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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY COLIN KING FOR JUDICIAL REVIEW

Before: Nicholson LJ, McCollum LJ and Weatherup J

NICHOLSON LJ

Introduction

[1] This is the judgment of the Court to which we have all contributed. It relates to an appeal from a judgment of Kerr J delivered on 5 July 2002, whereby he dismissed the application of the appellant for judicial review of the decision of the Secretary of State to provide materials to the trial judge (Campbell LJ) and the Lord Chief Justice because they will be participating in the fixing of a period "appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it under the Life Sentences (Northern Ireland) Order 2001 ("the Order").

[2] The Order came into effect in October 2001 and applies to mandatory life prisoners and discretionary life prisoners and to those who were juveniles at the date of offence and were ordered to be detained at the Secretary of State's pleasure. It provides a statutory regime for the release on licence of all life sentence prisoners and differs from the system presently operating in England and Wales and from that formerly applied in Northern Ireland: see Re: Whelan's Application [1990] NI 348 at 350 per Hutton LCJ, citing the summary of the former scheme by Carswell J (as he then was) at first instance.

[3] The appellant was born on 26 January 1978; the offence of murder was committed on 29 December 1994 when the appellant was nearly 17 years of age; he has been in custody since 2 February 1995 and was convicted of the murder on 6 March 1996; the conviction was quashed on appeal on 23 December 1996 and a re-trial was ordered; he was again convicted of murder and sentenced to detention at the Secretary of State's pleasure on 13 February 1998 and his further appeal was dismissed on 12 October 1998.

[4] The appellant contends that no materials which came into existence after 13 February 1998, the date on which he was sentenced to be detained during the pleasure of the Secretary of State, should be read by the trial judge or the Lord Chief Justice when they are considering the fixing of the relevant period. Kerr J decided that the materials in existence at the date of consideration of the relevant period by the trial judge and the Lord Chief Justice and the Secretary of State would be relevant to their decision and should be available to the decision-makers.

[5] The appellant also contends that the role of the Secretary of State envisaged by Article 11 of the Order is incompatible with Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms ("the Convention"). Kerr J held that the proper application of Article 11 in the appellant's case would not involve any violation of his Article 6 rights and that the appellant's challenge on this issue must fail. This has also been a live issue in this appeal and our decision on this point should, logically, precede the issue about materials.

[6] The fixing of a period is referred to in the heading of Part 3 of the Order as a "tariff". It is meant to be the minimum period of detention or imprisonment which a person sentenced to be detained at the Secretary of State's pleasure or to life imprisonment will serve. When it is appropriate to do so in this judgment we refer to the period as the minimum term. Minimum terms were not fixed for such prisoners before the coming into operation of the Order in October 2001. Article 11 of the Order seeks to cater for such prisoners. In our view the legislation intended to put such prisoners in a similar position to prisoners sentenced after the Order came into force, taking account of the fact that in many, if not all, of such cases no materials were placed before the sentencing court and no submissions were made by the prosecution or the defence in regard to retribution or deterrence. We have chosen "minimum term" because it reflects more accurately the effect of the exercise and has been recommended by the Sentencing Advisory Panel in England and Wales in April 2002 in their advice to the Court of Appeal entitled "Minimum Terms in Murder Cases" and was adopted in the Practice Statement (crime: life sentences [2002] 3 All ER 412).

[7] We were informed by Counsel that there are 75 such prisoners, most of whom were sentenced to a mandatory life sentence. Approximately a dozen

are serving discretionary life sentences and three were sentenced to be detained during the pleasure of the Secretary of State, of whom the appellant is one. The three are defined as life prisoners by Article 2(2) of the Order. None of the three remains a juvenile. None of them was a juvenile when sentenced. There is, obviously, an urgency about fixing all of the 75 minimum terms for reasons which are apparent from a reading of the Order. Some of the prisoners may have served the minimum term which will be fixed and they should be dealt with under Article 6 of the Order. Others are, understandably, anxious to know their position.

[8] Under Order 121, rule 3A, where the High Court or Court of Appeal is considering the compatibility of subordinate legislation with the Convention rights it shall give notice to the Crown. By an administrative error the Notice approved by Kerr J was not served on the Crown Solicitor. An amended Notice approved by this Court was so served. There was no appearance on behalf of the notice parties. Presumably it was felt that as Mr McCloskey QC and Mr Maguire, representing the respondent, would be arguing in favour of compatibility, it was unnecessary to duplicate their argument.

[9] Until a late stage of the argument in the appeal it appeared to be common case that the Order was subordinate legislation. However an argument was raised on behalf of the respondent that the Order was primary legislation or that it was neither primary nor subordinate Registration. Primary legislation is defined by Section 21(1) of the Human Rights Act 1998 as meaning "any … (f) Order in Council … (ii) made under Section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998". The corresponding provision is Section 84. As the respondent had rightly contended, at an earlier stage, that the Order was made under Section 85 of the 1998 Act, there was no substance in this argument.

[10] "Subordinate legislation" is defined by Section 21(1) of the Human Rights Act 1998 as meaning "any –(a) Order in Council other than one - … (ii) made under [Section 84] of the Northern Ireland Act 1998 … ." The Order, which is made under Section 85, is, therefore, subordinate legislation and there is no halfway stage between primary and subordinate legislation.

[11] As the Order is not primary legislation a declaration of incompatibility cannot be made under Section 4(2) of the Human Rights Act 1998. It was submitted on behalf of the respondent that the Court is debarred from making a declaration of incompatibility with a Convention right under Section 4(4) of the Human Rights Act 1998 in respect of this subordinate legislation because the Court cannot be satisfied that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility. The argument is incontrovertible and was accepted on behalf of the appellant.

[12] Section 3 of the Human Rights Act 1998 requires that subordinate legislation must be read and given effect to in a way which is compatible with the Convention rights, so far as it is possible to do so. However the court has power to declare that this subordinate legislation is unlawful if it is not compatible with a Convention right and thus to "strike it down".

[13] The case of Anderson and Taylor v Secretary of State for the Home Department (2002) UK HRR 261 (Court of Appeal) which was argued before the House of Lords at the same time as this appeal was heard is not concerned with subordinate legislation. The case concerns the compatibility of the system whereby the Home Secretary sets a `tariff' for mandatory life prisoners with Article 6 of the Convention. In England and Wales there is no equivalent of the Northern Ireland Order applying to mandatory life prisoners. In view of the urgency of fixing minimum terms we propose to give our decision before we know the outcome of the decision of the House of Lords and trust that they will not consider it discourteous on our part.

First Issue: Article 6 and the role of the Secretary of State

[14] As we have indicated, we propose, first of all, to deal with the argument about Article 6 of the Convention. In order to address it, it is necessary to set out so much of Articles 5, 6, 7 and 11 of the Order as are relevant. They are contained in Part III of the Order and are headed:-

"LIFE SENTENCES

Determination of tariffs

The relevant portions of Article 5 read:-

> 5.-(1) Where a court passes a life sentence, the court shall, unless it makes an order under paragraph (3), order that the release provisions shall apply to the offender in relation to whom the sentence has been passed as soon as he has served the part of his sentence which is specified in the order.
>
> (2) The part of a sentence specified in an order under paragraph (1) shall be such part as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it.

