Neutral Citation No. [2004] NICA 13 (3) | *Ref:* **HIGF4143**

Judgment: approved by the Court for handing down | *Delivered:* **23/04/04**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

ON APPEAL FROM THE HIGH COURT OF JUSTICE (CROWN SIDE)

_____

IN THE MATTER OF AN APPLICATION BY STEPHEN McCLEAN FOR JUDICIAL REVIEW AND IN THE MATTER OF A DECISION OF THE SENTENCE REVIEW COMMISSIONERS

_____

HIGGINS J.

[1] This is an appeal from the decision of Coghlin J whereby he dismissed the appellant's application for judicial review of a decision of the Sentence Review Commissioners (the Commissioners) revoking the declaration that the appellant was eligible for early release in accordance with the Sentences Act 1998, as amended (the 1998 Act).

[2] The historical back ground to this appeal is set out comprehensively in the judgment of Nicholson LJ and I need not repeat it in detail here.

[3] On 2 February 2000 the applicant, together with another individual, was convicted of the sectarian murder of Damien Trainor and Philip Allen at the Railway Bar, Poyntzpass as well as two counts of attempted murder and one count of possessing firearms and ammunition with intent. He was sentenced to life imprisonment in respect of each of the counts of murder, 20 years in respect of each of the counts of attempted murder and 15 years in respect of the count relating to the possession of firearms and ammunition with intent. The applicant appealed against both the convictions and sentences but his appeal was dismissed on 28 June 2001.

[4] The applicant applied to the Sentence Review Commissioners for a declaration that he was eligible for release in accordance with the provisions of Section 3 of the Northern Ireland (Sentences) 1998 Act. The Sentence Review Commissioners determined his application on 2 May 2000, declaring that he was eligible to be released in accordance with the provisions of the

1998 Act and indicated that they considered the 12 November 2008 to be the date that marked the completion of the period specified in Section 6(1) of the 1998 Act. In accordance with Section 10 of the 1998 Act the applicant was assigned an accelerated release date of 28 July 2000.

[5] On 10 July 2000 the Secretary of State applied to the Sentence Review Commissioners under Section 8 of the 1998 Act to revoke the declaration granted to the applicant on 2 May 2000. The application stated that the Secretary of State believed that there was a change in the applicant's circumstances and that evidence or other information, which was not available to the Commissioners, suggested that an applicable condition was not satisfied. The application stated - "the applicable condition referred to is that if the prisoner were released immediately he would not be a danger to the public". The application then outlined the change in the applicant's circumstances, namely that he had been charged with attempted murder.

[6] On 29 March 2002 the Commissioners determined the Secretary of State's application and revoked the declaration of eligibility for early release. During the process that led to this decision the Commissioners received "damaging information" which the Secretary of State had certified should not be disclosed to the appellant. Special counsel was appointed to represent the appellant in relation to this information. During a hearing on 24 January 2001, the then Chairman of the commissioners, indicated that "it was for the Secretary of State to satisfy the Commissioners on the balance of probabilities of the facts on which he relied while it was for the applicant to satisfy the Commissioners on the balance of probabilities that the applicable section 3 conditions were still satisfied" (that is, that he was not a danger to the public). A copy of the panel's reasons for revoking the declaration of eligibility for early release was sent to the applicant on 23 April 2002. This stated -

> "For the reasons set out hereunder, it is the Commissioners' decision to grant the Secretary of State's application to revoke the declaration that the respondent is eligible for early release in accordance with the provisions of the Act:
>
> 1. The original decision of the Commissioners that the respondent met the criteria for release was finely balanced. Since this is a revocation hearing in relation to an already granted licence, the Commissioners must have reference to the index offence. The Commissioners were concerned about the nature of the index offence, and its proximity in time to the application for release. There had been very little time for evidence to emerge that the respondent would not be a danger to the public.

Essentially, the Commissioners had to base their decision on the information then before them, and granted the application because the Secretary of State raised no objection to early release.

2. In order to revoke the release decision, the Commissioners must be persuaded that in the light of changed circumstances, new evidence or information, an applicable condition in section 3 of the Act is no longer satisfied. In this particular instance, are the Commissioners still able to say that if released immediately, the respondent would not be a danger to the public?

3. In the criminal proceedings dealing with the incident which give rise to this application, although the respondent was found not guilty of attempted murder or causing grievous bodily harm with intent and was acquitted on both counts, Mr Justice Girvan accepted the thrust of the Crown case that the respondent was much more involved in the whole business of flag removal than he admitted. However, in the words of the Judge, being an active participant in the flag removal does not of itself prove that the respondent participated in the assault.

