HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Regina *v.* Secretary of State for the Home Department (Respondent) *ex parte* Dudson (FC) (Appellant) and one other action

[2005] UKHL 52

LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hope of Craighead. I agree with it, and would dismiss the appeal for the reasons which he gives.

2. As Lord Hope makes plain, the review which the Lord Chief Justice was called upon to conduct was no ordinary sentencing exercise. It was procedurally unique. The trial had established the facts of the crime and the extent of the appellant's culpability. Those matters were not to be re-opened. But the Lord Chief Justice was invited to consider, following the decision of the European Court in *V v United Kingdom* (1999) 30 EHRR 121, whether the minimum term previously ordered by the Secretary of State to be served by the appellant, judged against the scale of sentences imposed for crimes of this kind and seriousness and taking account of the appellant's response to custody, was too long. Thus the procedure was more closely analogous to an appeal than to a first-instance decision. In conducting the review he had the benefit of detailed written representations on behalf of the appellant, and it is not suggested that there was any material adverse to the appellant which he was unable to address or any arguments in his favour he was unable to advance. Had the Lord Chief Justice with his immense experience felt that he could not resolve the matter fairly without an oral hearing, there was nothing to prevent him directing that there be such a hearing, although this is not a course he expressly provided for and there were strong administrative reasons for not holding oral hearings which would contribute nothing of value to the decision. As established by the decision of the House in *R v Secretary of State, Ex p Maria Smith* [2005]

UKHL 51, the Lord Chief Justice's decision does not preclude a further reduction in the appellant's minimum term if he makes truly exceptional progress for which no allowance has been made. In the exceptional circumstances of this case, I conclude that the Court of Appeal made the correct decision.

LORD NICHOLLS OF BIRKENHEAD

3. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hope of Craighead. For the reasons he gives, with which I agree, I would dismiss this appeal.

LORD HOFFMANN

My Lords,

4. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hope of Craighead. For the reasons he gives, with which I agree, I would dismiss this appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

5. On 17 December 1993 the appellant, with three adult co-defendants, was convicted of the murder of Suzanne Capper. He was 16 years old at the time of her murder, so he was sentenced to be detained during Her Majesty's pleasure under section 53(1) of the Children and Young Persons Act 1933. He remains in custody. The issue in this appeal relates to the procedure that was adopted when the Lord Chief Justice, Lord Woolf CJ, reviewed the minimum term (formerly known as the "tariff") which was to be applied in his case. This was done in accordance with the arrangements described by the Secretary of State, Mr Jack Straw, in his statement to Parliament (Hansard (HC Debates), 13 March 2000, cols 22-23) following the

decision of the European Court in *V v United Kingdom* (1999) 30 EHRR 121 that the procedure under which tariffs for those sentenced to be detained at Her Majesty's pleasure had originally been set violated article 6(1) of the European Convention on Human Rights.

6. The appellant's tariff had originally been set at 18 years. On 29 January 2002, having conducted his review, the Lord Chief Justice advised that it should be reduced to 16 years. His recommendation was accepted by the Secretary of State, who reset the appellant's tariff at this figure on 20 March 2002. On 30 October 2002 the appellant was given permission by McCombe J to seek judicial review of the Secretary of State's decision. It was contended, among other arguments, that the appellant was entitled to an oral hearing before his tariff was set. It was also contended that the advice which had been given to the Secretary of State was defective in that the Lord Chief Justice had failed to have regard to the appellant's welfare when deciding on the appropriate tariff. On 21 November the Divisional Court (Kennedy LJ and Mackay J) held that the Lord Chief Justice had been under no obligation to afford the appellant an oral hearing and, alternatively, that, if he was entitled to an oral hearing, he had waived that entitlement: [2003] EWHC 2797 (Admin). The court also held that the Lord Chief Justice had paid due regard to the appellant's welfare. On 11 February 2004 the Court of Appeal (Lord Phillips of Worth Matravers MR, Mantell and Carnwath LJJ), having heard the appellant's appeal against the decision of the Divisional Court together with an appeal by the Secretary of State in the case of another prisoner detained at Her Majesty's pleasure named Maria Smith, dismissed his appeal: *R (Smith) v Secretary of State for the Home Department* [2004] EWCA Civ 99; [2004] QB 1341.

