HOUSE OF LORDS SESSION 2005–06
[2005] UKHL 46

on appeal from: [2004] NICA 14

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

In re McClean (Original Respondent and Cross-appellant) (On Appeal from the Court of Appeal Northern Ireland) (Northern Ireland)

Appellate Committee

Lord Bingham of Cornhill
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Carswell
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
John Larkin QC
Barry Torrens
(Instructed by Field Fisher Waterhouse, agents for Cleaver Fulton Rankin)

Respondents:
Seamus Treacy QC
Karen Quinlivan
(Instructed by Arthur Downey & Co)

Intervener
Secretary of State for Northern Ireland
Bernard McCloskey QC
Piers Grant
(Instructed by Treasury Solicitor)

Hearing dates:
16, 17 and 18 May 2005

ON
THURSDAY 7 JULY 2005

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

In re McClean (Original Respondent and Cross-appellant) (On Appeal from the Court of Appeal Northern Ireland) (Northern Ireland)

[2005] UKHL 46

LORD BINGHAM OF CORNHILL

My Lords,

1. Before the House are an appeal and a cross-appeal. Both raise questions as to the procedure adopted in revoking a declaration previously made in favour of Mr McClean as a life-sentence prisoner under the Northern Ireland (Sentences) Act 1998. They are important questions, bearing on the freedom of the prisoner and the safety of the community in Northern Ireland.

The legislation

2. The Belfast (or Good Friday) Agreement reached at multi-party talks on Northern Ireland and signed on 10 April 1998 (Cm 3883) had as its political objective to break the cycle of political and sectarian violence which had disfigured the life of the province over a number of years. To that end the Governments of the United Kingdom and Ireland agreed, among other things, to put in place mechanisms for an accelerated programme for the release of prisoners convicted of offences scheduled under the Northern Ireland (Emergency Provisions) Acts 1973, 1978, 1991 or 1996 as, very broadly, offences motivated by political or sectarian considerations. But prisoners affiliated to organisations which had not established or were not maintaining a complete and unequivocal ceasefire were not to benefit from the accelerated release arrangements. The situation in this regard was to be kept under review. Both Governments agreed to complete a review process within a fixed time frame and to set prospective release dates for all prisoners qualifying for release. The review process would provide

for the advance of the release dates of qualifying prisoners while allowing account to be taken of the seriousness of the offences for which the prisoners had been convicted and the need to protect the community. It was the parties' intention that, should the circumstances allow it, any qualifying prisoners who remained in custody two years after the commencement of the scheme should be released at that point. Both Governments would seek to enact appropriate legislation to give effect to these arrangements by the end of June 1998. It seems plain that the intention was to promote reconciliation by early release of prisoners who had committed offences motivated by political or sectarian considerations but who were now willing to renounce violence.

3. Her Majesty's Government honoured its legislative undertaking by introducing what became the Northern Ireland (Sentences) Act 1998, which received the royal assent on 28 July 1998 and was brought into force on the same day. The key feature in the enacted scheme, provided for in section 3(1), is a declaration that a prisoner is eligible for release in accordance with the provisions of the Act. Such a declaration may be made in respect of a prisoner serving a life sentence or a determinate sentence of at least five years, but for present purposes no account need be taken of the latter. In the case of a life sentence prisoner a declaration may be made only if four conditions are satisfied. The first is that the sentence should have been passed in Northern Ireland for an offence committed before 10 April 1998 (the date of the Belfast Agreement), that the offence when committed should have been scheduled under one of the Emergency Provisions Acts already mentioned and that the offence in question should not have been, in effect, excluded from the relevant schedule by certificate of the Attorney General: that, in summary, is the effect of section 3(3) and (7). The second condition is that the prisoner should not be a supporter of an organisation specified by order of the Secretary of State as concerned in terrorism connected with the affairs of Northern Ireland, or promoting or encouraging it, and which has not established or is not maintaining a complete and unequivocal ceasefire: that is the effect of section 3(4) and (8). The third condition, closely linked with the second, is that if the prisoner were released immediately he would not be likely to become a supporter of a specified organisation or to become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland: section 3(5). The fourth condition, mostly directly in issue in this case and applicable only to life sentence prisoners, is that if the prisoner were released immediately he would not be a danger to the public: section 3(6).

4. A declaration under section 3 in the case of a life sentence prisoner must, by section 6 of the Act, specify a day which is believed to mark the completion of about two thirds of the period which the prisoner would have been likely to spend in prison under the sentence. The prisoner is then entitled to be released on licence, subject to conditions, on or about the date so specified or the date of the declaration, whichever is earlier: section 6(2) and (3), section 4(3) and section 9. But section 10 introduces a very important feature of the Act and of the present case: "the accelerated release day". Where, as in the present case, a sentence was passed after the date on which the Act came into force (28 July 1998) and is to be treated under section 26 of the Treatment of Offenders Act (Northern Ireland) 1968 as reduced by a period of custody beginning before 28 July 1998, the accelerated release day is the second anniversary of that date, 28 July 2000: section 10(5). The prisoner has "a right to be released" on the accelerated release day: section 10(2).

5. The administration of this important and, in a literal sense, extraordinary scheme is entrusted to a body of Sentence Review Commissioners to be appointed by the Secretary of State under section 1 of the Act, chosen (section 1(3)) as commanding widespread acceptance throughout the community in Northern Ireland and including among their number, so far as practicable, members with psychiatric or psychological as well as legal experience (section 1(2)). It is to them that a prisoner may apply under section 3 for a declaration of eligibility for release, and section 3(2) provides that, in the case of a life sentence prisoner, the Commissioners "shall grant the application if (and only if)" the four conditions noted in paragraph 3 above "are satisfied". It is the Commissioners who, in granting a declaration to a life prisoner, must specify (under section 6(1)) the day which "they believe" marks the completion of about two thirds of the period which the prisoner would ordinarily have been likely to serve. By contrast, the operation of the accelerated release provisions in section 10 takes effect automatically and calls for no further declaration or action by the Commissioners.

6. The Secretary of State's duty to appoint the Commissioners has already been noted, and he has an important power to make rules governing the Commissioners' procedure under Schedule 2 to the Act, referred to below. He also has power, under section 9(2), to suspend a licence on which a life sentence prisoner has been or is to be released under section 6 "if he believes the person concerned has broken or is likely to break" a condition of his licence. The consequence (section 9(3)) is that the person shall be detained in pursuance of his sentence, or be deemed unlawfully at large, and the Commissioners must consider

his case. On considering the case the Commissioners must confirm the licence if they think the person has not broken and is not likely to break a licence condition, but otherwise they must revoke the licence: section 9(4). On confirmation, the person's right to be released in effect revives, and if he is at large he has (so far as the relevant sentence is concerned) a right to remain at large: section 9(5).

7. It is section 8 which lies at the heart of this appeal. Section 8(1) requires the Secretary of State to apply ("shall apply") to the Commissioners to revoke a declaration under section 3(1) if, at any time before a prisoner is released under section 6, the Secretary of State believes

> "(a) that as a result of an order under section 3(8) [specifying an organisation as promoting terrorism or not observing a complete ceasefire], or a change in the prisoner's circumstances, an applicable condition in section 3 is not satisfied, or
>
> (b) that evidence or information which was not available to the Commissioners when they granted the declaration suggests that an applicable condition in section 3 is not satisfied."

Section 8(2) imposes an exactly corresponding duty on the Commissioners, who are required to grant an application under this section "if (and only if) the prisoner has not been released under section …6" and they share the Secretary of State's belief as to (a) or (b). Section 11(3) of the Act requires the Commissioners, if they revoke a declaration under section 8, to give notice of the revocation and the reasons for it to the prisoner and to the Secretary of State.

The facts

8. On the evening of 3 March 1998 (just over a month before the Belfast Agreement) there were eight customers in the public bar of the Railway Bar, Poyntzpass, County Down, when two masked gunmen burst in and ordered those present to lie down, which they did. When the occupants were in a position of complete vulnerability the gunmen opened fire, intending (on the finding of Kerr J, the trial judge) to kill as many people as possible, irrespective of their age or gender. The interior of the bar was sprayed with bullets. It seems that the gunmen

mistakenly believed that all the customers were Catholic. Two of those present sustained fatal injuries. Two more sustained serious injuries but survived.

9. The respondent, Mr McClean, was arrested on 12 March 1998, charged and tried on an indictment containing two counts of murder, two counts of attempted murder and one count of possessing a firearm and ammunition with intent to endanger life, all based on this incident at Poyntzpass. For reasons given in a judgment delivered on 2 February 2000 Kerr J convicted Mr McClean on all five counts. The judge was satisfied that he was either one of the masked gunmen or actively assisted the gunmen in their murderous enterprise in full knowledge of their intent. Passing sentence of life imprisonment for each of the murders and concurrent sentences of 20 years' imprisonment for each of the attempted murders and 15 years' for the firearms offence, the judge said that these crimes would "live in infamy as being among the most heinous offences in the history of Northern Ireland".

10. On 3 February 2000, the day following these convictions, Mr McClean applied to the Commissioners under section 3 of the Act for a declaration that he was eligible for release in accordance with the provisions of the Act. The Secretary of State, as required by the Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 (SI 1998/1859) made by her under Schedule 2 to the Act on 30 July 1998, served a response comprising information and documents prescribed by the Rules. The Commissioners were then required by the Rules, on consideration of the papers alone, to give a preliminary indication whether they were provisionally minded to grant or refuse the application. On 14 April 2000 the Commissioners gave a preliminary indication that they were minded to grant the application. It was open to the Secretary of State under the Rules to challenge this preliminary indication, but on 28 April 2000 he gave notice that he did not wish to do so. On receipt of this notice the Commissioners were obliged under the Rules to make the substantive determination they were minded to make when they gave the preliminary indication. This the Commissioners did on 2 May 2000, specifying 12 November 2008 as the day marking completion of the two thirds period specified in section 6(1) of the Act. Since Mr McClean fell within section 10(5) of the Act, he became entitled to accelerated release on 28 July 2000, the second anniversary of the coming into force of the Act.

