumstances and the conditions set out therein. Those conditions are set out in clear and unambiguous terms. The object is to generate fair trials. It does not require comments from parliamentarians at the time of the passing of the legislation to provide any explanation of them. The words of the legislation speak for themselves. Our task of construction is to see what is the intention expressed by the words enacted. *Pepper (Inspector of Taxes)v Hart* [1993] AC 593 need only be invoked when the use of clear Ministerial statements can be used as an aid to the construction of *ambiguous* legislation. A reading of the contents of the Act makes it clear that the scope is widely framed. This court must remain faithful to the wording of the statute and its context notwithstanding the need to narrowly and strictly construe section 1 of the 2007 Act.

[30] As Girvan LJ pointed out in *Arthurs' case*, the statutory conditions are expressed in clear and unambiguous terms justifying the exercise of the Director's power to issue a certificate for a non-jury trial. The tests of suspicion and risk to justice set out in section 1(2)(a) and 1(2)(b) are set at a modest level. Suspicion is clearly separate from prima facie proof. The latter consists of admissible evidence whereas the former can take into account matters that could not be put in evidence at all. (See *Hussien v Chong Fook Kam* [1970] AC 942).

[31] As the court pointed out in *Arthurs'* at paragraph [33]:

> "The nature of the statutory conditions (suspicion and a risk to the interests of justice) involves matters of impression and evaluation and judgement on the part of the Director."

[32] We also bear in mind that the decision has been taken by a highly experienced former criminal law practitioner appointed on that basis to this important post of Director of Public Prosecutions.

[33] The explanatory notes are of course an admissible aid to construction and they refer, inter alia, to special arrangements for a small number of exceptional cases albeit the presumption will be for jury trial to remain in Northern Ireland.

[34] However explanatory notes do have to be treated with some measure of caution. We are reminded of the sage words of Lord Steyn in *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956 at paragraph [6] where he said:

> "What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in explanatory notes cannot be attributed to Parliament. The object is to see what is the intention *expressed by the words enacted* (our emphasis)."

[35] The condition relied upon by the Director in the instant case was Condition 4 set out in section 1(6) of the 2007 Act. This condition has to be read in its full context, set as it is in close juxtaposition to subsections (7) and (8).

[36] Section 1(7) reflects the width of the definition of "religious or political hostility", being based to any extent even on "supposed religious belief or political opinion".

[37] Section 1(8) is significant in that it further extends the reach of Condition 4. References to persons and groups of persons need not include a reference to the defendant or to any victim of the offence or offences. Hence for example neither the applicant nor the victim needs to be a member of the IRA.

[38] The wording of section 1(6) containing Condition 4 therefore has to be carefully and contextually parsed. It cannot be gainsaid but that the wording is couched in wide terms. Some relevant instances are as follows:

- Condition 4 is not confined to the circumstances of Conditions 1, 2 and 3. The wording moves beyond the confines of the accused person being within a paramilitary organisation. It clearly envisages looking at the circumstances leading up to the offence being considered.

- The significance of the wording that the offence "was committed to any extent (whether directly or indirectly)" cannot be underestimated. This clearly widens the bracket of connective circumstances that can be embraced between the offence itself and the religious or political hostility.

- The breadth of this phraseology confounds Mr Power's assertion that the words "immediately" should be imported into the section so that the offence in question had to be committed immediately after the initial offence. Not only could Parliament have easily drafted this precise wording into the section if it was meant to apply, but to have done so would have been incongruous with the phraseology that has been included. We see no basis for adopting such an interpretation.

- As already indicated political hostility can apply to "supposed" political opinion, again widening the reach of the section.

[39] It could not be plausibly disputed that the IRA as an organisation was politically hostile to another group of people who were opposed to the concept of a united Ireland and in that context attacks were made on members of the British Army. The phrase "political hostility" is in use daily in Northern Ireland and is easily understood. It may be that the most obvious examples of the situation arising out of Condition 4 are those suggested for example by Mr Goggins involving incidents with a sectarian background. But in our view the wording of the statute is manifestly wide enough to embrace the scenario of the British Army engaging with suspected members of the IRA. The test for the Director was whether he *suspected* the impugned offence was directly or indirectly *to any extent* connected with this situation.

