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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER OF DENNIS DONALDSON, AN APPLICANT FOR BAIL

SHEILJ

[1] This is a second application for bail, bail having been refused by Nicholson LJ on 20 November 2002 in an eleven page judgment following a lengthy hearing. As appears from that judgment the applicant is charged with two offences under section 103 of the Terrorism Act and three offences under section 58 of that Act. Nicholson LJ refused bail stating that while he was satisfied that the applicant will turn up for his trial, he was "satisfied that there are substantial grounds for believing that he may commit offences for the reasons given by the Detective Superintendent (Suitters) and accordingly must refuse him bail".

[2] On 29 November 2002, the applicant requested "a fresh bail hearing, preferably before a differently constituted court." The matter came before me on 2 December 2002 solely by reason of the fact that Nicholson LJ was at that time engaged in a murder trial. At that hearing it was accepted on behalf of the Crown that there was an error of fact in paragraph 10 of the judgment of Nicholson LJ, which reads as follows:

> "The court was told that Mr Donaldson worked as an administrator of Sinn Fein offices at Castle Buildings. The bulk of the original documents, if not all of them, came from Castle Buildings where a Mr Mackessy had also worked until September 2001. The inference which the court was invited to draw was that Mr Mackessy passed on the bulk of photostat copies of the original documents to Mr Donaldson."

This error of fact was in no way the fault of Nicholson LJ who had been given erroneous information at the hearing before him. It is now accepted that Mr

Donaldson worked in Parliament Buildings and not in Castle Buildings where Mr Mackessy worked, although both buildings are in the same Stormont Estate. I referred the matter back to Nicholson LJ in order to ascertain if the correction of that fact and the inference drawn therefrom would have made any difference to his decision to refuse bail. On 10 December 2002 Nicholson LJ sat to deal with that one point. He stated that the correction of that fact would have made no difference to his decision to refuse bail to the applicant. The matter then came back before me on 13 December 2002.

[3] At the outset of the hearing I queried whether the applicant had a right of appeal to the Court of Appeal by reason of section 35(2)(a) and (g)(i) of the Judicature (Northern Ireland) Act 1978. Mr Morgan QC, who appeared for the Crown, submitted that there was no right of appeal to the Court of Appeal; Mr Treacy QC, who appeared on behalf of the applicant, agreed. Accordingly, the matter now comes before me in the form of a second application for bail, the grounds for which are set out in a document dated 21 November 2002 entitled "Grounds for fresh bail application".

[4] In what circumstances may an applicant, who has been refused bail, make a further application for bail to the High Court? The leading decision on this point, which regrettably is not reported in the Law Reports, is the decision of Hutton LCJ on 25 January 1993 In the Matter of an Application by Michael Hugh Beck and Others. As appears from the judgment of Hutton LCJ, the applicants had applied for bail to a judge of the High Court, Carswell J, on 22 December 1992, which applications were refused. The applicants renewed their applications on the following day, 23 December 1992, before a different judge of the High Court, Campbell J, who refused the applications on the ground he should not hear further applications which were, in effect, appeals from the decision of Carswell J. The applicants then brought further applications which gave rise, "to the important question whether, when bail has been refused by one High Court judge and there has been no material change in the circumstances, another High Court judge should consider the matter afresh and decide whether bail should be granted without regard to the earlier decision of the other judge."

Hutton LCJ dealt with this question at page 3 of his judgment as follows:

> "I consider that there is a clear rule of law established by a number of authorities that, where there has been no material change in circumstances, a judge cannot disregard an earlier refusal of bail but is bound by it and should not embark on a fresh hearing into the merits. It is therefore clear that the practice followed by the judges in this jurisdiction is not a matter of policy, but is grounded on a firm and valid principle of law which should be followed.

