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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY PATRICK McPARLAND and JOHN McPARLAND FOR JUDICIAL REVIEW

Before Kerr LCJ, Campbell LJ and Weatherup J

KERR LCJ

Introduction

[1] This is an application for judicial review by Patrick McParland and John McParland who were defendants in criminal proceedings before Stephens J in which they were charged with eight offences of defrauding the Inland Revenue between 11 March 1993 and 1 November 1993. They pleaded not guilty and their trial was due to commence at Coleraine Crown Court in September of 2007. After this court delivered an *ex tempore* judgment, the applicants pleaded guilty and were duly sentenced.

[2] Section 10 of the Justice and Security Act (Northern Ireland) 2007 inserts a new provision (article 26A) into the Juries (Northern Ireland) Order 1996 which restricts the disclosure of information about jurors. A new article 26C defines juror information as "information which identifies (or from which it is possible to identify a particular person as having been a juror" or on the jury list or panel. Consequential amendments made by Schedule 2 to the 2007 Act remove the right to inspect the jury list. They also ensure that the procedure for ascertaining jurors' attendance is conducted in private and that the balloting of jurors is by number rather than name. Section 13 of the 2007 Act amends article 15 of the 1996 Order by removing the defence's right of peremptory challenge to twelve jurors.

[3] The applicants challenged the compatibility of these provisions with article 6 of the European Convention on Human Rights and Fundamental Freedoms.

The essence of the jury trial, it was claimed, lies in its fairness to the accused with all the protections which have accrued to accused persons over the development of the system of trial by jury. It was submitted that the removal of the protections afforded by the right to challenge a number of jurors peremptorily and the right to know the identity of the tribunal of fact compromises the fairness of the trial.

Background to the 2007 Act

[4] On 1 August 2005, the Secretary of State for Northern Ireland announced a "Security Normalisation Programme", planned to culminate in the repeal of Part VII of the Terrorism Act 2000. The legislation of 2000 was the last in a series of Acts which had allowed non-jury trials of certain offences by a single judge in the Crown Court. These were widely known as "Diplock courts" because the first Act setting up those courts followed a report by Lord Diplock in 1973. The target date for the repeal of the Terrorism Act and the restoration of trial by jury was July 2007.

[5] In May 2000 a review group which had been established by the Northern Ireland Office to consider whether Diplock courts could be abolished published its report. The group concluded that the time was not yet right for a return to jury trial. Three factors were considered to be of particular importance in any assessment of when this might occur. These were: risk of juror intimidation; risk of perverse verdicts; and assessment of the level of threat to jurors and witnesses. On the question of jury intimidation the report said this: -

> "As the Diplock arrangements are not used elsewhere in the United Kingdom, their continued use in Northern Ireland requires that differences unique to Northern Ireland be demonstrated. The existence of organised paramilitary groups is clearly the major factor. While organised gangs in Great Britain may pose a serious threat, the problem in Northern Ireland is exacerbated by the relatively small community and the control the paramilitaries seek to exert over it through intimidation and so called punishment beatings and shootings. In a small community people are aware of who is on jury service. Paramilitary groups can still exert great influence over the communities and until that wanes, people in those communities will be potentially open to intimidation.
>
> …

> Since the perception of intimidation is in many ways as serious as actual intimidation, consideration would also need to be given to public confidence building. As Lord Diplock observed, 'a frightened juror is a bad juror even though his own safety and that of his family may not actually be at risk'."

[6] The report also dealt with the risk of perverse verdicts on sectarian grounds. It stated that while this was difficult to quantify, it was nevertheless a proper factor for Ministers to take into account in deciding when to return to jury trial. In relation to the level of threat from paramilitaries, it concluded that "the overall judgment must be that the level of threat does not reduce the criminal justice system's ability to deliver a fair trial in each case and to guarantee the safety of jurors".

[7] On 23 February 2006, the then Parliamentary Under-Secretary of State, Shaun Woodward MP, wrote to the Independent Reviewer of terrorism legislation, Lord Carlile of Berriew QC, asking him to provide "an independent review from outside the system as to whether the time is right to return to jury trial in all cases in July 2007". Lord Carlile responded in April 2006. The Police Service of Northern Ireland had informed him of four cases of jury tampering in the past seven years, which was, he said, "a low level… though one might assume that there would have been more cases affected in the absence of non-jury courts." He found "much material to justify the assertion that witness intimidation occurs in serious cases." This was not, he observed, a phenomenon peculiar to Northern Ireland but was "a bigger issue there". He cited examples of "subtle but disturbing" intimidation by those connected to defendants. This frequently took the form of persons in the public gallery looking intently at the faces of jurors. He considered that the three factors identified by the review group in 2000 had reduced but were still of greater significance in Northern Ireland than in other parts of the United Kingdom.