11. On 5 July 2000, while on pre-release home leave from prison, Mr McClean became involved in an incident at Banbridge, County Down, which culminated in serious injury to a man named Keith Butler. Mr McClean was arrested and charged with attempted murder and causing grievous bodily harm with intent to do so. The incident arose from the removal by a loyalist faction of flags displayed by another loyalist faction, the Ulster Volunteer Force (the UVF), as part of a struggle for local dominance between the two factions.

12. On 10 July 2000 the Secretary of State applied to the Commissioners in writing under section 8 of the Act to revoke the declaration of eligibility granted to Mr McClean under section 3. The Secretary of State, it was said,

> "believes that as a result of a change in Mr McClean's circumstances that evidence or other information which was not available to the Commissioners when they granted that declaration suggests that an applicable condition under section 3 of the 1998 Act is not satisfied".

The condition referred to was the fourth statutory condition, that if the prisoner were released immediately he would not be a danger to the public. The evidence or information said to have been unavailable to the Commissioners when they granted their declaration was Mr McClean's appearance in court charged with attempted murder, and his remand in custody, very shortly after he had been granted pre-release home leave. On 26 July 2000 section 10(7) of the Act was amended to provide that a prisoner should not be released following a declaration under section 3(1) at any time when an application for revocation under section 8(1) had yet to be finally determined: the Northern Ireland (Sentences) Act 1998 (Amendment of Section 10) Order 2000 (SI 2000/2024). On the same date the Commissioners gave a preliminary indication in writing that they were minded to grant the Secretary of State's application to revoke. As required by the Rules the Commissioners gave reasons:

> "The Commissioners believe that the information now available suggests that the qualifying condition in section 3(6) [the fourth, danger to the public, condition] is not satisfied for the following reasons:
>
> (1) [Mr McClean] has been charged with an offence of grave violence.

(2) The alleged offence occurred very shortly after [Mr McClean] was released on pre-release home leave.

(3) While noting [Mr McClean's] claim that the incident leading to the charge involved self-defence, the Commissioners also note that a High Court application for bail was refused on 21 July 2000".

Mr McClean gave notice on 4 August 2000, as he was entitled to do under the Rules, that he wished to challenge this preliminary indication.

13. There was some delay in bringing Mr McClean to trial on the Banbridge indictment and meanwhile the substantive determination of the Secretary of State's section 8 application was adjourned from time to time. On 27 November 2001 Mr McClean was acquitted of causing grievous bodily harm with intent by Girvan J, who had already ruled that he had no case to answer on the charge of attempted murder. The judge did not find it proved that Mr McClean had been involved in the assault on Mr Butler as part of a joint enterprise as alleged by the Crown. He found that Mr McClean had been very much more involved in the whole business of flag removal than he admitted, and was satisfied that Mr McClean had been an active participant in the removal of UVF flags which Mr Butler had gone to the scene to protect, but active participation in flag removal did not prove participation in the assault. The Secretary of State had meanwhile, on 12 October 2001, added the Loyalist Volunteer Force (the LVF) to the list of organisations specified under section 3(8) of the Act. Earlier, the LVF had been specified in July 1998 but omitted from the order made in November 1998. On 5 November and again on 3 December 2001 notice was given to Mr McClean that the Secretary of State would seek to support his section 8 application on the additional ground that Mr McClean was believed to have supported, and to support, a specified organisation, namely the LVF.

14. The substantive hearing of the Secretary of State's revocation application was fixed to take place on 17 January 2002. In anticipation of that hearing the Secretary of State on 21 December 2001 gave notice of application under the Rules to adduce further evidence. Some of that further evidence (such as Mr McClean's prison record and the judgment of Girvan J) was unremarkable. But he also sought to rely on an intelligence summary which was secret, and which calls for further explanation.

15. Under powers conferred in Schedule 2 to the 1998 Act the Secretary of State was authorised to make procedural rules which might, among other things, provide for evidence or information about a prisoner not to be disclosed to anyone other than a Commissioner if the Secretary of State certified that the evidence or information satisfied conditions specified in the Rules (para 5(e)), for the holding of proceedings in specified circumstances in the absence of any person, including the prisoner concerned and any representative appointed by him (para 7(1)) and for the appointment by the Attorney General for Northern Ireland of a person to represent the prisoner's interest in the proceedings when he and his representative were excluded from the proceedings (para 7(2)).

16. In the Rules made and laid before Parliament on 30 July 1998 these powers were exercised. It is unnecessary to recite all the detailed provision of the Rules, which expand but closely follow the provisions of Schedule 2. Rule 22 is, however, significant, and provides:

> "22.? (1) This rule applies where the Secretary of State certifies as 'damaging information' any information, document or evidence which, in his opinion, would if disclosed to the person concerned or any other person be likely to:
>
> (a) adversely affect the health, welfare or safety of the person concerned or any other person;
>
> (b) result in the commission of an offence;
>
> (c) facilitate an escape from lawful custody or the doing of any act prejudicial to the safe keeping of persons in such custody;
>
> (d) impede the prevention or detection of offences or the apprehension or prosecution of suspected offenders;
>
> (e) be contrary to the interests of national security; or
>
> (f) otherwise cause substantial harm to the public interest;
>
> and any such information, document or evidence is referred to in these Rules as 'damaging information'.
>
> (2) The Commissioners shall not in any circumstances disclose to or serve on the person concerned, his representative or any witness appearing for him any damaging information and shall not allow the person

concerned, his representative or any witness appearing for him to hear argument or the examination of evidence which relates to any damaging information.

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

17. The notice given by the Secretary of State on 21 December (see para 14 above) was given pursuant to his duty under rule 22(3). In pursuance of that duty also the Secretary of State notified Mr McClean of the gist of the information withheld and the reasons for withholding it, in these terms:

"1. The withheld information relates to intelligence to the effect that if you were released immediately you would be a danger to the public. In particular that you have been involved in paramilitary activities on behalf of the Loyalist Volunteer Force (LVF) both before committal to prison in 1998 and in the period since; that you have sought to retain an involvement in the affairs of the group; and that you will become re-involved in LVF activity upon release from prison.

2. I am withholding the information for the reasons that disclosure would be likely to?

(a) adversely affect the health, welfare or safety of other persons, namely, the sources of the information drawn upon in order to compile the intelligence summary;

(b) result in the commission of offences, namely, offences against the sources of the information referred to at (a) above, their families and property;

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

(d) be contrary to the interests of national security."

Mr McClean challenged the Secretary of State's application to rely on the secret intelligence summary, but the application was allowed by a single Commissioner and on appeal by a panel of Commissioners. On 14 January 2002 the Commissioners applied to the Attorney General for appointment of a special advocate to represent the interests of Mr McClean when he and his legal representative were excluded from the hearing pursuant to paragraph 7(2) of Schedule 2 to the Act and rule 19(8) of the Rules, and on 22 January 2002 Mr John Orr QC was appointed to fulfil that role.

18. The substantive hearing to determine the Secretary of State's section 8 application took place on 19 March. For reasons given in writing on 23 April 2002 the Commissioners granted the application and revoked the declaration made in favour of Mr McClean under section 3. With reference to that declaration the Commissioners said:

> "When the respondent's application for early release was considered by the Commissioners at the time of making the preliminary indication, the Commissioners had cause for concern due to the brutality of the index offence, the fact that the offence had been committed shortly before the signing of the Good Friday Agreement and the short time the prisoner had served prior to applying for early release.
>
> In the circumstances it was difficult for the Commissioners to say confidently that, if released immediately, the prisoner would not be a danger to the public. Nevertheless, since the Secretary of State did not oppose the respondent's application for early release and submitted no evidence to substantiate the Commissioners' concerns about the issue of danger to society, the Commissioners issued a preliminary indication in favour of early release, which was not opposed by the Secretary of State."

The Commissioners then continued:

> "The single issue which now has to be determined by the Commissioners is whether, in the light of new information not available when the Commissioners granted the declaration for early release in terms of section 3 of the Act, the Commissioners are still able to say that if the

prisoner were released immediately, he would not be a danger to the public.

The applicant called two witnesses at the hearing, Detective Chief Superintendent W Lamont and Detective Sergeant R Herron. Documentary evidence was also placed before the Commissioners by the applicant.

The respondent testified on his own behalf.

Mr Lamont was called as a witness to substantiate certain *damaging information.* By the nature of this evidence, due to statutory provisions the hearing had to proceed in the absence of both the respondent and his legal representative. During this closed session the respondent was represented by Mr J Orr, Special Advocate appointed by the Attorney General for Northern Ireland.

In making a decision in this application the Commissioners have taken no account whatsoever of the *damaging information* evidence submitted by the applicant, because it was not necessary to do so to reach a decision in this case.

The Commissioners' decision is based entirely on the respondent's oral evidence at the revocation hearing and the written Judgement of Mr Justice Girvan in the matter of The Queen v Stephen McClean, Noel William McCready and Philip Robert George Harrison, dated November 27, 2001".

19. The Commissioners gave seven reasons for their decision to revoke, which were these:

"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 gave 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 conclusions 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."

20. Mr McClean applied for judicial review of the Commissioners' determination on a number of grounds, all of which were dismissed by Coghlin J in the High Court on 15 May 2003. His appeal to the Court of Appeal was allowed by a majority (Nicholson and McCollum LJJ, Higgins J dissenting), but on a single ground relating to the burden of proof on a section 8 application. It is this ruling which gives rise to the Commissioners' appeal, in which they are supported by the Secretary of State. Mr McClean's challenge to the fairness of the procedure followed by the Commissioners was rejected, and forms the subject of Mr McClean's cross-appeal.

