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(subject to editorial corrections)

IN HER MAJESTY COURT OF APPEAL IN NORTHERN IRELAND
ON APPEAL FROM THE HIGH COURT OF JUSTICE (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY STEPHEN JAMES McCLEAN OF JUDICIARY REVIEW

-and-

IN THE MATTER OF A DECISION OF THE SENTENCE REVIEW COMMISSIONERS

Before Nicholson LJ, McCollum LJ and Higgins J

McCOLLUM LJ

[1] The applicant/appellant ("appellant") is presently serving concurrent sentences, two of life imprisonment for murder, two of 20 years for attempted murder and one of 15 years for possession of firearms and ammunition with intent.

[2] He was convicted of those offences on 2 February 2000 and his appeal against conviction was dismissed on 28 June 2001.

[3] As terrorist crimes they were scheduled offences and having been committed before 10 April 1998 were therefore qualifying offences under Section 3(7) of the Northern Ireland Sentences Act 1998 ("the 1998 Act").

[4] The appellant applied for a declaration that he was eligible for release in accordance with the provisions of the 1998 Act under Section 3(1) of Act, which provides

> "**3.**—[1] A prisoner may apply to Commissioners for a declaration that he is eligible for release in accordance with the provisions of this Act."

[5] A preliminary indication was given dated 14 April 2000 that he was so eligible and this was not challenged on behalf of the Secretary of State and accordingly on 2 May 2000 a substantive determination was made by the

Sentence Review Commissioners to grant the application and the appellant was thereafter eligible to be released in respect of his sentences in accordance with the provisions of the 1998 Act.

[6] The Commissioners also indicated that they considered 12 November 2008 to be the day which will mark the completion of the period specified in Section 6(1) of the Act which represents the completion of about two thirds of the period which the appellant would have been likely to spend in prison under his sentences.

[7] By virtue of Section 6(2) of the Act the appellant therefore had a right to be released on licence on that day.

[8] However Section 10 made provision for earlier release of prisoners on "the accelerated release day" which in respect of the appellant was calculated as 28 July 2000.

[9] On 5 July 2000 the applicant was released on pre-release home leave and on 6 July he was arrested in Banbridge and charged with the attempted murder of Keith Butler and causing grievous bodily harm to Keith Butler.

[10] On 27 November 2001 Girvan J acquitted him of those charges but made it clear that he believed that the appellant had been involved in the removal of UVF flags which contributed to a confrontation in which Keith Butler was seriously injured as a result of a beating.

[11] On 10 July 2000 the Secretary of State for Northern Ireland applied to the Commissioners under Section 8 of the 1998 act for revocation of the applicant's declaration of eligibility for release on the basis that he believed that an applicable condition under Section 3 of the 1998 Act was no longer satisfied because of a change in the applicant's circumstances and/or the emergence of evidence or information not available to the Commissioners when they made their original declaration. This was based on the fact that the appellant had been charged with the offences already referred to and this led the Secretary of State to the belief that the condition of the applicant would not be a danger to the public was no longer satisfied.

[12] On 25 July 2000 by statutory instrument 2000 No. 2024 the Secretary of State amended Section 10(7) of the 1998 Act in order to provide for the continued detention of prisoners whose applications under Section 8(1) for revocation of a declaration had yet to be finally determined.

[13] On 26 July 2000 the Commissioners indicated that they were minded to give a preliminary indication to the effect that the Secretary of State's application for the revocation of the declaration should be granted.

[14] The making of that statutory instrument has itself been the subject of a judicial review application and an appeal to this court, which found the Secretary of State's action to be lawful.

[15] On 4 August 2000 the appellant appealed against the preliminary indication of the Commissioners and on 24 January 2001 the Commissioners commenced a hearing of the Secretary of State's application to revoke the declaration.

[16] It was not until 19 March 2002 that the oral hearing was finally determined and on 23 April 2002 the Commissioners issued a decision granting the Secretary of State's application to revoke the declaration of eligibility for earlier release under the 1998 Act and the appellant remains in custody.