4. Notwithstanding the acquittal of the respondent, the outcome of the criminal proceedings, particularly in relation to the Judge's comments regarding the involvement of the respondent in the business of flag removal, left the Commissioners with *additional* doubt in their minds about the respondent's danger to the public.

5. The evidence of the respondent in the Hearing went no way in removing that doubt. On the contrary, the Commissioners came to the same conclusion as Mr Justice Girvan; namely that the respondent was more involved in flag removal than he admitted. It is, in the Commissioners' view, improbable beyond belief that the respondent did not know or at least suspect that they were embarking on a flag removal expedition.

6. Given the time of year, the week around Drumcree protests, and in an area of ongoing serious

> feuding between the LVF and the UVF, it is likely that the respondent knowingly entered a situation of high risk in which violence could follow. In the circumstances, it is not possible for the Commissioners to say that if released immediately, the respondent would not be a danger to the public.
>
> 7. Even if the Commissioners were to accept the respondent's version, there would still be a problem with danger to the public. Assuming for the sake of argument that the respondent did not enter a situation of risk knowingly, then he did so out of naiveté and lack of foresight and poor judgement. If the respondent is incapable of avoiding situations of obvious risk and potential violence, even then the Commissioners would not be able to say that if released immediately he would not be a danger to society."

[7] The appellant applied for judicial review of the decision of the Commissioners. The amended statement under Order 53 of the Rules of the Supreme Court (NI) was in the following terms –

> "2. The Applicant seeks the following relief:-
>
> (i) An Order of Certiorari to remove into this Honourable Court and quash the decision of the Sentence Review Commissioners revoking the declaration that the Applicant is eligible for early release within the provisions of the Northern Ireland (Sentences) Act 1998 (hereinafter "the Act").
>
> (ii) An Order of Certiorari quashing the decision of the Sentence Review Commissioners to receive 'damaging information' in the absence of the Applicant in the course of adjudicating on the application by the Secretary of State for Northern Ireland to revoke the declaration that the Applicant was eligible for early release within the meaning of the provisions of Act.
>
> (iii) An Order of Mandamus to compel the Sentence Review Commission to declare that the Applicant is eligible for early release within the meaning of the provisions of the Act.

(iv) A Declaration that the decision to receive 'damaging information' in the absence of the Applicant and his legal representatives amounted to a breach of the Applicant's rights under Article 6 of the Convention.

(v) A Declaration that the procedures adopted by the Respondent and in particular the Respondent's delay in adjudicating on the applicant by the Secretary of State to revoke the Applicant's early release the Applicant amounted to a breach of the Applicant's rights under Article 6 of the Convention.

(vi) A Declaration that the decision to revoke the Applicant's early release the Applicant amounted to a breach of the Applicant's rights under Article 5 of the Convention.

(vii) A Declaration under Section 4 of the Human Rights Act 1998 Rule 22 of the Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 is unlawful and incompatible with the Convention Rights of the Applicant, in that it breaches the Applicant's Article 6 rights.

(viii) An abridgement of time for service of the Notice of Motion to enable an urgent hearing of this case.

(ix) Such further or other relief as shall seem just.

(x) Costs."

[8] Coghlin J refused the application. The appellant appeals against that decision and the grounds of his appeal are –

"1. The Learned Trial Judge erred in dismissing the Appellant's judicial review;

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');

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;

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."

[9] It was submitted on behalf of the appellant that the Commissioners panel did not conform with Article 6 of the European Convention on Human Rights (the Convention), in that it lacks impartiality, independence and fairness. In particular the admission of the "damaging information" was contrary to Article 6(1) of the Convention and the appellant should have been informed that the original declaration that he was eligible for release, was regarded as a finely balanced one. It was contended that the process before the Commissioners involved the appellant's liberty and his civil rights and therefore Article 6 of the Convention was engaged. It was submitted that Re Adair (Unreported decision Carswell LCJ, as he then was), which Coghlin J followed, was wrongly decided. It was argued that Article 6(3) was engaged. It was not argued that the appellant was charged with a criminal offence or involved in a criminal procedure, but that his liberty was at stake, and thus Article 6(3) provided guidance as to how the process that involved his liberty should be conducted. Although it was accepted that no criminal charge was being considered by the Commissioners, it was submitted that the appellant's liberty was involved and thus Article 5(4) of the Convention was engaged. Furthermore it was contended that the Commissioners interpreted the legislation incorrectly, in placing on the appellant the onus of proving that he was not a danger to the public. Finally it was submitted that the grounds upon which the revocation was made were flimsy.