[8] Lord Carlile expressed the strong view that anonymity for jurors in Northern Ireland would give considerable reassurance and would be "proportionate to risk". This would also reduce the danger of perverse verdicts. As to the need for checks on whether jurors were not disqualified from serving, he said: -

> "In order to ensure that disqualified persons do not sit on juries, I suggest that the Court Service be given the authority and responsibility to obtain checks on the criminal records of all selected for jury service. If anything of concern were to appear, it should be given to the judge and presented to the parties as anonymised information for discussion in court. In

> addition, judges and advocates in each case, as is common already, would be able to prepare short case specific questionnaires for jurors where appropriate. Peremptory challenges, prosecution stand-by and access by the parties to the details of persons on the jury panel would no longer be necessary and should be removed. The ending of defence peremptory challenges in the courts of England and Wales has not diminished the integrity of the jury system."

[9] Lord Carlile was asked to clarify his views on a number of points. One of these concerned the proposed anonymity of jurors and the interrelated subject of challenge for cause. He replied to this query in this way: -

> "Challenge for cause would be exactly as in England and Wales now. They can arise where a juror is seen to behave badly, or to be wearing an inappropriate badge or other sigil, or where a juror expresses to the judge some concern about the trial or their own position. Anonymity would deprive the defence of nothing that names provide in England and Wales. The challenge position would be the same as here at present. Names add nothing significant."

[10] In 2006 an interdepartmental group was set up to consider alternatives to Diplock trials and it also produced a report in April of that year. The report included the findings of a juries' sub-group. In a paper annexed to the main report six areas that might be reformed were discussed: - access to personal jury information; jury check arrangements; the defendant's right of peremptory challenge; the exercise of the Crown's right of stand-by; eligibility for jury service; and other jury protection measures. The main report stated that "due to the inter-relationship of these issues (not least the linkages between peremptory challenge, stand-by and the information provided about jurors) a balanced approach must be taken that reduces the risks while still ensuring that a fair trial can be delivered."

[11] The juries' sub-group concluded that jury intimidation remained a significant issue in Northern Ireland and represented an obstacle to the holding of a fair trial. It agreed that anonymity for jurors would provide considerable reassurance in relation to fear of intimidation. The sub-group questioned the view of Lord Carlile that the anonymisation of jurors would have no impact on the exercise of the right to challenge for cause. It considered that there could be instances where access to the information would be of assistance to the defence. On balance it considered that "names and addresses should be withheld but recognised that the issue might require further consideration following consultation".

[12] The group considered that the abolition of peremptory challenge would reduce the risk of perverse verdicts by eliminating the opportunity to "pack the jury". It observed, however, that this could give rise to equality of arms issues that might require placing restrictions on the exercise of stand-by, possibly through the use of enhanced Attorney General's guidelines.

[13] Jury reform was then discussed at a meeting of the Criminal Justice Strategy and Delivery Group on 17 May 2006. This group is composed of those Ministers with responsibility for justice related matters in Northern Ireland. A policy paper presented to the group proposed that anonymity of jurors and the abolition of peremptory challenge should be introduced alongside guidelines relating to the use of standby which should be developed by the Director of Public Prosecutions or the appropriate law officer.

[14] A consultation paper was published by the Northern Ireland Office in August 2006, entitled "Replacement Arrangements for the Diplock Court System". It set out the following principal proposals: -

- Information about the jury panel should not be provided to the defence;
- Information about the jury panel should be given to a police unit unconnected to the case to enable additional checks to be carried out within defined guidelines;
- Guidelines should be developed to set out the circumstances in which those checks might be carried out;
- An additional jury check could only be requested by a police officer of sufficient rank and had to be authorised at a suitably senior level;
- The prosecution should retain the right of stand-by where information has come to light that calls into question the suitability of a particular person to serve on a jury;
- The exercise of the right of stand-by must be authorised at a suitably senior level;
- The defence right to peremptory challenge should be abolished;
- The right to challenge for cause should remain;
- Jurors should remain anonymous and balloting of jurors should take place by number only.

[15] In November 2006, a response paper on the public consultation exercise was published by the Northern Ireland Office. This noted that there was generally broad support for the proposed reforms. Opinions on the abolition of peremptory challenge and the restriction of stand-by were mixed. Some were in favour of bringing Northern Ireland into line with England and Wales. Others were concerned that this would put the prosecution at an unfair advantage. There was broad support too for restricting the amount of

juror information although the group, British Irish Rights Watch, thought that, as a minimum, the names of jurors should be made available.