(3) If the court is of the opinion that, because of the seriousness of the offence or of the combination of the offence and one or more offences associated with it, no order should be made under paragraph (1), the court shall order that, subject to paragraphs (4) and (5), the release provisions shall not apply to the offender.

(4) If, in a case where an order under paragraph (3) is in force, the offender was aged over 18 when he committed the offence, the Secretary of State may at the appropriate stage direct that the release provision shall apply to the offender as soon as he has served the part of his sentence which is specified in the direction.

(5) If, in a case where an order under paragraph (3) is in force, the offender was aged under 18 when he committed the offence, the Secretary of State shall at the appropriate stage direct that the release provisions shall apply to the offender as soon as he has served the part of his sentence which is specified in the direction.

(6) The appropriate stage, for the purposes of paragraphs (4) and (5), is when the Secretary of State has formed the opinion, having regard to any factors determined by him to be relevant for the purpose, that it is appropriate for him to give the direction."

The relevant portions of Article 6 are headed and read:-

"Release on licence"

Duty to release certain prisoners

"6.-(1) In this Order –

(a) references to a life prisoner to whom this Article applies are references to a life prisoner in respect of whom –

(i) an order has been made under paragraph (1) of Article 5; or

(ii) a direction under paragraph (4) or (5) of that Article has been given; and

(b) references to the relevant part of his sentence are references to the part of his sentence specified in the order or direction,

and in this Article "appropriate stage", in relation to such a direction, has the same meaning as in Article 5(6).

(2) …

(3) As soon as –

(a) a life prisoner to whom this Article applies has served the relevant part of his sentence; and

(b) the Commissioners have directed his release under this Article, it shall be the duty of the Secretary of State to release him on licence.

(4) The Commissioners shall not give a direction under paragraph (3) with respect to a life prisoner to whom this Article applies unless –

(a) the Secretary of State has referred the prisoner's case to the Commissioners; and

(b) the Commissioners are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined.

(5) A life prisoner to whom this Article applies may require the Secretary of State to refer his case to the Commissioners at any time –

(a) after he has served the relevant part of his sentence … "

Article 7 reads:

"7-(1) The Secretary of State may at any time release a life prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds.

> (2) Before releasing a life prisoner under paragraph (1), the Secretary of State shall consult the Commissioners, unless the circumstances are such as to make such consultation impracticable."

Article 11 reads:

> "11.-(1) This Article applies where, in the case of an existing life prisoner, the Secretary of State, after consultation with the Lord Chief Justice and the trial judge if available, certifies his opinion that, if this Order had been in operation at the time when he was sentenced, the court by which he was sentenced would have ordered that the release provisions should apply to him as soon as he had served a part of his sentences specified in the certificate.
>
> (2) This Article also applies where, in the case of an existing life prisoner, the Secretary of State certifies his opinion that, if this Order had been in operation at the time when he was sentenced, the Secretary of State would have directed that the release provisions should apply to him as soon as he had served a part of his sentence specified in the certificate.
>
> (3) In a case to which this Article applies, this Order shall apply as if –
>
> (a) the existing life prisoner were a life prisoner to whom Article 6 applies; and
>
> (b) the relevant part of his sentence within the meaning of Article 6 were the part specified in the certificate."

First Issue: appellant's arguments

[15] In their skeleton argument counsel for the appellant submitted that the fixing of the minimum term by the Secretary of State under Article 11(1) of the Order is incompatible with Article 6(1) of the Convention and is thus unlawful. It represents a retrospective fixing of a minimum term by the Secretary of State long after the time of the original sentence. Reliance was placed on V v United Kingdom (1999) 30 EHRR 121 in which, at paragraph 111, the European Court of Human Rights ("the ECtHR") stated that it considered "as was recognised by the House of Lords … that the fixing of the

tariff amounts to a sentencing exercise and that Article 6(1) is, accordingly, applicable to this procedure". It was argued that the procedure under Article 11(1) requiring the fixing of the minimum term was similar to the procedure fixing the minimum term in the case of V v United Kingdom. Paragraph 114 of the judgment stated: "The court notes that Article 6(1) guarantees, inter alia, a fair … hearing … by an independent and impartial tribunal … 'independent' in this context means independent of the parties to the case and also of the executive …." The Home Secretary, who set the applicant's minimum term in V v United Kingdom was clearly not independent of the executive, and it followed that there had been a violation of Article 6(1).

[16] The affidavit of Thomas Haire, Assistant Director of Court Services in the Northern Ireland Prison Service, sworn on 15 May 2003, stated:-

> "1. The Secretary of State has adopted a policy that in all cases to which Article 11 of the 2001 Order applies he will either (a) accept the judicial recommendation in respect of the appropriate 'tariff' period or (b) determine a shorter period. The Secretary of State cannot, at present, envisage acting other than in accordance with one of these two alternatives.
>
> 2. In order to cater in particular for the second alternative, the essence of the judicial recommendation will be conveyed to the prisoner before the Secretary of State makes a final determination under Article 11. The Secretary of State will, ultimately, decide whether there is anything in the prisoner's representations or any other factor which would merit determining a lower 'tariff' period than that proposed in the judicial recommendation."

At the hearing before Kerr J the statement made by Mr Haire in paragraph 1 of his affidavit of 15 May 2000 that "the Secretary of State cannot, at present, envisage acting other than in accordance with one of these two alternatives, viz accepting the judicial recommendation or determining a shorter period" was altered by counsel for the respondent, acting on instructions, so as to remove the words "at present".

[17] Kerr J found that Article 11(1) can be interpreted compatibly when he stated:

> "[15] Provided, as is currently the case, the Secretary of State will accept the recommendations of the trial judge and the Lord Chief Justice as to the appropriate tariff in this case, no violation of the applicant's Article 6 rights arises. It is clear, however, that in the present state of the jurisprudence of the Strasbourg court, a failure to follow their recommendations would give rise to a violation …
>
> [17] … I propose to give effect to Article 11 in the case of the applicant by acknowledging that, under that provision, the Secretary of State is obliged to accept the recommendations of the trial judge and the Lord Chief Justice in relation to the tariff to be served by him."

[18] The appellant argued that, as envisaged by Kerr J, the Secretary of State is still an effective decision-maker, in so far as he must choose between two potentially conflicting minimum terms, ie that of the trial judge and the Lord Chief Justice. It was argued on behalf of the appellant that the statement of policy made it clear that the Secretary of State would be the effective fixer of the minimum term, retaining a residual right to depart downwards from the judicial recommendation and, as further information and representations were made, this further removed his decision-making from the judicial recommendation. Article 11 required the Secretary of State to fix a minimum term which, from the coming into operation of the Order, would be fixed by the trial judge under Article 5, subject to appeal. The interpretation placed by Kerr J on the Article did not cure the incompatibility. Kerr J sought to construe Article 11 for a particular applicant and was prepared to construe it differently for other applicants.