[10] I have had the opportunity of reading in draft the judgments of Nicholson LJ and McCollum LJ. I agree with their conclusions that neither Article 5 (1) nor Article 5 (4) of the Convention is engaged in this process. As Lord Hope said in R (Giles) v Parole Board 2003 UKHL 42, 2003 3 WLR 736 at paragraph 25, albeit in the context of a determinate sentence – "the general rule is that detention in accordance with a determinate sentence imposed by a court is justified under Article 5 (1) (a) without further need for reviews of detention under Article 5 (3)". In the instant case the appellant was sentenced to several determinate sentences. It seems to me that this applies equally to a life sentence, where the punishment and deterrent element of that sentence has not been served. The relevant words of Article 5 (1) are "in accordance with a procedure prescribed by law" and "after conviction by a

competent court", both of which are fulfilled by the conviction and sentence before the trial judge, which was affirmed on appeal.

[11] I agree also with their conclusion that Article 6 is not engaged. I do not consider that any right to release that the appellant had acquired in domestic law under Section 6 (2) of the 1998 Act, following the grant of the declaration of eligibility, is also a "civil right " protected by Article 6 of the Convention. The European Court has expressed in many different cases its view as to what those words are intended to convey. Those views have not always been consistent as the recent case of Perez v France (App No 47287/99) demonstrates. In Runa Begum v Tower Hamlets London Borough Council 2003 UKHL 5 Lord Hoffman considered the meaning of this phrase and its history in the development of the European Convention. At paragraph 28 he said –

> "The dissenting opinion in *Feldbrugge v Netherlands* (1986) 8 EHRR 425 at 444 (paras 19–21) explains persuasively, by reference to the travaux préparatoires and other background to the convention, that the term 'civil rights and obligations' was originally intended to mean those rights and obligations which, in continental European systems of law, were adjudicated upon by the civil courts. These were, essentially, rights and obligations in private law. The term was not intended to cover administrative decisions which were conventionally subject to review (if at all) by administrative courts. It was not that the draftsmen of the convention did not think it desirable that administrative decisions should be subject to the rule of law. But administrative decision-making raised special problems which meant that it could not be lumped in with the adjudication of private law rights and made subject to the same judicial requirements of independence, publicity and so forth. So the judicial control of administrative action was left for future consideration.
>
> **[29]** In fact there has been no addition to the convention to deal with administrative decisions and the Strasbourg court has been left to develop the law. It has done so in two ways. First, it has been concerned to ensure that state parties do not exploit the gap left in art 6 by changing their law so as to convert a question which would ordinarily be regarded as appropriate for civil adjudication into an

administrative decision outside the reach of the article. It has done this by treating 'civil rights and obligations' as an autonomous concept, not dependent upon the domestic law classification of the right or obligation, which a citizen should have access to a court to determine. Otherwise, as the court said in *Golder v UK* (1975) 1 EHRR 524 at 536 (para 35):

> '… a Contracting State could, without acting in breach of [art 6]. Do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to [the rule of law] and power, would have serious consequences which are repugnant to [the rule of law] and which the Court cannot overlook.'

[30] The second development has been the doctrine, starting with *Ringeisen v Austria* (*No 1*) (1971) 1 EHRR 455, by which the Strasbourg court has extended art 6 to cover a wide range of administrative decision-making on the ground that the decision determines or decisively affects rights or obligations in private law. I traced some of the history of this doctrine in my speech in the *Alconbury Developments* case [2001] 2 All ER 929 at [77]–[88], and need not cover the same ground. More recently the scope of art 6 has also been extended to public law rights, such as entitlement to social security or welfare benefits under publicly funded statutory schemes, on the ground that they closely resemble rights in private law (see *Salesi v Italy* (1998) 26 EHRR 187).

[31] I shall have more to say about these extensions of art 6 when I come to deal with the first issue, but for the moment it is sufficient to note that from an early stage the Strasbourg court has recognised that the extension of art 6 into administrative decision-making has required what I called in the *Alconbury Developments* case [2001] 2 All ER 929 at [84],

'substantial modification of the full judicial model'. The most explicit recognition of the problem was by the Commission in *Kaplan v UK* (1980) 4 EHRR 64 at 90 (para 161), where, after noting the limited scope of judicial review in many contracting states and in the law of the European Union, it said:

> 'An interpretation of Article 6(1) under which it was held to provide a right to a full appeal on the merits of every administrative decision affecting private rights would therefore lead to a result which was inconsistent with the existing, and long-standing, legal position in most of the Contracting States.'