[17] The appellant applied for judicial review of the decision by the Sentence Review Commissioners on the basis of 18 different grounds of criticism of that decision. I will not set out all the grounds on which the application was based

[18] Following the refusal by Coghlin J to grant judicial review on 15 May 2003 the appellant appealed to this court and the following are the grounds of appeal set out in the notice:

> "1. The Learned Trial Judge erred in dismissing the Appellant's judicial review;
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> 2. The Learned Trial Judge erred in holding that the decision of the Sentence Review Commissioners (hereinafter 'the Commissioners') to admit the 'damaging information' about the Appellant was not a breach of Article 6(1) of the European Convention on Human Rights (hereinafter 'the Convention');
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> 3. The Learned Trial Judge erred in holding that the decision of the Commissioners to admit the 'damaging information' did not taint their decision and render it unfair in breach of Article 6(1) of the Convention;
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> 4. The Learned Trial Judge erred in holding that the Commissioners were able to reach a decision without taking into account the damaging information and remained unbiased despite receipt of the 'damaging information';

5. The Learned Trial Judge erred in holding that the Commissioners training was such that they can be regarded as equivalent to members of the judiciary in terms of their ability to ignore material placed before them prejudicial to the Appellant;

6. The Learned Trial Judge erred in holding that a revocation procedure in which 'damaging information' was admitted was fair within the meaning of Article 6;

7. The Learned Trial Judge erred in failing to determine whether the independence and impartiality of the Commissioners was undermined by the Rule 22 procedure which permitted a party to the proceedings, namely the Secretary of State, by certificate to place before the Commissioners material which could not be considered or challenged by the Appellant or his representative;

8. The Learned Trial Judge erred in failing to determine whether the combination of Rule 22 and Schedule 2 paragraph 7 of the Northern Ireland (Sentences) Act 1998 had produced a procedure which had resulted in the Appellant being denied his right to a hearing in his presence in breach of Article 6(1);

9. The Learned Trial Judge erred in failing to determine whether the provisions of Article 6(3) of the Convention can be regarded as guidance for the test of whether fair procedures were adopted in the proceedings before the Commissioners in circumstances where the issue at stake was the liberty of the subject;

10. The Learned Trial Judge erred in determining that despite the fact that the proceedings before the Commissioners involved the liberty of the subject they did not attract the safeguards afforded by Article 6(3) of the Convention;

11. The Learned Trial Judge erred in holding that it was neither unfair nor disproportionate to require the Applicant to establish on the balance of

probabilities that he would not be a danger to the public;

12. The Learned Trial Judge erred in law in ruling that the Commissioners were entitled to place the onus on the Applicant 'to satisfy the Commissioners that' he was not a danger to the public if immediately released;

13. The Learned Trial Judge erred in holding that the failure to inform the Appellant that the Commissioners original decision that the Appellant met the criteria for released in accordance with the 1998 Act was 'finely balanced' was unfair.

14. The Learned Trial Judge erred in holding that the failure to inform the Appellant that the Commissioners original decision that the Appellant met the criteria for release in accordance with the 1998 Act was 'finely balanced' was unfair within the meaning of Article 6 of the Convention;

15. The Learned Trial Judge erred in holding that the there was evidence before the Commissioners sufficient to justify the substantive decision to revoke the Appellant's licence;

16. The Learned Trial Judge erred in holding that the procedure whereby the determination was made to revoke the Appellant's licence was not unfair within the meaning of Article 6 of the Convention;

17. The Learned Trial Judge erred in ruling that the Revocation decision was reached in a manner compatible with Article 6 of the Convention;

18. The Learned Trial Judge was obliged by virtue of section 6 of the Human Rights Act to act in a manner compatible with the Appellant's Article 6 rights when read alone or in conjunction with Article 6 and he erred in failing to do so."

[19] It appears to me that the issues raised in the appeal can be considered under a number of different headings.

Is the procedure of the Sentence Review Commissioners subject to the requirements of Article 6 of the European Convention on Human Rights

[20] Much of the argument on behalf of the applicant was predicated on the proposition that the hearing before the Commissioners was subject to the provisions of Article 6 of the European Convention on Human Rights.

[21] This is obviously a question of considerable importance, in that certain procedures are regarded as fundamental to the conduct of a fair trial and failure to conform with them would be regarded as a breach of human rights.

[22] Article 6 provides as follows:

> "Right to a fair trial
>
> (1) In the determination of a civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court and special circumstances where publicity would prejudice the interests of justice."

