Northern Ireland (Sentences) Act 1998 – revocation of licence – recall to prison – review by Sentence Review Commissioners – certificate of damaging information – appointment of a special advocate – compatibility of procedure with Art 5(4) – whether unfair procedure at common law – whether Art 6(1) engaged – whether Commissioners acted unlawfully.

Neutral Citation No. [2006] NIQB 37

Ref:	**GIRC5580**
Delivered:	**30/05/2006**

Judgment: approved by the Court for handing down
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JOHN HUGH BRADY FOR JUDICIAL REVIEW

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GIRVAN J

Introduction

[1] In this application the applicant, a life sentence prisoner, seeks an order of certiorari to quash the determination of the Sentence Review Commissioners ("the Commissioners") that the applicant's licence should be revoked. Central to his case is his contention that the hearings of the Commissioners on 11 and 22 August 2005 upon which the determination was based failed to comply with the common law requirements of procedural fairness and the procedural requirements of Article 5(4) Convention and Article 6(1) of the Convention.

Background

[2] The applicant pleaded guilty to the murder of Reserve Constable Black on 7 May 1991 and he was sentenced to life imprisonment. The offence was a terrorist offence. The sentencing judge pointed out that the applicant had previously been involved with the IRA but following his release from prison for those previous offences he became involved again in terrorism. On the indictment for murder he was charged with 41 other terrorist offences and received determinate sentences in respect of those offences.

[3] The applicant served 8½ years before his release on licence on 7 October 1999 in accordance with section 3 of the Northern Ireland (Sentences) Act 1998 ("the 1998 Act")

[4] On 7 November 2003 the applicant was arrested with two other persons in a car in Londonderry. Two firearms were found concealed in a lunchbox which was inside a drawstring sports bag found at the back seat of the car. The applicant was subsequently charged with the offence of possession of a firearm with intent to endanger life and he was returned to custody. In his interviews he denied knowledge of the guns in the car, said that he did not support terrorism and stated that he would remain silent throughout his interviews. On 13 November 2003 in exercise of powers conferred by section 9 of the 1998 Act the Secretary of State suspended the licence on which he was released and recalled him to prison.

[5] On 1 June 2004 the DPP decided that, having regard to all facts and information submitted by the police, the test for prosecution was not met in this case. Charges were withdrawn on 3 June 2004 and a direction of no prosecution was issued on 17 June 2004.

[6] On 7 June the applicant submitted an application for review of the suspension of the licence. The application asserted that the applicant was entitled to rely on the presumption of innocence and that the withdrawal of the charges should be recognised as an acceptance by the prosecution that the evidence was speculative.

[7] The Secretary of State's response paper included a certificate of damaging information issued under Rule 22(1) of the Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1988 ("the Rules"). A notice of the gist of the information was issued under Rule 22(3) which stated:

> "The withheld information relates to intelligence to the effect that you have been and are likely to be concerned in the commission and preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland. In particular you have had and continue to maintain close links with dissident Republican elements and had been involved in serious crime committed by the Real IRA and will become involved in acts of terrorism upon release."

The Proceedings Before the Commissioners

[8] By letter of 5 August 2004 the applicant was informed that a panel of the Commissioners had considered the suspension of his licence. The letter stated that the Commissioners could not be satisfied that the applicant had not broken the licence conditions specified in section 9(c) (that is that he does not become a danger to the public) and the Commissioners indicated that they were minded to make a substantive determination that his licence be revoked. The Commissioners stated that they did not have sight of the damaging information when making that preliminary decision. The applicant gave notice challenging that preliminary assessment. Thus a substantive hearing was necessary.

[9] The Commissioners invited the Attorney General to appoint a special advocate to represent the applicant's interests at any closed session dealing with the damaging information. In the result Mr John Orr QC was appointed as Special Advocate.

[10] The applicant consulted the Special Advocate who explained his role. The applicant avers that he was not able to give specific instructions as he did not know the substance of the evidence that might be used against him in closed session. The applicant disputed the validity of any intelligence information that might suggest that he had broken or was likely to break a condition of his licence. In the absence of specific details or allegations emanating from intelligence sources he said that the instructions he could give the Special Advocate were based on pure speculation as to what the damaging information was.

[11] The hearing before a panel of three Commissioners took place on 11 and 22 August 2005. In the open part of the hearing the applicant gave evidence and was cross-examined. The Commissioners considered the evidence in private and the chairperson informed the applicant that the Commissioners could not make their decision based on the information already before them. The panel decided to move on to consider the damaging information in closed session. The applicant was accordingly excluded. The Special Advocate was able to attend the closed session but he was not permitted to communicate in any way with the applicant.