[32] The Commission in *Kaplan v UK* offered what would seem to an English lawyer an elegant solution, which was not to classify the administrative decision as a determination of civil rights or obligations, requiring compliance with art 6, but to treat a dispute on arguable grounds over whether the administrator had acted *lawfully* as concerned with civil rights and obligations, in respect of which the citizen was entitled to access to a fully independent and impartial tribunal. By this means a state party could be prevented from excluding any judicial review of administrative action (as in the Swedish cases which I have mentioned) but the review could be confined to an examination of the legality rather than the merits of the decision.

[33] The Strasbourg court, however, has preferred to approach the matter in a different way. It has said, first, that an administrative decision within the extended scope of art 6 is a determination of civil rights and obligations and therefore prima facie has to be made by an independent tribunal. But, secondly, if the administrator is not independent (as will virtually by definition be the case) it is permissible to consider whether the composite procedure of administrative decision together with a right of appeal to a court is sufficient. Thirdly, it will be sufficient if the appellate (or reviewing) court has 'full jurisdiction' over the administrative decision. And fourthly, as established

> in the landmark case of *Bryan v UK* (1996) 21 EHRR 342, 'full jurisdiction' does not necessarily mean jurisdiction to re-examine the merits of the case but, as I said in the *Alconbury Developments* case [2001] 2 All ER 929 at [87], 'jurisdiction to deal with the case as the nature of the decision requires.'
>
> **[34]** It may be that the effect of *Bryan v UK* is that the Strasbourg court has arrived by the scenic route at the same solution as the Commission advocated in *Kaplan v UK*, namely that administrative action falling within art 6 (and a good deal of administrative action still does not) should be subject to an examination of its legality rather than its merits by an independent and impartial tribunal. Perhaps that is a larger generalisation than the present state of the law will allow. But, looking at the matter as an English lawyer, it seems to me (as it did to the Commission in *Kaplan v UK*) that an extension of the scope of art 6 into administrative decision-making must be linked to a willingness to accept by way of compliance something less than a full review of the administrator's decision.
>
> **[35]** In this way the first and third issues are connected with each other. An English lawyer can view with equanimity the extension of the scope of art 6 because the English conception of the rule of law requires the legality of virtually all governmental decisions affecting the individual to be subject to the scrutiny of the ordinary courts. As Laws LJ pointed out in the Court of Appeal [2002] 2 All ER 668 at [14], all that matters is that the applicant should have a sufficient interest. But this breadth of scope is accompanied by an approach to the grounds of review which requires that regard be had to democratic accountability, efficient administration and the sovereignty of Parliament. As will appear, I think that the Strasbourg jurisprudence gives adequate recognition to all three of these factors."

[12] It is clear that the right under consideration in this case is far removed from what was originally intended by the term "civil rights and obligations" which were adjudicated upon by civil courts. The extent of the Article 6 (1) rights has been the subject of development noticeably in the field of social benefits as well as civil claims for compensation arising from and associated

with criminal proceedings, such as Perez, supra. . In Runa Begum's case it concerned the alleged right to housing accommodation. No specific argument was addressed to the court as to why the right of release following a declaration of eligibility would be a civil right under Article 6. I do not consider Article 6 extends to a right to release under the 1998 Act, of a prisoner recently sentenced to long terms of imprisonment. In relation to the Alconbury question – are the determinations of the Commissioners subject to control by a court having full jurisdiction to deal with the issue as the nature of the determination required – the answer is yes. The appellant had, in addition to his right of appeal under the legislation, access to judicial review, which he has exercised in this case.

[13] As I have concluded that neither Article 5 or Article 6 are engaged I do not need to consider the arguments addressed to the court based on the alleged Convention rights. However from a common law point of view two maters require mention. It was submitted that the Commissioners did not represent an independent and impartial tribunal. I agree with the observations by Girvan J in Re Neil Sheridan and endorsed by this court that the Commissioners represent an independent and impartial body of persons well equipped to perform the functions assigned to them under the 1998 Act. What the 1998 Act requires is a procedure that is fair and which provides a just solution to the issues that it is empowered to determine. It requires to provide justice, not only to the individual prisoners concerned, but also to the community and to afford it the protection it deserves, from persons who have committed serious criminal offences. The second matter relates to the admission of "damaging information " evidence, seen only by the Commissioners and not by the prisoner or his legal representatives. This is a departure from what would normally apply. However, given the nature of the applications to the Commissioners and the issues to which they give rise, I am satisfied that this necessary in order to administer the scheme and protect society and that the availability of special counsel to represent the prisoner is an adequate safeguard in the circumstances. The procedure before the Commissioners and the issues raised are very different from those that may arise in a criminal trial. The ultimate objective is fairness and I am satisfied that this procedure is designed to achieve that in all he circumstances.