[19] In addition reliance was placed on the judgment of the ECtHR in Stafford v United Kingdom Appl. No. 46295, 28 May 2002 which was not available when the case was argued before Kerr J and was not relied on by either party to the hearing prior to his judgment. The Court stated:

> "77. … Then in the case of Anderson and Taylor decided [by the Court of Appeal] in November 2001, which concerned a challenge under Article 6(1) to the role of the Secretary of State in fixing the tariffs for two mandatory life prisoners, the Court of Appeal was unanimous in finding that this was a sentencing exercise which should attract the guarantees of that Article …

> 79. The court considers that it may now be regarded as established in domestic law that there is no distinction between mandatory life prisoners, discretionary life prisoners and juvenile murderers as regards the nature of tariff-fixing. It is a sentencing exercise …"

[20] As the parties did not rely on the decision in Stafford Kerr J said in his judgment at [18]:

> "The situation is different in the case of mandatory life prisoners. In *R (Anderson & Taylor) v Secretary of State for the Home Department* [2002] UKHRR 261 the Court of Appeal in England held that where Parliament had deliberately chosen not to interfere with the Home Secretary's discretion as to the length of the tariff in the case of mandatory life sentences, the court should not interfere with the clearly expressed views of the democratically elected Parliament. In that case, however, the court found that its decision was not inconsistent with the approach adopted by ECtHR. In the present case, involving as it does a sentence of detention during the Secretary of State's pleasure, I consider that to allow the Secretary of State to refuse to follow the recommendations of the judiciary would be inconsistent with the decision of ECtHR in *V v United Kingdom.* It is for this reason that I have adopted the interpretation of Article 11 that I set out in the preceding paragraph. I expressly refrain from expressing any view as to how Article 11 should be applied in cases involving mandatory life sentences imposed before the coming into force of the 2001 Order."

[21] It was urged on us on behalf of the appellant that the better course is to declare the whole of Article 11 to be incompatible with Article 6(1) in so far as it involves the Secretary of State. They referred to the 'Annotated Statutes' and to the commentary which notes that:

> "Section 3(2)(c) of the Human Rights Act should be read alongside Section 6(2)(b). In general the Act envisages that subordinate legislation which is incompatible with the Convention should be quashed. Parliamentary sovereignty does not protect subordinate legislation; the courts have a

> long-established jurisdiction to quash such legislation … But if it were possible to attack subordinate legislation that primary legislation requires to be incompatible with the Convention, the result would be to emasculate the primary legislation. The result would be inconsistent with the scheme of the Act …"

[22] Reliance was placed on R (on the application of Alconsbury Development Ltd) v Secretary of State for the Environment [2001] UKJL 23, also reported at [2001] 3 All ER 1, and, in particular, on passages from the judgment of Tuckey LJ in the Divisional Court. At paragraph [104] of his judgment he stated:

> "We do not think it is legitimate to read down a legislative provision so as to extinguish it."

Kerr J was attempting to do what Tuckey LJ rejected; he was reading down the role of the Secretary of State so as to extinguish it. To construe Article 11 compatibly with Article 6(1), one would have to remove the Secretary of State or nullify his powers as a decision-maker. That would be a step too far, they argued.

[23] Reliance was placed on R v A [2001] UKHL 25, [2001] 3 All ER 1 and the speech of Lord Steyn at paragraph [44] in which he stated:

> "A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so. If a clear limitation on Convention rights is stated in terms, such an impossibility will arise."

Reliance was also placed on the decision in Re S and Re W [2002] UKHL 10 and the passages in the speech of Lord Nicholls at paragraphs [37] to [40].

First issue: respondent's arguments

[24] On behalf of the respondent counsel set out in their skeleton argument the statutory framework, pointing out that Article 11 is self-contained: it is not supplemented by any Schedule or statutory rules. Article 5 applies, prospectively, to all prisoners who receive a life sentence subsequent to the appointed day, viz 8 October 2002. All such prisoners are given a minimum term. Article 11 devises a mechanism whereby all "pre-existing" life prisoners are also given a minimum term. That is to say the minimum term should be set for pre-existing life prisoners in the same way as it is set for prisoners receiving a life sentence after 8 October 2001 so far as practicable.

[25] They pointed out that, by virtue of section 2(1) of the Human Rights Act, the court is obliged to take into account any relevant jurisprudence of the Strasbourg institutions. They referred to the decision in Anderson and Taylor and drew our attention to the summary at paragraphs [8]–[20] of the judgment of Lord Woolf MR of the relevant jurisprudence of the ECtHR. At that time the case of Stafford had not been decided by the ECtHR.

[26] They submitted that the compatibility of the system of fixing a minimum term under challenge in these proceedings with Article 6 of the Convention was to be determined by reference to Article 11 itself and the complementary policy adopted by the Secretary of State (see the affidavit of Mr Haire of 15 May 2000 with the words "at present" removed) which gave pre-eminence to the judicial recommendation. They further submitted that there was a sufficient independent judicial element of sufficient potency in the process, coupled with the availability of judicial review, to establish compatibility with Article 6.

[27] In any event, they argued, the court may not make a declaration of incompatibility without first giving effect to section 3(1) of the Human Rights Act, the impact of which has been repeatedly emphasised by the House of Lords. They set out in their skeleton argument the passage in Lord Steyn's judgment in R v A (2001) UKHRR 825, also reported at [2001] 3 All ER 1, at paragraph [44]. They reminded us of the decision of this court in Foyle, Carlingford and Irish Rights Commission v McGillion [2002] NI 86 at pp 91, 92 per Carswell LCJ.

[28] They submitted that Kerr J was right to conclude:

> "Provided, as is currently the case, the Secretary of State will accept the recommendations of the trial judge and the Lord Chief Justice as to the appropriate tariff in this case, no violation of the applicant's article 6 rights arises."

[29] They contended that the court would not have to re-phrase Article 11 but could read in, after the words "certifies his opinion", the words "in accordance with the lower of the recommendations of the trial judge and the Lord Chief Justice", assuming that they gave differing recommendations. As a result of this submission it could be argued that they accepted that it would not be appropriate for the Secretary of State to determine a shorter minimum term. In respect of Section 3 of the Human Rights Act they drew our attention to passages from Lester and Pannick's Human Rights Law and Practice at 2.3.2 and to Starmer's European Rights Law at 1.15. They drew our attention to paragraphs (6) and (7) of the headnote in R v A and to further

passages in Lord Steyn's judgment and to the judgment of Lord Hutton, notably at paragraph [162].

First Issue: Our Conclusion

[30] We are satisfied that Article 11 is on ordinary principles of construction incompatible with Article 6(1) of the Convention, so far as the appellant and the other 74 "pre-existing" life prisoners are concerned.

[31] The decision of the House of Lords in Regina v Secretary of State for the Home Department ex parte Venables and Thompson [1997] 3 All ER 97 involved a finding by the majority of their Lordships that in fixing a minimum term the Home Secretary was exercising a power equivalent to a judge's sentencing power in the case of a child or young person convicted of murder. We consider that in Thynne v United Kingdom, Gunnell v United Kingdom, Wilson v United Kingdom (1991) 13 EHRR 666 it was decided implicitly that the fixing of a minimum term in the case of a discretionary life sentence prisoner was a sentencing exercise although the Court was expressly making a finding in respect of Article 5(3). In T v United Kingdom, V v United Kingdom (2000) 30 EHRR 121 the ECtHR concluded that the role of the Home Secretary in fixing the minimum term in connection with those detained during Her Majesty's pleasure amounted to a sentencing exercise and was in breach of Article 6(1) which required the fixing of the minimum term to be by an independent and impartial tribunal at a public hearing (our underlining).