[40] Contrary to Mr Power's characterisation of the respondent's argument as being so wide as to embrace every single case where a soldier was involved, Condition 4 clearly excludes a number of circumstances where members of the British Army might be involved. Examples include two soldiers fighting in a bar, a soldier committing a crime unconnected with the circumstances of Northern Ireland such as domestic violence against his partner, unjustifiably and deliberately shooting at a burglar whilst out on patrol or deliberately out of sheer wickedness shooting someone in the back unconnected to political hostility. These are but some illustrations that the condition is not wide enough to cover every action by a member of the British Army. As the Director pointed out in his affidavit, each incident involving the army must be looked at individually on a case by case basis.

[41] In our view the assertion of the Director that it was the intention of Parliament to provide that "the sub-section should be broadly interpreted", whilst it could have been more felicitously worded, does not necessarily contradict the proposition put forward in *Arthurs'* case that it is necessary to construe section 1 narrowly and strictly. The wording of Condition 4 is such that Parliament clearly intended to include a broad reach of circumstances whilst at the same time recognising that any legislation removing jury trial needs to be tightly construed.

Section 1(a) of the 2007 Act

[42] We commence with the prefatory observation that the Director was entitled to consider all the facts, circumstances and information before him in forming the necessary statutory suspicion. The factual material which is common case and has been set out in paragraph 8 of this judgment (save for the controversial areas of 13 and 14) by themselves provided ample material and a compelling basis for the necessary suspicion.

[43] The Army patrol in question had been attacked with gunfire two days previously by members of the IRA. The position is well summed up at page 33 of the report of the HET where it records:

> "Two days before John Pat's death, in another incident, a Life Guard foot patrol had surprised a group of men who were in the process of transferring weapons into a car near the village of Eglish. The patrol was fired on and during an exchange of gunfire, three men were arrested and a quantity of arms and explosives was recovered. However, at least three other gunmen escaped. Following that incident, the patrol that came across John Pat had been engaged in follow up operations in the general area in an effort to apprehend the remainder of the gunmen and also to location further arms caches believed to be in the area."

[44] Therefore a mere two days after the initial incident, in what was clearly a difficult and potentially dangerous area for this patrol and the regiment insofar as the IRA were hostile and clearly intent on killing such soldiers, the incident under discussion now occurred. It would defy common sense to argue that a suspicion that the two incidents had a connection in a context of IRA activity was somehow Wednesday unreasonable.

[45] The incident where Mr Cunningham lost his life cannot be divorced from the context of the previous incident and the background situation in this area.

[46] As Mr Power himself conceded during exchanges, had the incident occurred in the *immediate* aftermath of the earlier shooting incident, Condition 4 would clearly have been invoked. The brief temporal gap of two days in our view is more than sufficient to retain the connection between the incidents in question.

[47] Such a conclusion was not Wednesbury unreasonable and there is no basis for considering that the Director left out of account relevant considerations or took into account irrelevant matters.

Section 1(b) of the 2007 Act

[48] Mr Power's second attack upon the Director's determination was on the basis that his suspicion, even if properly formed, could not have led him to be satisfied that there was a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.

[49] The reasoning behind the determination of the Director was set out in his affidavit of 28 September 2017 at paragraphs [14] and [15] (*see paragraph 21 of this judgment*) and initially in the pre-action protocol response letter of 10 May 2017 (*see paragraph 22 of this judgment*).

[50] Mr Power contended that in fact no reasons had been given to make this finding and there was no reasonable correlation between the facts set out in paragraphs 12 of the Director's affidavit and the present day. Mr Power contended that we need to trust juries and that some evidence would have been necessary to establish that there was a risk of bias particularly in circumstances where the Director had refused to disclose all the information before him.

[51] We do not agree with Mr Power's contentions. The Director does not look at this matter in a vacuum. As an aid to his determination on the question of jury bias an analysis of *Jordan's* cases was properly considered by the Director (the judgment of Stephens J, as he then was, *[2014] NIQB 11* and the decision of the Court of Appeal at *[2014] NICA 76).*

[52] The *Jordan* circumstances surrounded an inquest into the death of Mr Jordan who had been shot and killed by a member of the Royal Ulster Constabulary. The case and its appeal was in respect of judicial review applications by the father of the deceased concerning the investigation of his son's death and the conduct of an inquest which was heard before a coroner with a jury. One of the grounds of challenge to the Coroner was his decision to hear the inquest with a jury.