[14] The 1998 Act became law as a result of the Belfast Agreement reached between various political parties and the Government, and the government of the Republic of Ireland, on Good Friday 10 April 1998. This was, as counsel on behalf of the Secretary of State described it, a political compromise designed to bring to an end almost 30 years of communal strife and terrorist activity to which this community, regrettably, has been subjected. The nature and purpose of the 1998 in that context are of some significance and relevance.

[15] Section 3 of the 1998 Act makes provision for eligibility for release.

> "(1) A prisoner may apply to Commissioners for a declaration that he is eligible for release in accordance with the provisions of this Act.
>
> (2) Commissioners shall grant the application if (and only if)
>
> (a) the prisoner is serving a sentence of imprisonment for a fixed term in Northern Ireland and the first three of the following four conditions are satisfied, or
>
> (b) the prisoner is serving a sentence of imprisonment for life in Northern Ireland and the following four conditions are satisfied.
>
> (3) The first condition is that the sentence
>
> (a) was passed in Northern Ireland for a qualifying offence, and
>
> (b) is one of imprisonment for life or for a term of at least five years.
>
> (4) The second condition is that the prisoner is not a supporter of a specified organisation.
>
> (5) The third condition is that, if the prisoner were released immediately, he would not be likely
>
> (a) to become a supporter of a specified organisation, or
>
> (b) to become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland.
>
> (6) The fourth condition is that, if the prisoner were released immediately, he would not be a danger to the public.
>
> (7) A qualifying offence is an offence which
>
> (a) was committed before 10 April 1998;

(b) was when committed a schedule offence …

(8) A specified organisation is an organisation specified by order of the Secretary of State and he shall specify any organisation which he believes

(a) is concerned in terrorism connected with the affairs of Northern Ireland or in promoting or encouraging it, and

(b) has not established or is not maintaining a complete and unequivocal ceasefire."

[16] In order to be considered eligible for release a prisoner must apply for a declaration that he is eligible for release in accordance with the provisions of the 1998 Act. In the case of a prisoner serving a sentence of life imprisonment the Commissioners can grant the prisoner's application only if four conditions are satisfied. The fourth condition is that if the prisoner was released immediately he would not be a danger to the public.

[17] Section 4 relates to fixed term prisoners. Section 4(1) provides that if a affixed term prisoner is granted a declaration he has a right to be released on licence on the day on which he has served one-third of his sentence. Section 4(4) provides that if a fixed term prisoner is released on licence his sentence shall expire and the licence lapse at the time when he could have discharged under prison rules.

[18] Section 6 relates to life sentence prisoners and is in these terms.

"(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 subsection (1), 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."

When the Commissioners grant a declaration to a life sentence prisoner he has a right to be released on the day specified by the Commissioners.

Section 8 makes provision for the revocation of a declaration. It is in these terms –

> "(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 that
>
> (a) as the result of 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 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 the result of … 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 them when they granted the declaration suggests that an applicable condition in section 3 is not satisfied."

[19] Section 9 establishes the conditions applicable to release on licence and provides for suspension of that licence by the Secretary of State in defined circumstances. Section 10 makes provision for prisoners granted a declaration of eligibility for release and who qualify for release on an accelerated release day. The appellant was such a prisoner. Section 10 (7) as amended provides that following a declaration of eligibility for release, such a prisoner is not permitted to be released before he has served two years of the sentence to which the declaration of eligibility relates or before the time when an application for revocation of such a declaration has been finally determined. Thus the appellant qualified for release on 28 July 2000. Section 11 requires the Commissioners to give notice of and reasons for refusing an application for a declaration of eligibility or revocation of such a declaration.

[20] Coghlin J decided that as the issue before the Commissioners was one of risk rather than guilt it was neither unfair nor disproportionate to require the appellant to establish on the balance of probabilities that he was not a risk.

[21] It was submitted on behalf of the appellant that placing the onus on the appellant was contrary to the terms of the 1998 Act. The appellant argued that the correct interpretation of section 8 is that the onus lies on the Secretary of State to present any new evidence or information and also to satisfy the Commissioners that the appellant would pose a danger to the public if released. Generally speaking the onus lies on he who makes the assertion.