[16] The Justice and Security (Northern Ireland) Bill 2006 was introduced in the House of Commons on 27 November 2006. On 19 December 2006, the Joint Committee on Human Rights wrote to the Secretary of State for Northern Ireland seeking information about the proposed new system, in particular about the incidence of juror intimidation in Northern Ireland compared to the rest of the United Kingdom. It also asked for sight of the Attorney General's guidelines or an indication of their likely content and expressed the committee's concerns on equality of arms issues.

[17] On 22 January 2007, the Parliamentary Under-Secretary of State for Northern Ireland, Paul Goggins MP, replied. He informed the committee that there was police intelligence of eleven cases of jury tampering since 1999. Seven of these had occurred between 2004 and 2006 and seven of the eleven instances involved persons with paramilitary connections. He reported that legal practitioners had informed him of many more anecdotal examples of intimidation. In one of these a trial had collapsed as a result of jury-tampering.

[18] Mr Goggins quoted the Independent Monitoring Commission's Seventh Report on paramilitary activity (October 2005), which concluded that "paramilitaries sometimes use violence within … communities, sometimes threats and intimidation … activities of this kind go hand in hand with unofficial forms of control". He concluded that cases which would formerly have been tried in the Diplock system would be most vulnerable to intimidation and that intimidation was still a significant problem in Northern Ireland, despite recent improvements in the security system.

[19] In response to the question on the guidelines, Mr Goggins indicated that he understood they would be in line with those applying in England and Wales and emphasised that while absolute juror anonymity would carry some benefits, it was considered important to balance these against the risk that prohibiting access to juror information would inhibit the carrying out of additional juror checks by the police. Such checks were designed to reduce the risks of perverse verdicts and juror intimidation. On the question of equality of arms Mr Goggins said: -

> "As far as the issue of equality of arms is concerned, it is considered that any imbalance is acceptable and does not breach Article 6 human rights principles. The right to trial by jury in itself is not a guaranteed right. The prosecution are under a duty to act with absolute propriety in every case and will only exercise their right of stand-by in future where in accordance

> with the Attorney-General's guidelines, information comes to light suggesting that a juror is not suitable for jury service. Both parties will retain the right to challenge for cause. It is considered that this arrangement best serves the requirements of the justice system.
>
> Having considered carefully the equality of arms issue we concluded that to abolish this right should not, in principle, compromise in any way the defendant's right to a fair trial. Such rights as the defendant may enjoy in this respect will continue to have adequate protection in the perpetuation of [challenge with cause] and the diligent and impartial exercise by the trial judge of his supervisory duties. Moreover, in so far as any counterbalancing is required, this will surely be provided by the introduction of restrictions on [the exercise of stand-by]. Even in the absence of significant restrictions on the exercise of this Crown right, the fairness of the trial should not be jeopardised for the reasons provided by the Court of Appeal in *Regina v McKinney* viz, the obligation on the Crown to act with absolute propriety and the obligation of the court to intervene to ensure that appropriate standards of propriety are observed. This will obviously be reinforced still further if guidelines on the exercise of this right are promulgated."

[20] On 12 February 2007 the joint committee produced a report in which it accepted that reducing juror intimidation was a legitimate aim. The committee considered, however, that the proposed administrative guidelines did not overcome concerns about equality of arms between the defence and prosecution in cases concerning national security or terrorism. It asserted that "a breach of the principle of equality of arms is not capable of justification".

[21] On 19 March 2007, the Bill came before the House of Lords. An amendment to clause 12 (abolishing the right of peremptory challenge) was tabled by Lord Avebury. It proposed the abolition of the Crown's right of stand-by. Lord Goldsmith, the Attorney-General, stated that he intended to introduce guidelines broadly comparable to those operating in England and Wales. Observing that the abolition of the right to peremptory challenge itself did not appear to be in issue, he said: -

> "If this provision [abolition of the right of peremptory challenge] is passed as it stands, I intend to introduce

