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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Arthurs' (Brian and Paula) Application [2010] NIQB 75

IN THE MATTER OF AN APPLICATION BY BRIAN AND PAULA ARTHURS FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DIRECTOR OF PUBLIC PROSECUTION FOR NORTHERN IRELAND

Morgan LCJ, Girvan LJ and Weatherup J

GIRVAN LJ

Introduction

[1] In these proceedings the applicants Brian and Paula Arthurs seek judicial review of a decision made by the Director of Public Prosecutions in Northern Ireland ("the Director") on 16 March 2009 whereby he certified that the trial of applicants be conducted without a jury.

[2] The applicants are charged with a number of criminal offences involving crimes of dishonesty in dealing with the proceeds of crime. They were returned for trial on 25 February 2009. The indictment on which they stand trial involves a range of counts. These allege possession of criminal property, contrary to section 329(1)(c) of the Proceeds of Crime Act 2002; obtaining money transfers by deception, contrary to section 15A of the Theft Act (Northern Ireland) 1969; obtaining services by deception, contrary to article 3(1) of the Theft (Northern Ireland) Order 1978; converting criminal property contrary to section 327(1)(c) of the Proceeds of Crime Act 2002; and possession of criminal property contrary to section 329(1)(c) of the Proceeds of Crime Act 2002.

[3] Mr Hussain QC appeared with Mr Squires and Miss Doherty on behalf of the applicants. Mr Maguire QC and Mr Scoffield appeared on behalf of the Director. Mr Perry QC appeared on behalf of the Secretary of State for Northern Ireland. The court also has the benefit of written submissions from British Irish Rights Watch who were given leave to intervene on 15 January 2010.

The relevant statutory provisions

[4] The Director's decision to certify that the trial be conducted without a jury was made under section 1 of the Justice and Security (Northern Ireland) Act 2007 ("the 2007 Act").

[5] So far as material section 1 is in the following terms:

> "(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 the 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 the proscribed organisation, or

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

(6) Condition 4 is that the offence or any offences was committed to any extent (whether directly or indirectly) as a result of, or 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.

….

(9) For the purposes of this section a person (A) is the associate of another person (B) if –

(a) A is the spouse or a former spouse of B,

(b) A is the civil partner or a former civil partner of B,

(c) A and B whether of different sexes or the same sex live as partners, or have lived as partners, in an enduring family relationship,

(d) A is a friend of B, or

(e) A is a relative of B.

(10) For the purposes of this section an organisation is the proscribed organisation, in relation to any time, if at that time –

(a) it is (or was) proscribed (within the meaning given by section 11(4) of the Terrorism Act 2000 (c .11)), and

(b) its activities are (or were) connected with the affairs of Northern Ireland."

[6] Section 2(1) of the Act requires the certificate to be lodged with the court before arraignment of the defendant or any person committed for trial on indictment with the defendant. It may be modified or withdrawn within the same timescale.

[7] Section 5 provides that the effect of the certificate under section 1 is that the trial on indictment of the person to whom the certificate relates and any person committed for trial with that person is to be conducted without a jury. Section 5(4) provides:

> "(4) No inference may be drawn by the court from the fact that the certificate has been issued in relation to the trial."

Where a trial is conducted without a jury under the section the court must give a judgment stating the reasons for the conviction at or as soon as reasonably practicable after the time of the conviction. A defendant so convicted has a right to appeal without leave.

Limitation on the challenges to the issue of a certificate

[8] Section 7 provides:

> "(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) Sub-section (1) is subject to section 7(1) of the Human Rights Act 1998 (claim that public authority has infringed Convention rights."