In R v Nottingham Justices, ex-parte Davies [1981] 1 QB 38 bail had been refused by the Justices. On a subsequent application the Justices refused to consider matters previously before the court unless there had been a change in the circumstances. The headnote reads:

> 'On an application for on Order for Mandamus directed to the Justices requiring them to hear the full facts supporting and determine the application for bail: -
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> HELD, refusing the application, that although the court had a duty under section 4 of the Act to consider granting bail on every application, a previous refusal of bail by a court was a finding that the court was satisfied that one or more of the exceptions in Schedule 1 to the granting of bail existed and as such the matter was res judicata or analogous thereto, unless that finding was reversed on appeal to the judge in Chambers; that, accordingly, Justices considering the renewed application for bail had no duty to reconsider matters previously considered but should confine themselves to circumstances which had since occurred or to matters not brought to the attention of the court on the previous occasion.'

At 43H Donaldson LJ stated:

> 'I accept that the fact that a Bench of the same or a different constitution has decided on a previous occasion or occasions that one or more of the Schedule 1 exceptions applies and has accordingly remanded the accused in custody, does not absolve the Bench on each subsequent occasion from considering whether the accused is entitled to bail, whether or not an application is made.
>
> However, this does not mean that the Justices should ignore their own previous

> decision or a previous decision of their colleagues. Far from it. On those previous occasions, the court will have been under an obligation to grant bail unless it was satisfied that a Schedule 1 exception was made out. If it was so satisfied, it will have recorded the exceptions which in its judgment were applicable. This "satisfaction" is not a personal intellectual conclusion by each Justice. It is a finding by the court that Schedule 1 circumstances then existed and is to be treated like every other finding of the court. It is res judicata or analogous thereto. It stands as a finding unless and until it is overturned on appeal. Appeal is not to the same court, whether or not of the same constitution, on a later occasion. It is to the judge in chambers. It follows that on the next occasion when bail is considered the court should treat, as an essential fact, that at the time when the matter of bail was last considered, Schedule 1 circumstances did indeed exist. Strictly speaking, they can and only should investigate whether that situation has changed since then.'
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> It is relevant to note that the House of Lords dismissed an application for leave to appeal against this decision."

Hutton LCJ then referred to a number of other cases which are set out in his judgment before refusing the applications for bail stating, "I am satisfied that, as there has been no material change in the circumstances, I should not reconsider the matter adjudicated upon by Carswell J."

[5] I, for my part, refer to one other passage from the judgment of Donaldson LJ in R v Nottingham Justices, ex-parte Davies, at page 44E:

> "But the starting point must always be the finding of the position when the matter was last considered by the court. I would inject only one qualification to the general rule that Justices can and should only investigate whether the situation has changed since the last remand in custody. The finding on that occasion that Schedule 1 circumstances existed will have been based upon matters known to the court at that time. The court considering a

> fresh question of bail, is both entitled and bound to take account not only of a change in circumstances which has occurred since that last occasion, but also of circumstances which, although they then existed, were not brought to the attention of the court. To do so is not to impugn the previous decision of the court and it is necessary in justice to the accused. The question is a little wider than 'has there been a change?' It is 'are there any new considerations which were not before the court when the accused was last remanded in custody?'"

[6] The decision in R v Nottingham Justices, ex-parte Davies and the decision in of Hutton LCJ The Matter of Beck and Others pre-dated the introduction into domestic law of the European Convention on Human Rights by the Human Rights Act 1998, which came into force on 2 October 2000. When this bail application was first before Nicholson LJ in November, Mr Treacy made various submissions under Article 5 (right to liberty and security) and Article 6 (right to a fair trial), as appears from the Skeleton Argument dated 18 November 2002 submitted by him at that time. Nicholson LJ, as appears from his judgment, took those submissions into account when reaching his decision to refuse bail to the applicant. He was referred, among others, to the decision of the European Court of Human Rights in Lamy v Belgium 11 EHRR 529 where the court held that failure to disclose or grant access to the prosecution file in the first 30 days of detention effectively prevented the defendant from challenging the reasons relied on to remand them in custody and that the procedure failed to ensure equality of arms and accordingly breached Article 5.4 of the Convention.