> guidelines, broadly comparable to those which have operated in England and Wales since 1988, making clear that the Crown should assert its right to stand-by only on the basis of clearly defined and restrictive criteria; namely, where in cases involving national security or terrorism which are being tried with a jury – many will not be if the rest of the Bill is passed – an additional jury check reveals information justifying the exercise of stand-by and the Attorney-General personally authorises the exercise of the right of stand-by. Or where a person is about to be sworn as a juror who is manifestly unsuitable, and the defence agrees that stand-by would be appropriate. I hope that gives an indication of how the measure will operate. It is broadly comparable to the guidance which operates in England and Wales.
>
> I do not accept that the principle of equality of arms prevents that proposal. As the report of the Joint Committee on Human Rights makes clear, the principle of equality of arms requires that the defendant should not be placed at a substantial disadvantage. I do not consider that the proposal to abolish peremptory challenge will place a defendant at a substantial disadvantage or interfere with the overall right to a fair trial. He will continue to enjoy adequate protection through retention of the right to challenge for cause. I do not agree that the proposal to abolish peremptory challenge while retaining stand-by in a very restricted form – that is what the guidelines that I shall issue will do – infringes the equality of arms principle.
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> ECHR jurisprudence establishes that, although the overall fairness of a criminal trial cannot be compromised, limited qualification of the constituent rights within Article 6 can be acceptable if they are proportionate and directed towards a legitimate aim. I believe that making provision for the limited use of stand-by in the way I have indicated is proportionate to the overall objective of ensuring that the trial process is fair and delivers justice for defendants, victims and society at large."

[22] The amendment was withdrawn, Lord Avebury stating that he presumed that the Attorney General, in exercising his discretion, would have regard to

the question of how far, if at all, the defendant was disadvantaged by the use of the clause, and that if there was a substantial disadvantage, the power would not be exercised. No exception to that suggestion was taken on behalf of the government.

The Attorney General's guidelines

[23] On 1 August 2007 the Attorney General promulgated the following guidelines on the use of jury checks and the power to stand-by jurors: -

> "**ATTORNEY GENERAL'S GUIDELINES ON JURY CHECKS ON THE USE OF THE PROSECUTION OF STAND-BY**
> **Jury checks**
>
> 1. The principles which are generally to be observed are (a) that members of a jury should be selected at random from the panel, subject to any rule of law as to right of challenge by the defence, (b) the correct way for the Crown to seek to exclude a member of the panel from sitting as a juror is by the exercise in open court of the right to request a stand-by or, if necessary, to challenge for cause, and (c) no class of person may be treated as disqualified or ineligible other than those identified by the Juries (Northern Ireland) Order 1996
>
> 2. Parliament has provided safeguards against jurors who may be corrupt or biased. In addition to the provision for majority verdicts, there is the sanction of a criminal offence for a disqualified person to serve on a jury. The omission of a disqualified person from the panel is a matter for court officials following a search of criminal records.
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> 3. There are, however, certain exceptional types of case of public importance for which the provisions as to majority verdicts and the disqualification of jurors may not be sufficient to ensure the proper administration of justice. In such cases it is in the interests of both justice and the public that there should be further safeguards against the possibility of bias and in such cases checks which

go beyond the investigation of criminal records may be necessary.

4. These classes of case may be defined broadly as (a) cases in which national security is involved and part of the evidence is likely to be heard in camera, and (b) cases involving terrorism that are not the subject of a certificate by the Director of Public Prosecutions for Northern Ireland under section 1 of the Justice and Security (Northern Ireland) Act 2007.

5. The particular aspects of these cases which may make it desirable to seek extra precautions are (a) in security cases a danger that a juror, either voluntarily or under pressure, may make an improper use of evidence which, because of its sensitivity, has been given in camera, (b) in both security and terrorist cases the danger that a juror's political beliefs are so biased as to go beyond normally reflecting the broad spectrum of views and interests in the community to reflect the extreme views of sectarian interest or pressure group to a degree which might interfere with his fair assessment of the facts of the case or lead him to exert improper pressure on his fellow jurors.

6. In order to ascertain whether, in exceptional circumstances of the above nature, either of these factors might seriously influence a potential juror's impartial performance of his duties or his respecting the secrecy of evidence given in camera, it may be necessary to conduct a limited investigation of the panel. In general, such further investigation beyond one of criminal records made for disqualifications may only be made with the records of police Special Branches or security services and no general inquiries are to be made save to the limited extent that they may be needed to confirm the identity of a juror about whom the initial check has raised serious doubts.

7. No further investigation, as described in para. 6 above, should be made save with the personal authority of the Attorney General on the application of the Director of Public Prosecutions

for Northern Ireland and such checks are hereafter referred to as 'authorised checks'. When the Chief Constable or Deputy Chief Constable PSNI has reason to believe that it is likely that an authorised check may be desirable and proper in accordance with these guidelines he should refer the matter to the Director of Public Prosecutions as soon as possible. The Director will make any appropriate application to the Attorney General.