[23] Mr Treacy QC for the appellant submitted that the right to accelerated release granted by Section 10 of the 1998 Act amounted a civil right which was determined by the decision of the Sentence Review Commissioners and that the requirements of a fair trial set out in Article 6 applied to the hearing.

[24] He did not entirely abandon the proposition that if the hearing did not involve determination of the appellant's civil rights then it did amount to determination of a criminal charge against him but it is clear that the language of Article 6 does not admit of that interpretation.

[25] The issue before the Commissioners was to determine whether the conditions set out in Section 3(3), (4),(5) and (6) were satisfied. None of those involved the determination of any criminal charge.

[26] The issue of the applicability of Article 6 to hearings of the parole board in England were considered in the case of The Queen (on the application of Justin West v The Parole Board 2002 EWCA Civ 1641.

[27] Referring to similar arguments advanced in that case Simon Brown LJ said at paragraph 23:

> "23. Powerfully though these arguments were advanced and persuasive though at first blush they may appear, to my mind they founder upon the rock on which all of Mr Crowe's submissions ultimately stand: the critical fact that when a parole licence is revoked and its revocation is subsequently confirmed this is solely with a view to the prevention of risk the protection of the public and not at all by way of punishment."

He went on to say at paragraph 30:

> "In short I accept Mr Crowe's core submission that the rationale of prisoner recall is protective and preventive not punitive and deterrent; the decision taken (initially by the Secretary of State and then by the parole board) is that, having regard to the risk now shown to exist, it is necessary for the protection of the public that the offenders serve the balance of his existing sentence (up to the three quarter stage) in prison rather than on licence and thereafter be released conditionally instead of unconditionally.
>
> Unlike the position in Ezeh and Connors the same sentence is being served and it is being served for the same offence. Ezeh and Connors indeed proves on analysis to provide no real help on the issue of classification under Article 6; all it does is to apply the three part Engle test on its own particular facts."

[28] In paragraph 31 he referred to the following passage in the Commission's judgment in the case of Aldrian v Austria Application No. 16266/90:

> "The Commission recalls its constant case law according to its proceedings concerning the execution of a sentence imposed by a competent court, including proceedings in the grant of conditional release, are not covered by Article 6(1) of the Convention. They concern neither the determination of a criminal charge nor of civil rights and obligations within the meaning of this provision."

[29] In the case of the application by John Adair in which judgment was delivered on 18 February 2003 Sir Robert Carswell LCJ, as he then was, said at paragraph 11:

> "The English Court of Appeal held by a majority in R West v Parole Board 2002 EWCA 1641 that the consideration by the parole board of whether to recommend the re-release of a prisoner whose licence has been revoked did not amount the determination of a criminal charge against him. I respectfully agree and propose to follow this decision."

[30] I agree with both of those distinguished authorities and am of the view that a determination by the Commissioners is not the determination of a criminal charge.

[31] It may be of some significance that in the West case the issue of whether the matter concerned the determination of the applicant's civil rights and obligations arose does not appear to have been raised.

[32] On this topic Simon Brown LJ said at paragraph 32:

> "It seems to me however one thing in the exercise of a discretionary power to refuse a prisoner release on licence: another, as here, having been compelled by law to release him at the high way stage of a sentence, then to recall him to prison. Although, as already indicated, I accept that recall does not involve the determination of a criminal charge I say nothing as to whether it involves the determination of 'civil rights and obligations'. (That question not being argued before us)."

[33] In "The Law of Human Rights" by Clayton and Tomlinson Volume 1 paragraph 11.163 reads as follows:

> "It is well established that civil does not mean merely non-criminal: not all of the rights and obligations that might arguably be claimed by an individual in national law attract the protection of Article 6. The word 'civil' has an automatous convention meaning so that the classification of a right and domestic law is not decisive."

Paragraph 11.165 goes on to say:

> "The court has, nevertheless, consistently held that the basis for the definition of civil rights and obligations is the distinction between public and private law."

And at 11.169:

> "The basic principle is that public law matters are not excluded from being civil rights and obligations if they are directly decisive of private law rights. The most important consideration is whether the applicant has a financial interest at stake in relation to which the action of estate is directly decisive: the existence of such an interest is usually determinative (although in a limited class of cases it may be held to have a public law nature.)"