[7] With regard to other decisions on bail in this jurisdiction, I refer to the decision of Campbell LJ in Re Dienly [2000] NIJB 232 and the decision of Girvan J in Shaw's Application for Bail [2002] NIJB 147. I also refer to the decision of McCollum LJ in Re Maguaid's Application [2000] NIJB 282 at 286g where he stated:

> "At this stage the prosecution does not have to prove the guilt of the accused. Its duty is to establish sufficient facts to show the existence of reasonable suspicion that the applicant has committed the offence in question together with such circumstances which would provide justification for his or her being detained in custody."

In each of the aforementioned three cases, the court had to consider Article 5 of the European Convention, but they all pre-dated the decision of the European Court of Human Rights in Garcia Alva v Germany, to which I now refer.

[8] Prior to the matter coming back before me on 13 December, Mr Morgan QC, who had not appeared on behalf of the Crown when the matter was first before Nicholson LJ, drew Mr Treacy's attention to two decisions of The European Court of

Human Rights, Garcia Alva v Germany 13 February 2001 and Lanz v Austria 30 April 2002, which decisions had not been drawn to the attention of Nicholson LJ when the matter was first before him.

[9] In the course of the hearing before Nicholson LJ, Detective Superintendent Suitters gave evidence in support of the submission made by Crown Counsel that it was believed that the applicant was an active member of the Headquarters Intelligence Unit of the Provisional IRA involved in collating military intelligence. At present the applicant is not charged with membership of the Provisional IRA or any other unlawful organisation. At that hearing it was apparent that Detective Superintendent Suitters was reading from a document which Mr Treacy requested to see but the witness claimed privilege from disclosure of that document. Nicholson LJ himself inspected that document, which apparently was an intelligence briefing, and upheld the claim of privilege from disclosure. Accordingly, neither counsel for the applicant nor counsel for the Crown saw the contents thereof and that remains the position at present. At the hearing before me I asked counsel whether they wished me to inspect that document but both stated that they did not wish me to do so.

[10] Nicholson LJ, before refusing bail on the ground that he was satisfied that there were substantial grounds for believing that the applicant may commit further offences for the reasons given by Detective Superintendent Suitters, stated with regard to his evidence:

> "But I am faced with the evidence of Detective Superintendent Suitters. I recognise that because it is based on hearsay it is virtually impossible to challenge and I have to consider his bona fides of the intelligence sources untested by cross-examination."

[11] In Labita v Italy, 6th April 2000, the European Court stated in the course of its judgment at para 152:

> "Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty."

With regard to the fact that the applicant has not to date been charged with membership of the Provisional IRA or of any unlawful organisation I refer to paragraph 155 of the same judgment:

> "As regards 'reasonable suspicion', the court reiterates that the fact that an applicant has not been charged or brought before a court does not necessarily mean that the purpose of his detention was not in accordance with Article 5.1(c). The existence of such a purpose must be considered independently of its achievement and sub-paragraph (c) of Article 5.1 does not presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicant was in custody."

[12] In Garcia Alva v Germany the applicant, who was charged with drug trafficking, invoked Article 5.4 of the Convention, complaining that in proceedings for the review of his detention on remand, his counsel had no access to the criminal files. Article 5.4 of the Convention reads as follows:

> "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 ordered if the detention is not lawful."

In March 1993, when questioned as a witness in connection with other investigation proceedings, a Mr K, who had been convicted of drug trafficking in 1992 and sentenced to 12 years imprisonment, outlined his drug trafficking activities in Germany since 1991 and implicated several persons involved therein, including the applicant. The applicant was then arrested and questioned. He denied the accusations made by Mr K. The applicant's defence counsel applied to the Berlin Public Prosecutor's Office for access to the criminal files. The Prosecutor's Office supplied the defence counsel with some documents but refused access to others on the ground that to do so would endanger the purpose of the ongoing investigations into the drug trafficking. These other documents included a record of Mr K's questioning by the police, which was the basis of the strong suspicion that the applicant had committed the offences mentioned in the arrest warrant and was also involved in organised crime relating to drug trafficking. Later the applicant's counsel was given copies of the records of the police questioning of Mr K to the extent that they related to the applicant but other passages had been blacked out. Counsel requested full access to the files as the copies sent to him were not comprehensible by reason of the blacked out passages. He was then granted full access to the file. The applicant was subsequently convicted of aiding and abetting drug trafficking but he maintained his complaint about the earlier proceedings for the review of his detention on remand, when he had been refused access to some of the documents, in particular the record of K's questioning. The court unanimously held that there had been a violation of Article 5.4 of the Convention, stating at paragraph 39:

"The court recalls that arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the `lawfulness', in the sense of the Convention, of their deprivation of liberty. This means that the competent court has to examine `not only compliance with the procedural requirements set out in domestic law but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention'.

A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure `equality of arms' between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention. In the case of a person whose detention falls within the ambit of Article 5.1(c), a hearing is required (see, among other authorities, the Lamy v Belgium judgment of 30 March 1989, series A number 151, pp 16-17:29 and the Nikolova v Bulgaria [GC], No 31195/96, :58, ECHR 1999 – 11).

These requirements are derived from the right to an adversarial trial as laid down in Article 6 of the Convention, which means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. According to the court's case law, it follows from the wording of Article 6 – particularly from the autonomous meaning to be given to the notion of `criminal charge' – that this provision has some application to pre-trial proceedings (see the Imbrioscia v Switzerland judgment of 24 November 1993, series A No 275, page 13, :36). It thus follows that, in view of the dramatic impact of deprivation of liberty and the fundamental rights of the person concerned, proceedings conducted under Article 5.4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure. While national law may satisfy

this requirement in various ways, whatever method is chosen should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment thereon (see, mutati mutandis, the Brandstetter v Austria judgment of 28 August 1991, series A No 211, page 27, :67).

In the present case, the applicant was, upon his arrest, informed in general terms of the grounds for suspicion and of the evidence against him, as well as the grounds for his detention. Upon counsel's request, copies of the applicant's statements to the police authorities and the detention judge, of the record of the search of the applicant's premises, as well as of the arrest warrant against him were made available to the defence, but at that stage, the Public Prosecutor's Office dismissed counsel's request for consultation of the investigation files, and in particular of the depositions made by Mr K, on the ground that consultation of these documents would endanger the purpose of the investigations.

The Berlin-Tiergarten District Court, for its part, reached its conclusion that there was a strong suspicion that the applicant had committed the offences in question on the basis of the contents of the investigation file – including, to a large extent, Mr K's statements – and the parties' submissions. In June and July 1993 the applicant's respective appeals were dismissed by the Berlin Regional Court and the Berlin Court of Appeal, which also had a copy of the files at their disposal.

The contents of the investigation file, and in particular the statements of Mr K, thus appear to have played a key role in the District Court's decision to prolong the applicant's detention on remand. However, while the Public Prosecutor and the District Court were familiar with them, their precise content had not at that stage been brought to the applicants or his counsel's knowledge. As a consequence, neither of them had an opportunity adequately to challenge the findings referred to by the Public Prosecutor and the District Court, notably by questioning the reliability or conclusiveness of the statements made by Mr K, who had a previous conviction and was the subject of another set of investigations for drug trafficking.

It is true that, as the Government point out, the arrest warrant gave some details about the facts grounding the suspicion against the applicant. However the information provided in this way was only an account of the facts as construed by the District Court on the basis of all the information made available to it by the Public Prosecutor's Office. In the court's opinion, it is hardly possible for an accused to challenge the reliability of such an account properly without being made aware of the evidence on which it is based. This requires that the accused be given a sufficient opportunity to take cognisance of statements and the other pieces of evidence underlying them, such as the result of the police and other investigations, irrespective of whether the accused is able to provide any indication as to the relevance for his defence of the pieces of evidence which he seeks to be given access to.