[22] Proceedings before the Commissioners are regulated by the Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 (the 1998 Rules) made by the Secretary of State in exercise of the powers conferred upon the Secretary of State by of Schedule 2 paragraph 1 to the 1998 Act. Rule 6 provides that the Commissioners may regulate their own procedure in dealing with each case, as they consider appropriate. Rule 7 and Schedule 1 make provision for applications to the Commissioners and the information that should be included in the application. The information should include the grounds on which the application is made and any outline submissions that the applicant wishes to make in support of it. Schedule 3 makes provision for the information and documents to be included in the response papers by the Secretary of State. Part II of Schedule 3 provides that the Secretary of State may submit any information relating to the likelihood of an applicant being a danger to the public if released immediately. Following receipt of the response papers the panel of Commissioners give a preliminary indication in accordance with Rule 14 of the Rules. A preliminary indication is given without a hearing - see Rule 14 (3). Under Rule 14 (4) the preliminary indication shall indicate the substantive determination that the panel are minded to make and a copy of their written decision is served on the parties. Where the preliminary indication is to refuse an application the panel must include a statement of their reasons for the refusal. The parties then have 14 days within which to challenge the preliminary decision. After the preliminary indication has been given the panel shall then make the substantive determination in accordance with Rule 15. Under Rule 15(2), if both parties have indicated that they do not wish to challenge the preliminary indication, the panel shall make the substantive determination it was minded to make, when it gave the preliminary indication. Where either party indicates that he wishes to challenge the preliminary indication the panel shall make the substantive determination pursuant to a substantive hearing in accordance with Part V and in particular in accordance with Rule 19. Part VI makes provision for the reception of evidence and for the non-disclosure of "damaging information" certified by the Secretary of State.

[23] In the instant case a preliminary indication was given, which neither party wished to challenge and the substantive determination then followed. The procedure for applications to revoke under Section 8 (1), is largely the same as for applications under section 3 (1). By Rule 9 (1) an application under section 8 (1) is referred to as a "further application". Rule 9 (2) provides that the Commissioners may only determine a further application if in their view there has been a change in circumstances since the last substantive determination or if reliance is placed on any material information, document or evidence that was not placed before the Commissioners at the last substantive determination. The latter situation applied in the instant case.

[24] In making their preliminary indication that they were minded to make a substantive determination to grant the application for eligibility for release, the Commissioners had to be satisfied that the four conditions, applicable to prisoners serving a sentence of imprisonment for life, were satisfied. The Secretary of State did not oppose the application. It may be inferred from this that the Secretary of State did not include in his response papers any information to suggest, that the appellant was likely to be a danger to the public, if released immediately. Therefore it would appear that the appellant's written application satisfied the Commissioners about the four conditions.

[25] Section 8 empowers the Secretary of State to apply to the commissioners to revoke a declaration under Section 3 (1). The Secretary of State's right to apply for revocation of a declaration is triggered by his belief that one or more of the four conditions that must be satisfied under section 3, is no longer satisfied. That belief might be brought about as a result of an order under section 3 (8) (relating to a specified organisation), by a change in the prisoner's circumstances, or by evidence or information that was not available to the Commissioners when they granted the declaration and which suggests that the condition is not now satisfied. In this instance the decision to apply for revocation was triggered by the belief that evidence or information, which was not available to the Commissioners, suggested that an applicable condition was not now satisfied. The new evidence or information need only suggest to the Secretary of State that the prisoner would be a danger to the public if he were released immediately for an application to revoke to be made, provided the Secretary of State believes that to be so. Under section 8 (2) the Commissioners shall grant the application to revoke if they believe that the new evidence or information suggests that the prisoner would be a danger to the public if he were released immediately. If the new evidence or information does so suggest it is difficult to see how the condition that he is not a danger to the public could be satisfied. The Secretary of State is required to serve on the Commissioners an application to revoke together with the new evidence or information relied on by the Secretary of State. The set of application papers is then served on

the prisoner, the respondent to the application. The respondent (the prisoner) then serves on the Commissioner a set of response papers comprising the information and documents specified in Schedule 2 to the 1998 Rules. Schedule 2 provides that the response should state any outline submissions which the respondent wishes to make, together with any supporting information or documents upon which the respondent wishes to rely, in response to the application.

[26] Does this procedure on an application under section 8 (1) place an onus on the Secretary of State to satisfy the Commissioners that the prisoner would be a danger to the public if released immediately. I do not think so.