[32] In Stafford v United Kingdom (Application no. 46295/99) the ECtHR stated at paragraph 79:

> "The Court considers that it may now be regarded as established in domestic law that there is no distinction between mandatory life prisoners, discretionary life prisoners and juvenile murderers as regards the nature of tariff-fixing. It is a sentencing exercise. The mandatory life sentence does not impose imprisonment for life as a punishment. The tariff, which reflects the individual circumstances of the offence and the offender, represents the element of punishment. The Court concludes that the finding in Wynne that the mandatory life sentence constituted punishment for life can no longer be regarded as reflecting the real position in the domestic criminal justice system of the mandatory life prisoner. This conclusion is reinforced by the fact that a whole life tariff may, in exceptional cases, be imposed where justified by the gravity of the particular offence. It is

> correct that the Court in its more recent judgments in *T* and *V*, citing the Wynne judgment as authority, reiterated that an adult mandatory life sentence constituted punishment for life (*T v the United Kingdom*, cited above, § 109, and *V v the United Kingdom*, cited above, § 110). In doing so it had, however, merely sought to draw attention to the difference between such a life sentence and a sentence to detention during Her Majesty's pleasure, which was the category of sentence under review in the cases concerned. The purpose of the statement had therefore been to distinguish previous case-law rather than to confirm an analysis deriving from that case-law."

[33] Having found that Article 11 is on ordinary principles of construction incompatible with Article 6(1) of the Convention, it is our duty to have recourse to Section 3(1) of the Human Rights Act which provides:

> "So far as it is possible to do so, … subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

[34] We have given special regard to the words of Lord Steyn in R v A at paragraph [44]:

> "… the interpretative obligation under section 3 of the 1998 Act is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings. It is an emphatic adjuration by the legislature: R v Director of Public Prosecutions ex parte Kebilene [2000] 2 AC 326 sub nom. R v Director of Public Prosecutions ex parte Kebilene [2000] UKHRR 176, per Lord Cooke of Thorndon at 373F; and my judgment at 366B. The White Paper made clear that the obligation goes far beyond the rule which enabled the courts to take the Convention into account in resolving any ambiguity in a legislative provision: see Rights Brought Home: The Human Rights Bill, cm 3782 (1997) para 2.7. The draftsman of the Act had before him the slightly weaker model in s 6 of the New Zealand Bill of Rights Act 1990 but preferred stronger language. Parliament specifically rejected the legislative model of requiring a reasonable interpretation. Section 3 places a duty on the court to

> strive to find a possible interpretation compatible with Convention rights. Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: s 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: s 3 is more radical in its effect. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it: compare, for example, Arts 31-33 of the Vienna Convention on the Law of Treaties 1980 (Cmnd 7964). Section 3 qualifies this general principle because it requires a court to find an interpretation compatible with Convention rights if it is possible to do so. In the progress of the Bill through Parliament the Lord Chancellor observed that 'in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility' and the Home Secretary said 'We expect that, in almost all cases, the courts will be able to interpret the legislation compatibly with the Convention': *Hansard* HL Deb, col 840, 3rd Reading (5 February 1998) and *Hansard*, HC Deb, col 778, 2nd Reading (16 February 1998). For reasons which I explained in a recent paper, this is at least relevant as an aid to the interpretation of s 3 *against* the executive: 'Pepper v Hart: A re-examination' (2001) 21 *Oxford Journal of Legal Studies 59*. In accordance with the will of Parliament as reflected in s 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so. If a *clear* limitation on Convention rights is stated *in terms*, such an impossibility will arise: *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115, 132A-B per Lord Hoffman. There is, however, no limitation of such a nature in the present case."

[35] At paragraph [45] of his judgment he stated:-

> "In my view s.3 requires the court to subordinate the niceties of the language of s 41(3)(c), and in particular

> the touchstone of coincidence, to broader considerations of relevance judged by logical and common sense criteria of time and circumstances. After all, it is realistic to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material. It is therefore possible under s 3 to read s 41 and in particular s41(3)(c), as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under Art 6 of the Convention should not be treated as inadmissible. The result of such a reading would be that sometimes logically relevant sexual experiences between a complainant and an accused may be admitted under s 41(3)(c). On the other hand, there will be cases where previous sexual experience between a complainant and an accused will be irrelevant, eg an isolated episode distant in time and circumstances. Where the line is to be drawn must be left to the judgment of trial judges. On this basis a declaration of incompatibility can be avoided. If this approach is adopted, s 41 will have achieved a major part of its objective but its excessive reach will have been attenuated in accordance with the will of Parliament as reflected in s 3 of the 1998 Act."

[36] In the same case Lord Hutton said:

> …. I would hold on ordinary principles of construction that S. 41 [of the Youth Justice and Criminal Evidence Act 1999] is incompatible with the right to a fair trial given by Art. 6." He went on to say:
>
> *"Under S 3 of the Human Rights Act 1998 can S 41 be read and given effect in a way which is compatible with the right to a fair trial given by Art. 6?"*

[37] He then set out Section 53(1) and continued at paragraph [162]:

> "As my noble and learned fried Lord Steyn stated in *R v Director of Public Prosecutions ex parte Kebilene* [2000] 2 AC 326, 366B, sub nom *R v Director of Public Prosecutions ex parte Kebilene* [2000] UKHRR 176, 182G, this subsection enacts a strong interpretative

> obligation, and Lord Cooke of Thorndon at 373F and 190A respectively, described the subsection as an adjuration. It is clearly desirable that a court should seek to avoid having to make a declaration of incompatibility under s 4 of the Human Rights Act 1998 unless the clear and express wording of the provision makes this impossible."

He went on to state at paragraph [163] that he was in full agreement with the test of admissibility stated by Lord Steyn in that case.

These passages are cited in order to show the approach in principle by the House of Lords. The decision in R v A itself, is not germane to the argument in this case.

[38] In Lester and Pannick's Human Rights Law and Practice at chapter 2.3.2 it is stated:

> "The crucial words in relation to this interpretative obligation (Section 3) are 'possible' and 'must'. As the White Paper explained: 'This goes far beyond the present rule which enables the courts to take the Convention into account in resolving any ambiguity in a legislative provision. The courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so. So, it is argued, courts and tribunals must strive for compatibility between legislation and Convention rights, so far as possible, if necessary reading down (that is limiting in scope and effect) provisions which would otherwise breach Convention rights, and reading in necessary safeguards to protect such rights. In this context, the role of the court is not (as in traditional statutory interpretation) to find the true meaning of the provision, but to find (if possible) the meaning which best accords with Convention rights."

[39] In a footnote reference is made to an article by Lord Steyn in [1998] European Human Rights Law Review, 153 at 155:

> "Traditionally the search has been for the one true meaning of a statute. Now the search will be for a possible meaning that would prevent the need for a declaration of incompatibility. The questions will be:

> (1) What meanings are the words capable of yielding? (2) And, critically, can the words be made to yield a sense consistent with Convention rights? In practical effect there will be a rebuttable presumption in favour of an interpretation consistent with Convention rights. Given the inherent ambiguity of language the presumption is likely to be a strong one."

See also Lord Cooke of Thorndon: in the course of the second reading debate in the House of Lords he said:

> "Section 3(1) will require a very different approach to interpretation from that to which the United Kingdom courts are accustomed. Traditionally, the search has been for the true meaning; now it will be for a possible meaning that would prevent the making of a declaration of incompatibility."