The background to the Director's certificate

[9] Stephen Herron, a senior public prosecutor in the Public Prosecution Service ("PPS") who has carriage of the prosecution of the applicants in his affidavit explains the procedure followed in a case where there is the possibility of prosecution on indictment the question arises as to whether a certificate should be issued under section 1 of the 2007 Act. The police indicate an initial view on the question and if they indicate that the case may require non-jury trial the police are asked to provide a considered view on whether the conditions specified in section 1 are satisfied. The considered view will have regard to the views of the investigating officer, the Detective Superintendent and any material facts or information including intelligence. The prosecution's report is forwarded to the regional prosecutor or Assistant Director as appropriate and therefrom to the relevant Senior Assistant Director. It is then forwarded with any additional recommendations to the Director. Generally where a certificate is to be issued this will occur in advance of the accused's committal but in any event it may issue up until arraignment but no later.

[10] The police view was that, taking account of the views of senior investigating officers and intelligence held by the police, the conditions in (1) and (2) in section 1(3) and (4) of the 2007 Act were met. The intelligence was considered reliable by the police and was available for inspection by Mr Herron and was duly inspected. Mr Herron prepared a report for the Director in consultation with senior colleagues and he conducted an internet search of the media reporting relating to the applicant Brian Arthurs generally. His report to the Director also drew attention to the report of the International Monitoring Commission.

[11] The Director in his affidavit personally averred that he had carefully and conscientiously considered Mr Herron's report on the statutory tests and took into account the recommendations which had been made. Arriving at his own independent judgment he concluded that the statutory conditions for the issue of a certificate for non-jury trial were met in this case. In relation to Brian Arthurs he suspected that condition 1 was met. He also suspected that condition 2 was met. In view of that suspicion he was satisfied that there as a risk that the administration of justice might be impaired if his case were conducted with a jury. He suspected that condition 1 was met in relation to Paula Arthurs on the basis that she was an associate within the meaning of section 1(9) of the 2007 Act and he was satisfied that there was a risk that the administration of justice might be impaired if her trial were to be conducted with a jury. He also considered whether the risk to the administration of

justice might be obviated and mitigated by jury measures such as screening, sequestration or transfer of venue but he was not satisfied that those measures would be sufficiently effective to obviate or mitigate the risk of impairment to the administration of justice in the case. The Director also stated that he considered the nature and circumstances of the events charged, the background and affiliations of Brian Arthurs and extracts of the 19th and 20th reports of the International Monitoring Commission. The certificate as issued by the Director recorded his decision.

[12] Following the issue of the certificate by the Director it was lodged in the Crown Court prior to arraignment on 27 March 2009. According to his affidavit the first applicant was aware from 13 March that a certificate was going to be issued. It appears clear that the applicants were aware before the actual arraignment of the existence of the certificate. No application was made to adjourn the arraignment pending a challenge to the lawfulness of the certificate. Each applicant pleaded not guilty.

The challenge to the certificate

[13] Correspondence from the applicants' solicitors seeking details of an evidential basis for the foundations of the issue of the certificate began in March 2009. In a letter of 26 May 2009 the PPS indicated that the Director had concluded that to provide the information requested could give rise to real harm to important public interests, namely the maintenance and protection of information gathering systems and the security and protection of individuals. The rights of others under Articles 2, 3 and 8 of the Convention had to be taken into account.

[14] Further correspondence ensued. In the course of the correspondence the PPS on 16 September 2009 stated that the Director had commenced a review of his decision to issue the certificate. On 12 October the applicant's solicitors were informed that, having regard to the advice of senior counsel, the Director concluded that in view of section 2(2) of the 2007 Act he had no power to modify or withdraw the certificate after arraignment.

[15] On 19 October 2009 the applicants' solicitors indicated the applicants would seek to challenge the certificate by way of judicial review. These proceedings were initiated on 7 December 2009 with leave being granted on 15 January 2010.

The background to the relevant statutory provisions

[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 threat 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 for 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. In its original form clause 7 of the Bill was drafted thus:-

> "7(1) No court may entertain proceedings for questioning (whether by way of judicial review or otherwise) any decision of the Director of Public Prosecutions for Northern Ireland in relation to the issue of a certificate under section 1.
>
> (2) Subsection (1) prevents a court, in particular, from entertaining proceedings to determine whether

> a decision or purported decision of the Director (without dishonesty or bad faith) was a nullity by reason of lack of jurisdiction or error of law.
>
> (3) section 7(1) of the Human Rights Act 1998 (claim that public authority has infringed Convention rights) is subject to sub-sections 1 and 2."