The burden of proof

21. The relevant passages in the Commissioners' reasons have been quoted in para 18 above. Perhaps inadvisedly, one of the Commissioners who had been party to the decision swore affidavits in the proceedings suggesting that on a revocation application it was for the Secretary of State to satisfy the Commissioners on the balance of probabilities of the facts on which he wished to rely while it was for the prisoner to satisfy the Commissioners, again on the balance of probabilities, that the applicable section 3 conditions were still satisfied. After referring to some domestic and Strasbourg authority, Coghlin J concluded (in para 27 of his judgment) that it was neither unfair nor disproportionate, on the facts of Mr McClean's case, to require him to establish on the balance of probabilities that he would not be a danger to the public.

22. Dissenting in the Court of Appeal, Higgins J (in para 36 of his judgment) approved the approach of the Commissioners and the ruling of the judge. In para 32 of his judgment he observed:

> " … 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 … Once [new evidence or information] 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."

23. The majority took a different view. Nicholson LJ accepted (para 50 of his judgment) that, so far as there is a burden of proof, it is for a prisoner seeking a declaration under section 3 to satisfy the Commissioners that he complies with the section 3 conditions. But he considered (para 51) that on a section 8 application the Commissioners should not have placed an onus on Mr McClean to prove that he would not be a danger to the public if released immediately. McCollum LJ (in para 85 of his judgment) was of opinion that in so far as an onus of proof exists, it lies on the Secretary of State not merely to establish the new facts but also to persuade the Commissioners that those facts lead to the belief that they suggest that the fourth statutory condition is not satisfied.

24. In submissions to the House Mr Treacy QC, for Mr McClean, supported the reasoning of the Court of Appeal majority. Mr Larkin QC and Mr McCloskey QC, for the Commissioners and the Secretary of State respectively, contended that the Court of Appeal majority had erred in concluding that Mr McClean did not have to satisfy the Commissioners that he would not be a risk to the public if released, that it was for him to persuade the Commissioners that the fourth statutory condition was satisfied, or alternatively that the Commissioners were required to make a judgment about dangerousness without regard to burdens of proof.

25. It is evident that the four conditions laid down in section 3 are not of the same character. The first is a matter of formal record, readily susceptible to proof. The second is purely factual, however difficult to resolve on inadequate or disputed evidence. The third, relating to what a prisoner would or would not be likely to do in future if released immediately, calls for a predictive judgment. So does the fourth condition: the Commissioners are called upon to make the best judgment they can on the material available.

26. As acknowledged by the judges below, the House in *R v Lichniak* [2002] UKHL 47, [2003] 1 AC 903, paras 16, 20, 21, 38, 39, 40 and 41 questioned the aptness of applying a burden of proof to a judgment of risk made by the Parole Board, a doubt echoed in later cases such as *R (Sim) v Parole Board* [2003] EWCA Civ 1845, [2004] QB 1288, para 42, *R (Brooks) v Parole Board* [2004] EWCA Civ 80, para 28, and *R*

(DJ) v Mental Health Review Tribunal [2005] EWHC 587 (Admin), para 102. There are dangers in an unduly legalistic approach to what may well be a very difficult predictive judgment.

27. It is, however, possible in my opinion to advance certain general propositions concerning the correct approach to the fourth statutory condition. First, when considering a section 3 application by a life sentence prisoner such as Mr McClean there can be no presumption that he would not be a danger to the public if released immediately. Significantly, the fourth condition is one that only life sentence prisoners, and not those serving determinate sentences, are required to meet. The Commissioners would rightly wish to honour the spirit of the Belfast Agreement, as would the Secretary of State. But the facts giving rise to Mr McClean's convictions show clearly how unsound any presumption in his favour would be.

28. Secondly, section 8 cannot be invoked simply because the Secretary of State or the Commissioners have second thoughts about the section 3 declaration which has been made. For better or worse, such a declaration has been made and the prisoner is entitled to the benefit of it. To trigger the operation of section 8 something must have changed since the making of the declaration: a new specification order under section 3(8), a change in the prisoner's circumstances or the obtaining of evidence or information previously unavailable to the Commissioners. When such a change is shown the Commissioners must assess its significance in relation to satisfaction of the statutory conditions. If they conclude that it has little or none they will refuse the application. But if they are caused to doubt whether one of the statutory conditions is satisfied, their statutory duty is to grant the application to revoke.

29. Thirdly, the primary concern of the Commissioners, as of the Parole Board in England and Wales, must be to protect the safety of the public, with which neither body is entitled to gamble: *R v Parole Board, Ex p Watson* [1996] 1 WLR 906, 916-917, *R (West) v Parole Board* [2005] UKHL 1, [2005 1 WLR 350, para 30. Thus the Commissioners must recognise that Parliament has conferred a right of accelerated release on a qualifying life sentence prisoner satisfying the four statutory conditions. That is an important right, not to be belittled or discounted or lightly taken away. But it is not a right which can override the important interest of public safety. In the last resort, any reasonable doubt which the Commissioners properly entertain whether, if released immediately, a prisoner would be a danger to the public must be resolved against the prisoner, whether under section 3 or (if it is

properly invoked) section 8. In each case the Commissioners' task is essentially the same, to make an informed assessment of risk.

30. In the course of argument, I was concerned at the use in section 8 of language ("believe", "suggests") which had no counterpart in section 3. It appeared that section 8 might contemplate a provisional hearing, leading to a further application and determination under section 3. This was not, however, a reading which any party adopted; it is not consistent with the Rules; and the Commissioners did not treat the section 8 hearing as in any way provisional. I am satisfied that this reading should be discarded.

31. Like Coghlin and Higgins JJ, and differing with respect from the Court of Appeal majority, I find no error of principle in the Commissioners' approach to the section 8 application as expressed in their published reasons. Nor can their assessment of the facts be faulted. Within hours of leaving prison on pre-release home leave, Mr McClean knowingly engaged in a course of provocative conduct which predictably culminated in serious violence, even though he was acquitted of causing it. That was new evidence or information plainly sufficient to trigger the operation of section 8 and plainly sufficient to support the conclusion which the Commissioners reached. Given their findings of fact, I doubt if any other conclusion would have been tenable. I do not think it was entirely apt to speak (as the Commissioner in his affidavit evidence, and Coghlin and Higgins JJ did) of a burden on Mr McClean once section 8 was shown to be properly invoked, but no error in the Commissioners' approach, if there was such, can in my view have affected the outcome.

32. For these reasons, and those given by my noble and learned friend Lord Carswell, I would allow the Commissioners' appeal.

Fairness

33. In support of Mr McClean's cross-appeal Mr Treacy argued that the right to liberty conferred on him by section 3 of the 1998 Act was, although defeasible, a civil right within the autonomous meaning of article 6(1) of the European Convention and also, or alternatively, a right which entitled him to the procedural protection of article 5(4). These rights were, he submitted, breached in a number of respects in the determination of the Secretary of State's section 8 application. The

independence and impartiality of the Commissioners was infringed by the power of the Secretary of State, a party to the proceedings, to communicate information to the Commissioners without disclosure to Mr McClean or his legal representative. The withholding of information from Mr McClean and his legal representative violated a fundamental rule of a fairly-conducted adversarial hearing, that a party should know what is said against him so that he can meet and, if possible, rebut the accusation. The exclusion of Mr McClean and his legal representative from the hearing denied him the ordinary right of any litigant to witness and participate in the proceedings, instruct his legal representative and present his case. The introduction of a special advocate departed from the ordinary rules of professional representation. There was no equality of arms in a proceeding where one party could provide evidence to the tribunal unknown to the other party.

34. Mr Larkin and Mr McCloskey did not accept that Mr McClean enjoyed a civil right within the meaning of article 6(1) or a right protected by article 5(4). But they both accepted that Mr McClean enjoyed an undoubted common law right to a fair decision-making process. Mr Larkin went further, accepting that the procedure laid down by the Act and the Rules could be operated in a way that was unfair. Both however insisted that what falls for consideration here is not the fairness of the procedural regime in theory but its fairness or unfairness as applied to Mr McClean in the present case. This is in my opinion the correct approach. Whatever force there may be in Mr Treacy's general criticisms of the procedural regime laid down by the Act and the Rules, they cannot avail Mr McClean if this regime in fact worked no unfairness to him.

35. I am of opinion, in common with all the judges below, that the procedure adopted did not work unfairness to Mr McClean. I reach that opinion for two main reasons. First, although the Secretary of State communicated to the Commissioners damaging information which he withheld from Mr McClean and his legal representative, he duly conveyed the gist of that information to Mr McClean as quoted in para 17 above. That notice did not, understandably in the circumstances, identify informants or reveal operational methods. But it can have left Mr McClean in no doubt at all of the substance of the Secretary of State's reasons for believing that the fourth statutory condition was not satisfied in his case: that he had been, was and on release would be involved in the paramilitary activities of an organisation which had recently been specified by the Secretary of State as a terrorist organisation. Mr McClean's involvement at Banbridge, described by the Commissioners as "an area of ongoing serious feuding between the

LVF and the UVF" (see para 19 above), was entirely consistent with that belief.

36. My second reason for concluding that the procedure did not operate unfairly to Mr McClean is based on the Commissioners' unequivocal statement that they had taken no account whatsoever of the damaging information submitted by the Secretary of State because it was not necessary to do so to reach a decision in this case. Without impugning the good faith or integrity of the Commissioners, Mr Treacy invited the House to view this claim with some scepticism. It is not always possible for even a fair-minded decision-maker to put out of his mind information which he has heard adverse to a party. A decision-maker may be subject to bias without any consciousness of being so. With these points, in general terms, I agree. But a trained mind is on the whole better able than an untrained mind to exclude matters from consideration, and there is no reason to doubt that the Commissioners were high quality professional people carefully chosen to discharge a very important responsibility. There are cases in which it is hard to understand how a conclusion is justified if material said to have been excluded was not relied on, but this is not one of them. If, arguably, there is room for surprise, it is not that the section 3 declaration was revoked but that it was ever made.