[12] The decision of the panel was communicated to the applicant on 5 October 2005. The Commissioners were not satisfied on the basis of evidence presented in the open part of the hearing that the applicant had breached the conditions of his licence nor did they think it likely that if released he would breach the terms of his licence. The Commissioners did, however, determine that his licence would be revoked on the basis of the evidence heard in closed session.

> "Having fully and carefully considered all the evidence presented in the closed session, the panel took the view that Mr Brady has breached the conditions that he does not support a specified organisation, that he does not become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland and that he does not become a danger to the public."

[13] On 5 September 2005 after the hearing but before the communication of the decision the applicant was charged with attempted murder, possession of explosive substances in relation to an incident on 29 March 2002 at Sion Mills and he was "reported for" membership of the Real IRA. The applicant appeared at Enniskillen Magistrates' Court charged with those offences and was remanded at custody. The Northern Ireland Prison Service wrote to the Commissioners referring to this development.

The Commissioners' Decision

[14] According to the affidavit of the chairperson Mr McFerran sitting as a single Commissioner considered the Secretary of State's certificate in relation to the damaging information. After considering the secret intelligence summary he concluded that the information was correctly classified as damaging. The panel itself concluded that the damaging information was appropriately certified. Had it not been so satisfied it would have referred the matter back to the Secretary of State for consideration.

[15] In paragraph 13 of her affidavit the chairperson stated:

> "In accordance with current policy, the Commissioners first considered the evidence during the open aspect of the hearing and concluded that this evidence alone was insufficient to revoke the applicant's licence. We therefore proceeded to hear the damaging information, but that is not to say that we ultimately placed no reliance on the evidence presented in the open hearing. It is quite difficult to fully clarify this statement without revealing anything of the confidential material. However, as a general statement, the evidence heard in the closed hearing presented a different context as in which the evidence heard in the open part of the hearing was considered. The confidential evidence effectively served to tip the balance in relation to

> her assessment of the open evidence. Thus, after consideration of the damaging information presented, the panel concluded that the applicant had breached the conditions of his licence (i) does not become concerned in the commission, preparation or instigation of acts of terrorism connected with affairs of Northern Ireland and (iii) that he does not become a danger to the public."

The Commissioners therefore revoked the applicant's licence.

[16] In relation to the damaging information the Commissioners stated at page 3 of their decision:

> "Within the terms of Rule 22 of the Northern Ireland Sentences Act (Sentence Review Commissioners) Rules 1998 the Commissioners are required to safeguard the confidentiality of the damaging information presented to them. For this reason, the panel takes the view that it would be inappropriate to set out in any detail its assessment of the evidence presented to it in the closed session. The general comment may, however, be made that the panel sought to apply clear criteria carefully and consistently to the evaluation of the damaging information before it. The panel were at all times mindful of the constraints inherent on the damaging information procedures and the disadvantage at which the prisoner was placed, notwithstanding the appointment by the Attorney General under Rule 7(2) of a Special Advocate to represent his interests. During the course of the closed part of the hearing and its assessment of the evidence the panel sought to minimise any such disadvantage by methodically and thoroughly examining and testing all of the information before them."

[17] In the concluding last paragraphs of its decision the panel stated:

> "On the basis of the evidence put before them in the open part of the hearing the panel was not satisfied that Mr Brady had breached the conditions that he does not support a specified organisation, that he does not become concerned in the commission, preparation or instigation of

acts of terrorism connected with the affairs of Northern Ireland or that he does not become a danger to the public. Nor did the panel think on the basis of the evidence presented in the open part of the hearing that Mr Brady is likely, if released, to breach the terms of his licence.

Having reached this conclusion, the panel proceeding to consider the damaging information. For the reasons outlined above no detailed assessment of this evidence can be given however, having fully carefully considered all of the evidence presented in the closed session, the panel took the view that Mr Brady has breached the conditions that he does not support a specified organisation, that he does not become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland and that he does not become a danger to the public."

The Statutory Context

[18] Section 9 of the Northern Ireland Sentences (1998) provides:

"**9.** - (1) A person's licence under section 4 or 6 is subject only to the conditions-

(a) that he does not support a specified organisation (within the meaning of section 3),

(b) that he does not become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland, and

(c) in the case of a life prisoner, that he does not become a danger to the public.

(2) The Secretary of State may suspend a licence under section 4 or 6 if he believes the person concerned has broken or is likely to break a condition imposed by this section.