[53] At paragraph [84] the Court of Appeal in *Jordan* specifically asserted that it would be idle to ignore the problems both of jury intimidation and perverse verdicts in Northern Ireland. It adverted to this strain coursing through the presence of scheduled criminal cases in Northern Ireland following the Diplock report of 1972, the consultation paper of August 2006, the Justice and Security (Northern Ireland) Act 2007 and the Attorney General's Guidelines and Jury Checks. The risks identified by the jury's sub-group of juror intimidation, partisan juries and perverse jury verdicts has not been seriously disputed by most commentators albeit there is disagreement about the measures needed to deal with those risks. The Court of Appeal concluded:

> "That risk, albeit reduced, exists to the present time."

[54] In the instant case the Director, having considered possible precautionary measures, was entitled to ask himself if there was a real possibility that a jury would be biased in a case of this nature. Was there not a real possibility that in the fractured society in which we live in Northern Ireland someone or more on the jury might entertain a prejudice against or a partiality in favour of a soldier fighting terrorism? It is not without significance that the Court of Appeal, in offering guidance to jurors and considering whether it was likely to be beyond the reach of a jury to decide such matters impartially, set out in paragraph [90] such factors as:

> "
>
> - There are formidable difficulties in being satisfied that the insidious nature of bias has been removed in security and terrorist type cases.
>
> - It is necessary to confront directly the need to ensure that jury verdicts emerge unconstrained by tribal loyalties. A Coroner must be satisfied that there will be a sensitively constructed distance between prejudice and justice.
>
> - The existence of a real risk of a biased juror or jury will outweigh any other factor."

[55] Moreover as Stephens J pointed out in the *Jordan* case at first instance at paragraph [242], the community divisions in our society are such that the exact nature of the danger of a perverse verdict is influenced by the geographic location of an inquest.

[56] We are satisfied that the facts of this case alone provide a solid basis for the Director, a highly experienced criminal law practitioner in the context of Northern Ireland, to be satisfied that there was a risk of a biased juror in this case. Courts will give weight to the experience of the primary decision maker (see *Huang v Secretary of State for the Home Department* [2007] UKHL 11.

[57] As the *Arthurs'* case made clear at paragraph [24], this matter calls for a *personal* judgment reached by the Director in the light of the information available to him and is an evaluative judgment that would frequently be of a sensitive nature. We find no reason in this instance to dispute his conclusion that, where the context is of a soldier shooting an innocent bystander against the background of an IRA attack a short time before, this circumstance carries in its wake the risk of a partisan juror or jurors in at least parts of this province with all the attendant dangers of impairment of the administration of justice if that trial were to be conducted with a jury.

[58] Accordingly we do not consider that the determination of the Director was Wednesbury unreasonable and there is no basis for considering that the Director left out of account relevant considerations or took into account irrelevant matters.

[59] In passing, however we make two further comments in the context of section 1(2)(a) and 1(2)(b) of the 2007 Act.

[60] First, perhaps Mr Power's strongest arguments centred around his submissions that the Director had in the first place failed to provide appropriate reasons for his decisions and, secondly, that he had failed to disclose materials upon which his reasoning was based.

[61] Mr Power drew our attention to a number of authorities including *R v Secretary of State of the Home Department ex parte Nelson,* The Independent 2 June 1994, CO/2284/92 of 11 May 1994. The authorities make clear that it is an important obligation on the part of decision-makers to provide adequate reasons and an appellant should be assured that there has been no subsequent rationalisation of the reasoning to cure an earlier inadequacy.

[62] We consider that arguably greater care could have been given by the Director to setting out in some more detail in his affidavit (and indeed in the pre-action protocol response letter) the nature of his reasoning for both his suspicion and his satisfaction. We strongly urge the Director to consider the need for such care in all future cases. Why, to take but one example, did the letter of 10 May 2017 specifically refer to the issue of jury bias but the Director's affidavit did not embrace such specificity?

[63] However the obligation to give reasons does not demand a full legal and factual audit of every matter considered by the decision maker In the instant case we are content that the facts of the case (see paragraph 8 of this judgment) are self-evident and in many ways speak for themselves. The degree of reasoning outlined by the Director, relying as he did on the facts and circumstances of the instant case, point clearly to a connection with the political hostility of the IRA to those who believed that Northern Ireland should remain a part of the United Kingdom. The temporal and geographical proximity between the two incidents is conclusive. Hence his reliance on those facts alone provides sufficient basis for his conclusions.