[27] The Secretary of State is required to present the new evidence or information to the Commissioners that suggests to him, the Secretary of State, that the condition that the prisoner would not be a danger to the public if released immediately, is not now satisfied. He is not required to satisfy the Commissioners that the prisoner would be a danger if released immediately. If the new evidence or information does not suggest that the condition is not now satisfied then the application fails. If the new evidence or information does suggest or tends to suggest, that the condition is not now satisfied, then the issue is whether the Commissioners believe that the condition is no longer satisfied. In other words the new evidence or information undermines the earlier determination that the prisoner was not a danger to the public if released immediately. Where the information either suggests or tends to suggest that the condition is not now satisfied, then the onus shifts to the prisoner to demonstrate to the Commissioners that they should not believe that to be so, that is that he remains not a danger to the public. The wording of section 8 is unusual. It requires the Commissioners to grant an application to revoke if they <u>believe</u> an applicable condition is not satisfied, and in the case of evidence or information which was not available to them when they granted the declaration of eligibility, if that evidence or information <u>suggests</u> that the condition that the prisoner would not be a danger to the public is not satisfied. It does not seem to me that the use of the word "suggest" throws any onus on the Secretary of State to prove that the condition is not now met or that he would be a danger to the public, if released immediately. Rather the use of the word "believe" in relation to the Commissioners, implies that the prisoner should demonstrate to the Commissioners that they should not believe that the new evidence or information does suggest that the applicable condition in section 3 is not satisfied. It does not imply that the onus lies on the Secretary of State to prove that the Commissioners should believe that the new evidence or information suggests that an applicable condition is not satisfied.

[28] In an application under Article 3(1) the prisoner applies for a declaration that he is eligible for release in accordance with the provisions of the 1998 Act. The Commissioners may grant the application only if the four

conditions are shown to be satisfied. There is clearly an onus on the applicant prisoner to demonstrate that the conditions are satisfied and in particular to demonstrate that the condition that he would not be a danger to the public if he were released immediately, is satisfied. The procedure by which the applicant demonstrates that he would not be a danger to the public if released immediately, is by way of the grounds on which the application is made and his submissions in support of it. The task of the Commissioners is to evaluate the information and submissions together with the response by the Secretary of State and determine whether the conditions are satisfied, in this instance whether the applicant if released immediately would not be a danger to the public. Thus this condition must be fulfilled positively, that is, it must be demonstrated that he would not be a danger to the public, albeit that is a negative.

[29] By their substantive determination the commissioners concluded that the applicant would not be a danger to the public if released. The appellant submits that in order to reverse that conclusion there is an onus on the Secretary of State to prove that the condition is no longer satisfied. An application to revoke a declaration of eligibility under Article 8 can only be granted before the prisoner is released. Thus it is unlike a case in which the Secretary of State has suspended a person's release on licence where he believes that the person concerned has broken or is likely to break a condition imposed by reason of his licence. Under Section 8 the application to revoke the declaration of eligibility arises, inter alia, from the Secretary of State's belief that evidence or information not available to the Commissioners when they granted the declaration suggests that an applicable condition is not now satisfied. In effect an application under Section 8 involves a reconsideration of the prisoners application for a declaration, based on new evidence or information. He has not yet been released. Only a declaration of eligibility for released has been granted and a released date set. The Secretary of State must present the new evidence or information. The prisoner has the right to respond to that new evidence or information in the same way as he would have done had the Secretary of State challenged his original application. Once the Secretary of State satisfies the Commissioners as to the fact of the evidence or information which was not available earlier, and it suggests that the fourth condition is not satisfied, then it is for the prisoners, as earlier, to show that it is satisfied. The fourth condition to be satisfied is that the prisoner, if released immediately, would not be a danger to the public. The Commissioners are concerned with the risk of danger that the prisoner poses to the public. It is risk that the public may be endangered through the activities of the prisoner, in the same way that they were endangered in the commission of the criminal offences that led to the sentence of imprisonment. To qualify for release, the prisoner must not be a danger to the public. If the Secretary of State believes there is new evidence or information which shows that not to be the case, then he is duty bound to present that evidence or information to the commissioners for their