37. This conclusion makes it unnecessary to express a concluded opinion on the applicability of articles 6 and 5(4), despite the erudition with which this question was explored in the courts below and in argument. I would simply observe that these articles do not lay down a single unvarying standard of fairness, to be applied inflexibly irrespective of the context and circumstances. I refer to the principles summarised in paras 14-19 of my dissenting opinion in *R (Roberts) v Parole Board* [2005] UKHL 45. There may, for special reasons (such as, in my opinion, obtained in Northern Ireland), be departures from what would ordinarily be regarded as the basic rules of a fair procedure, but this is subject to the overriding requirement that there are adequate safeguards to ensure that the procedure adopted, viewed overall, is fair and that the right in question (here the important right of liberty) is not deprived of its value. In the present case the procedure was fair. It is not the fairness of the procedure *in abstracto* which matters, but its fairness as applied to Mr McClean.

38. I would dismiss Mr McClean's cross-appeal.

39. I would invite the parties to make written submissions on costs within 21 days from the date of this judgment.

LORD SCOTT OF FOSCOTE

My Lords,

40. I am in complete agreement with the reasons given by my noble and learned friends Lord Bingham of Cornhill and Lord Carswell for their conclusion that the way in which the Commissioners dealt with the Secretary of State's application under section 8 of the 1998 Act was in accordance with the requirements of the Act and the Rules made thereunder. I agree also that the procedures adopted by the Commissioners were, viewed overall, fair. I want, however, to add a few words on the applicability of articles 5(4) and 6(1) of the Convention to the circumstances of this case.

41. The facts underlying the respondent's challenge to the Commissioners' decision on the section 8 application have been fully set out by Lord Bingham and I need not repeat them. It suffices to say that on 2 February 2000 the respondent was convicted of the murder of two people, of the attempted murder of others and of possessing firearms and ammunition with intent to endanger life. These were sectarian offences. He was sentenced to life imprisonment for murder, twenty years' imprisonment for attempted murder and fifteen years' imprisonment for possession of firearms and ammunition. His appeal against conviction was dismissed. There has never been any suggestion that these criminal proceedings, his conviction and the sentences imposed on him, were otherwise than in accordance with the law and with the rights guaranteed by the Convention. His detention following his conviction for these offences has unquestionably constituted "lawful detention … after conviction by a competent court" (para (a) of article 5(1) of the Convention).

42. No "tariff" or punitive term was imposed in relation to the Respondent's life sentences for murder. The Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564) came into operation in October of 2001. It provided for the establishment of life sentence review commissioners and tariff setting. Prior to that there was no provision for tariff setting in Northern Ireland. If there had been, the tariff attributed

to the respondent's life sentences would, inevitably and rightly, have been a long one. There would have been a lengthy period still unexpired at the time the respondent's section 3 application and the Secretary of State's subsequent section 8 application under the 1998 Act came to be made. If the 1998 Act had not been enacted, giving a possibility of early release "… in accordance with the provisions …" of the Act (section 3(1)), the respondent would have had no expectation other than many years in prison in lawful detention before he could hope for release.

43. The 1998 Act, as Lord Bingham has explained, was a consequence of the Good Friday Agreement. The contracting governments agreed to institute in their respective countries a review process that would "provide for the advance of the release dates of qualifying prisoners while allowing account to be taken of the seriousness of the offences for which the [prisoners had been] convicted and the need to protect the community" (para 3 of the *Prisoners* section of the Agreement). The 1998 Act and its Rules constituted the United Kingdom's implementation of the Agreement so far as the institution of a review process was concerned.

44. The importance of the "need to protect the community" permeates the review procedures prescribed by the 1998 Act and its Rules. Section 3 of the Act does not allow the Sentence Review Commissioners to declare a prisoner to be eligible for early release unless a number of specified conditions are satisfied. All, bar one (the first condition), are concerned directly or indirectly with the protection of the community. The prisoner must not be a supporter of a "specified organisation" (section 3(4)) and must not, if released immediately, be likely to become a supporter of a "specified organisation" (section 3(5)). A "specified organisation" is an organisation believed by the Secretary of State to promote or encourage terrorism (section 3(8) and (9)). And the final condition is that a life-sentence prisoner must, if he is to be eligible for release, be someone who, if released immediately, would not be a danger to the public (section 3(6)). Each of these conditions must be satisfied if there is to be an early release under the Act. The fourth condition, although looking into an inherently uncertain future, is expressed in stark and absolute terms: "… would not be a danger …" This language can be contrasted with the more flexible language of the third condition, which is similarly looking into the future: "… would not be likely to become a supporter". The fourth condition is requiring a high degree of certainty on the Commissioners' part before they can conclude that the condition is satisfied.

45. The same emphasis on protection of the public is evident in sections 8 and 9. Section 8 comes into play where the Commissioners have made a declaration, on a section 3 application, that the prisoner is eligible under the Act for release but where the prisoner has not yet been released. The section allows the Secretary of State, on the basis of a change in the prisoner's circumstances or new information or evidence, to apply to the Commissioner for a revocation of the declaration (section 8(1)). The Commissioners are obliged to grant the application and revoke the declaration if they "believe" either that as a result of a change in the prisoner's circumstances an applicable section 3 condition is not satisfied or that the new information or evidence "suggests" that a section 3 condition is not satisfied. The yardstick for success of a section 8 application implicit in the use of the verbs "believe" and "suggests" is not a stringent one but is, to my mind, wholly consistent with the high degree of certainty that the requisite conditions are satisfied required by section 3 of the Commissioners. If the Commissioners "believe" that the new information or evidence put forward by the Secretary of State "suggests" that a condition is not satisfied, that will suffice.

46. Section 9 may come into play where, following a successful section 3 application, a prisoner has been released. All such releases are releases on licence and it is a condition of every licence that the prisoner does not become involved in terrorism or, in the case of a life prisoner, that he does not become a danger to the public. If the Secretary of State believes that either of these conditions has been or is likely to be broken, he can suspend the licence. The prisoner will then lose his liberty and be detained in prison while the Commissioners consider the case. If the Commissioners "think" that the prisoner has not broken and is not likely to break a condition of the release, they must confirm the release. Otherwise the licence must be revoked and the prisoner must remain in detention under his sentence. Section 9 did not come into play in the present case because the respondent never was released. The Banbridge incident described by Lord Bingham (para 11 of his opinion) occurred while the respondent was on pre-release home leave. But section 9 is another example of the care with which the statutory scheme endeavours to ensure that no one is released or, if already released, allowed to remain at large, who is likely to be a danger to the public.

47. And, finally, I want to refer to the Rules made by the Secretary of State which prescribe the procedures to be followed by the Commissioners in discharging their functions under the Act. The rule making power is conferred by section 2 and paragraph 1 of the 2nd Schedule to the Act. Paragraph 5 of the 2nd Schedule says that the rules

may make provision about evidence and information, including provision:

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

Paragraphs 6 and 7 allow rules to be made enabling the Commissioners to hold proceedings in private and to specify circumstances in which the prisoner and his representatives may be excluded from the proceedings. Paragraph 7 goes on to say that where a prisoner and the representative are excluded from the proceedings, the Attorney General for Northern Ireland may appoint a special advocate to represent the prisoner.

48. Rules were made accordingly on 30 July 1998. They came into effect the next day. They included a rule, rule 22, enabling the Secretary of State to provide the Commissioners with "damaging information" that may not be disclosed to the prisoner or his representatives. Lord Bingham has set out rule 22 in full (para 16 of his opinion).

49. The 1998 Act and the 1998 Rules made thereunder constitute the statutory scheme enacted in order to discharge the Government's undertaking in the Good Friday Agreement to put in place a review process that would permit the early release of prisoners serving sentences for sectarian offences if this could be done consistently with the need to protect the community. The statutory scheme was introduced in the pursuit of a highly important political objective. It was not introduced in order to respond to some requirement of criminal justice or in recognition of any human rights guaranteed by the Convention. Its well-spring was political, namely, the political imperative of trying to move towards a political settlement in Northern Ireland.

50. This statutory scheme is a single, coherent scheme. The procedural rules, among which are the rules enabling "damaging information" to be withheld from a prisoner and his representatives, authorising the Commissioners to exclude the prisoner and his representatives from the proceedings and to appoint a special advocate to represent him, enabling the Commissioners to sit in private, are as much an integral part of the scheme as the prohibition in section 3 on the

release of a prisoner unless all requisite conditions are satisfied. The scheme taken as a whole provides prisoners serving sentences for sectarian offences with a clear benefit, namely, the possibility of early release that they would otherwise have no right to expect. But they cannot cherrypick, embracing parts of the scheme that suit them but complaining of other parts that don't.

51. Mr Treacy QC, counsel for the respondent, submitted that the procedures prescribed by the Rules breached the respondent's rights under the Convention guaranteed by either or both of article 5(4) and article 6(1). But this submission ignores the fact that the respondent's human rights do not entitle him to any early release scheme. He has been convicted of serious offences and sentenced to lengthy terms of imprisonment. There are many years to go before he could, absent the 1998 Act scheme, have any expectation of release. His continued incarceration does not infringe his human rights. The 1998 Act and its Rules constitute a statutory scheme of which the respondent was, and still is, a potential beneficiary. He certainly has the right to have the scheme properly and fairly applied to him in accordance with its terms. But he does not have the right, under the Convention or otherwise, to complain that the scheme is not sufficiently favourable or that part of the scheme, more particularly rule 22, infringes his human rights and should be struck down.

52. Article 5(4) says that

> "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."