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)."

The applicants' challenge to the certificate

[19] Mr Hussain on behalf of the applicants argued that the Director's decision was substantively flawed, procedurally unfair and contrary to Article 6 of the Convention. Procedural unfairness rendered the decision a nullity and it should accordingly be quashed. There was no reason to suspect that the offences were committed on behalf of the IRA or that the IRA was involved and there was no evidence that persons within or associated with the IRA might seek to frustrate the administration of justice if there was a jury trial. It was irrational to conclude that jurors might not be objective because the defendant had been linked in the media to the IRA. Counsel argued that it was for the court itself to carefully scrutinise any purported basis for the removal of a right of a jury trial and the court to be satisfied that the removal of the right to jury was justified. For a defendant to have a fair trial the ultimate decision-maker on critical questions (including a question relating to the loss of a right to a jury) should not be the prosecutor who is not independent but rather the court. The State must accord the minimum procedural protections guaranteed by Article 6(1). Counsel drew on the analogy of appeal rights. Even though Article 6 does not confer a right of appeal, if the State provides for appeals an appeal must be determined in accordance with the minimum procedural protections guaranteed by Article 6. When a decision-maker determines civil rights and obligations or determines a criminal charge and is not independent Article 6(1) will not be breached provided that a court with full jurisdiction and sufficiency of review can review the decision. It will have to be able to scrutinise the evidence for itself. To ensure Article 6 compliance the 2007 Act should be so read that the court is provided with all the relevant evidence so that it can make decisions of fact for itself and so that any question of judgment made by the DPP can be properly scrutinised. Otherwise, a key element of the determination of the criminal charge against the appellant will have been made not by an

independent court tribunal but by the prosecution. Mr Hussain strongly relied on the reasoning applicable to control orders (see, for example, SSHD v MB [2007] QB 415). The legislature in the Criminal Justice Act recognised the importance of court involvement in any decision to remove the right to jury in a jury tampering case.

[20] It was argued that Article 6 was engaged for two reasons. Firstly, the determination of the mode of trial was part of the determination of the criminal charge. In R v T [2009] All ER the Court of Appeal did not dispute that Article 6 extended to procedural matters including the proceedings to determine whether the trial should be held without a jury. Secondly a Director's certificate under section 1 of the 2007 Act had a bearing on the applicant's reputation and thus engaged his civil rights aspect of Article 6. Counsel called in aid in support of his argument the decision of the European Court of Human Rights in Fayed v United Kingdom [1994] 18 EHRR 393 and Werner v Poland [2003] 36 EHRR 28. The Director's conclusions affected the applicants' reputations and engaged Article 6.

[21] Apart from Article 6 it was submitted that the Director and the court had an obligation to act fairly at common law in determining whether the removal of the right to jury trial was appropriate. Having regard to the deeply entrenched right to a jury the highest possible standards of fairness applied to any procedures to remove the right. The Divisional Court in Re Shuker [2004] NI 367 in dealing with a judicial review challenge to the Attorney-General's decision not to de-schedule a case was dealing with a different legislative provision and it was decided before Roberts v Parole Board [2005] 2 AC 738 and if it could not be distinguished, it should not be followed. Procedural fairness required that the defendant be given at least the gist of the case against him and a special advocate could be appointed to represent the interests of the defendant in closed proceedings in which the security intelligence could be properly reviewed by the court.