(3) Where a person's licence is suspended-

(a) he shall be detained in pursuance of his sentence and, if at large, shall be taken to be unlawfully at large, and

(b) Commissioners shall consider his case.

(4) On consideration of a person's case-

(a) if the Commissioners think he has not broken and is not likely to break a condition imposed by this section, they shall confirm his licence, and

(b) otherwise, they shall revoke his licence."

[19] The Commissioners must act in accordance with the Rules. The Rules were made under the enabling power contained in section 2 of the 1998 Act. Schedule 2 paragraph 5 provides that the Rules may make provision about evidence and information. This includes provision:

> "(e) for evidence or information about a prisoner not to be disclosed to anyone other than a commissioner if the Secretary of State certifies that the evidence or information satisfies conditions specified in the rules."

Paragraph 6 of the Schedule provides that the Rules may provide for proceedings to be held in private except where Commissioners direct otherwise and paragraph 7(2) provides:

> "Where a prisoner and any representative appointed by him are excluded from proceedings by virtue of sub-paragraph (1) the Attorney General for Northern Ireland may appoint a person to represent the prisoner's interest in those proceedings."

[20] Rule 22 of the Rules provides:

"**Non-disclosure of damaging information**

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

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

(b) result in the commission of an offence;

(c) facilitate an escape from lawful custody or the doing of any act prejudicial to the safe keeping of persons in such custody;

(d) impede the prevention or detection of offences or the apprehension or prosecution of suspected offenders;

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

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

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

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

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

The Applicant's Case

[21] Mr Treacy QC and Mr Doran in their skeleton argument and Mr Treacy in his oral submission submitted that the applicant's rights under Article 5 and 6 of the Convention were breached and that the standards of procedure of fairness at common law were not met in this case. Unlike the situation in Re McClean [2005] NI 21 the panel based its decision on damaging information to which the applicant was not privy. In fact the decision makes clear that the continued detention of the applicant was justified solely on the basis of the damaging information. Insofar as the

averments of paragraph 12 of the affidavit filed on behalf of the respondent suggest otherwise they should be disregarded on the basis of R v Westminster County Council ex parte Ermakov [1996] 2 All ER 302. Article 5(4) was engaged in an application such as the present where the applicant has been recalled to custody. Counsel strongly relied on Garcia Alva v Germany (2001) 37 EHRR 335 at paragraph 39. Counsel invited the court to rule that the procedure followed was a breach of Article 5(4) and Article 6(1), the interference being with the applicant's liberty which was a civil right.

[22] The affording of the gist of the damaging information was couched in broad terms so as to make it impossible for him properly to challenge any allegations that were made against him. The gist included a reference to intelligence information to the effect that the applicant had been involved in specific acts of criminality but did not identify the alleged acts with any particularity.

[23] Counsel referred to the Report of the House of Commons Constitutional Affairs Committee on the use of Special Advocates (HC 323-1). The Committee highlighted the potential problems with the use of Special Advocates in chapter 4 and 5 of its report. It highlighted the limitation placed on the Special Advocate in taking instructions with reference to damaging material; the absence of reasons afforded to the ordinary legal team; and the lack of any power to call witnesses. At paragraph 112 the Committee recommended that the Government should ensure steps are taken to make it easier for Special Advocates to communicate with appellants and the legal advisors after they have seen enclosed material, on a basis which does not compromise national security. This was for two reasons, firstly, to ensure that the Special Advocate is in a position to establish whether the evidence or charges can be challenged by evidence not available to the appellant, and, secondly, so that the Special Advocate is able to form a coherent legal strategy with the appellant's legal team.

[24] Counsel enumerated the factors which he contended rendered the procedure adopted procedurally unfair. The applicant and the Special Advocate were not privy to the evidence before the closed session and the applicant could not properly consult with the Special Advocate in consequence. The Special Advocate was forbidden from communicating with the applicant after the evidence was heard. The Special Advocate had no opportunity to conduct a factual review or call evidence. He had no disclosure functions. The Secretary of State had an almost unfettered power to withhold information subject to limited review by the Commissioners. There was no ongoing duty imposed on the Secretary of State to refer to the Special Advocate any material that might become available in the future that would tend to undermine the damaging information. Mr Treacy argued that the European Court of Human Rights had declined to endorse specifically the system of special advocates introduced in special immigration appeal

commission proceedings in the wake of the Chahal decision (see Al Nashif v Bulgaria (2002) ECHR 497).