[34] I agree with these statements of the law. It appears to me that where the relationship between the individual and the state is analogous to a relationship between two private individuals or where a citizen is involved in a dispute with the state involving a private or economic right then it could properly be said that a civil right is engaged.

[35] However where the issue is one which concerns the public interest, it is a matter of public law, and not therefore one which involves the determination of civil rights or obligations.

[36] The primary issue at stake in this case is the safety of the public, and the role of the State is to act as guardian of that interest.

[37] In those circumstances this case falls into neither the category of the determination of a civil right or obligation or of the determination of a criminal charge and Article 6 is not engaged.

Is Article 5 engaged?

[38] Article 5(1) of the Convention provides:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with the procedure prescribed by law:
>
> (a) The lawful detention of a person after conviction by a competent court;

> …."

5(4) provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release order if the detention is not lawful."

[39] Those provisions were considered by Lord Justice Keene in R (on the application of Sim) v Parole Board and Another (2003) EWCA Civ 1845 [2003] All ER (D 368).

[40] In paragraph 11 of his judgment he stated as follows:

> "11. There is an obvious inter-relationship between Article 5(1) and Article 5(4) which has been recognised for very many years. Article 5(1) embodies the right to liberty and security of person and Article 5(4) creates the necessary associated right for any person who is under some form of detention to be able to challenge the lawfulness of that detention, both under domestic law and under Strasbourg jurisprudence. That review of the lawfulness of the detention must be by a court, that it is to say by a body which is judicial in character, and the review must be speedy, as was emphasised by the European Commission of Human Rights in Zamir v United Kingdom [1983] 40 DR 42. But there are a number of exceptions to the right to liberty and security of person, of which the first is 'the lawful detention of a person after conviction by a competent court': Article 5(1)9a). As was said by Lord Hope in R (Giles) v Parole Board [2003] UKHL 42; [2003] 3 WLR 736 at 745, paragraph 25:
>
> > 'The general rule is that detention in accordance with a determinate sentence imposed by a court is justified under Article 5(1)(a) without the need for further reviews of detention under Article 5(4).'

As the European Court of Human Rights has itself put it, in such a case the supervision required by Article 5(4) is incorporated in the decision made by the sentencing court: De Wilde, Ooms and Versyn v Belgium (No. 1) [1971] 1 EHRR 373, 407 at paragraph 76."

[41] In determining whether the appellant's continued detention is justified by the sentence of the court it is helpful to consider Section 6 of the 1998 Act, which provides as follows:

> "6(1) When Commissioners grant a declaration to a life prisoner in relation to a sentence they must specify a day which they believe marks the completion of about two thirds of the period which the prisoner would have been likely to spend in prison under the sentence.
>
> (2) The prisoner has a right to be released on licence (so far as that sentence is concerned) –
>
> (a) on the day specified under sub-section (i), or
>
> (b) if that day falls on or before the day of the declaration, by the end of the day after the day of the declaration."

[42] The prisoner therefore only becomes entitled to be released on licence from his life sentence without any condition other than that contained in the terms of his licence after he has served the period specified under Section 6(1).

[43] A life sentence prisoner is given the right to be released on the accelerated release day only if the conditions set out in Section 3 are satisfied.

[44] That there is no element of punishment for the original crime involved in a revocation of a Section 3 declaration is apparent from the fact that a prisoner may be released even if he has committed the most heinous of murders provided that the conditions are satisfied, while a prisoner who has committed a far less serious crime will not qualify for a declaration for release if the conditions are not satisfied.

[45] Unless and until a prisoner can satisfy the conditions under Section 3 he continues to serve the sentence imposed by the court that convicted him. If, before release, his declaration is revoked under Section 8 he continues to serve the original sentence.

[46] In those circumstances Article 5 does not apply in the present case.