Conclusions

[22] Article 6(1) so far as material provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

It is important to determine whether Article 6(1) is engaged in the present context for, as Mr Hussain's argument demonstrates, if it is, it would have an important impact on the role and duty of the court in the determination of the judicial review challenge. The Director and the Secretary of State contend

that it is not engaged and that the Director's decision does not "determine" a criminal charge or a civil right, the Director's certificate being in the nature of an ancillary or interim decision relating to the procedure to be followed in the trial. They argued that for Article 6 to arise the proceedings must be decisive of a right in question. Both Mr Maguire on behalf of the Director and Mr Perry on behalf of the Secretary of State contended that Article 6 does not apply to procedural steps which do not involve the determination of a charge. The Director's decision is akin to a decision to prosecute or a decision to direct a prosecution summarily or on indictment. The Director's decision does not deprive the defendant of a fair trial, it not being in dispute that a non-jury trial before a court of competent jurisdiction can provide a defendant with a fair trial there being no Convention right or legitimate expectation to a jury trial in all circumstances. Mr Maguire and Mr Perry both relied on the reasoning adopted by the Divisional Court in Re Shuker [2004] NI 367 which, it was argued, who was equally applicable in the present context.

[23] In Re Shuker [2004] NI 367 the applicants were charged with scheduled offences pursuant to Schedule 9 of the Terrorism Act 2000 and thus subject to judge alone trial unless the Attorney General de-scheduled the offences. They challenged the refusal by the Attorney General to de-schedule the relevant offences. Three key issues arose before the Divisional Court namely, firstly, whether the decision of the Attorney General was justiciable; secondly, whether there had been a failure to observe procedural fairness; and, thirdly, whether the procedure adopted by the Attorney General complied with Article 6. While accepting that the matter was justiciable the court concluded that there were significant restraints on the extent of the review that might be undertaken. The discretion of the Attorney General was unfettered and it was open to him to adopt his approach to the power not to de-schedule an offence unless he was satisfied it was unconnected with the emergency. Ultimately the question had to be answered in a way which took account of the particular features of the process of decision-making. It was not a process which was suitable for the full panoply of judicial review superintendence and, in particular, was not amenable to review on the basis that it failed to comply with the requirements of procedural fairness. The decision involved the evaluation of material which would frequently be of a sensitive nature and the assessment of recommendations made by or on behalf of the DPP based on his appraisal of matters that might not have been admissible in evidence or whose disclosure would have been against the public interest. This was a procedure in which the courts would be reluctant to intrude. It was a task entrusted to the Attorney General which was a further reason for reticence. The court concluded that such rights as the applicants had in relation to the decision did not come within Article 6, the decision falling within the public law sphere and it was not similar to the determination of private law rights. The court rejected the argument that

depriving the applicants of trial by jury amounted to a breach of the right to a fair and public hearing. Kerr LCJ stated that:

> "Trial by jury may be the traditional mode of trial of indictable offences in most common law jurisdictions but it is not the exclusive touchstone of a fair trial."

[24] Although the applicants' argument sought to distinguish the decision-making process involved in the Attorney-General's approach to the issue of de-scheduling from that involved in the Director making a decision under section 1 of the 2007 Act there are close parallels between the two. Parliament has conferred on the Director the function of issuing a certificate, imposing upon him the obligation of considering the issues of suspicion and risk to justice. The consideration of those issues will involve considering the same type of material as that to which the Attorney General had regard in relation to the question of whether an offence should be de-scheduled. As Kerr LCJ pointed out in Shuker it necessarily involved:

> "the evaluation of material that will frequently be of a sensitive nature and the assessment of recommendations of the DPP based on his appraisal of matters that might not be admissible in evidence or whose disclosure would be contrary to the public interest. This is par excellence a procedure in which the court should be reluctant to intrude."

In view of that clear conclusion the court in Shuker considered it unnecessary to decide if the information in the possession of the Attorney-General would have been disclosable even if there was a duty of procedural fairness (which the court rejected).