This provision has, in my opinion, no relevance to proceedings before the Commissioners whether under section 3, section 8 or section 9. On applications under each of these sections the Commissioners must follow the procedures prescribed by the Act and the Rules and must do so fairly. A prisoner can, of course, challenge by judicial review proceedings the propriety of the Commissioners' handling of an application. The respondent has done so. But the result of the challenge will, or should, depend on whether the Commissioners have properly followed the statutory scheme. It will not depend on whether the statutory scheme departs, in some respect or other, from some other

scheme that would allegedly be fairer to prisoners. In short, unless and until the respondent is released in accordance with the 1998 Act statutory scheme, or some other applicable statutory scheme such as the parole scheme, his continued detention for the duration of his sentence, with whatever automatic reductions to which he may be entitled, will, in my opinion, be unimpeachably lawful.

53. Article 6(1) entitles everyone

> "In the determination of his civil rights and obligations … to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

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

54. I would for these reasons reject the respondent's reliance on his Convention rights for the purpose of impugning the manner in which the Commissioners dealt with the section 8 application and, for the reasons given by Lord Bingham and Lord Carswell, would allow the Commissioners' appeal and dismiss the respondent's cross-appeal.

LORD RODGER OF EARLSFERRY

My Lords,

55. I have had the advantage of considering the speeches of my noble and learned friends, Lord Bingham of Cornhill, Lord Carswell and Lord Brown of Eaton-under-Heywood in draft. For the reasons they give, I too would allow the Commissioners' appeal and dismiss Mr McClean's cross appeal.

LORD CARSWELL

My Lords,

56. The respondent Stephen McClean was on 2 February 2000 convicted by Kerr J, sitting in Belfast Crown Court without a jury, of grave crimes committed on 3 March 1998, when he was concerned in the murder of two men and the attempted murder of two others at the Railway Bar in Poyntzpass, Co Down. He was one of two masked gunmen who entered the bar and sprayed the occupants with gunfire. On conviction he was sentenced to imprisonment for life on each of the murder charges, to 20 years' imprisonment on each of the attempted murder charges and to 15 years on firearms charges, all sentences to be concurrent. An appeal against their conviction brought by the respondent and his co-accused Noel William Joseph McCready was dismissed by the Court of Appeal on 28 June 2001.

57. Because the offences were committed before 10 April 1998 the respondent became entitled to make an application under the Northern Ireland (Sentences) Act 1998 ("the Act") to the appellants, the Sentence Review Commissioners ("the Commissioners"), for a declaration that he was eligible for release in accordance with the provisions of that Act. My noble and learned friend Lord Bingham of Cornhill has set out in his opinion a summary of the applicable statutory provisions, which I gratefully adopt and need not repeat.

58. The respondent made application for a declaration and on 14 April 2000 a panel of Commissioners gave a preliminary indication, pursuant to the provisions of rule 14 of the Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 ("the Rules"), to the effect that they were minded to make a declaration that the respondent was eligible for release under the provisions of the Act. The Secretary of State indicated, pursuant to rule 14(6), that he did not wish to challenge the Commissioners' preliminary indication. The Commissioners proceeded, in accordance with the terms of rule 15, to make on 2 May 2000 a substantive declaration of eligibility for release. In that declaration, as required by section 6(1) of the Act, they specified 12 November 2008 as being the day which they believed would mark the completion of about two thirds of the period which the respondent would have been likely to spend in prison under the sentences imposed on him. The effect of the accelerated release provisions contained in section 10, however, was that the respondent acquired a statutory right

to be released on 28 July 2000, being the second anniversary of the day on which the Act came into force. In consequence of these provisions, enacted in order to put into effect the terms of the Belfast Agreement of 10 April 1998, the respondent, notwithstanding the gravity of his crimes, was due for release some two years and four months after his arrest.

59. His right to release was, however, subject to defeasance if the declaration was revoked in accordance with the terms of section 8 on an application made to the Commissioners by the Secretary of State. Such a revocation did take place in the circumstances and in the manner which I shall describe, and the validity of the Commissioners' decision to revoke the declaration was the subject of the appeal before the House. By the Northern Ireland (Sentences) Act 1998 (Amendment of Section 10) Order 2000 (SI 2000/2024) made by the Secretary of State on 25 July 2000 section 10(7) of the Act was amended to provide that prisoners were not to be released at any time when an application under section 8(1) for revocation of the declaration relating to him had yet to be finally determined. The respondent has accordingly remained in custody to the present time.

60. The incident which gave rise to the Secretary of State's application for revocation took place in Banbridge, Co Down on 5 July 2000, when the respondent was on pre-release home leave from prison. When a number of persons were in the process of removing flags erected by members of the Ulster Volunteer Force from lamp posts, a fracas took place in which one Keith Patrick Butler, who took objection to removal of the flags, was violently assaulted and received very severe, extensive and life-threatening injuries. The respondent and two other men were charged with attempted murder and causing grievous bodily harm with intent. After a trial at Belfast Crown Court before Girvan J sitting without a jury, the respondent was acquitted on both charges. Although he held that it had not been proved to the requisite standard that the respondent participated in the joint enterprise of the assault in the manner alleged by Butler, the judge expressed the following view at page 7 of his judgment:

> "I do accept the thrust of the Crown case that McClean and McCready were much more involved in the whole business of flag removal than they admitted. Having seen and heard McClean in giving evidence I reject his evidence that the initial meeting with Harrison was a chance meeting and that they went off in the car without prior arrangement. I am satisfied that McClean and

> McCready were active participants in the removal of the flags. I reject McClean's evidence that McClean and McCready distanced themselves from the taking down of the flags or that they walked away countrywards. Neither McClean nor McCready made such a case in their interviews and it would make little sense for them to walk away and then in a relatively short distance later come back over to their friends at the scene where the assault took place."

This finding was regarded as material by the Commissioners in reaching their conclusions on revocation.

61. On 10 July 2000 the Secretary of State applied to the Commissioners under section 8 of the Act to revoke the declaration granted to the respondent, on the ground that the fourth condition contained in section 3 of the Act, that the respondent would not if released be a danger to the public, was no longer satisfied. This was based on the fact that he had been charged with the attempted murder of Mr Butler on 5 July 2000. On 26 July 2000 a panel of the Commissioners gave a preliminary indication that they were minded to grant the Secretary of State's application. The preliminary indication was challenged by the respondent, so the Commissioners proceeded, with many intermediate alarms and excursions, to a substantive determination.

62. One material development was that on 12 October 2001 the Secretary of State added to the list of organisations specified under the terms of the Act the Loyalist Volunteer Force ("LVF"), an organisation which it was alleged the respondent supported (and which had a violent feud in progress with the Ulster Volunteer Force). The Secretary of State then on 3 December 2001 made a further application to the Commissioners under section 8 for revocation of the release declaration, on the ground that the second and third conditions in section 3 were not satisfied. The respondent has at all times denied that he is a supporter of the LVF and claimed that all of the conditions in section 3 were satisfied.

63. On 21 December 2001 the Secretary of State made a further application to the Commissioners for leave to enter into evidence certain further items of evidence. One of these was a secret intelligence summary, the contents of which were certified as constituting

"damaging information" within the meaning of the Rules. A document containing the gist of the information withheld and the reasons for withholding it was served on the respondent, in accordance with rule 22(3). The document set out those matters in the following terms:

> "1. The withheld information relates to intelligence to the effect that if you were released immediately you would be a danger to the public. In particular that you have been involved in paramilitary activities on behalf of the Loyalist Volunteer Force (LVF) both before committal to prison in 1998 and in the period since; that you have sought to retain an involvement in the affairs of the group; and that you will become re-involved in LVF activity upon release from prison.
>
> 2. I am withholding the information for the reasons that disclosure would be likely to –
>
> (a) adversely affect the health, welfare or safety of other persons, namely, the sources of the information drawn upon in order to compile the intelligence summary;
>
> (b) result in the commission of offences, namely, offences against the sources of the information referred to at (a) above, their families and property;
>
> (c) impede the prevention or detection of offences or the apprehension or prosecution of suspected offenders; and
>
> (d) be contrary to the interests of national security."

Your Lordships were furnished with a copy of this document, but they have not seen or considered any of the damaging information itself.

64. A single Commissioner acceded to the Secretary of State's application on 11 January 2002 and an appeal against his decision was dismissed by a panel of three Commissioners on 22 February 2002. The Secretary of State requested the Attorney General to appoint a person to represent the interests of the respondent and his co-accused McCready (known as a special advocate), pursuant to para 7(2) of Schedule 2 to the Act. The Attorney General, after consulting the respondent's solicitors, appointed Mr John Orr QC to represent his interests in the revocation proceedings for the purpose of dealing with the damaging information.

65. A panel of Commissioners held the substantive hearing of the section 8 application on 19 March 2002. In the course of the hearing a closed session was held in the absence of the respondent and his legal representatives, as provided for by para 7(1) of Schedule 2 to the Act. Evidence was given by a senior police officer at this session, at which the special advocate was present to represent the respondent.

66. The Commissioners issued a written decision, communicated to the respondent's solicitors under cover of a letter dated 23 April 2002, whereby they confirmed their preliminary indication that they would allow the Secretary of State's application for revocation of the release declaration. In that decision they stated:

> "In making a decision in this application the Commissioners have taken no account whatsoever of the *damaging information* evidence submitted by the applicant, because it was not necessary to do so to reach a decision in this case.
>
> The Commissioners' decision is based entirely on the respondent's oral evidence at the revocation hearing and the written Judgement of Mr Justice Girvan in the matter of The Queen v Stephen McClean, Noel William McCready and Philip Robert George Harrison, dated November 27, 2001."

This statement is confirmed by para 9 of the affidavit of Dr Duncan Morrow filed on 14 August 2002.

67. The Commissioners set out in the decision their reasons for granting the application in the following terms:

> "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 gave 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 conclusions 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 naivete 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."