The court is aware that the Public Prosecutor denied the requested access to the file documents on the basis of Articles 147:2 of the Code of Criminal Procedure, arguing that to act otherwise would entail the risk of compromising the success of the ongoing investigations, which were said to be very complex and to involve a large number of other suspects.

The court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer.

In these circumstances, and given the importance in the Berlin Court's reasoning of the contents of the investigation file, and in particular of the statements made by Mr K, which could not be adequately challenged by the applicant, since they were not communicated to him, the procedure before the said courts, which reviewed the lawfulness of the applicant's detention on

> remand, did not comply with the guarantees afforded by Article 5.4. This provision has therefore been violated."

[13] In the later case of Lanz v Austria the court, in rather similar circumstances, again held unanimously that there had been a violation of Article 5.4 of the Convention. The court referred to its earlier decision in Garcia Alva v Germany and went on to state at paragraph 44:

> "But even if it is not always necessary that the procedure under Article 5.4 be attended by the same guarantees as those required by Article 6.1 of the Convention for criminal litigation, they have to be `truly adversarial' and must always ensure equality of arms between the parties (Grauzinis v Lithuania)."

[14] In Doorson v Netherlands (1996) 22 EHRR 330 the applicant was convicted on his trial for drug trafficking on the evidence of witnesses, two of whom, who remained anonymous as witnesses Y15 and Y16, identified him from his photograph. These two witnesses had not been heard in his presence and he had not had an opportunity to question them. He complained that the taking of, hearing of and reliance on that evidence violated Article 6(1) and (3)(d) of the Convention. The court held by seven votes to two that there had been no violation of Article 6(1) taken together with Article 6(3)(d) of the Convention. Article 6(3)(d) of the Convention reads as follows:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

In the majority judgment the court stated at paragraph 69 (page 358):

> "As the court has held on previous occasions, the Convention does not preclude reliance, at the investigation stage on sources such as anonymous informants. The subsequent use of their statements by the trial court to found a conviction is however capable of raising issues under the Convention.
>
> As was already implicit in paragraphs 42 and 43 of the abovementioned Kostovski judgment such use is not under all circumstances incompatible with the Convention.

It is true that Article 6 does not explicitly require the interests of witnesses in general, and those victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that contracting states should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of the witnesses or victims called upon to testify.

As the Amsterdam Court of Appeal made clear its decision not to disclose the identity of Y15 and Y16 to the defence was inspired by the need, as assessed by it, to obtain evidence from them while at the same time protecting them against the possibility of reprisals by the applicant. This is certainly a relevant reason to allow them anonymity. It remains to be seen whether it was sufficient.

Although, as the applicant has stated, there has been no suggestion that Y15 and Y16 were threatened by the applicant himself, the decision to maintain their anonymity cannot be regarded as unreasonable per se. Regard must be had to the fact, as established by the domestic courts and not contested by the applicant, that drug dealers frequently resorted to threats or actual violence against persons who gave evidence against them. Furthermore, the statements made by the witnesses concerned to the investigating judge showed that one of them had apparently on a previous occasion suffered violence at the hands of a drug dealer against whom he had testified, while the other had been threatened.

In sum, there was sufficient reason for maintaining the anonymity of Y15 and Y16.

The maintenance of the anonymity of the witnesses Y15 and Y16 presented the defence with difficulties which criminal proceedings should not normally involve. Nevertheless, no violation of Article 6(1) taken together

> with Article 6(3)(d) of the Convention can be found if it is established that the handicaps under which the defence laboured were sufficiently counter balanced by the procedures followed by the judicial authorities.
>
> In the instant case the anonymous witnesses were questioned at the appeals stage in the presence of counsel by an investigating judge who was aware of their identity, even if the defence was not."