[25] In its reasoning the court was heavily influenced by well established limitations on the review of the prosecutorial decisions by the DPP emerging from the authorities such as Re Adams [2001] NI 1 Ex parte Treadaway [1997] Times 31 October and DPP v Manning [2001] QB 330. The approach to the judicial review of prosecutorial decisions was subsequently succinctly stated by Lord Bingham in Sharma v Brown-Antoine [2007] 1 WLR 780 at 789:

> "It is … well established that the judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy. The language of the cases shows a uniform approach: 'rare in the extreme' (R v Inland Revenue Commissioners ex parte Mead [1993] 1 All ER 772 at 782): 'sparingly the exercised' (R v Director of Public Prosecution ex parte C[1995] 1 Crim App R 136, 140);

> 'very hesitant' (Kostuch v Attorney-General of Alberta [1995] 128 DLR 4th 440 at 449); ('very rare indeed') (R (Pepushi) v Crown Prosecution Service [2004] Im App R 549 para 49); 'very rarely': R (Birmingham v Director of Serious Fraud Office [2007] 2 WLR 635, para. 63.) In R v Director of Public Prosecutions ex parte Kebilene [2000] 2 AC 326, 371 Lord Steyn said:
>
> > 'My Lords I would rule that absent dishonesty or mala fides or exceptional circumstances, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review'."

It is apparent that the statutory language in section 7 is inspired by the principle of exceptionality applicable in the context of prosecutorial decisions. Section 7 gives statutory recognition to the common law reticence in the scrutiny of decisions made in the field of prosecutorial decision-making. The wording lends support to the contention put forward by Mr Maguire and Mr Perry that a decision made by the Director under section 1 of the 2007 Act is intended to fall within the band of prosecutorial decision-making.

[26] The precise parameters of the limitations arising from the concept of exceptionality in section 7 are not defined. This is equally the case in the judicial pronouncements in the case law. Laws LJ coined the phrase "a sliding scale of review" to make clear that the degree of intensity of judicial scrutiny depends on the context of the issues before the court. It will be influenced in part by the legal scheme under review; the subject matter of the decision; the importance of the countervailing rights and interests; and the extent of the interference with rights and interests. In cases engaging the most highly protected of the Convention rights the degree of scrutiny will be of the most rigorous kind. The case law speaks in terms of "heightened" or "anxious" scrutiny or of "a close and penetrating examination of the factual justification for the impugned interference with the right". In other situations the court will adopt what has been called a "light touch" review. Within that sliding scale of review the review of a decision by the Director under section 1 is by the statutory effect of the wording of section 7 clearly demonstrated to be one falling within the least intrusive side of the spectrum.

[27] As is pointed out in Clayton and Tomlinson in the law of Human Rights (2nd Edition) Volume 1 paragraph 11.333 there is no strictly defined point in the criminal process at which Article 6 guarantees must be in place. The protection applies as soon as a person is subject to a criminal charge and continues to apply until the charge is finally determined or discontinued. It is

for this reason that Lord Bingham in R v Durham Constabulary [2005] UKHL 121 at paragraph 12 said:

> "For good and understandable reasons the protection given to criminal defendants by Article 6 covers not only the trial itself but extends back to the priority and preliminary processes preceding trial and forward to sentence and appeal."

That, however, does not mean that at every step in the process which ultimately concludes in the trial the defendant has a right to a fair and public hearing by an independent and impartial tribunal before a decision is made. Proceedings are determinative when the outcome of the proceedings is *decisive* for them (see Clayton at paragraph 11.330). Ultimately in deciding whether a person has had a fair trial it will be necessary and appropriate to consider what happened at the different stages of the process and if what transpired earlier undermined the fairness of the trial process a breach of Article 6 may have occurred. In the present context a decision that the defendant's trial should be way of a trial before a judge alone will not deprive the defendant of a fair trial. The Director's certificate is not decisive of any issue that falls to be determined in the trial and it does not in itself undermine the right of the applicant to a fair trial which, as Re Shuker demonstrates, can happen before a judge alone without infringing his fair trial rights.