The Respondents' Case

[25] Mr Larkin QC and Mr Torrens in their written submissions and Mr Larkin in his oral submissions contended that it was evident that the Commissioners were at all times aware of the restrictions placed on the applicant during the closed damaging information stage. They so expressed themselves that they made clear that they sought to minimise any such disadvantage by methodically and thoroughly examining and testing all the information before them. The affidavit of the chairperson was not an impermissible averment such as was condemned in Ermakov. The issue was whether fairness was applied to the applicant. The applicant had been released under a special statutory scheme designed to advance larger political objectives and little assistance was to be obtained from authorities based on the tariff principle in non terrorist life sentence cases. The applicant in the present case before the Commissioners was able to and did actively participate in the open stage of the hearing; was provided with the gist of the information to be used during the closed part of the hearing; had appointed for him a Special Advocate, an experienced Queen's Counsel, to represent him during the closed part of the hearing; did not object to the Special Advocate proposed to him and consulted with the special advocate prior to the closed hearing and after the gist was provided on three occasions. Mr Maguire on behalf of the Secretary of State made a similar submission.

[26] Counsel argued that the European Court of Human Rights had recognised the Special Advocate procedure could accommodate security considerations and the rights of the individual (Chahal v United Kingdom [1996] 23 EHRR and Tinnelly & Sons Ltd and McElduff v United Kingdom [1998]27 EHRR 249). Al Nashif v Bulgaria [2003] EHRR in fact was approbatory of the Special Advocate system.

[27] Mr Larkin contended that Lord Scott in his speech in Re McClean [1995] NI correctly set out the legal position namely that Article 5(4) had no relevance to proceedings before the Commissioners who were bound to follow the procedures established by the Rules. The only civil right of the applicant was the right to have the statutory scheme fairly applied according to its terms. He had no right to have his entitlement to release under the statutory scheme dealt with by the Commissioners otherwise than in accordance with the procedure set out in that scheme.

The House of Lords Authorities

[28] In a trilogy of cases arising under three different schemes the House of Lords has enunciated principles and given guidance on the proper legal approach to issues which arise in a case such as a present. These cases are –

(i) Re McClean [2005] NI 490, an appeal from this jurisdiction dealing with questions arising under the 1998 Act,

(ii) R (Smith and West) v Parole Board (2005) UKHL 1 dealing with questions arising on the release of determinate sentence prisoners released on licence and subject to recall, and

(iii) R (Roberts) v Parole Board (2005) UKHL 45 dealing with the question of withholding sensitive information and the use of special advocates. It is necessary to analysis these decisions to arrive at a proper conclusion to be drawn on the present case.

[29] In Re McClean [2005] NI 490 the Commissioners declared M eligible for accelerated release under the 1998 Act as from 28 July 2000. In the absence of such declaration he would not have been eligible for release until 2008. On 5 July 2000 he was released from prison on pre-release home leave. The next day he was charged with a violent disturbance and with attempted murder. The Secretary of State applied for a revocation of the declaration that he was entitled to be released contending that M was no longer able to satisfy the statutory conditions that he would not be a danger to the public if released. M was acquitted of attempted murder but the trial judge concluded that he had been actively involved in the activity that sparked the incident. The Commission concluded that the statutory criteria had been satisfied in respect of a damaging information certificate made to the Secretary of State under Rule 22. That decision was taken in a closed session at which the applicant's interests were represented by a special counsel. When the Commissioners turned to consider the application they proceeded on the basis that it was for the Secretary of State to satisfy them on the balance of probabilities of the facts upon which he relied but it was for M to satisfy the Commissioners that he was not a danger to the public. The Commissioners granted the application. M applied for judicial review contending that the reception of damaging information and the use of the Special Advocate procedure breached his Article 6 right to a fair and public hearing in the determination of his civil rights. He contended that the Commissioners had erred in placing the onus on the applicant to show that he was not a danger to the public. At first instance Coghlin J concluded that the procedure taken as a whole was fair and complied with the requirements of natural justice and, on the assumption that it was engaged, complied with Article 6(1). In so doing he followed the reasoning of Carswell LCJ as he then was in Re Adair [2003] NIQB 16. Carswell LCJ in Re Adair had held that assuming that Article 6 did apply

there was no breach of it under the provisions of the Northern Ireland (Remission of Sentences) Act 1995. Carswell LCJ in that case tended to the view that Article 6(1) was not engaged.