[40] In our view the ordinary construction of Article 11 entitles the Secretary of State, after consultation with the Lord Chief Justice and the trial judge if available, to certify his *own* opinion as to the minimum term in respect of the 75 life prisoners to whom Article 11 applies. But he would be acting in contravention of Article 6(1) of the Convention. We have no reason to suppose that he would wish to do so. He has sought by affidavit and in Court to restrict himself to following the recommendation of the judiciary. Counsel accepted on his behalf that he would not reduce the minimum term under Article 11(1). If he did, he would be in contravention of Article 6(1).

[41] In the unlikely event that the trial judge and the Lord Chief Justice make differing recommendations, the Secretary of State could have been faced with a choice which would involve a sentencing exercise. Accordingly we propose to read into Article 11 a restriction on the opinion of the Secretary of State which will require him to accept the minimum term set by the judiciary and the lower of the two minimum terms, if faced with the choice. His counsel it seemed to us, agreed. In taking this course we have striven "to find a possible interpretation compatible with Convention rights" as required by Section 3. Thus we construe Article 11(1) as meaning in effect:

> "This Article applies, where in the case of an existing life prisoner, the Secretary of State, after consultation with the Lord Chief Justice and the trial judge if available, certifies his opinion *in accordance with their recommendation or the lower of the two recommendations,* that if this Order had been in operation when he was sentenced, the court by which he was sentenced would have ordered that the release provisions

> should apply to him as soon as he had served a part of his sentence specified in the certificate."

[42] We recognise that we are giving a somewhat artificial meaning to "opinion". But there are parallels such as when a judge is restricted by binding precedent.

[43] In view of our decision that Article 11 of the Order can be read as compatible with Article 6 of the Convention, we do not propose to deal with the arguments advanced as to whether the appellant is a "victim" entitled to raise the issue of incompatibility.

[44] We note Kerr J's reference to mandatory life prisoners; the decision in Stafford was not made available to him when he wrote his judgment. Thus he refrained from expressing any view as to how Article 11 should be applied in cases involving mandatory life sentences. If he intended to hold that Article 11 could be validly interpreted in different ways for different kinds of prisoners, as set out at paragraph [20] above, we would require persuasive argument before we expressed support for this view.

Second Issue: The materials to be provided to decide the minimum term

[45] The other issue in this case is: what materials (if any) which came into existence after the appellant was sentenced should be provided to those who participate in the exercise of fixing the minimum term as required by Article 11.

[46] The relevant words of Article 11 are:

> "… certifies his opinion that, if this Order had been in operation when he was sentenced, the court by which he was sentenced would have ordered that the release provisions should apply to him as soon as he had served a part of his sentence specified in the certificate [of the Secretary of State]."

Second Issue: appellant's arguments

[47] The submission made on behalf of the appellant, put concisely, is that materials coming into existence after the appellant was sentenced or after his application to appeal or his appeal was dismissed should not be provided to those engaged in fixing the minimum term.

[48] It appeared from the first affidavit of Ms Angela Ritchie, Solicitor for the appellant, that reports had been compiled for consideration in connection

with the fixing of the appellant's minimum term as a result of the judgment of the Divisional Court in R v Secretary of State, ex parte Bulger [2001] 3 All ER 449.

[49] It was argued that there were two particular features of the Bulger case that did not apply to the Northern Ireland scheme. First of all the sentencing exercise was part of the Secretary of State's policy and not governed by a statutory scheme. Secondly the sentencing of juveniles was subject to a statutory requirement to have regard to welfare considerations which was not a statutory requirement when sentencing adults. Accordingly the approach in Bulger did not apply to the setting of the minimum term for existing life prisoners in Northern Ireland.

[50] The Bulger case had arisen out of a minimum term of 15 years set by the Home Secretary in 1994. The House of Lords quashed that decision as it was unlawful for the Home Secretary to adopt a policy which even in exceptional circumstances treated as irrelevant the progress and development of a child who had been detained during Her Majesty's pleasure: see R v Secretary of State for the Home Department ex parte Venables and Thompson [1997] 3 All ER 97.

[51] After the decision of the ECtHR in T and V v UK (1999) 30 EHRR 121 an interim scheme was introduced pending the introduction of legislation in relation to the detention of juveniles during Her Majesty's pleasure whereby minimum terms would be set by the Home Secretary on the recommendation of the Lord Chief Justice.

[52] Rose LJ at paragraphs [29]-[34] of ex parte Bulger reviewed the judgments of the members of the House of Lords in the case of ex parte Venables [1997] 3 All ER 97 and stated:

> "(35) In my judgment, it is plain beyond peradventure on the English and European authorities that, in relation to a child, the court fixing a tariff not only can, but must, take into account matters known in relation to rehabilitation at the date when the tariff is fixed or reviewed. Where as in the present case, the tariff, unusually, and for the reasons given earlier, was fixed not soon after the trial but nearly eight years after, the events during those eight years should be taken into account. It follows that Lord Wolff LCJ was right to take those matters into account."

[53] It was submitted that the comments of the court in ex parte Bulger cannot be directly "read across" from the English jurisdiction to the Northern

Ireland jurisdiction, in order to justify the intended dissemination of the reports on the appellant in this jurisdiction and are of no application in this jurisdiction.

[54] It was further argued that the interim scheme in England which arose as a result of the decision of the ECtHR in T and V v UK involved a specific undertaking/agreement on behalf of the Home Secretary and Lord Wolff LCJ. There was no evidence of any such statement of policy from the Secretary of State revealing a similar agreement between the Secretary of State and the Lord Chief Justice in Northern Ireland. The policy of dissemination of reports was based on the wrongful premise that our judiciary were to give consideration to matters outside the scope of deterrence and retribution. Moreover, at all material times Thompson and Venables were minors and any "welfare" consideration which applied to them would not apply to the appellant who reached his majority before he was sentenced.

[55] The question to be answered was said to be: what is relevant? Reliance was placed on R v The Secretary of State for the Home Department, ex parte Raymond McCartney (Unreported: 19 May 1994) where the Court of Appeal in England had considered similar transitional provisions relating to discretionary life prisoners.

[56] Further it was submitted that the dissemination of the reports would not be in accordance with domestic law as they dealt with confidential medical and historical issues intimately affecting the person of the appellant and could be said to infringe upon his rights to privacy and may represent a breach of his right to respect for his private life under Article 8 of the Convention.

Second Issue: respondent's argument

[57] On behalf of the respondent it was argued that it is an elementary principle of pubic law that all material considerations must be taken into account by the relevant authority at the time of making its decision: See, for example, Wade and Forsythe, Administrative Law (8th Edition) page 377:

> "It has long been established that if the Secretary of State … takes into account matters irrelevant to his decision or refuses or fails to take into account matters relevant to his decision … the court may set his decision aside".

They also referred to the judgment of Lord Slynn in R (Alconsbury Developments) v Secretary of State for the Environment [2001] 3 All ER 1 at paragraph [50].

[58] It is well settled that in the absence of any contrary intention (and it was contended that none is expressed in the Order) there are two material presumptions of statutory interpretation:

(a) A presumption that any principle or rule of law which prevails in the territory to which the enactment extends and is relevant to its operation in that territory is imported.

(b) A presumption that where an enactment confers on a public authority a power to make a decision the relevant legal rules and principles are imported. See Bennion, Statutory Interpretation (3rd Edition) pp 805 and 817.