[47] The test therefore which is to be applied to the determination by the Sentence Review Commissioners is that set out in paragraph 46 of the judgment of Keene LJ in Secretary of State for the Home Department v (1} Sim (William), (2) The Parole Board 9Supra]:

> "46. I observe that the European Commission on Human Rights in Comerford asked itself whether the test applied by the Parole Board was inconsistent with the objectives of the sentencing court. In that case it was dealing with an offender who had been convicted of murder and given what was in effect a sentence of life imprisonment. The House of Lords in Lichniak was dealing with a similar situation. One can see that in those circumstances, where the sentencing court has imposed an indeterminate sentence of imprisonment, its objectives may well be seen as wishing to ensure that a person who has committed such a serious crime is not to be released unless and until it can be shown that he no longer presents a danger to the public. But as Elias J pointed out, the objective of an extended sentence under section 85 is very different:
>
> > 'In such cases the object of the sentence is not to subject the prisoner to detention for the extended licence period, and indeed frequently when such sentences are imposed there would be no power at that stage to detain the prisoner in custody for that period. The aim of the sentence is to manage the risk in the community rather than in prison, albeit that it is recognised that it may be necessary to resort to further detention if that aim fails. The offender is not on licence as an alternative to prison; rather he is on licence as an alternative to liberty, …' "

In West (R on the application of) v The Parole Board and anr [Supra] @ Para 24 Sedley J said:

> "It may well be therefore that, whether the recall process is taken to be the determination of a criminal charge, the determination of a prisoner's civil rights and obligations, or a statutory process directly impinging on personal liberty, what matters both in modern public law and

> under the Convention (two streams which since 2 October 2000 have flowed in one channel) is that the prisoner should have every reasonable opportunity to contest his recall. This means, in my view, that Home Secretary's reasons for recalling the prisoner must stand up by themselves – in other words it is not for the prisoner to displace a fait accompli – as well as that the prisoner's own submissions to the contrary must be fully and fairly entertained. Among the things which will differ from our received criminal process – though not necessarily from that of other states signatories of the Convention or of modern international criminal tribunals – is the mode of proof. Provided the overall objective of a fair hearing is met I see no great problem in any of this".

[48] The Sentence Review Commissioners must therefore try the issue before them fairly and impartially, in accordance with the statutory rules laid down and give full consideration to the reasons and arguments advanced on behalf of the prisoner.

[49] The appellant submits that they have not done so.

Article 6 "3"

[50] It is submitted that while the requirements of Article 6 may not apply as an absolute requirement to the proceedings of the Commissioners nonetheless they are relevant to the determination of the issues because they could be regarded as guidance for the test of whether fair procedures were adopted in legal proceedings in circumstances where the issue at stake was the liberty of the subject.

[51] However it is quite clear that these requirements specifically apply to criminal proceedings and where the principles which underpin them are important in any proceedings they are nonetheless not mandatory in proceedings which do not constitute the charging of a criminal offence.

[52] It is not therefore necessary for the Commissioners to literally apply the provisions of Article 6 "3" in order to ensure the fairness of their proceedings.

Damaging Information

[53] On his behalf Mr Treacy submits that the reception of "damaging information" in the absence of the appellant made the hearing unfair. Of necessity, we have not seen the information concerned but the gist of it was made available to the appellant and his advisers.

[54] The Commissioners have said that they paid no regard to that information and that it played no part in their decision, but having regard to the issue to be determined by them which is not a stark issue of fact but more one of impression then it may have been more difficult to resist being influenced by information directly relevant to that issue than it would be were an issue of concrete fact to be determined.

[55] The question therefore arises whether the procedure by which damaging information is revealed to the Commissioners is a fair procedure.

[56] If it is then it is immaterial whether they considered or were influenced by that material or not. If it is not then the court would have to consider whether the Commissioners should have proceeded to a decision having heard that material even though they did not rely upon it.

[57] In receiving the damaging information as they did the Commissioners were acting within the terms of the rules governing their procedure, the Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998. Rule 22 provides as follows:-

> "**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, is 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."

[58] In my view it was permissible and appropriate for the Commissioners to receive the damaging information in the way that they did.

[59] It must be borne in mind that in any case before the Commissioners the prisoner is serving a sentence of at least five years imprisonment for a terrorist crime. It could well be that the information in question may be attributable to a person who has good grounds to fear for his safety should his identity be revealed. To disclose details of information given to the authorities could well reveal enough to identify him and to put him at risk.

[60] The right of the prisoner to be fully informed about the reasons for his continued detention is an important one but so also is the need for secrecy in respect of information in the category of damaging information. The rights of the prisoner and those of the Sate and any person who might be endangered by the disclosure of damaging information are properly balanced by the prescribed procedures. In any case, in the absence of the engagement of any right guaranteed by the European Convention this Court is bound to apply the law as Parliament has decreed it.