[15] In R (DPP) v Havering Magistrates Court [2001] 3 All ER 997, a divisional court had to consider whether Article 5 of the Convention required oral evidence or some other admissible evidence to prove the breach of bail conditions and whether such proof had to be on the criminal standard. It is to be noted that this decision pre-dated the decision of the European Court of Human Rights in the Garcia and Lanz cases. Latham LJ, delivering the judgment of the court, stated at page 1007 (paragraph 27):

> "Article 5 therefore requires there to be in place a judicial procedure which not only meets the criterion of being in accordance with law, but which also provides the basic protection for a defendant inherent in the concept of judicial proceedings. Such proceedings must ensure equal treatment of the person liable to be detained and the authorities, it must be truly adversarial, and there must be `equality of arms' between the parties. These concepts inevitably overlap. In language more familiar to common lawyers, a person liable to detention is entitled to natural justice. He must be treated fairly."

[16] At paragraph 34 (page 1008) the judgment continued:

> "It seems to me that care needs to be taken to ensure that the facts and decisions in given cases do not hide the principle purpose behind the provisions of Article 5. It is to ensure that persons are not subject to arbitrary deprivation of liberty. That is clear, not only from the cases to which I have already referred, but also from the decision of the court in Kemmache v France (No 3) (1994) 19 EHRR 349. The court said (at 363-364 (para 37)):
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> > 'The court reiterates the words "in accordance with a procedure prescribed by law" essentially refer to domestic law; they state the need for compliance with the relevant procedure under that law. However, the domestic law must itself be in

> conformity with the convention, including the general principles expressed or implied therein. The notion underlying the term in question is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary.'
>
> It is clearly with this principle in mind that the court has been prepared to borrow some of the general concepts of fairness in judicial proceedings from Article 6. But that does not mean that the process required for conformity with Article 5 must also be in conformity with Article 6. That would conflate the Convention's control over two separate sets of proceedings, which have different objects. Article 5, in the present context, is concerned to ensure that the detention of an accused person before trial is only justified by proper considerations relating to the risk of absconding, and of interfering with witnesses, or the commission of other crimes. Article 6 is concerned with the process of determining the guilt or otherwise of a person who if found guilty would be subject to criminal penalties. It is in that context that the procedural safeguards required respectively under Articles 5 and 6 must be viewed.

[17] I consider that where, as in the present, an applicant who has been refused bail applies again to the bail court on the basis of change in circumstances, or new considerations whether of fact or law which were not before the court on the previous occasion, it is preferable that in term time the application should be heard, where reasonably convenient, by the same judge who heard the original application refusing bail. That would avoid the necessity which arose in the present case of my having to refer the matter back to Nicholson LJ with reference to the misstatement of fact referred to earlier in the course of this judgment. It would also avoid the problem which arose to some extent in the present case as to what were the facts, law, circumstances and considerations placed before the judge at the first hearing.

[18] In Blackstones Criminal Practice 2003 at para D5.36 (D) the learned authors state that "the identifying of a new consideration relevant to bail should entitle the accused to make a further full bail application in which both the fresh and the old arguments may be relied on." I do not agree with that as a general proposition. This is particularly so where the matter comes back before the same judge, who initially refused bail but who accepts that there are changed circumstances or new considerations which were not before the court on the previous occasion. It will only be necessary in that situation for the judge to refer back to his earlier notes. If the renewed application for bail comes back before a different judge, which in my

opinion should be avoided unless it causes inconvenience, it will depend upon the circumstances of the particular application and the discretion of the judge as to what extent, if at all, the earlier facts law and arguments should be re-opened to him. The court should not entertain what is in reality an attempt to appeal the earlier decision of the court under the guise of alleged change of circumstances or new considerations.

[19] Having regard to the fact that the decision of the European Court of Human Rights in Garcia Alva v Germany and the later decision in Lanz v Austria were not before Nicholson LJ when he considered the matter, I hold that that is a new consideration which empowers the court properly to entertain this further application for bail, particularly having regard to the heavy reliance placed by Nicholson LJ on the evidence of Detective Superintendent Suitters and the apparent reliance of Nicholson LJ on the contents of the security document which he read but which was not disclosed to the defence. In the concluding paragraphs of his written reasons for refusing bail Nicholson LJ stated at paragraphs 56-57:

> "But I am faced with the evidence of Detective Superintendent Suitters. I recognise that because it is based on hearsay it is virtually impossible to challenge and I have to consider his bona fides and the bona fides of intelligence sources untested by cross-examination.
>
> Despite everything that Mr Treacy has urged upon me I am satisfied that there are substantial grounds for believing that he may commit offences for the reasons given by the Detective Superintendent and accordingly must refuse him bail."