[59] A consideration is material if it reasonably bears on the decision to be made:

> "The relevant test … is whether a consideration has been omitted which, had account been taken of it, might have caused the decision maker to reach a different conclusion" per Sedley J (as he then was) in R v Parliamentary Commissioner for Administration, ex parte Balchin (1988) 1 PLP 1.

If the papers considered by those involved in the decision-making process contained materials outside the ambit of the exercise being performed, as defined above, they would be obliged to disregard them. The judiciary had ample expertise and experience to enable them to segregate the relevant from the irrelevant. If, ultimately, any errors in this respect should occur the remedy of judicial review would be at the disposal of the prisoner.

[60] They contended that the conclusion of Kerr J at paragraph [11] of his judgment was correct:-

> "… I have concluded that the progress of the applicant since the time of sentencing may be highly relevant to the issues that those who fix the tariff have to consider. There is no reason, therefore, that they should be deprived of material that could be heavily influential on their decision."

In support of this conclusion they relied on the judgment of Hoffman LJ (as he then was) in R v Secretary of State for the Home Department, ex parte McCartney [Unreported, 19th May 1994] and by analogy, on the decision of the English Divisional Court in R (Bulger v Secretary of State [2001] 3 All ER 449, especially the remarks of Rose LJ: see paragraph [35].

[61] However, in the course of argument counsel accepted that in view of the wording of Article 11 and the judgment of Stuart-Smith LJ for the majority of the Court in ex parte McCartney Kerr J had gone too far and that the good (or bad) behaviour of the appellant in prison which could not have been known or foreseen by the trial judge at the date of sentence should not be taken into account by the Lord Chief Justice and the trial judge (if available) in fixing the minimum term which would have been set, had the Order been in force at the time of sentence.

[62] But they did contend that the judiciary should have the materials which at the time of sentence would or could have been made available to the sentencer when he was fixing the minimum term. The judiciary would not be addressed by counsel, except in the rare case, but written representations should be made as if counsel was addressing them on the issues of retribution and deterrence. These representations should avoid reference to matters which would not and could not have been known to the sentencer and matters irrelevant to retribution and deterrence should be avoided or ignored by the judiciary. The judiciary should be placed in the same position as a trial judge setting a minimum term today. This might be a somewhat artificial exercise but it would mean that the appellant would be placed in the same position as he would have been if he had been sentenced after the Order came into effect.

[63] Mr McCloskey informed us that it was not currently proposed to generate reports in cases of mandatory life sentences.

[64] He contended that, if the appellant's argument was correct, representations by a prisoner now and representations by the families of victims, based on the impact which the crime had at the time, and other matters of procedural fairness would have to be ignored.

[65] So far as the issue of welfare was concerned, Section 48 of the Children and Young Persons' Act of 1968 was in force until 24 June 1998. When the appellant was first sentenced on 6 March 1996 and when he was sentenced for the second time on 13 February 1998, Section 48 was in force and applied to children and young persons until they attained their 18th birthday. But when he was first sentenced and, of course, when he was sentenced for the second time he was over the age of 18 and it was the submission of the respondent that Section 48 played no part in the fixing of the minimum term for the appellant.

[66] In rare cases those responsible for fixing the minimum term could make findings of fact relevant to retribution or deterrence which could not have been discovered at the time of sentence if brought to their attention in a proper way. Every public authority must perform its function and is not

excused from its obligation to take into account the true facts of the crime, for example.

[67] Reference was made to paragraph 11 of the appellant's affidavit in which he claimed that his co-accused would be making a confession that he was alone in the room when the old lady was killed and burnt. In such a case, if the co-accused did make such a confession and it was true, this should be taken into account in fixing the minimum term.

[68] Mr McCloskey then took us to the documentation which would generally be provided to the Lord Chief Justice and the trial judge (if available) and to the particular documents to be made available in this case. He referred to Mr Haire's affidavit of 7 February 2002, paragraphs 5 and 7, which outline in general that:

(a) A fact sheet would be provided containing

(1) details of all convictions and sentences imposed at the time of the conviction of the life prisoner and whether any appeal had been made

(2) the date of committal to prison and length of time served at time of referral to the Lord Chief Justice (and trial judge)

(3) the current prison location, including pre-release unit if appropriate

(4) a record of any referrals to the Life Sentence Review Board and the outcome of the Board's consideration of the case.

(b) Where relevant, for any prisoner currently detained at the Secretary of State's pleasure a progress report on the prisoner since sentence and any representations made by the prisoner or the victim's family in relation to the life sentence conviction.

(c) The court papers from the time of conviction. A list of such papers would be provided to the prisoner and/or his legal representative and copies might be obtained by them if they so wished.

(d) The guide to the Order would be provided to the judiciary by way of background. A copy had been sent to all prisoners.

(e) Any written representations to the Secretary of State would be made available to the judiciary. Representations by the victim's family would also be made available. They would also be made available to the prisoner.

The Lord Chief Justice and the trial judge would make their recommendations without holding a hearing (save in exceptional cases). The Secretary of State

would act on their joint recommendation or on the lower of the two recommendations.

He then dealt with the documentation in the appellant's case. The progress report in the appellant's case, to which paragraph 7 of Mr Haire's affidavit of 7 February 2002 referred, would consist of a report from Dr Pollock, Forensic Clinical Psychologist dated 3 September 2001 based on an interview with the appellant on 31 August 2001 which had been provided to the appellant: the medical officer's report on the appellant which was dated 17 September 2001: the prison governor's report would have to be edited but would include records of any anger management or alcohol dependency course and reports thereon: the Probation Service progress report dated 8 October 2001, omitting reference to the prisoner's good or bad conduct in prison. All of these would have to be updated. Other documents referred to by Mr Haire would be omitted.

The judiciary should be given information which in all probability the trial judge would have obtained, if enquiries had been carefully made. These would include representations from the victim's family. All information made available to the judiciary would be given to the prisoner's legal representatives before they were given to the judiciary so that written representations could be made to the judiciary.

[69] Article 7 should be given a wide interpretation so that facts which emerged after the setting of the minimum term and which indicated that the minimum term should not be served, could be given weight under that Article. The question was raised (but not answered) as to whether the period fixed under Article 11 was a sentence, so as to affect the jurisdiction of the Criminal Cases Review Commission to refer it to the Court of Appeal under Section 10 of the Criminal Appeal Act 1995. We do not propose to rule on this matter.

[70] In regard to ex parte McCartney it was argued that Stuart-Smith LJ did not pose the question: at a date later than the date of sentencing should the fixer of the minimum term have regard to matters relevant to retribution and deterrence? Nor were the basic principles of interpretation referred to by him. It was accepted, however, that good conduct after the date of sentence would not be germane to fixing the minimum term and that the judgment of Stuart-Smith LJ at pp 12, 13 should be preferred to the judgment of Hoffman LJ in that respect. Good behaviour in prison was relevant to the risk to the public, not to the minimum term.

[71] It was submitted that Article 8 of the Convention did not arise as it had not been argued. This was not correct as the appellant relied on his skeleton argument as grounding his submissions on Article 8. The respondent in his skeleton argument submitted that no prima facie infringement of Article 8(1)

was demonstrated. In particular, the appellant had willingly submitted to the interviews in question and had voluntarily disclosed information to his interviewers, in the full knowledge that there would be some dissemination of the reports generated in consequence. Such voluntary consent negatived any possible infringement of Article 8(1). In this respect the European Court had stated:

> "… The essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities … The concept of respect is not precisely defined. In order to determine whether such obligations exist, regard must be had to the fair balance that has to be struck between the general interest and the interest of the individual, while the State had, in any even, a margin of appreciation." Botta v Italy (1998) 26 EHRR 241, paragraph 33.