[30] In the Court of Appeal the Commissioners and the Secretary of State argued that Article 6 did not apply and that a right to be released on licence did not engage Article 5(4). Nicholson LJ at 56 concluded in relation to Article 6(1) that it was not in play either in its criminal or civil sense. He also concluded that Article 5 was not engaged as the plaintiff was detained under a sentence imposed by a competent court. McCollum LJ and Higgins J agreed with the conclusion that Article 5(1) and(4) and Article 6(1) were not engaged.

[31] The view reached by all the judges was that in any event the procedure of the Commissioner, including the use of damaging information and Special Advocates under the 1998 Act, complied with the Convention and was lawful and fair if the Articles were in play.

[32] The case went on appeal to the House of Lords. The House of Lords concluded that there had been no error of principle by the Commissioners in their approach to the case overruling the majority view in the Court of Appeal. The majority concluded that the Commissioners were wrong to impose an onus of proof on the applicant. The House concluded that the procedure adopted by the Commissioners did not work any unfairness to McClean. The gist of the damaging information had been conveyed to McClean leaving him in no doubt of the substance of the Secretary of State's reasoning for believing that the fourth statutory condition was not satisfied in his case, namely, that he had been, was and on release would be involved in the paramilitary activities of a terrorist organisation. Secondly the Commission had reached their decision taking no account whatever of the damaging information submitted by the Secretary of State because it was not necessary to do so to reach a decision in the case. With their trained minds the Commissioners were able to leave out of account the damaging information when assessing the information adduced in open hearing. Lords Bingham, Rodgers and Carswell expressed no concluded view on the applicability of Article 6(1) or 5(4).

[33] Lord Scott at paragraph 51 said:

> "Counsel for the respondent submitted that the procedures prescribed by the rules breached the respondent's rights under the Convention guaranteed by either or both of Article 5(4) and Article 6(1). But this submission ignores the facts that the respondent's human rights do not entitle him to any early release scheme. He has been convicted of serious offences and sentenced to

> lengthy terms of imprisonment. There are many years to go before he could, absent the 1998 scheme, have any expectation of release. His continued incarceration does not infringe his human rights the 1998 Act and its rules can constitute a statutory scheme of which the respondent was and still is a potential beneficiary. He certainly has the right to have the scheme properly and fairly applied to him in accordance with its terms but he does not have the right under the Convention or otherwise to complain that the scheme is not sufficiently favourable or that part of the scheme, more particularly Rule 22, infringes his human rights and should be struck down."

In relation to Article 5(4) Lord Scott said that it had no relevance in the proceedings before the Commissioners and in relation to Article 6(1) he concluded:

> "The respondent's only relevant civil right is the right to have the statutory scheme fairly and properly applied according to its terms. That relevant right has been adjudicated upon by Coghlin J in the High Court and by the Court of Appeal in Northern Ireland and now I hear by Your Lordships. The respondent has no other relevant civil right. In particular he does not have the right to have his entitlement to release under the statutory scheme dealt with by the Commissioners otherwise than in accordance with the procedures that are part of that scheme."

Lord Brown at paragraph 105 of his speech stated that he saw force in Lord Scott's views. He concluded that even assuming (which might be the better view) Article 5(4) did apply in the circumstances and that the Commissioners were discharging the function of a court in determining the lawfulness of the prisoner's continuing detention there was no incompatibility between the requirements of Article 5(4) and the prisoner's need to satisfy the Commissioners that he could safely be released.

R (Smith and West) v Parole Board

[34] In R (Smith and West) v Parole Board [2005] UKHL 1 the appeals concerned the procedure to be followed by the Parole Board when a determinate sentence prisoner was released on licence and sought to challenge a subsequent revocation of his licence. The question arose as to

whether such a prisoner would be entitled to an oral hearing. Lord Bingham considered that the civil limb of Article 6(1) even if applicable would afford no greater protection than the common law duty of procedural fairness. Lord Slynn at paragraph 55 stated:

> "I have been persuaded (by counsel) … that recall, even of someone who has only a conditional right to his freedom under licence ('more circumscribed in law and more precarious than the freedom enjoyed by the ordinary citizen' (Weeks v United Kingdom 10 EHRR 293)), is a new deprivation of liberty by detention. The prisoner is therefore entitled to take proceedings by which the lawfulness of that detention can be decided speedily by a court under Article 5(4). Review by the Parole Board of the recall decision, however, if conducted in accordance with the fairness which the common law requires, is in my view compliance with Article 5(4) and therefore there is no breach of this Article."