8. The result of any authorised check will be sent to the Director of Public Prosecutions. The Director will then decide, having regard to the matters set out in para. 5 above, what information ought to be brought to the attention of prosecuting counsel.

9. No right of stand-by should be exercised by counsel for the Crown on the basis of information obtained as a result of an authorised check save with the personal authority of the Attorney General and unless the information is such as, having regard to the facts of the case and the offences charged, to afford strong reason for believing that a particular juror might be a security risk, be susceptible to improper approaches or be influenced in arriving at a verdict for the reasons given above.

10. Where a potential juror is asked to stand by for the Crown, there is no duty to disclose to the defence the information on which it was founded; but counsel may use his discretion to disclose it if its nature and source permit it.

11. When information revealed in the course of an authorised check is not such as to cause counsel for the Crown to ask for a juror to stand by but does give reason to believe that he may be biased against the accused, the defence should be given, at least, an indication of why that potential juror may be inimical to their interests; but because of its nature and source it may not be possible to give the defence more than a general indication.

12. A record is to be kept by the Director of Public Prosecutions of the use made by counsel of the

information passed to him and of the jurors stood by or challenged by the parties to the proceedings. A copy of this record is to be forwarded to the Attorney General for the sole purpose of enabling him to monitor the operation of these guidelines.

13. No use of the information obtained as a result of an authorised check is to be made except as may be necessary in direct relation to or arising out of the trial for which the check was authorised.

Exercise by the Crown of its right of stand-by

1. Although the law has long recognised the right of the Crown to exclude a member of a jury panel from sitting as a juror by the exercise in open court of the right to request a stand-by or, if necessary, by challenge for cause, the abolition by section 13 of the Justice and Security (Northern Ireland) Act 2007 of the defence right to peremptory challenge makes it appropriate that the Crown should assert its right to stand by only on the basis of clearly defined and restrictive criteria. Derogation from the principle that members of a jury should be selected at random should be permitted only where it is essential.

2. It is fundamental to the principles of fairness in selecting a jury that (a) the members of a jury should be selected at random from the panel, subject to any rule of law as to right of challenge by the defence, and (b) no class of person may be treated as disqualified or ineligible other than those identified by the Juries (Northern Ireland) Order 1996.

3. Primary responsibility for ensuring that an individual does not serve on a jury if he or she is not competent to discharge properly the duties of a juror rests with the appropriate court officer and, ultimately, the trial judge. Current legislation provides, in Articles 10 and 11 of the of the Juries (Northern Ireland) Order 1996, fairly wide discretions to excuse or discharge jurors either at the person's own request, where the judge is satisfied there is good reason why he should be

> excused, or where the judge determines that on account of physical disability the person would not be capable of acting effectively as a juror.
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> 4. The circumstances in which it would be proper for the Crown to exercise its right to stand by a member of a jury panel are: (a) where a jury check authorised in accordance with the Attorney General's guidelines on jury checks reveals information justifying exercise of the right to stand by in accordance with para. 9 of the guidelines and the Attorney General personally authorises the exercise of the right to stand by; or (b) where a person is about to be sworn as a juror who is manifestly unsuitable and the defence agree that, accordingly, the exercise by the prosecution of the right to stand by would be appropriate. An example of the sort of exceptional circumstances which might justify stand-by is where it becomes apparent that, despite the provisions mentioned in para. 3 above, a juror selected for service to try a complex case is in fact illiterate."

[24] It is therefore the position that checks, beyond those required to ascertain whether possible jurors have criminal convictions rendering them ineligible, can only be carried out with the authority of the Attorney General and that information obtained in the course of those checks may likewise only be used as a basis for standing by a juror where the Attorney General has authorised it. Otherwise the exercise of the right to stand by can only occur with the agreement of the defence. Where it appears, as a result of information obtained in the course of the checks, that a juror might be biased against a defendant there is a duty to inform the defence of at least the gist of the reason that it is considered that such a juror would be hostile to the defendant's interests.

The relevant statutory provisions

[25] As originally enacted, article 15 of the Juries Order permitted twelve peremptory challenges by a defendant in a criminal trial on indictment. These were removed by section 13 of the 2007 Act. Now only challenges for cause are permitted. A hearing of a challenge for cause may be ordered by the judge to take place either in camera or in chambers.

[26] Section 10 of the 2007 Act introduces a new article 26 to the Juries Order which forbids the release of information concerning the identity of jurors except in narrowly confined situations none of which is relevant for present

purposes. Article 7 of the 1996 Order, which provided for the inspection of the names, addresses and occupations of members of the jury panel, has now been deleted by paragraph 2(2) of Schedule 2 to the 2007 Act. Unless, therefore, the defence has applied successfully to the court for disclosure of jury information, no material to identify potential jurors is available.