68. In hearing the application on 19 March 2002 the Commissioners proceeded on the basis that they were required to reconsider their original determination in light of new information available in July 2000 (minutes of hearing, para 22). A discussion concerning burden of proof had been held at a hearing on 24 January 2001, the outcome of which was a ruling, as Dr Morrow expressed it in para 3 of his affidavit of 14 August 2002:

> "It was for the Secretary of State to satisfy the Commissioners on the balance of probabilities of the facts on which he wished to rely while it was for the applicant to satisfy the Commissioners also on the balance of probabilities that the applicable section 3 conditions were still satisfied."

The hearing on 19 March 2002 went ahead on the basis that this was the applicable burden of proof of the issues before the Commissioners.

69. Mr McClean brought an application for judicial review of the Commissioners' decision, seeking orders of certiorari and mandamus and declarations. The application was dismissed by Coghlin J in a written decision given on 15 May 2003. The arguments advanced on behalf of Mr McClean ranged over a variety of issues, but the main thrust covered two grounds, first, that the admission of the damaging information and the use of a special advocate constituted breaches of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and, secondly, that the

Commissioners were wrong to place the burden of proof on Mr McClean. The judge held against him on both grounds. In respect of the burden of proof, he regarded it as resting upon the prisoner, but concluded after examination of the general shape and function of the Act that it was neither unfair nor disproportionate to require him to establish on the balance of probabilities that he would not be a danger to the public.

70. Before the Court of Appeal the case was run on the same two grounds. The court (Nicholson and McCollum LJJ, Higgins J dissenting) reversed the judge's decision and quashed the decision of the Commissioners, remitting the matter to them for rehearing with a number of directions. All members of the court held that the procedure of the Commissioners, including the use of damaging information, did not involve a breach of the Convention, but the majority concluded that the burden of proof had been wrongly imposed upon the prisoner. The order of the court was framed in terms which directed the Commissioners to require the Secretary of State to prove on the balance of probabilities that the prisoner, if released immediately, would be a danger to the public. Both Nicholson LJ and Higgins J analysed the procedure of the Commissioners as involving the discharge by either the prisoner or the Secretary of State of a burden of proof, Nicholson LJ concluding that it should not be imposed upon the prisoner, while Higgins J took the view that the Commissioners were correct to place it upon him. McCollum LJ agreed with the conclusion that the Commissioners were in error in placing a burden of proof on the prisoner, but analysed their procedure in terms which I think contained a better approach to the issue. Citing a passage from para 16 of the opinion of Lord Bingham of Cornhill in *R v Lichniak* [2002] UKHL 47, [2003] 1 AC 903 (to which I shall return later), he stated at para 77 of his judgment:

> "However I find it difficult to apply the traditional principles of evidence to proceedings of the kind under consideration here. The conclusion that a person is or is not a danger to the public, while it may be reached quite emphatically, is not the establishment of a concrete fact, but rather the formulation of an opinion or impression. As such it is not capable of proof in the manner usually contemplated by the law of evidence."

He went on at paras 81 to 83:

> "[81] The test for the Commissioners therefore is whether they believe that evidence or information which was not available to them when they granted the application suggests that an applicable condition is not satisfied. The word 'suggests' is not indicative of the imposition of a burden of proof. On the other hand, if their state of mind is such that they are unable to form that belief then they should not grant the application. I do not take the view that, after the Secretary of State has placed new information before them a burden of proof passes to the appellant to show that in spite of that information he will continue to pose no danger to the public but rather that they must form an impression as to the existence and extent of danger posed by him to the public based on the information placed before them.
>
> [82] A conclusion of fact is readily susceptible to the imposition of a burden of proof, and in so far as the learned judge and the Commissioners recognized a burden of proof on the Secretary of State to establish the facts amounting to new evidence or information I would agree with their view, but I am unable to agree that the issue of whether danger to the public has been manifested by that evidence or information is one in respect of which the burden of proof fell on the Appellant.
>
> [83] This is in the nature of an inference or impression that the Commissioners may form on the basis of the information or evidence placed before them without either party being required to demonstrate its greater probability or improbability. A wide variety of factual situations could give rise to such a view. It is not necessary that a prisoner should have been guilty of any criminal behaviour. Some offences might not give rise to any apprehension of danger to the public, while some behaviour that did not constitute a breach of civil or criminal law might well do."

71. The two grounds to which I have referred formed the subject of the arguments presented to the House. The Commissioners appealed against the decision of the Court of Appeal on the issue of the burden of proof, and Mr McClean cross-appealed on the Convention issue. I shall deal first with the appeal.

72. For the reasons which I shall give I am unable to agree with the conclusion reached by the majority of the Court of Appeal that the

Commissioners were in error in their decision, or that the order of the court which required them to impose the burden of proof on the Secretary of State was correct. Nevertheless I consider that the approach taken by McCollum LJ in the passages which I have quoted from his judgment provides a more appropriate way for the Commissioners to determine the issues which they have to decide than that which focuses on the burden of proof.

73. Under section 3 of the Act the Commissioners are to grant the application for a release declaration of a prisoner sentenced to life if four conditions are satisfied. The first is purely factual. The three remaining conditions are framed in terms of negatives and each requires some exercise of judgment. In deciding on the second condition the Commissioners have to make a determination about the present affiliations of the prisoner. In the third they have to do so about his future likely affiliations and activities. The fourth condition requires a pure exercise of judgment, the issue being whether the prisoner, if released immediately, would not be a danger to the public. It seems to me that forming those judgments, certainly in respect of the second, third and fourth conditions, is more akin to many administrative decisions than the ordinary judicial process of deciding whether a matter requiring proof has been established. Decisions of the latter type require sufficient evidence to be adduced by the party who wishes to establish it, and if he does not succeed in doing so it may be properly said that he has failed to discharge the burden resting upon him. Although the prisoner obviously wants the Commissioners to find that the conditions have been satisfied, it is not a *lis inter partes*, and it is not the function of the Secretary of State to prove the case for keeping him in custody. The Commissioners will seek the information on which to make their decision from whatever source it may be obtained. That will include the prisoner, who will be concerned to show in relation to the fourth condition that his future behaviour is likely to constitute no danger to the public. It may also include information from the prison and security services about his past and present activities and associations, which will not necessarily be unfavourable to him. When they have assembled the information which they deem necessary the Commissioners determine whether the four conditions have been satisfied.

74. This approach is supported by the observation of Lord Bingham of Cornhill in *R v Lichniak* [2002] UKHL 47, [2003] 1 AC 903, when he said of the Parole Board, whose function is similar in many respects to that of the Commissioners (para 16):

> "I doubt whether there is in truth a burden on the prisoner to persuade the Parole Board that it is safe to recommend release, since this is an administrative process requiring the board to consider all the available material and form a judgment."

An analogous function is to be found in section 3(8) of the Act, which requires the Secretary of State to specify any organisation which he believes is concerned in terrorism or has not established or is not maintaining a complete and unequivocal ceasefire. In so deciding the Secretary of State is not applying the concept of a burden of proof, but is forming a conclusion based on evidence and information which he has before him (for a discussion of the exercise of this power see *Re Williamson's Application* [2000] NI 281, 299-301). Many examples could be assembled from administrative decisions to be taken in the course of exercising functions conferred by statute. Some of those in cognate spheres are the decisions of the Parades Commission to issue determinations in respect of public processions (*Re Tweed's Application* [2001] NI 165) and the discretion of the Secretary of State to pay criminal injury compensation notwithstanding the fact that the claimant may have been engaged at some time in the commission of acts of terrorism (*Re McCallion's Application* [2001] NI 401). In *R v Chambers* [1994] NI 170 Hutton LCJ held that the decision of a senior police officer to authorise a delay in access to a prisoner by a solicitor, where he has to have reasonable grounds for believing that certain conditions are satisfied, is not to be determined by the application of the concept of a burden of proof.

75. There are rather more difficulties with the construction of section 8 of the Act. Subsection (1) is relatively straightforward. The Secretary of State must apply for a revocation if he believes –

> (a) that as a result of an order under section 3(8), or a change in the prisoner's circumstances, an applicable condition in section 3 is not satisfied, or
> (b) that evidence or information which was not available to the Commissioners when they granted the declaration suggests that an applicable condition in section 3 is not satisfied.

Under paragraph (a) certain factual changes will have occurred, the specification of an organisation by the Secretary of State or a change in

the prisoner's circumstances. If the Secretary of State in the light of those factual changes (assuming that they are established) believes that an applicable condition is not satisfied, then he is to apply to the Commissioners to revoke their declaration.

76. Subsection (2) then sets out the Commissioners' duty on receipt of the revocation application. They must grant it if they believe –

> (a) that as a result of an order under section 3(8), or a change in the prisoner's circumstances, an applicable condition 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.

Again, paragraph (a) appears straightforward. If the Commissioners believe, in the light of the factual changes which have occurred, that one of the four conditions is no longer satisfied, they must revoke the declaration. That is the same exercise as under section 3, the application of their judgment to the factual situation. It is more difficult to see why the legislature has used the word "suggests" in paragraph (b). It was quite appropriate for use in subsection (1)(b), where it defined the conditions in which the Secretary of State should apply for revocation. At that stage he is not making a determination on the continued application of the conditions, merely that the evidence or information suggests that one of them is not satisfied. The Commissioners have, however, to make a definitive determination, and one would have expected to find their task defined in terms of deciding whether in their judgment the condition was or was not satisfied.

77. The issue arose in the course of argument before the House whether the effect of section 8(2)(b) was that the Commissioners should revoke the declaration once there is some evidence which suggests that the condition is not satisfied, without proceeding as far as a definitive decision to that effect. They would then leave it to the prisoner to bring a fresh application under section 3, relying on rule 9(2), which permits the Commissioners to determine a further application if in their view –

> "(a) circumstances have changed since the most recent substantive determination was made in respect of the person concerned; or
>
> (b) reliance is placed in support of the further application on any material information, document or evidence which was not placed before the Commissioners when the most recent substantive determination was made in respect of the person concerned."