He went on at paragraph 60 to state:

> "Decisions as to recall are not within the meaning of Article 6 concerned with `civil rights'. Questions as to the deprivation of liberty by a body like the Parole Board (regarded as a court for this purpose) fall to be dealt with under Article 5(4) and the common law rules relating to the fairness of the proceedings."

Lord Hope concluded that Article 5(4) applied and the procedure for conducting reviews must embody the procedural fairness that the common law required of a court. In relation to Article 6(1), he considered that it did not follow from the fact that the right to liberty can be described generally as a civil right that the appellant's civil rights within the meaning of Article 6(1) were engaged. He concluded that the Article 6 civil right is not infringed by proceedings of the kind that are in issue in this case so long as the individual has access to the domestic court to assert his rights of liberty. The proceedings of the Parole Board did not deprive the appellants of that right of access. What the Board was doing was giving effect in the performance of functions given to it by statute to the sentence which had been previously imposed by the judge when the appellants were convicted. When they were called to custody the requirement of Article 5(4) would have been satisfied by the review of their recall by the Parole Board which due to its independence from the Executive and its impartiality had the characteristics of a court for

the purposes of the Article if an oral hearing had been offered to them. None of the elements that were inherent in the sentence from the beginning were being enlarged or altered. Lord Carswell agreed with the opinions of Lord Bingham and Lord Hope and thus appears to have accepted Lord Hope's analysis of Article 6(1). This would be in line with the view provisionally reached by him in Re Adair.

[35] The House of Lord decision in Smith and West came after the decision of the Court of Appeal in Re McClean and accordingly its conclusions in Articles 5(4) and 6(1) issues must be considered in the light of the evolution of the law in that case and also in the House of Lords decision in R (Roberts) v Parole Board [2005] UKHL 45.

R (Roberts) v Parole Board

[36] In Roberts the House of Lords delivered the speeches on 7 July on the same day as the speeches were delivered in Re McClean. In Roberts the issue to be determined by the House was whether the Parole Board, a statutory tribunal of limited jurisdiction, was able, within the powers granted by the Criminal Justice Act 1991 and compatibly with Article 5 of the Convention to withhold information relevant to the appellant's parole review from his legal representatives and, instead, to disclose that material to a specially appointed advocate who would represent the appellant in the absence of the appellant and his legal representatives at the closed hearing before the Parole Board. There was no statutory underpinning for the provision of the Special Advocate procedure. That was a case involving a mandatory life sentence prisoner whose tariff had expired. It was common case that Article 5(4) applied.

[37] Their Lordships were divided in their views on the issues raised in the appeal. Lord Bingham and Lord Steyn concluded that the procedure would infringe the domestic and Convention law principles of fairness. Lord Bingham doubted whether a decision of the Board adverse to the appellant based on evidence not disclosed even in outline to him or his legal representatives which neither he nor his legal representatives had heard could be held to meet the fundamental duty of procedural fairness required in Article 5(4). However, he declined to rule that the adoption of the proposed procedure was necessarily incompatible with Article 5(4). Some outcomes might not offend Article 5(4) despite the employment of a specially appointed advocate. At paragraph 19 of his speech he set out the situations where that might be so. Lord Bingham laid weight on the absence of any parliamentary sanction for the Special Advocate procedure in the case of the Parole Board. Referring to specific statutory provisions establishing such procedures (including the 1998 Act) Lord Bingham went on to state at paragraph 30 of his speech:

> "The examples considered above show plainly that Parliament in practice observes the principle of legality. If it intends that a tribunal shall have power to depart from the ordinary rules of procedural fairness, it legislates to confer such power in clear and express terms and it requires that subordinate legislation regulating such departures should be the subject of parliamentary control. It follows this practice even when the security of the nation is potentially at stake … It is my opinion contrary to legal principle and good democratic practice to read such a power into a statute which contains no hint whatever that Parliament intended or even contemplated such a departure. Had it done so, as in the other cases considered the departure would have been carefully confined and controlled. It is nothing to the point to argue that if damaging adverse evidence is withheld from a prisoner and his legal representative he is better off with limited help given by a specially appointed advocate than without it unless there is a lawful authority to conduct the hearing while withholding such evidence from the prisoner which in the present context there is not."

Lord Steyn agreeing with the views of Lord Bingham considered that the Special Advocate procedure struck at the root of the prisoner's fundamental right to a basically fair procedure. If such departures are to be introduced this must be done by Parliament. He considered that the Special Advocate procedure emptied the prisoner's fundamental right to an oral hearing of all meaningful content.