consideration before he is released. The Commissioners must evaluate that evidence or information together with any response from the prisoner. It is not for the Secretary of State to prove that the prisoner is a danger to the public. If that were the case Parliament would have stated this clearly. It is for the Commissioners to decide, having evaluated, all the information, if it has been shown that he is not a danger to the public. If the Commissioners conclude that the condition that he would not be a danger to the public has not been satisfied, then the declaration must be revoked. It must be remembered that the Commissioners are considering the question of danger to the public. Not danger to the public by any person, but danger by a person convicted of murder and sentenced to imprisonment for life. Whether the application is for a declaration or to revoke a declaration the Commissioners are still considering the question whether such a prisoner is a danger to the public. If such a prisoner is to be considered not a danger to the public he must demonstrate that he is not. I do not think it can be demonstrated by anyone else. Once the issue of danger to the public is in question the prisoner concerned must show that he is not a danger to the public. It was suggested by counsel on behalf of the appellant that where the prisoner has already been declared no longer a danger to the public, then any application to revoke that status requires to be proved by the Secretary of State and that the onus rests on him to do so. Until the prisoner is released the question of whether he is a danger to the public remains open to review, inter alia, on the basis of fresh information or evidence. Section 8 is framed in such a way as only to require the Commissioners to consider whether the condition remains satisfied, in the light of the new evidence or information. Once that is disclosed it remains, as in the first instance, for the prisoner to demonstrate that he is still a person who is not a danger to the public.

[30] It seems clear from the nature of the Secretary of States' application under Section 8 and the wording of the Commissioners decision that the revocation was made under Article 8 (2) (b), namely that evidence or information which was not available to the Commissioners when they granted the declaration suggested that an applicable condition was not satisfied. Article 8 (2) (a) applies in two situations. One is where the Secretary of State makes an order specifying a particular organisation which he believes is concerned in terrorism and is not maintaining a ceasefire. The other is where there is a change in the prisoner's circumstances. It was not suggested that either of these situations arose in this case. In paragraph 2 of their decision the Commissioners stated that in order to revoke the declaration they required to be persuaded that in the light of new evidence or information an applicable condition was no longer satisfied. They phrased the question in this way – "are the Commissioners still able to say, if released immediately, the respondent would not be a danger to the public". The new information left them with additional doubt about the respondent's danger to the public, which the evidence of the appellant did not dispel; indeed it had the opposite effect. On both the new information and the evidence of the

appellant the condition that he was not a danger to the public was left unsatisfied. Therefore the declaration required to be revoked.

[31] It is not clear from their decision that the Commissioners followed the advice of the previous Chairman that "it was for the applicant to satisfy the commissioners on the balance of probabilities that the applicable section 3 conditions were still satisfied". In paragraph 2 of their decision they stated that they "required to be persuaded that in the light of the changed circumstances or new evidence or information, an applicable condition is no longer satisfied. They decided that the new evidence or information left them with additional doubt and that the evidence of the applicant did not dispel that doubt – in other words they placed an onus on the appellant and he failed to persuade them. They then went on to say that even on the appellant's case they would not have concluded that the fourth condition was satisfied.

[32] The Commissioners are an independent body of person who include professional members, all of whom are trained to consider applications that may arise under the 1998 Act. One of their principal tasks is to evaluate danger to the public. The appellant challenges the merits of their decision to revoke the declaration of eligibility, principally on the ground that the evidence was "flimsy". It is not for this Court to second guess the judgment of a specialist tribunal - to use the words of Lord Bingham when considering a decision of the Parole Board in R v Parole Board ex parte Watson 1996 2 AER 641 at 650. In judicial review this Court should only intervene where the impugned decision is shown to be irrational or unreasonable in the sense that no rational body properly directing itself could have arrived at the decision. There was information or evidence before the Commissioners to justify the decision that they made. It was a matter for them and it could not be said that it was irrational for them to conclude as they did. I consider that they approached the application correctly and the learned trial judge was not wrong to conclude that it was neither unfair nor disproportionate for the Commissioners to require the appellant to establish that he was not a danger to the public.

[33] I have already concluded that Article 6 of the Convention does not apply to applications to the Sentence Review Commissioners. While that is so any procedure that determines the release or otherwise of prisoners should be demonstrably fair and designed to protect the prisoner as well as to safeguard the public. Such a procedure must also address the exigencies of the situation. The 1998 Act was passed to facilitate the early release of prisoners convicted of very serious criminal offences, some of which were committed a relatively short time before the Belfast Agreement was concluded It was necessary to devise a procedure that protected and reassured the public, as well as achieve the peaceful objective of the Agreement. The situation in a small community like Northern Ireland, with

its history of community division and conflict over many years, required a procedure whereby information could be provided to the Commissioners in private and to which the prisoner would have no access. The procedure for the reception of "damaging information" is in my view neither unfair nor disproportionate in the circumstances. The provision of special counsel to protect the interests of the prisoner concerned is both fair and a sufficient safeguard in these circumstances. I conclude that the learned trial judge was correct in his decision and I would dismiss the appeal.