[61] Mr Treacy argues that the Commissioners should first try to determine the revocation application without any reference to the damaging information and only to receive it if of the view that without it the prisoner would be entitled to be released.

[62] However, if the Commissioners are entitled to consider the damaging information, the stage of the proceedings at which they do so is immaterial; , if they are not so entitled, it is equally objectionable irrespective of when it is received.

[63] Clearly it is unsatisfactory that anybody should make a decision based on evidence that is not available to one of the parties. However the safety of the public is a matter of great concern and where the release of a convicted terrorist is in issue it is imperative that the Commissioners have the fullest possible information and it is undesirable that the prisoner should have access to enable him to identify the identity of the informer or the circumstances in which the information was received.

[64] I would therefore hold that the procedure for receiving damaging information is lawful.

Decision finally balanced

[65] It is submitted on behalf of the appellant that it would in some way have been helpful to him to have been told before or during the course of the proceedings before the Commissioners that their original decision had been finally balanced and it is suggested that failure to do so.

[66] It is said that failing to advise the appellant of that fact given that it formed a significant ground of a decision to revoke the appellant's release amounted to a breach of natural justice and further that it amounted to a breach of Article 6 since the appellant was entitled "to be informed promptly of the nature and cause of the accusation against him".

[67] However it does not appear to me that knowledge that the initial decision was finally balanced would have been of any assistance to the appellant or his advisors in presenting the case.

[68] The issue before the Commissioners was whether evidence or information not available to the Commissioners when they granted the original declaration suggested an applicable condition in Section 3 is not satisfied.

[69] If, and only if, the Commissioners find new evidence or information is it proper for them to consider revocation, but if there is such evidence or information clearly it has to be considered in the context of the evidence or information placed before them at the time of the prisoners original application.

[70] The appellant's representative would therefore have been aware of the context in which significance was being attached to the new evidence or information and was in a position to deal with it in that context. Knowledge that the original decision was finally balanced would not have altered the significance of the new information or evidence or the context in which it was to be placed and no advantage would have accrued to the appellant from having been given that information.

Inadequate grounds for Secretary of State's Application

[71] The appellant submits that the only "fresh" evidence before the Commissioners was the evidence that Girvan J did not believe that the appellant had not been active participant in the removal of flags.

[72] He argues that the flimsiness of that is a basis for revoking the decision to release can be adequately demonstrated when once considers whether an application to revoke would have been considered if initiated on the basis that a release prisoner had been involved in the removal of flags.

[72] It must be remembered that the Commissioners' decision on the facts is not to be interfered with by the court where evidence exists to support its conclusion.

[73] The issue of danger to the public is a delicate one and has to be decided inferentially on information of considerable less clarity than would be required to proof a criminal offence.

[74] Clearly there was material in this case to justify the Commissioners taking the view that they did and it is not for this court to re-evaluate the evidence.

Onus of proof.

[75] Mr Treacy also submits that the view taken by the Commissioners of the appropriate standard of proof to apply is mistaken.

[76] The judge took the view that the Act required the appellant to establish on the balance of probabilities that he would not be a danger to the public and that this was neither unfair nor disproportionate.

[77] However I find it difficult to apply the traditional principles of evidence to proceedings of the kind under consideration here. The conclusion that a person is or is not a danger to the public, while it may be reached quite emphatically, is not the establishment of a concrete fact, but

rather the formulation of an opinion or impression. As such it is not capable of proof in the manner usually contemplated by the law of evidence.

[78] Therefore while the burden of establishing the facts which may lead to such a conclusion may lie on a party, the conclusion itself is reached by the Commissioners on a review of all the circumstances of the case.

[79] The judge quoted a passage from Lord Bingham in R v Lichniak [2002] 4 All ER 1122:

> "I doubt whether there is in truth a burden on the prisoner to persuade the Parole Board that it is safe to recommend release , since this is an administrative process requiring the Board to consider all the available material and form a judgement. There is , inevitably, a balance to be struck between the interests of the individual and the interests of society, and I do not think it is objectionable, in the case of someone who has once taken life with the intent necessary for murder, to prefer the latter in case of doubt."