It was submitted that the reasoning and conclusion of Kerr J on this issue were beyond reproach.

[72] Argument was advanced as to whether the appellant was a victim which, it was stated, could be ignored if Article 11 was held to be in conformity with Article 6 of the Convention.

Second Issue: Our Conclusion

[73] The critical words of Article 11 are:

> "… certifies his opinion that, if this Order had been in operation at the time when he was sentenced, the court by which he was sentenced would have ordered that the release provisions should apply to him …"

[74] Kerr J said at paragraph [8] of his judgment:

> "It would be illogical to ignore factors that are directly relevant to the issue [of the tariff] simply because they were not known at the time of sentencing. The applicant's progress while in custody may well be of substantial significance in deciding on the appropriate tariff period. If he had evinced remorse for his crime and had displayed evidence of rehabilitation it may well be considered that the period required to ensure that he has been deterred from such offending in the

> future is not as great as might originally have appeared necessary."

[75] We are of the opinion that the legislation requires that the minimum term be determined as if fixed by the sentencing court at the time at which the prisoner was originally sentenced as a life prisoner. Accordingly the issue as to what is relevant to the fixing of the minimum term must be addressed in accordance with the approach which the statutory scheme has adopted, subject to compliance with Article 6 of the Convention.

[76] The Order is deemed to have been in force at the time when he was sentenced. In the case of the appellant this was 13 February 1998. Because the trial judge was required to sentence the appellant to detention at the pleasure of the Secretary of State and was not required to fix a minimum term, he did not seek documents or information or submissions in respect of retribution or deterrence. If he had had to fix a minimum term, he may well have called for a pre-sentence report and, possibly, a psychiatric report and counsel for the prosecution and defence could and the latter probably would have made submissions on the factors which should be taken into account. The materials and submissions which would normally be placed before a trial judge since the Order came into operation would thus have been placed before the trial judge at that time.

[77] In R v The Secretary of State for the Home Department, ex parte McCartney (19 May 1994, Unreported) the question turned on the correct construction of the transitional provisions contained in the Criminal Justice Act 1991 ("the 1991 Act") relating to the penal element of the sentence of those serving discretionary life sentences. These transitional provisions were to be found in Schedule 12, paragraph 9 of the 1991 Act and were similar to, although not identical with, Article 11. Paragraph 9 read:

> "9(1) This paragraph applies where, in the case of an existing life prisoner [such as the appellant], the Secretary of State certifies his opinion that, if –
>
> > (a) section 34 of this Act had been in force at the time when he was sentenced; and
> >
> > (b) the reference in subsection (1)(a) of that section to a violent or sexual offence the sentence for which is not fixed by law were a reference to any offence the sentence for which is not so fixed,
> >
> > the court by which he was sentenced would have ordered that this section should apply

> to him as soon as he had served a part of his sentence specified in the certificate."

[78] Stuart-Smith LJ, giving the judgment of the majority of the court, stated that:

> "the appellant, then 22 years old, was convicted of three offences of attempted murder of police officers and sentenced to concurrent terms of life imprisonment on 7 May 1976 … For the first 6 or 7 years of his imprisonment the [appellant] was thoroughly uncooperative, unruly and disruptive. However, in about 1983 he seems to have turned over a new leaf; he had become a model, not to say an exemplary prisoner, attracting high commendation from those who have been concerned with him. This is accepted by the Home Secretary … a discretionary life sentence is to be regarded as the sum of two sentences to be served consecutively. First, a determinable number of years appropriate to the nature and gravity of the offence; this is called the tariff or penal element of the sentence. Secondly, an indeterminate period, which the offender begins to serve when the penal element is exhausted …… It remains only to consider the relevance, if any, of the appellant's good conduct in prison since 1983. Should the Secretary of State take this into account when certifying under paragraph 9(1)? Mr Fitzgerald accepted that the logic of his argument on the construction of this paragraph [that the Secretary of State is required to fix as the tariff the equivalent fixed term sentence which the court would have imposed in 1976] means that he could not. I agree with him. … it is clear in my judgment that questions of motivation, remorse and contrition, especially if the latter are reflected in a plea of guilty, are always regarded as reflecting on the seriousness of the offence and behaviour after the offence but before sentence should be taken into account by the trial judge in fixing the part [the minimum term] under section 34. But it appears to me that once this part has been set, the Secretary of State has no discretion to alter it, either upwards or downwards, having regard to the appellant's conduct in prison. This

> will therefore only be relevant to the risk factor … Both counsel [Mr Fitzpatrick QC and Mr Pannick QC] accepted that this was so … I consider, however, that this does not affect the Secretary of State's power to grant early release on compassionate grounds … it is consistent with my view of the construction of the paragraph which seeks to put the test back to what the sentencing court would have done had section 34 been in force at the time. I do not see how it could have taken into account matters either in favour of or against the prisoner, which ex hypothesi it would have known nothing about."

Saville LJ (as he then was) agreed with this judgment.

[79] Hoffman LJ (as he then was) agreed "except on one short point at the very end …" He said in his judgment:

> "… The argument turns on the nature of the opinion which the Secretary of State must certify. Mr Pannick QC for the Secretary of State says that he must certify his opinion, first, that the sentencing court would have ordered that section 34 should apply after some unspecified period of imprisonment had been served, and secondly, his own opinion as to what that period should be. In forming the latter opinion he is not confined to considering what a court at the time of passing sentence would have thought appropriate but what `having regard to his public responsibilities' he now thinks that the seriousness of the offence deserves. Mr Fitzgerald, for the applicant, says that the Secretary of State must certify his opinion that if section 34 had been in force, the sentencing court would have ordered that the section should apply to him after the expiry of the tariff period specified in the certificate.
>
> The Divisional Court … favoured Mr Pannick's construction. With all respect to the Divisional Court, it seems to me plain and obvious that Mr Fitzpatrick must be right. The last four words of paragraph 9(1) – `specified in the certificate' are a past participial phrase which qualifies `part of his sentence' … if a discretionary life sentence by its

> nature contains within it a notional determinate sentence, I think it offends against basic principles of justice that the sentence should be fixed retrospectively 15 years later by reference to the view taken of the seriousness of the offence in the circumstances then prevailing. It offends even further if the Home Secretary is, as Mr Pannick submitted, not even required to apply the section 34(2) criteria but can take into account other matters such as current public confidence in the way the criminal justice system deals with the IRA. The applicant has been in prison since 1976 and cannot be held responsible for what the IRA had been doing since that date."

[80] But Hoffman LJ stated that there was no logical cut-off date which precluded subsequent events from being taken into account in respect of co-operation with the police or genuine contrition. In our view the logical cut-off date was the date when sentence was or would have been passed. The sentencer could not know at the date of sentencing whether the prisoner would later show remorse or co-operate with the police. Accordingly we prefer the reasoning of the majority of the court.