Such an interpretation would in my view produce odd and undesirable results. The prisoner would have to remain in custody, unless granted bail, until a fresh section 3 application could be heard, which might take some time. It is not at all clear to me that the bringing of a section 8 application by the Secretary of State could be construed as a change of circumstances within rule 9(2)(a) or that the process of adducing and testing the evidence on which he relied in the section 8 application comes within the terms of rule 9(2)(b). The latter provision refers more naturally to fresh evidence adduced on behalf of the prisoner to found his case for a review of the previous refusal of his section 3 application. Moreover, section 8(2)(a) refers, as one might more readily expect, to a change in the prisoner's circumstances. The language of section 8(2)(b) is undoubtedly strange in its use of the word "suggests". I think nevertheless that it fits the overall scheme and intention of the legislation more aptly to regard every application governed by either section 8(2)(a) or section 8(2)(b) as a complete review *de novo* of the prisoner's case under section 3 for a release declaration. In my view, accordingly, section 8 can and should be construed in this manner.

78. It follows from the conclusions which I have reached that it was the duty of the Commissioners to conduct a full review of the case of a prisoner in respect of whom the Secretary of State has made an application under section 8 of the Act. They should take into account any order made under section 3(8), any relevant change of circumstances and any fresh evidence or information which bears on the satisfaction of the conditions contained in section 3. They should do so without imposing a burden of proof either on the prisoner or on the Secretary of State, their object being to determine whether in their opinion those conditions remain satisfied. If they consider that the conditions do remain satisfied, the application should be refused; if not, then the application should be granted and the declaration revoked.

79. As Dr Morrow stated in para 3 of his affidavit sworn on 14 August 2002, the Commissioners accepted that the burden of proof

rested on the parties in the manner which he has described, and for the reasons which I have given I consider that they were in error in that. It is necessary, however, to have regard to what they actually decided, as set out in the written reasons for their decision. In para 2 of those reasons, which I have set out in para 67 of this opinion, they stated that they "must be persuaded" that a condition in section 3 was no longer satisfied. They then posed the question whether they were "still able to say that if released immediately, the respondent would not be a danger to the public". In para 4 they say that the matters which they considered left them "with *additional* doubt in their minds about the respondent's danger to the public," which was not dispelled by his evidence in the hearing. They concluded in para 6 that "it is not possible for the Commissioners to say that if released immediately, the respondent would not be a danger to the public," a formula which they repeated in para 7.

80. It is apparent accordingly that the Commissioners took into account the material originally placed before them when making the declaration under section 3 and added to that the further material received on the section 8 application. They applied the statutory tests contained in section 3 to that amalgam of material and formed the conclusion that the conditions were no longer satisfied. When it came to their actual decision they took the correct approach, and that was not invalidated by their previously being distracted by legally incorrect propositions about the burden of proof. I would therefore hold that their decision on the section 8 application was validly reached and reverse the finding of the Court of Appeal on that issue.

81. The respondent's cross-appeal was based on a claim that the procedure adopted by the Commissioners constituted a breach of articles 5(4) and 6(1) of the Convention. I respectfully agree with and adopt Lord Bingham's observations on this issue contained in paras 33 to 37 of his opinion, and in particular the reasons expressed by him in paras 35 and 36 for holding that the procedure adopted did not work unfairness to the respondent. Like him, I do not find it necessary to express a concluded opinion on the applicability of articles 5(4) and 6(1). I would, however, refer to paras 135 to 144 of my opinion in *R (Roberts) v Parole Board* [2005] UKHL 45 for an exposition of my views on the way in which article 5(4) should be applied in giving weight to opposing considerations in determining whether the deciding body has operated its procedures in a way which satisfies the essential requirements for a judicial body.

82. I would dismiss the cross-appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

83. There have been many terrible killings in the history of Northern Ireland. But few have occasioned more revulsion than the cold-blooded murder on 3 March 1998 at the Railway Bar, Poyntzpass of two men, lifelong friends although of different religions, in what was intended, by the loyalist terrorist gunmen involved, to be a sectarian attack on Catholics.

84. Stephen McClean, the respondent in your Lordships' House, was on 2 February 2000 convicted of these killings and sentenced to life imprisonment on two counts of murder and, arising out of the same incident, concurrent terms of twenty years imprisonment on two counts of attempted murder, and fifteen years imprisonment for possessing firearms and ammunition with intent to endanger life.

85. Meantime, just a few weeks after these killings, the Belfast (Good Friday) Agreement had been signed on 10 April 1998 and in furtherance of it the Northern Ireland (Sentences) Act 1998 (the 1998 Act) had been passed and, on 28 July 1998, brought into effect. Put at its simplest, the 1998 Act provided upon certain conditions for the accelerated release of those convicted of serious terrorist offences committed before 10 April 1998, their accelerated release date ordinarily being the second anniversary of the coming into force of the 1998 Act, namely 28 July 2000. That, indeed, would have been Mr McClean's release date—many years earlier than he could otherwise have hoped to be released—but for the appellant Commissioners' eventual conclusion that one of the conditions applicable to his case had not been satisfied. The condition in question was that, if released immediately, "he would not be a danger to the public". At issue on this appeal is whether, when that condition comes to be considered under section 8 of the 1998 Act—a provision allowing in certain circumstances for the Commissioners, upon the Secretary of State's application, to revoke an earlier declaration of the prisoner's eligibility for early release—the burden is upon the prisoner to show that he is not a danger to the public or upon the Secretary of State to show that he is.

86. The Court of Appeal by a majority held that the burden lies upon the Secretary of State. By its order of 23 April 2004 it quashed the Commissioners' decision of 23 April 2002 and directed that, in their re-determination of the Secretary of State's application, "they shall require the Secretary of State to prove on the balance of probabilities that the appellant, if released immediately, would be a danger to the public." Was that an appropriate direction? That essentially is the question formulated by the parties for your Lordships' determination on the appeal. A further question arises under Mr McClean's cross appeal with regard to the "damaging information" procedure.

87. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill, Lord Scott of Foscote and Lord Carswell. I agree with them all and on the cross appeal there is nothing I want to add. There are aspects of the appeal, however, on which I wish to comment.

88. The provisions of the 1998 Act on which I wish to focus are sections 3, 8 and 9. Section 3, so far as relevant to the present appeal, provides that in the case of a life sentence prisoner convicted of terrorist offences, the Commissioners shall grant his application for a declaration that he is eligible for early release "if (and only if) . . . the following four conditions are satisfied." This appeal concerns the fourth condition which is that "if the prisoner were released immediately, he would not be a danger to the public."

89. The material parts of section 8 are as follows:

> "8 *Revocation of declaration*
>
> (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 . . . the Secretary of State believes—
>
> (a) . . .
>
> (b) that evidence or information which was not available to the Commissioners when they granted the declaration suggests that an applicable condition in section 3 is not satisfied.

(2) The Commissioners shall grant an application under this section if (and only if) the prisoner has not been released . . . and they believe—

(a) . . .

(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.

90. Section 8, it will be noted, applies only before the prisoner's release on licence. After release the position is dealt with under section 9. This provides that amongst the conditions of a life prisoner's licence will be one "that he does not become a danger to the public". If the Secretary of State believes that the prisoner "has broken or is likely to break" that condition, he may suspend the licence and re-detain the prisoner. In that event the Commissioners are required to consider the case and, in doing so:

"(a) if the Commissioners think he has not broken and is not likely to break [the] condition . . . they shall confirm his licence, and

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

91. It will readily be seen that under section 3 the Commissioners cannot grant a declaration of eligibility unless, were the prisoner to be released, he would not be a danger to the public. Somewhat oddly this condition is set out for all the world as if its fulfilment were capable of being ascertained as an objective fact: there is nothing in the section about the Commissioners having to be "satisfied" of its fulfilment or having to "believe" or "think" it fulfilled—compare the language in sections 8 and 9. In my judgment, however, it is implicit in section 3 that it is for the Commissioners to form their own opinion as to whether, using shorthand, the prisoner can safely be released and, if satisfied that he can, they must declare his eligibility for early release but otherwise refuse it. Certainly nothing is clearer under section 3 than that, were the Commissioners to be in any doubt as to whether the prisoner could be released without risk to the public, they would be bound to refuse his application: the benefit of such doubt would go to the public, not to him.

92. So too in my judgment it is plain from the statutory language that at the section 8 stage the Commissioners must revoke their previous declaration if they believe that the fresh evidence presented by the Secretary of State now suggests that, after all, the prisoner would present a risk on release, if in other words the Commissioners are no longer satisfied that he can be released without risk.

93. And exactly the same approach applies even after the prisoner's release on conditional licence if the Secretary of State has thought it right to suspend the licence. Once again the Commissioners, when they come to consider the case, are obliged to revoke the licence unless they think that the prisoner "has not broken and is not likely to break" the condition "that he does not become a danger to the public." He will, of course, have broken it (or be likely to do so) if he has (or is likely to) become a danger and the Commissioners must therefore be satisfied, before he can be released afresh, that he presents no danger.

94. In other words, the Commissioners must ask themselves the same question at each stage: are we satisfied that the prisoner can be released without risk to the public. If so, he must be released, otherwise not, and any doubt about the matter must be resolved against him.

95. Generally speaking there will be no doubt as to whether a prisoner can be released without risk. As Lord Bingham of Cornhill said in *R v Lichniak* [2003] 1 AC 903 at para 16:

> "I doubt whether there is in truth a burden on the prisoner to persuade the Parole Board that it is safe to recommend release, since this is an administrative process requiring the board to consider all the available material and form a judgment."

That thinking finds an echo in other judgments too—see, for example, Lord Hoffmann's speech in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 at para 48: "The final decision is evaluative, looking at the evidence as a whole, and predictive, looking to future danger."