[27] Article 26B outlines circumstances in which juror information may be disclosed with lawful authority. Among these is where disclosure is made "(a) by an officer of the court to a member of the police service; (b) by a member of the police service to another member of the police service; or (c) by a member of the police service to an officer of the court, for or in connection with the making of checks, in accordance with jury check guidelines, on the person to whom the juror information relates" – article 26B (6). Article 26B (9) permits disclosure to be made with the leave of a court. The circumstances in which a court may order disclosure are not defined in the legislation and it is to be presumed that this is therefore at large.

Article 6 of ECHR

[28] In so far as is material, article 6 of ECHR provides: -

> "(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable period of time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly…
>
> …
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> (3) Everyone charged with a criminal offence has the following minimum rights:
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> a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> b. to have adequate time and facilities for the preparation of his defence;
> c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

The parties' arguments

[29] For the applicants Mr Larkin QC submitted that the loss of the right of peremptory challenge, together with the retention of the Crown power of stand-by, was in breach of article 6 of the Convention. The Crown was able to influence the shape and composition of the tribunal of fact but the defence was quite bereft of the power to do so. Implicit in the terms of article 6 was the principle of equality of arms. One aspect of this principle was expressly recognised in article 6 (3) (d) where it provided that an accused had a specific right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

[30] The principle of equality of arms had particular application and resonance within the sphere of the appraisal of evidence, Mr Larkin argued. The jury was the body charged with evaluating the evidence provided by witnesses and making findings of fact. The composition of the jury was one of the "conditions" under which witnesses were examined. As a matter of basic fairness there should be equality between the Crown and defence in their respective abilities to influence the composition of the jury (and, relatedly, to obtain information about the jury panel).

[31] In the course of the hearing of this application it emerged that no jury checks had in fact been carried out. Indeed, the Attorney General's authority to carry out such checks had not been sought. The question of inequality of arms in relation to the availability of information to the prosecution which has been denied the defence does not therefore arise.

[32] On discovering that no information had in fact been obtained by the prosecution about the identity of the jurors, Mr Larkin concentrated his challenge to the compatibility of the legislation with ECHR on the claim that there was nevertheless an interference with the fairness of the trial because the identity of the jurors had been withheld from the defence. No useful challenge for cause could be made, he said, because there was no material available to the defence on which the claim that a juror was unsuitable could be made. He suggested that Lord Carlile had confused the randomness that anonymous juries would undoubtedly provide with fairness of the trial procedure. Accepting that article 6 of ECHR did not prescribe jury trial as the only means of achieving a fair trial, Mr Larkin nonetheless argued that where the state provided that form of trial, it was required that the selection of the jury be fair in terms of the article.

[33] Mr Larkin also contended that the new arrangements in effect brought about trial of defendants by a 'secret tribunal'. This was in breach of article 6 of the convention in infringing the guarantees of a public hearing and of trial within a system containing sufficient guarantees of impartiality.

[34] In support of his claim that the anonymising of jurors would inevitably wreak unfairness to the defendants Mr Larkin referred to the *Fraud Trials Committee Report* prepared by Lord Roskill which at paragraph 7.34, discussing the possible abolition of the right to peremptory challenge, stated: -

> "The second question arising from a possible limitation of the right to challenge is whether the limited information which is presently available to the defence concerning those included on the jury panel would need to be supplemented. Otherwise, it may be said that the defence would have little upon which to base any possible challenge for cause. One possibility which we have considered would be a return to the position which existed until 12 years ago when the names, addresses and *occupations* of prospective jurors were listed."

[35] For the respondent Mr McCloskey QC submitted that, on proper analysis, the central proposition advanced on behalf of the applicants was that a defendant in a criminal trial had the right to shape and influence the composition of the tribunal of fact in every trial on indictment by judge and jury. He argued that such a right was not protected by article 6 of the convention. The claimed right to peremptorily challenge up to twelve members of the jury panel and to receive the amount of personal information about members of the jury panel which was formerly contained in jury lists (name, address and occupation) was not protected by article 6. Alternatively, insofar as such a right came within the ambit of that article, the impugned statutory provisions were capable of being operated in a manner compatible with the rights enshrined in it and did not, therefore infringe it. In any event, even if the statutory provisions interfered with the applicants' article 6 rights, they pursued legitimate aims *viz*. the integrity of the criminal trial and the protection of jury members and were proportionate.