[81] In R v Secretary of State for the Home Department, ex parte Furber [1998] 1 All ER 23 Simon Brown LJ said:

> "… I turn next to the transitional provisions, which apply to sentences passed before the 1991 Act came into force … when certifying a period under para 9(1) the Home Secretary must adopt an identical approach: he must put himself in the position of the sentencing court and ask what period it would have fixed had s 34 been in force at the time of the sentence (see the Court of Appeal decision in *R v Secretary of State for the Home Dept, ex p McCartney* (1994) Times, 25 May, [1994] CA Transcript 667. "

[82] In our view section 48 of the Children and Young Persons Act (Northern Ireland) 1968 does not apply to the appellant or his co-accused who were over eighteen years of age when they were sentenced. It states:

> "Every court in dealing with a child or young person who is brought before it … as an offender … shall have regard to the welfare of the child or young person …".

The Court, when sentencing the appellant and his co-accused, was dealing with prisoners who were no longer young persons.

We consider that Section 48 does not require the Court to take into account the age of the convicted person when he committed the offence if he was not a child or young person when the Court was dealing with him for the purpose of sentencing him. Section 73(1) which provides that the juvenile offender shall be sentenced to be detained during the pleasure of the [Secretary of State] does not require the Court to treat the offender as a juvenile at the time of sentencing, if he has attained eighteen years of age.

[83] As it was not argued before us, we express no view as to the procedure which the trial judge and the Lord Chief Justice ought to adopt in fixing the minimum term in the case of Colin King or his co-accused or the other 73 life prisoners. But, as we have stated, Article 11(1) was designed to provide that life prisoners, for whom no minimum term has been set, should be treated in the same way, so far as practicable, as life prisoners are treated since the Order came into force. We have also held in this judgment that the setting of a minimum term under Article 11(1) is the exercise of a sentencing power, as held by the ECtHR.

[84] The judiciary will be considering whether (a) the case came close to the borderline between murder or manslaughter; or (b) the offender suffered from mental disorder or from a mental disability which lowered the degree of his criminal responsibility for the killing, although not affording a defence of diminished responsibility; or (c) was provoked (in a non-technical sense) such as by prolonged and eventually unsupportable stress; or (d) the case involved an over-reaction in self-defence; or (e) the offence was a mercy-killing.

They will be assessing whether there were aggravating features which rendered the offender's culpability exceptionally high or where the victim was in a particularly vulnerable position. Matters to be considered will include whether:

(a) the killing was `professional' or a contract killing;

(b) the killing was politically motivated;

(c) there were sectarian motives for the killing;

(d) the killing was racially motivated or the victim was targeted because of his or her sexual orientation;

(e) the killing was done for gain, eg in the course of a burglary or robbery;

(f) the victim was providing a public service;

(g) the victim was a child or was otherwise vulnerable;

(h) there was evidence of sadism, gratuitous violence or sexual maltreatment, humiliation or degradation of the victim before the killing;

(i) extensive and/or multiple injuries were inflicted on the victim;

(j) the offender committed more than one murder;

(k) the fact that the killing was planned;

(l) the use of a weapon, especially a firearm;

(m) concealment of the body, destruction of the crime scene and/or dismemberment of the body;

(n) the fact that the murder was the culmination of cruel and violent behaviour by the offender over a period of time;

(o) the offender's previous record and failures to respond to previous sentences to the extent that these are relevant to culpability rather than to risk.

Mitigating factors will include:

(a) an intention to cause grievous bodily harm rather than to kill;

(b) spontaneity and lack of premeditation;

(c) the offender's age;

(d) clear evidence of remorse or contrition at the time of sentence;

(e) a timely plea of guilty;

(f) the manner in which the case has been defended eg by not challenging the evidence for the prosecution.

We take these matters from the English Practice Statement of 27 August 2002 conscious that it has not been adopted in Northern Ireland. It will be for the Lord Chief Justice and the trial judge to consider whether they are appropriate and, of course, these are not intended to be exhaustive.

[85] We repeat that fixing the minimum term should proceed on the basis that it reflects the period of retribution and deterrence that would have been passed by the Court, had the Order been in force at the time when the

prisoner received his life sentence. Materials placed before the judiciary should be limited to those which were available to the Court at that date or which could have been made available upon any reasonable inquiry at that date. If such materials are regarded as inaccurate, later information should be provided as a decision about the minimum term should not be made on a known mistake of fact. Those acting for the Secretary of State and for the life prisoner are responsible for placing these materials before the judiciary. If there is a dispute as to the correctness of the information, it must be determined by the judiciary after a fair hearing. They cannot be required to proceed on a mistake of fact.

[86] It follows that information about facts occurring after the date of sentence relevant to the issues of retribution and deterrence cannot be taken into account in fixing the minimum term, unless refusal to take it into account infringes Article 6(1) of the Convention. Remorse and reform or a history of bad behaviour and absence of rehabilitation in prison after the date of sentence are relevant to the role of the Life Sentence Commissioners on our construction of Article 11(1) of the Order. Otherwise they would be placed twice in the balance for or against the life prisoner, not that we disapprove of double-counting in all cases. Overlap may occur but needs to be recognised.

[87] In paragraph 5 of his affidavit of 7 February 2002 Mr Haire refers to "Supplementary Guidance to Life Sentence Prisoners". This document has been sent to the 75 life prisoners and may require revision.

[88] Relevant materials to be sent to the judiciary will include:

(i) The summing-up or judgment of the trial judge and the judgment on appeal (if any). The judiciary may ask for other material available to the trial judge such as the pathologist's report or medical evidence given at the trial; there is no discernible point in sending "the court papers from the time of conviction", other than the documents which relate to sentencing;

(ii) Details of all convictions and sentences imposed at or before the date the life sentence was imposed and documents relating to any application to appeal or any appeal which are relevant to the factors which the judiciary have to take into account;

(iii) The date of committal to prison and length of time served at the time of referral under Article 11(1);

(iv) Any written representations (or submissions) made on behalf of the prisoner or the victim's family; it would be inappropriate to place any limit on these, but they should be told that the judiciary is likely to ignore irrelevant representations;

[89] The current prisoner location is irrelevant as is information whether or not the prisoner is in a pre-release location; referrals to the Life Sentence Review Board are irrelevant, but representations and documents submitted on behalf of the life prisoner may of course include the outcome of the Board's consideration of the case and disclose that he is in a pre-release location. These ought to be ignored by the judiciary unless they consider that there would otherwise be a breach of Article 6(1) of the Convention; a progress report on any prisoner who was sentenced when he was over the age of eighteen is also irrelevant.

[90] We reject the argument that there has been a breach of Article 8(1) of the Convention. We accept the argument of the respondent on this aspect of the appeal.

[91] On the first issue we have expressed our view that Article 11(1) is compatible with Article 6(1) of the Convention: see paragraphs [30] to [44]. On the second issue we have expressed our views on the material which should be made available to the judiciary at paragraphs [73] to [89]. As we do not consider that Article 11(1) should be set aside – for the reasons which we have given – the Lord Chief Justice and the trial judge (if available) have been set an unenviable task.

[92] Accordingly we affirm the compatibility of Article 11(1) with Article 6(1) of the Convention. We reverse Kerr J's decision on the issue of materials, to the extent which appears in our judgment. We refuse to grant any declaration sought by the appellant. We consider that materials should be placed before the judiciary by the respondent in accordance with the terms of this judgment and that the appellant is entitled to place before them such materials as he sees fit, bearing in mind that it is unhelpful to place any irrelevant materials before them.