[64] We do not consider the additional affidavit from the Director, which we are content to admit, does anything other than *clarify* a matter that was not clear to us. It does not infringe the rules in *Commissioner of Customs and Excise v Mukesh Permchand Sah* CO 4003/1998, *The Queen on the Application of CD, AD (By his Litigation and Friend the Official Solicitor) v The Secretary of State for the Home Department* [2003] EWHC 155 Admin, *The Queen on the Application of London Fire and Emergency Planning Authority v The Secretary of State for Communities and Local Government* [2007] EWHC 1176 in that it is not materially adding to explanations already given.

[65] The court will not always limit itself to considering material that was before the decision maker. It is not strictly limited to evidence which was or should have been before the decision-maker at the time of the decision. In *R v the Home Department, ex p.Turgut* [2001] 1 AER 719, 735 Shiemann LJ stated that:

> "If an applicant for permission to move for judicial review claims that the Secretary of State's decision is vitiated by some form of illegality he will file evidence to that effect. The court will not shut out evidence that is relevant to the issues. Indeed, it may order disclosure of evidence for disposing fairly of the application. The evidence is not strictly limited to evidence which was or should have been before the Secretary of State at the time of the decision"

[66] The fact of the matter is that irrespective of the specific details of the Crown case against the applicant in his criminal trial –for example that the applicant did not make a case that he suspected that the deceased was a terrorist—this does not prevent a suspicion arising that this is but one interpretation of the answers which he provided. Moreover the fact that evidence to be adduced by the prosecution does not include evidence that the applicant suspected that the defendant was armed does not expunge the evidence from the HET report that another soldier present at the scene believed that the deceased had a concealed weapon. Neither of these points changes the other fundamental factual background facts which were used to fuel the Director's suspicion that condition 4 of the statute had been met.

[67] Similarly, we consider that in this case the factual background and the guidance given in *Jordan's* case both in the High Court and the Court of Appeal are more than sufficient to ground a satisfaction on the part of the Director that there was a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.

[68] The second concern arose with Mr Power's reproach that that the Director was insufficiently disclosive in terms of the material which was sought from the respondent prior to the hearing.

[69] In correspondence 4 October 2017 the solicitor on behalf of the applicant had specifically sought disclosure of the material that the Director had considered in making his decision to issue a certificate under section 1 of the 2007 Act. It added:

> "Without limiting the generality of this request we specifically seek disclosure of: the facts, the analysis and counsel's opinion referred to in paragraph 15 of the Mr McCrory's affidavit."

[70] The respondent had replied in somewhat terse terms:

> "Please be advised that the material you have requested has been considered and in light of the decision arising in the case of *Tweed v Parades Commission* [2007] 1 AC 650, it is not considered that disclosure of the material sought is necessary in order to resolve the matters fairly and justly."

[71] *Tweed's* case concerned the issue of discovery of five documents held by the Parades Commission which it was contended should be ordered for the purposes of Mr Tweed's application for judicial review of a decision concerning a proposed procession by a local Orange Lodge.

[72] The court recognised that it will often be appropriate for underlying documents to be supplied in support of a decision that is subject to judicial review where an issue of proportionality arises.

[73] At paragraph [3] in *Tweed*, Lord Bingham of Cornhill said:

> "In the minority of judicial review applications in which the precise facts are significant, procedures exist in both jurisdictions … for disclosure of specific documents to be sought and ordered. Such applications are likely to increase in frequency, since human rights decisions under the Convention tend to be very fact specific and any judgment on the proportionality of a public authority's with reference to a protected Convention right is likely to call for a careful and accurate evaluation of the facts. But even in these cases, orders for disclosure should not be automatic. The test will always be whether in the given case, disclosure appears to be necessary in order to resolve the matters fairly and justly."

[74] Lord Carswell at paragraph [33] arrestingly observed:

> "A party whose affidavits contain a reference to documents should therefore exhibit them in the absence of a sufficient reason (which may include the length or volume of the documents, confidentiality or public interest immunity). If he raises objection to production of any document, the judge in a Northern Ireland case can decide on the hearing of a summons … whether to order production."