[20] In the light of the decision of the European Court of Human Rights in Garcia Alva v Germany, I consider that reliance upon the evidence of Detective Superintendent Suitters, in so far as he relied on the contents of the document disclosure of which was denied to the defence, is not compatible with the applicant's rights under Article 5.4 of the Convention. I do not consider that the fact that Nicholson LJ read the contents of the document, valuable though that safeguard was, is sufficient to satisfy the requirements of Article 5.4 in the present case. If the Crown intends to rely on intelligence material in a bail application and the defence seeks disclosure thereof, that material now has to be disclosed to the defence in the light of the Strasbourg jurisprudence to which I have referred. The material may however be edited so as not to disclose directly or indirectly the identity of informants, in accordance with the decision in Doorson v The Netherlands, or other sensitive material upon which no reliance is being placed by the Crown in the bail application. In the event of a dispute as to disclosure, or the extent thereof, the judge will play an important role in ensuring equality of arms and fairness as between the parties.

[21] While it is preferable for the reasons mentioned earlier in the course of this judgment, that this matter should now be referred back to Nicholson LJ for him to reconsider in the light of the new considerations to which I have referred, having regard to the fact that I have already done so once and that the matter is now back again before me and as I understand that Nicholson LJ agrees to my entertaining this application, I now proceed to do so.

[22] The terrorism charges laid against the applicant are very serious. The battle against terrorism goes on and I fully appreciate the consequences of this decision for that battle. It has been made clear however by the European Court on a number of occasions that the seriousness of an offence is not in itself a reason for refusing bail. The first and most important starting point for all pre-trial remand decisions is the presumption of innocence. Where there is a prima facie case against an applicant for bail, as exists in the present case, acceptable reasons for refusing bail fall into four categories as stated by Lester and Panick in Human Rights Law and Practice, pages 123-124:

1. The risk that the accused will fail to appear for trial,
2. Interference with the course of justice,
3. Prevention of further offences,
4. The preservation of public order.

[23] I do not consider that it is necessary for me to rehear all the facts which were placed before Nicholson LJ when the matter came before him. They are set out in his lengthy judgment. The sole ground upon which Nicholson LJ refused bail was that he was satisfied that there were substantial grounds for believing that the applicant may commit further offences for the reasons given by Detective Superintendent Suitters. As already stated I consider that reliance upon the evidence of Detective Superintendent Suitters, insofar as he relied on the contents of the intelligence document disclosure of which was denied to the defence, is not compatible with the applicants rights under Article 5.4 of the Convention and cannot be relied on by this court as a ground for refusing him bail. At paragraphs 54-55 of his judgment, Nicholson LJ had stated:

> "I am satisfied that the applicant will turn up for his trial, if I were to grant him bail. Everything I have read about him from his family and others convinces me that he will do so. I am also satisfied that he has worked hard for the Peace Process as the evidence of many impeccable sources record."

[24] I consider that with appropriate conditions attached to bail the risk of the applicant committing further offences will be prevented.

[25] I admit him to bail himself in the sum of £1000.00 and two sureties of £5000.00 each. Conditions of the bail are:

1. He is to reside at

2. He is to report daily, save on Christmas Day, to his local police station at

3. He is to surrender any passports which he now possesses and he is to make no application for any new passport of any kind whatsoever.

4. He does not enter the Stormont Estate or any building therein.

5. He does not have any contact or communication by any means whatsoever with any person working in the Stormont estate or in the general Government of Northern Ireland.

6. He is to have no contact by any means whatsoever with any of his co-accused, save for his court appearances and then only for the duration of those court appearances.

7. He does not leave Northern Ireland, without the prior leave of this court.