[28] The same reasoning leads to the conclusion that the Director's decision does not determine anything about the applicant's right to reputation. In Fayed v The United Kingdom [1994] 18 EHRR 393 the Secretary of State had appointed inspectors to investigate and report on a company take-over. In their published report the inspectors made findings critical of the applicants and damaging to their reputation. Their argument that they had been denied effective access to the cause to challenge the determination failed because as the court ruled in paragraph [61] of its judgment:

> "The inspectors did not adjudicate, either in form or in substance. They themselves said in their report that their findings would not be disposative of anything. They did not make a legal determination as to criminal or civil liability concerning the Fayed brothers, and in particular concerning the latter's civil right to honour and reputation … the object of the proceedings before the inspectors does not resolve any dispute (*contestation*) … In short it cannot be said that the inspector's inquiry determined the applicant's civil right to a good reputation for the purposes of Article 6.1 …"

The Director's decision reached pursuant to the statutory test which he was obliged to take into account in carrying out his public law function as prosecutor clearly did not and was not intended to determine anything decisively about the applicant's reputation. The statutory test was the test of "suspicion" which deliberately falls far short of any form of adjudication in relation to the reputation of the applicant. Section 4(5) specifically prohibits the drawing by the court of any inference adverse to the applicants. Throughout the prosecution process decisions necessarily must be made which may impact on the standing of a defendant in the eyes of the uninformed but throughout the process the defendant remains entitled to the presumption of innocence. While the PPS may conclude that there is sufficient evidence to prosecute a defendant or, for example, to oppose the granting of bail and the reputation of the defendant may thereby temporarily be damaged pending the trial of the charges it could not be said that the PPS is purporting to determine anything relative to the reputation of the defendant.

[29] For these reasons and for the reasoning adopted by the court in Re Shuker the applicants' argument that Article 6(1) was engaged and breached in the present instance must be rejected. The position of control orders is not *in pari materia* control orders seriously infringing the rights of parties to liberty or interfering with their private lives and undermining their standing within the community. Since Article 6 is not engaged in the present context no question arises of applying section 3 of the Human Rights Act 1998 to the interpretation of the legislation which falls to be interpreted applying ordinary principles. In construing the legislation regard may be had to the mischief with which the legislation was intending to deal; to the historical background lying behind the legislation; and to the common law context in which the legislation is set.

[30] Mr Hussain relied strongly on the approach adopted in R v T [2009] 3 All ER 1002 in which the Court of Appeal gave guidance as to the proper approach to section 7 of the Criminal Justice Act 2003 dealing with the discharge of a jury where suspected jury tampering has allegedly occurred. In that case Lord Judge LCJ at paragraph [10] stated:

> "In this country a trial by jury is a hallowed principle of the administration of criminal justice. It is properly identified as a right available to be exercised by a defendant unless and until the right is amended or circumscribed by express legislation."

Later in the context of the question about whether the criminal standard of proof beyond reasonable doubt applied in relation to the proof of the fulfilment of the pre-conditions for removing a jury under the jury tampering provisions Lord Judge said:

> "The right to trial by jury is so deeply entrenched in our constitution that unless express statutory language indicates otherwise the highest possible forensic standard of proof is required to be established before the right is removed. That is the criminal standard."

[31] Mr Hussain relied on this latter statement in support of his argument in favour of special procedural safeguards and argued that such legislation falls to be strictly construed and that the right to a jury cannot be removed without establishing beyond reasonable doubt that the statutory conditions are met. Lord Judge in the passage was, of course, dealing with the question of the quantum of proof in relation to the fulfilment of the express statutory conditions under consideration by the court in that case. It was in his earlier statement at paragraph [10] that he stated the central proposition which is that the right of one defendant in common with other defendants to a jury trial in relation to an indictable offence can only be removed by clear wording in statute. In the present instance the 2007 Act does remove the right to demand a trial before a jury provided the statutory conditions set out in section 1 are satisfied. The right of an indicted defendant to a jury trial is a right recognised by the common law and it is a right which is commonly described as being in the nature of a constitutional right insofar as any right can be described as constitutional in an unwritten constitution which is based on the principle of Parliamentary supremacy. In other constitutional systems some rights are regarded as constitutionally entrenched rights, entrenched in this context meaning "unable to be repealed except under more than unusually stringent conditions" (Shorter Oxford Dictionary). A statutory exclusion of a right to demand a jury does not infringe a right entrenched in law as such the right of an indicted defendant at common law being alterable by statute and in this case altered by statutory provision. The strong presumption that a right to jury trial is not intended to be taken away will, however, lead to a strict construction of any statutory restriction or limitation on the right to a jury trial. While the Human Rights Act 1998 remains in full force, Convention rights partake of the nature of what in other constitutional environments are considered to be entrenched rights. Thus the right of a defendant to a fair trial before an independent and impartial tribunal cannot be abrogated as long as the Human Rights Act is in full force. But, as we have seen, this does not mean that the trial must be before a jury.