96. But whilst ordinarily the evaluative process will lead to a reasonably clear judgment on risk, sometimes (if only rarely) it will not.

This problem was usefully discussed by the Court of Appeal in *R (Sim) v Parole Board* [2004] QB 1288, a decision concerning the onus of proof in the context of section 44A (4) of the Criminal Justice Act 1991:

> "the Board shall direct the prisoner's release if satisfied that it is no longer necessary for the protection of the public that he should be confined (but not otherwise)."

97. At para 43 of his judgment in *Sim*, Keene LJ adopted the following passage from Elias J's judgment in the court below (a passage I too find helpful):

> ". . . there is in my view a distinction between on the one hand the board being required to order his release if satisfied that it is no longer necessary to detain the prisoner, which is how the legislation is framed; and on the other the board being required to release unless satisfied that it is necessary to detain the prisoner . . . the logic of [the Parole Board's] argument, as [counsel] was constrained to accept, is that either formulation would have precisely the same effect. I do not accept that. In my view there is a clear distinction between the two formulations, notwithstanding that in practice it is likely to be of little significance which is adopted. As the provision stands the default position is that detention will continue unless the board is satisfied that this is not necessary. If after hearing all the evidence the board remains genuinely unsure whether the prisoner needs to be detained or not, it must on the ordinary construction of section 44A continue his detention. On the alternative formulation the prisoner in that situation would be at liberty (albeit on licence)."

98. The court in *Sim* was concerned with an extended sentence imposed under what became section 85 of the Powers of Criminal Courts (Sentencing) Act 2000, described by Keene LJ as "a novel creature, differing in its characteristics both from the classic indeterminate sentence and from the 'normal' type of determinate sentence under consideration in *Giles's* case [R *(Giles) v Parole Board* [2004] 1 AC 1]." Mr Sim had been recalled to prison during the extended licence period of his sentence and it was decided that, unlike the position in *Giles*, where this House held that article 5 (4) of the European Convention on Human Rights had no application in the case

of a prisoner sentenced to an ordinary extended determinate term, Mr Sim's detention had to be subject to review by a judicial body. Keene LJ observed, at para 36:

> "In short, when an offender is detained during the extension period of a section 85 sentence, such detention must be subject to review by a judicial body. No court ha ordered his detention during that period: prima facie the sentencing court took the view that he could be dealt with in the community during that period. This is the critical factor which distinguishes this situation from that considered in *Giles* and in *R (Smith) v Parole Board (No 2)* [2004] 1 WLR 421, [later reversed by this House at [2005] 1 WLR 350], in both of which the court was concerned with detention falling within the term of imprisonment imposed by a competent court. In cases of extended sentences under section 85, it is the executive which decides upon an offender's recall during the extension period, and because that detention has not been ordered by a court it must be scrutinised by a judicial body. Otherwise there is a danger of an arbitrary decision being made by the executive. As it happens, it *is* so supervised, because section 44A of the 1991 Act so provides through the mechanism of the Parole Board. Parliament was right to take the view that such judicial supervision of detention during that period was necessary."

The correctness of this view cannot be doubted, in particular following the House's decision in *R (West) v Parole Board* [2005] 1 WLR 350, reversing the Court of Appeal's decision in that case and in *Smith* and holding that a prisoner's recall from release on licence engages article 5 (4).

99. Having decided that Mr Sim's recall from licence during the extended period of his sentence required his fresh detention to be subject to supervision under article 5(4), the Court of Appeal then held that section 44A(4) on its ordinary construction was incompatible with his article 5 rights. As Keene LJ put it in para 49:

> "If the redetention of the offender is not something which is to be seen as prima facie necessary because of the

> original sentence passed on him by the court, then one is driven back to first principles. It is detention which has to be shown to be necessary, not liberty. In *Reid v United Kingdom* (2003) 37 EHRR 211, the European Court of Human Rights noted that there is no direct Convention case law governing what it called the onus of proof in article 5 (4) proceedings, but it went on to say, at p 232, para 70:
>
> > 'That it is however for the authorities to prove that an individual satisfies the conditions for compulsory detention, rather than the converse, may be regarded as implicit in the case law.'"

100. In the result the Court of Appeal applied section 3 of the Human Rights Act 1998 to read and give effect to section 44A(4) in a way which was compatible with article 5(4) by requiring the Board to direct the offender's release unless positively satisfied that it was necessary for the protection of the public that he be confined.

101. In so ruling the Court of Appeal distinguished *Lichniak* where this House had expressly rejected the prisoner's argument that the requirement upon him at the end of the tariff period to show that it was safe to release him was contrary to article 5. As Lord Bingham said, at para 16:

> "There is, inevitably, a balance to be struck between the interest of the individual and the interest of society and I do not think it objectionable, in the case of someone who once has taken life with the intent necessary for murder, to prefer the latter in case of doubt."

102. The basis of that distinction, explained Keene LJ (at para 46), was that whereas the objectives of the sentencing court imposing an indeterminate prison sentence "may well be seen as wishing to ensure that a person who has committed such a serious crime is not to be released unless and until it can be shown that he no longer presents a danger for the public," in a section 85 case "the object of the sentence is not to subject the prisoner to detention for the extended licence period . . [but rather] to manage the risk in the community rather than in prison, albeit that it is recognised that it may be necessary to resort to further detention if that aim fails. The offender is not on licence as an alternative to prison; rather he is on licence as an alternative to liberty."

103. *Sim* is the only decision that I am aware of which holds that where after hearing all the evidence the Board remains genuinely unsure whether the prisoner needs to be detained or not, the benefit of that doubt must be given to the prisoner. Should this be another such case? Should the Commissioners (who fulfil substantially the same role under the 1998 Act as the Parole Board under the criminal justice legislation) allow a life sentence prisoner's early release if in doubt whether he can be safely released? In my judgment emphatically not. Rather this case seems to me *a fortiori* to *Lichniak.* If a mandatory life sentence prisoner having already served the tariff period of his sentence must positively satisfy the Board that he can be safely released, the benefit of any doubt about that being given to the public, so surely must a life sentence prisoner whose only claim to be entitled to early release within the tariff period depends upon his satisfying a series of statutory conditions. One could of course argue that unless the Commissioners under the 1998 Act are sure that a life sentence prisoner, if immediately released, would not be a danger to the public then by definition they must have concluded that he would be: a risk must necessarily exist unless it can be positively discounted. And the graver and more recent the prisoner's convictions, the stronger such argument would be. But even accepting that just occasionally the Commissioners may be genuinely unsure if such a prisoner can safely be released—the only situation in which the burden of proof assumes relevance—I for my part would unhesitatingly conclude that he should remain in prison rather than benefit from the accelerated release scheme.

104. It is difficult to imagine a case further removed than this one from the very particular situation arising in *Sim.* Not only did that case, unlike this, involve a recall from release on licence; more importantly still the original sentence in *Sim* had expressly contemplated the extended licence period being spent at liberty whereas of course here the sentencing court must have intended custodial punishment far exceeding two years.

105. I want to add just a few words with specific regard to the application and effect of article 5(4). It is now authoritatively established that that article is engaged in any indeterminate sentence case after the expiry of the tariff period and in any case involving a recall from release on licence. In both those situations the lawfulness of the detention (continuing detention in the one case, fresh detention in the other) must be challengeable before "a court" (a role fulfilled by the Parole Board). It is, however, altogether less clear that article 5(4) requires the prisoner's continuing or fresh detention to be subject to

judicial supervision in the circumstances arising under sections 3, 8 or 9 of the 1998 Act. There is force in what Lord Scott has to say about that.

106. Even assuming, however, which may be the better view, that article 5(4) does apply in these circumstances and that the Commissioners are discharging the function of a court and determining the lawfulness of the prisoner's continuing detention (or fresh detention), I see no incompatibility whatever between the requirements of article 5(4) and the prisoner's need to satisfy the Commissioners (whether under section 3, section 8, or section 9) that he can safely be released. *Reid v United Kingdom* (the case relied upon by Keene LJ at para 49 of his judgment in *Sim*—see para 99 above) concerned what was then the domestic law requirement for the compulsory detention of mental patients that their mental illness was amenable to treatment. Section 64 of the Mental Health (Scotland) Act 1984, however, placed the burden of proof on the applicant to satisfy the sheriff that he was no longer suffering from a mental disorder of a nature or degree which made it appropriate to continue his detention. The ECtHR held it incompatible with article 5 (4) to place the burden on the applicant "to establish that his continued detention did not satisfy the conditions of lawfulness" (para 73).

107. If I may respectfully say so, that seems to me a perfectly sensible and correct decision. Similarly I have no difficulty in accepting the application of the *Reid* principle to *Sim's* case where, as Keene LJ noted: "It is detention which has to be shown to be necessary, not liberty." But it would be a very different thing to say that in no circumstances can the onus be upon a detainee to satisfy a condition for his release and I do not understand either Keene LJ in *Sim* or for that matter the ECtHR in *Reid* to have been saying any such thing. Whereas in *Sim* it was the detention, not liberty, which had to be shown to be necessary, under the 1998 Act the situation was very different: the prisoner's continued detention plainly *was* regarded as necessary (and unarguably it was justified) unless the Commissioners were satisfied that he could be safely released (or, following release and recall, safely re-released under section 9). Turning to para 70 of the Court's judgment in *Reid* (quoted by Keene LJ—see para 99 above), the conditions for the prisoner's compulsory detention *are* here satisfied (and proved by the Secretary of State to be satisfied) if he fails to persuade the Commissioners that his release would not endanger the public. On this part of the case I am in full agreement with all that Lord Scott says in paras 51-53 of his speech.

108. For these reasons, therefore, in addition to those given by my Lords, I too would allow the Commissioners' appeal and dismiss Mr McClean's cross appeal.