[75] Lord Carswell drew attention to the duty of candour which can be fulfilled by the adduction of summaries of a police report, authorised officers' reports and other documents.

[76] Whilst we recognise that the instant case did not involve a challenge under the Convention and the principle of proportionality was not specifically invoked, nonetheless we have some difficulty understanding why in this case disclosure was not made of matters which were specifically referred to as informing the decision such as the police report (even in summary form) and "the other material" which the Director expressly indicated he had analysed. The duty of candour is an exacting one and we entertained some doubts as to whether sufficient consideration was given in this case by the Director as to what documents could have been provided in the interests of transparency and explanation.

[77] In the event however, given the specific facts of this case, we are not satisfied that anything turns on this. As we have earlier indicated, hopefully in clear terms, the background circumstances of this case alone were more than sufficient to provide a solid foundation for the twin decision-making process carried out by the Director and we fail to see how any of the documents which were sought could have materially added to the applicant's understanding of the reasoning in question. For example the police report and commentary could have done no more than rehearse the facts already outlined, the HET report is before the parties and counsel's opinion is privileged .However that is not to say that in the modern spirit of transparency the Director should not have provided at least a summary of the materials before him (excluding counsel's opinion if necessary) rather than blandly invoking Tweed's case which in itself arguably confounds his approach in any event.

[78] In the course of his skeleton argument Mr Power also asserted that the applicant had been given no opportunity to make representations before the issue of the certificate.

[79] The courts have now recognised that the principles that can be applied by a court in judicial review, and also the procedure that will be applied to determine an application, are not fixed but depend on context. Essentially judicial review is the procedure by which the court exercises its supervisory jurisdiction, but that jurisdiction in its modern form is flexible and sensitive to context (see MB v Secretary of State for the Home Department [2007] QB 451 at paragraph [48]).

[80] Once again the answer to this proposition is found in *Arthurs'* case where at paragraph [33] the court said:

> "As Re Shuker [2004] NI 376 shows, it is not every decision making process which demands procedural fairness in the sense of requiring the decision maker to consult the party affected or to make him aware of

> the nature of the evidence being relied on when reaching a decision adverse to him. The nature of the statutory conditions (suspicion and a risk to the interests of justice) involves matters of impression and evaluation and judgment on the part of the Director. A suspicion once formed on the basis of sensitive intelligence material, usually of such a nature that it could not in the public interest be disclosed to the defendant, will remain unless it can be wholly dispelled. The ipse dixit of the defendant denying any ground for suspicion is not going to dispel a suspicion properly formed on the basis of intelligence advice emanating from apparently reliable sources. The nature of the exercise to be carried out by the Director does not, as pointed out in Re Shuker, lend itself either to the full panoply of judicial review or the implication of a duty to seek or receive representations before the Director forms a suspicion. The Director had to act fairly in the sense of reaching a dispassionate decision based on some material which led him rationally to form a suspicion that one or more of the conditions was satisfied and that there was a risk that the administration of justice might be impaired if the trial were conducted with a jury. There is no evidence that the Director failed to approach his task in the correct manner."

[81] We respectfully concur with these comments of Girvan LJ and we consider that they apply equally to the instant case. Accordingly we do not consider that there was any procedural impropriety in failing to afford the applicant an opportunity for representations before the decision was made.

Section 7 of the 2007 Act

[82] Both parties made submissions on section 7 of the Act which places limitations on the challenge to the issue of a certificate. In this regard counsel invoked leading authorities such as *Re Shuker* and *Regina v Director of Public Prosecutions* [2000] 2 AC 326 (*Kebeline*) and *Anisminic Limited v Foreign Compensation Commission* [1969] 2 AC 147, *R (G) v Immigration Appeal Tribunal* [2004] EWCA Civ 731. However since we have concluded that the application must fail on the basis that the Director has faithfully and legally applied section 1 of the Act, this matter does not require authoritative analysis by this court.

[83] Suffice to say that we are satisfied that the Director did have appropriate jurisdiction and made no error of law in that he properly exercised his discretion to

issue a certificate having applied the appropriate tests to the conditions set out in section 1 and thereafter concluded that the administration of justice might be impaired if the trial were to be conducted with a jury.

Conclusion

[84] In all the circumstances therefore we dismiss the applicant's case.