[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 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. In the context of this particular judicial review challenge, leaving aside for the moment the question of procedural fairness, there was ample material before the Director which entitled him to reach the conclusion which he did and it could not be said that his decision was Wednesbury unreasonable. Nor is there a basis for considering that he left out of account relevant considerations or took into account irrelevant ones.

[33] Once it is concluded that no breach of Article 6 has occurred the applicants rely on the argument that the decision-making process infringed the principles of common law fairness. Those principles, it is argued, demanded that the applicants should have an opportunity to have, at least, the gist of the case against them so as to enable the applicants to make representations before a decision adverse to them was reached. The Director's alleged disregard of the dictates of common law fairness, it was argued, constituted an error of law vitiating his decision. Counsel argued that section 7 of the Act in its limitations on a judicial review of Director's decisions could not be construed so as to exclude a judicial review if the Director's decision was procedurally unfair. The argument that the Director's decision must be quashed for procedural unfairness must be rejected. As Re Shuker 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.

[34] While counsel for both sides raised interesting arguments on the effect of section 7 and the nature of its limitations on the powers of review and referred to the Parliamentary debates to support their respective contentions it is possible to interpret and apply the provisions of section 7 of the Act in the present context without the need to resort to any extrinsic evidence contained in the Parliamentary material, the Director having properly applied the legal tests laid down and having reached his decision in accordance with the statutory framework.

[35] The issue of delay raised in the written submissions was not pursued in the oral submissions. It must be said that the timing of the challenge to the Director's certificate and the timescale of the judicial review process raise serious questions as to whether the application should be dismissed by reason of delay. The application to challenge the decisions was presented after the applicants were arraigned. This was notwithstanding the fact on the applicants' case they were aware for some days before arraignment that a certificate under section 1 was to be issued and, in any event, they were aware of it before the actual arraignment took place. If a challenge is made after arraignment a successful challenge to the certificate deprives the Director of the opportunity to review his decision or to take account of fresh material. The Divisional Court could not accordingly remit the matter to the Director for reconsideration and, if the decision is quashed, the Director could not issue a fresh section 1 certificate even if it might be in the interests of justice that it should issue. This leads to the conclusion that it is, at least, highly desirable that any challenge should be brought before the arraignment and, if necessary, an application should be made to seek an adjournment of the arraignment. In the event of the court being informed of a defendant's intention to bring judicial review proceedings in respect of a Director's certificate the better course would be for the arraignment to be adjourned to enable the applicant to apply for leave to challenge the certificate and, if leave is granted, to exhaust the judicial review route. This would leave open the possibility that the Director could reconsider his certificate following a successful challenge. Clearly in the interests of a fair and expeditious trial the Divisional Court should impose a strict timetable in relation to the challenge so as to ensure that the interference with the progress of the trial is as limited as possible. In the present case neither party demonstrated the requisite degree of urgency which the situation demanded. However, in view of the conclusions reached in relation to the substantive issues in this application, the first of its kind under section 1, it is unnecessary to reach a final conclusion on the issue of delay.

[36] For the reasons given we conclude that the application should be dismissed.