[38] The majority view of Lord Woolf, Lord Rodgers and Lord Carswell was that the Parole Board had express and implied power to give such directions as were needed to ensure that the proceedings before it were conducted fairly in the interests of the prisoner, the public and those who supplied with information to enable it to perform its role. Where there are public interest reasons that satisfy the Board of the need for non-disclosure not only to the prisoner but also his representatives, and the Board considers that the nature of the proceedings and the extent of the non-disclosure do not mean that the prisoner's right to a fair hearing will necessary be abrogated, the Board has an implicit or express power to give directions as to the withholding of information and, if it would assist the prisoner, the use of a Special Advocate. There can be situations where it is possible and other situations where it is not possible for the Board within its powers and

compatibly with Article 5(4) to withhold material relevant to the review of his legal rights and instead disclose it to a Special Advocate. Into which category a case falls can only be identified after examining all the circumstances and cannot be decided in advance as a matter of principle. The procedure may not be ideal but it may be the only method of balancing the triangulation of interests involved in the small number of cases where a special advocate may be instructed.

[39] Lords Woolf, Rodgers and Carswell laid weight on the provision in Rule 6(3) of the Parole Board Rules 2004 which contains an express power to withhold a document from the prisoner. The use of the Special Advocate procedure operated to mitigate the rigour of a direction to withhold information and the disadvantages accruing to the prisoner from such withholding.

[40] Dealing with the question of the compatibility with Article 5(4) of the system of withholding sensitive material (with the Special Advocate procedure mitigating its rigours) Lord Carswell at paragraphs [135]-[144] of his speech analysed the Strasbourg authorities of Lamy v Belgium (1989) 11 EHRR 529, Nikolova v Bulgaria (1999) 31 EHRR 64, Garcia Alva v Germany (2001) 37 EHRR 335 and Edwards and Lewis v United Kingdom (2003) 15 BHRC 189 at paragraph 53. At paragraph [143] and [144] of his speech Lord Carswell said:

> "[143] The present case is a classic instance of weighing up competing interests. The appellant's interests in presenting his case effectively with sufficient knowledge of the allegations made against him is clear and strong. The informant has a compelling interest in being protected from dangerous consequences which might ensue if any indication leaked out which would lead to his identification. Thirdly, there is the public interest in ensuring that the Parole Board has all proper material before it to enable it to decide which prisoners were safe to release from prison.
>
> [144] Having balanced these interests, I conclude that the interests which I have outlined of the informant and the public must prevail over those of the appellant, strong though the latter may be. I emphasis, however, that my conclusions relating to the powers of the Parole Board to use the Special Advocate procedure and the compatibility with Article 5(4) are a decision in principle, for that was all that was before the House."

[41] The majority made clear that the Special Advocate procedure should be used only in rare and exceptional cases and as a course of last resort (see Lord Carswell at paragraph [144]. As Lord Woolf points out at paragraph 43 the procedure is a derogation from the golden rule of full disclosure but the derogation must be the minimum necessary to protect the public interest.

Principles Emerging from the Authorities

[42] Having regard to the authorities it is now possible to draw some conclusions on the principles to be applied in the present case.

(a) The 1998 Act contains an express power for the Secretary of State to certify that evidence satisfying conditions specified in the Rules should not be disclosed to anyone other than the Commissioners. The Rule may permit the exclusion of the prisoner and his representatives and, in that event, the Attorney General may appoint a Special Advocate to represent the prisoner's interest. The Secretary of State, so far as he considers it possible to do so without causing damage, may give notice of the gist of the information which has been withheld and his reasons for certifying it. This statutory power sets out clear legislative basis for modifying the ordinary rules of fairness applicable to the hearing and the golden rule of disclosure.

(b) The statutory scheme presents a balanced weighing up of competing interests, provided it is fairly and properly operated, used and implemented where the circumstances warrant its use. The procedure does involve a derogation from the ordinary rules of fairness and should be used in strictly confined circumstances justified by the Rules.

(c) The civil rights provisions of Article 6(1) are not in play. Although in McClean the question was left open by all save Lord Scott, the reasoning of Lord Slynn, Lord Hope and Lord Carswell in Roberts establishes that in the circumstances of the statutory scheme considered in that case Article 6(1) was not in play. The same principle applies a fortiori in the context of the 1998 Act. The judge at first instance and the Court of Appeal in Re McClean all concluded that Article 6(1) was not in play. That reasoning was in line with the later reasoning of the majority in Roberts albeit in the context of the statutory scheme considered in that case.