[36] Mr McCloskey argued that in convention terms the risks to the integrity of the criminal trial involved in having jurors readily identified engaged one of the cornerstones of the convention regime, 'the balance principle' and in non-convention terms what Lord Steyn described in *Attorney General's reference (No 3 of 1999)* [2001] 2 AC 91, 118 as the "triangulation of interests … [represented by] … the position of the accused, the victim and his or her family, and the public". Reflecting these considerations the changes in the

right to challenge jurors were entirely consonant with article 6 and did not deprive an accused person of a fair trial.

Conclusions

[37] From the time that it was introduced until its abolition in 2007 the system of non jury trial in Northern Ireland has been the subject of controversy. The factors that led to its introduction have perhaps been less controversial. The existence of the risks identified by the juries' sub-group of juror intimidation, of partisan juries and of perverse jury verdicts has not been seriously disputed by most commentators, although there has been acute disagreement about the measures needed to deal with those risks.

[38] Northern Ireland is, by any standard, a small society. Regrettably, many of its citizens live in sharply segregated communities. Those performing important civic duties such as serving on juries can, partly as a result of this, be easily identified and, as the recent case of *R v Mackle* [2007] NICA 37 has shown, they are all too readily vulnerable to alarming approaches from malevolent individuals.

[39] The descent of relative peace on our society has not eliminated these difficulties. Indeed, the *Mackle* case graphically illustrates how they persist. The threat to the criminal justice system in general and to trial by jury in particular if the problems of jury intimidation, partisan juries and perverse jury verdicts are not addressed is both obvious and incontestable.

[40] The *Mackle* case also exemplifies the dilemma faced by the authorities in providing protection for jurors. The measures required to ensure that they remain immune from the kind of approach that occurred in that case will inevitably give rise to apprehension on the part of jurors as to their own safety and that of their families. If, for instance, a constant police guard is required, jurors will naturally believe that they are at risk. Thus, in seeking to protect jurors from dangers that might impair their impartiality, the authorities may bring about precisely that eventuality.

[41] The anonymisation of juries unquestionably reduces the value of the right to challenge for cause, however, and, in this respect, we are unable to agree with Lord Carlile's observation that "anonymity would deprive the defence of nothing that names provide in England and Wales". If one knows nothing about the juror, one cannot know anything about the reasons that he or she might be unsuitable to serve as a member of the jury impanelled to try the defendant.

[42] The value of knowing the name and address of a potential juror must not be overstated, however. In the experience of each of the members of this court, such information will rarely provide an insight into the disposition of

individual members of the jury panel on which one could reliably depend. At most, it will offer an indication of the possible attitude of a jury member to a particular defendant based on no more than a deduction as to which side of the community the juror comes from. The essential question on this issue is whether the reduction in the value of the right to the challenge for cause is a price that requires to be paid in order to deal with the risks that have been identified.

[43] The conclusion that anonymisation would provide considerable reassurance to potential jurors and diminish the risk of jury intimidation is, in our opinion, irresistible. Moreover, it is difficult to see how such reassurance could otherwise be provided. We have concluded therefore that the removal of the ability of defendants to be aware of the identity of jurors is indeed a price that must be paid in order to preserve the integrity of the trial process in our jurisdiction.

[44] The argument that knowing nothing about a proposed juror inevitably compromises the right to a fair trial under article 6 neglects, in our opinion, the safeguards that a properly regulated system of trial already provides. It also unwarrantably concentrates on the parties' opportunity to dictate the composition of the jury as the sole guarantor of a fair trial. It is the duty of every trial judge to inform those who might be called to serve on the jury of the principal issues and personalities involved in the trial and to advise them of circumstances in which it would be unsuitable for them to serve as jurors. Experience has shown that jury panel members are conscientious in heeding these warnings and are quick to identify any possible conflict.

[45] As Mr McCloskey pointed out, recent jurisprudence in relation to the modern criminal trial focuses on the roles and responsibilities of the prosecutor and the trial judge. In *R v H and C* [2004] 1 All ER 1269, after commenting on the phenomenon of differing criminal trial processes in differing jurisdictions, Lord Bingham stated in paragraph 13: -

> "…the achievement of fairness in a trial on indictment rests above all on the correct and conscientious performance of their roles by judge, prosecuting counsel, defending counsel and jury. Save in defined circumstances (such as when ruling on the voluntariness of a confession in a voir dire or, much more rarely, an allegation of official misconduct) the judge is not a factual decision maker. His task is to ensure that the trial is conducted in a fair and even-handed way. For this latter purpose he is entrusted with numerous discretions …"