[80] Section 8 of the Act provides as follows

> "**8**.-(1) The Secretary of State shall apply to Commissioners to revoke a declaration under section 3(1) if, at any time before the prisoner is released under section 4 or 6, the Secretary of State believes –
>
> (a) that as a result of an order under section 3(8), or a change in the prisoner's circumstances, an applicable condition in section 3 is not satisfied, or
>
> (b) that evidence or information which was not available to the Commissioners when they granted the declaration suggests that an applicable condition in section 3 is not satisfied.
>
> (2) The Commissioners shall grant an application under this section if (and only if) the prisoner has not been released under section 4 or 6 and they believe –
>
> (a) that as a result of an order under section 3(8), or a change in the prisoner's circumstances, an

> applicant condition in section 3 is not satisfied, or
>
> (b) that evidence or information which was not available to them when they granted the declaration suggests that an applicable condition in section 3 is not satisfied."

[81] The test for the Commissioners therefore is whether they believe that [further] evidence or information suggests that an applicable condition is not satisfied. The word "suggests" is not indicative of the imposition of a burden of proof. On the other hand, if their state of mind is such that they are unable to form that belief then they should not grant the application. I do not take the view that, after the Secretary of State has placed new information before them a burden of proof passes to the appellant to show that he is not a danger to the public but rather that they must form an impression as to the existence and extent of danger to the public based on the information placed before them.

[82] A conclusion of fact is readily susceptible to the imposition of a burden of proof, and in so far as the learned judge and the Commissioners recognized a burden of proof on the Secretary of State to establish the facts amounting to new evidence or information I would agree with their view, but I am unable to agree that the issue of whether danger to the public has been manifested by that evidence or information is one in respect of which the burden of proof fell on the Appellant.

[83] This is in the nature of an inference or impression that the Commissioners may form on the basis of the information or evidence placed before them without either party being required to demonstrate its greater probability or improbability. A wide variety of factual situations could give rise to such a view. It is not necessary that a prisoner should have been guilty of any criminal behaviour. Some offences might not give rise to any apprehension of danger to the public, while some behaviour that did not constitute a breach of civil or criminal law might well do.

[84] The Commissioners took an erroneous view in holding that there was an onus on the Appellant to prove that he was not a danger to the public. The situation is different when, under Sec 3(6), they are empowered to grant an application

> "if (and only if)-------- the prisoner were released immediately, he would not be a danger to the public".

In that case it could well be said that if the Commissioners were unable to agree on that conclusion they should refuse to make an order. However under Sec 8 they should grant the Secretary of State's application

> "if (and only if) they believe ------that the [new] evidence or information suggests that an applicable condition in section 3 is not applicable".

If, therefore, they are unable to agree that they so believe the application should be refused and the prisoner could be released.

[85] In so far as an onus of proof exists it lies on the Secretary of state not merely to establish the new facts, but also to persuade the Commissioners that those facts lead to the belief that they suggest that the condition that the prisoner would not be a danger to the public is not satisfied.

[86] It is by no means certain if the Commissioners had shared my view that they would have come to a different conclusion but nevertheless it appears to me that on that ground alone it would be preferable to have a rehearing of the application.

Delay

[87] Delay in disposing of the application is another ground of appeal. There is no dispute about the fact that there was considerable delay, but it is the respondent's case that the authorities have not been responsible for any appreciable part of it.

[88] A chronology has been furnished, which I reproduce here:

"24/1/01	Oral hearing at HMP Maghaberry adjourned to allow Commissioners to seek legal opinion
8/2/01	Commissioners advise McClean's solicitor that they will reconvene hearing when they have enough information to do so (copy of letter attached)
13/2/01	McClean's solicitor says hearing should reconvene asap irrespective of information available
20/2/01	Commissioners ask NIPS for details of injury to alleged victim