(d) In Re McClean in the House of Lords only Lord Scott definitively held that Article 5(4) was not engaged. The judges in the lower courts considered that Article 5(4) was not engaged. Their reasoning predated Smith and West. I find compelling Lord Slynn's reasoning in paragraph [55] of his speech that recall even of someone who has only a conditional right to his freedom under licence is a new deprivation of liberty by detention engaging Article 5(4).

There seems to be no logical reason why the same principle should not apply in relation to recall under the 1998 Act.

(e) On the assumption that Article 5(4) does apply the statutory scheme represents a balanced exercise by the legislature weighing up the competing interests that must be taken into consideration in the statutory context of the release scheme. The reasoning of Lord Carswell in Roberts is fully in line with the views of the judges in the lower courts in Re McClean.

Determination of the Applicant's Challenge

[43] Mr Treacy QC's challenge to the panel's decision was essentially a challenge to the underlying unfairness of the Act and the Rules and is in reality an attempt to reopen issues which have now been established by the House of Lords in the trilogy of cases discussed. In Re McClean the decision of the House of Lords ultimately turned on the point that there was no reliance on the damaging information and, accordingly, the question of the damaging information and the use of the Special Advocate was academic. It is thus true that the House of Lords in that case did not definitively hold that the procedure under the 1998 Act is valid or Convention compliant. However, the reasoning of the Court of Appeal on the issue remains compelling. The reasoning in cases of Smith and West and Roberts, albeit dealing with different prisoner regimes point to the conclusion that any challenge to the compatibility of the damaging information and Special Advocate regime, under the 1998 Act and Rules is misconceived. Moreover the applicant has not in these proceedings as formulated challenged the Convention compatibility of the 1998 Act or the Rules. In any event in the light of the authorities such a challenge would not succeed.

[44] The applicant's challenge, if it is to succeed, must be on the basis that the Commissioners have not properly followed the statutory scheme. As Lord Scott pointed out, it will not depend on whether the statutory scheme departs in some respect or other from some other scheme that could allegedly be fairer to the prisoner. He has a right to have the statutory scheme dealt with by the Commissioners fairly and properly according to its terms.

[45] The applicant's contention is that this is a case in which the procedures have operated in an unfair manner to the detriment of the applicant. His detention was based solely on the basis of material of which he had no sight. This is a result which may inevitably happen in some cases which depend for their strength on damaging information which cannot be disclosed to the appellant. Having regard to the analysis of the speeches of the majority in Roberts, the protection of the triangulation of interests may compel the Commissioners to a conclusion adverse to the prisoner solely on the damaging information. At paragraph 3.16 of the skeleton Mr Treacy relied on the specific factors referred to earlier in paragraph [24] above to show that the

appointment of a Special Advocate was not a sufficient measure to prevent procedural unfairness accruing to the applicant. However, the Commissioners could not do other than follow the procedural rules which led them to the decision they reached.

[46] An applicant may be able to establish that Commissioners in a given case have permitted the use of damaging information or have relied on such information in circumstances where they should have declined to do so. The Commissioners have a power to refer the matter back to the Secretary of State so that he might reconsider the need for certification. In the present case following the evidence at the hearings the Commissioners became aware of the fact that the applicant had been charged with serious terrorist offences on 5 September. The Commissioners concluded that this should not take this into account. One might have expected the Secretary of State to have asked for the matter to be re-listed for further consideration in the light of this development. The development raised a number of issues of importance which were not addressed by any of the parties. From the Secretary of State's point of view it was a matter of importance which it could be argued added to the strength of the case against the applicant. From the applicant's point of view it could have supported an argument that it had an impact on the certificate of damaging information. Charging a person with offences brings into the public domain the question of the evidence which is the basis of the charges. The applicant may have had an argument that his charging justified a revisiting of the certification issue. If the applicant had material to rely on to show he had a good defence to the charges he could have sought to put that before the Commissioners. The Commissioners themselves might reasonably have posed the question whether the certified damaging information (which included evidence of involvement in serious crimes committed by the Real IRA) referred in whole or in part to the matters which were now the subject of the public charging of the defendant with actual alleged criminal offences no longer requiring the secrecy of certification as damaging information under the Rules. None of these points, however, were part of the pleaded or argued case of the applicant. If the charging has produced a material change of circumstances on which the applicant wishes to rely (and this seems unlikely) he is, of course, entitled to ask to have the matter brought back before the Commissioners.

[47] In the result, on his pleaded and argued case the applicant has failed to establish entitlement to the relief sought. I dismiss the application accordingly.