[46] It appears to us that the duty to ensure that the trial is conducted in "a fair and even-handed way" will require the trial judge in this jurisdiction to reflect the circumstance that peremptory challenges to jurors and informed challenges for cause may no longer be made, in a suitably adjusted admonition to potential jury members that they should not serve if there is any possibility of conflict arising. Of course, it might be suggested that no instruction to the jury on this theme, however phrased, can guarantee the elimination of every biased juror but this has always been the position. In the United Kingdom we have not adopted the practice of in depth inquiry into the views and attitudes of potential jurors that has been deemed in other jurisdictions to be an essential concomitant of a fair trial procedure. But it is not suggested that the absence of such inquiry has produced an unfair system of trial. Ultimately, a measure of trust must be reposed in the conscientiousness and sense of civic duty of those who serve on juries in this jurisdiction. Happily, in the vast majority of cases that trust has not been betrayed.

[47] The role of prosecutors in the changed order that now applies in jury trials must also be considered. In the *H and C* case, Lord Bingham described the duty of prosecuting counsel as "not to obtain a conviction at all costs but to act as a minister of justice." It is now well settled that material that may weaken the prosecution case or strengthen that of the defence must (subject to certain public interest considerations) be disclosed by the prosecution to the defendant. It is entirely consistent with the philosophy that underlies these principles that the prosecuting authorities should be scrupulous to ensure that any material of which they become aware that calls into question the suitability of a potential juror is brought to the attention of the defence. Quite apart from the duties that arise under paragraph 11 of the Attorney General's guidelines, it appears to us that prosecutors must be astute to detect any possibility of a lack of impartiality on the part of a member of the jury panel. If there is doubt about the independence or neutrality of any juror, this should be communicated to the defence and steps should be taken (conventionally, one would expect, by an agreed exercise of the Crown's stand by power) to make sure that such person does not serve on the jury.

[48] Neither of the rights asserted by the applicants (*viz* the right to peremptory challenge of jurors and to be informed of their identity) is expressly protected by article 6 of ECHR. Nor indeed is trial by jury indispensable to a fair hearing in determination of a criminal charge – see *X and Y –v- Ireland* [No. 8299/78] where the European Commission on Human Rights stated: -

> "… Article 6 does not specify trial by jury as one of the elements of a fair hearing in the determination of a criminal charge"

[49] A non-compatibility challenge to the impugned provisions was viable only if it could be shown that they introduced an intrinsic – indeed, inevitable – unfairness to the trial process. For that reason, no doubt, the initial emphasis of the applicants' case was on the inequality of arms basis. For the reasons that we have earlier given, this was quickly shown to be unfeasible. We should observe that, in any event, it would not be sufficient, in order to make good that claim, merely to show that a facility was available to the prosecution that was denied the defence. As Mr McCloskey reminded us, the essence of the equality of arms principle is to entitle the defendant to "a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent" - *Kaufman –v- Belgium* [50 DR 98, p. 115]. The proper application of the impugned statutory provisions and the scrupulous discharge of the prosecutor's duty as a minister of justice will confer no material advantage on the prosecutor and should not subject a defendant in a criminal trial to any corresponding disadvantage.

[50] The claim that the applicants would be deprived of a fair trial if they were denied the right to challenge peremptorily or refused information about the identity of jurors must be viewed in light of contemporary notions of what a fair trial requires and entails. In *Attorney General's Reference No. 3 of 1999* Lord Steyn said this about the triangle of interests to be served by a criminal trial: -

> "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family and the public."

[51] The House of Lords has affirmed that recognition of the general interests of the community in the context of a criminal trial will not, of itself, involve impermissible conflict with an individual's Convention rights. In *Brown –v- Stott* [2003] 1 AC 681, 704 Lord Bingham said: -

> "The jurisprudence of the European court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater

> qualification than the situation calls for. The general language of the Convention could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently eschewed by the court throughout its history. The case law shows that the court has paid very close attention to the facts of particular cases coming before it, giving effect to factual differences and recognising differences of degree. *Ex facto oritur jus*. The court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention: see *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, 52, para 69; *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163, 191, para 52."

[52] In our judgment, the anonymisation of juries in Northern Ireland and the removal of peremptory challenge do not compromise the right to a fair trial. These rights were not indispensable to a fair trial. In so far as the armoury of defendants in the adversarial battle that a criminal trial represents may have been diluted by the removal of those rights, we consider that it has been established that this pursued "a clear and proper public objective" and represents "a fair balance between the general interest of the community and the personal rights of the individual".