26/2/01	Consultant's statement received from NIPS
8/3/01	Commissioners ask NIPS for copy of preliminary enquiry papers served on McClean on 1 March 2001 Commissioners again advise McClean's solicitor that it would be improper to proceed without sufficient disclosure of facts (copy of letter attached)
13/3/01	McClean's solicitor says if hearing is not reconvened immediately they would seek an alternative remedy in another forum
23/3/01	Commissioners advise McClean's solicitor that case is now ready to proceed (copy of letter attached)
28/3/01	Reconvened hearing scheduled for 10 April 2001 – McClean's solicitor advised that if date was not suitable it would probably not be rescheduled before the end of May (copy of letter attached)
30/3/01	**McClean's solicitor advises Commissioners by phone that date is not suitable – his barrister is on holiday** NIPS advised of postponement before their reply received
4/4/01	Panel changed to expedite hearing (copy of file note and change of panel form attached)
5/4/01	Reconvened hearing scheduled for 1 May 2001 (copy of letter attached)
10/4/01	NIPS ask for extension of deadline for reply as unable to contact their legal representative in CSO – given another week as does not directly affect hearing date

12/3/01	**McClean's solicitor advises Commissioners that date is not suitable - appeal against original conviction to be heard from 30 April 2001 (dismissed)**
	NIPS advised of postponement before their reply received
15/5/01	Reconvened hearing scheduled for 18 June 2001 (copy of letter attached)
23/5/01	NIPS agree date is suitable
25/5/01	**McClean's solicitor advises date not suitable - barrister not available**
30/5/01	McClean's solicitor suggests various dates in June but unable to convene a panel on any of them - no psychiatrist available
31/5/01	Reconvened hearing scheduled for 9 July 2001 (copy of letter attached)
	McClean's solicitor advises no date suitable in July or August - all on holiday
	NIPS advised of postponement before their reply received
22/6/01	Commissioners ask McClean's solicitor asked to suggest suitable dates in September (copy of letter attached)
21/8/01	**McClean phoned for update - stated he would not push for hearing to be held before court case (copy of file note attached)**
27/11/01	McClean acquitted of assault charge
28/11/01	Reconvened hearing scheduled for 11December 2001 (copy of letter attached)

	McClean's solicitor advises they are content for hearing to proceed on that date
3/12/01	NIPS advise date not suitable as they require time to study Judgement
5/12/01	McClean's solicitor says this is unreasonable and will bring the matter to the attention of the Courts if hearing does not proceed on 11 December 2001
	Commissioners request copy of Judgement from McClean's solicitor - received by fax
6/12/01	McClean's solicitor advised by telephone that hearing scheduled for 11 December postponed.
7/12/01	McClean's solicitor advised that postponement does not affect McClean's liberty in light of second revocation application (copy of file note attached)
19/12/01	Reconvened hearing scheduled for 17 January 2002 (copy of letter attached)
20/12/01	McClean's solicitor advises they are content for hearing to proceed on this date
21/12/01	NIPS lodge ancillary application to introduce "damaging information", sworn affidavits in relation to judicial review of NIPS and McClean's prison discipline record.
28/11/01	NIPS advise they are content for hearing to proceed on 17 January 2002
11/1/02	Single Commissioner meets with D/Chief Supt Flanagan to assess intelligence report for appropriateness of certification (copy of file note

	attached) and consider ancillary applications (copy of letter attached)
14/1/02	Commissioners request Attorney General to appoint a Special Advocate to represent McClean at reconvened hearing
15/1/02	NIPS give notice that the Secretary of State intends to appeal against ancillary decisions - hearing scheduled for 17 January 2002 postponed to allow McClean's solicitors to respond (copy of letter attached)
18/1/02	Reconvened hearing scheduled for 19 March 2002 (copy of letter attached)
22/1/02	Attorney General appoints Mr John Orr QC as Special Advocate
31/1/02	Ancillary appeal hearing scheduled for 12 February 2002 - both parties advise date are content to proceed on this date
4/2/02	Panel appointed to consider ancillary appeal
12/2/02	Ancillary appeal hearing held in Windsor House
22/2/02	Both parties notified of ancillary appeal decisions
19/3/02	Reconvened hearing held in HMP Maghaberry."

[89] It can be seen that a number of different factors contributed to the delay, and that they can variously be attributed to the Secretary of State, the Commissioners and the appellant. Following the completed hearing of the application it is difficult to envisage what relief could be provided for the appellant if the delay were the fault of the other parties but in any case there is no basis on which to hold that the delay is such that it can be attributed to the responsibility of the authorities, and accordingly no order on that ground is appropriate or required.

[90] My conclusion is that the appellant has failed to establish any ground of appeal, other than that based on the question of where the onus of proof of danger to the public lay but on that ground I would allow the appeal and order a fresh hearing of the application.