7. The issues in this appeal are (i) whether the appellant had a right under article 6(1) of the European Convention on Human Rights to an oral hearing before the Lord Chief Justice when the tariff was set in his case; (ii) if he had such a right, whether he waived that entitlement; and (iii) whether, if he had that right and it was not waived, he should be granted any form of relief. The respondent accepts that article 6(1) applies with respect to the setting of the minimum term in the appellant's case. He points out in his written case that this was the very reason why the matter was referred to the Lord Chief Justice. But it does not, of course, follow that all the requirements of article 6(1) were satisfied by the procedure which he adopted.

The facts

8. The appellant was born on 25 July 1976. He was 16 years old when the murder was committed. The crime was characterised by a series of acts of exceptional cruelty. The deceased, who was also aged 16, was tricked into going to the house of one the appellant's co-defendants. She was held prisoner there and later in the house of the other co-defendant for a period of about eight days. She was beaten and savagely tortured. She was then starved, bound to a bed and gagged. Finally she was taken away from the house by car and driven into the country. She was forced out of the car shoeless and virtually naked, down a bank and into a wood. Petrol was poured over her and she was set alight. She died four days later.

9. Following his conviction the appellant applied for leave to appeal against it. On 3 May 1994 leave to appeal was refused by the Court of Appeal. This decision was affirmed by the full court on 3 November 1994.

10. In his report dated 13 January 1994 the trial judge, Potts J, acknowledged that the appellant, who was much younger, had been corrupted by his co-defendants. But he said that he had played an active part in the torture and the killing. Having recommended a tariff of 25 years in the case of the three adult co-defendants, he recommended that detention for a period of 18 years was necessary in the appellant's case to meet the requirements of retribution and deterrence for the offence. On 17 January 1994 the Lord Chief Justice, Lord Taylor of Gosforth CJ, agreed with these recommendations, observing that this was an exceptionally grave case. They were accepted by the Secretary of State, Mr Michael Howard, who then set the tariff which was to be applied in the appellant's case at 18 years in accordance with the procedure described in his statement to Parliament (Hansard (HC Debates) 27 July 1993, written answers, col 863) following the decision in *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531.

11. In *V v United Kingdom* (1999) 30 EHRR 121 the European Court held that the setting of a tariff in the case of a young person detained at Her Majesty's pleasure was a sentencing exercise that engaged article 6(1) of the European Convention on Human Rights and that it should not be set by ministers. The court said, at pp 186-187, para 114:

> "The court notes that article 6(1) guarantees, inter alia, 'a fair…hearing…by an independent and impartial tribunal…' 'Independent' in this context means independent of the parties to the case and also of the executive. The Home Secretary, who set the applicant's tariff, was clearly not independent of the executive, and it follows that there has been a violation of article 6(1)."

12. In his statement to Parliament on 13 March 2000 the Secretary of State said that he would bring forward legislation to provide for tariffs to be set by the trial judge in open court, in the same way as they were already being set for adults subject to discretionary life sentences. But he noted that about 250 people who had been sentenced as juveniles were currently detained at Her Majesty's pleasure, and that fresh cases were continuing to go through the courts which would have to be dealt with before the new legislation was brought into force. Addressing himself to this problem he said:

> "For new cases, pending the necessary change in the law which I have announced, I shall set any tariffs in line with the recommendation that the Lord Chief Justice makes to me in each case. For existing cases, I propose a fresh review of tariffs in line with the principles in the judgment. I shall be inviting representations from those whose tariffs have not yet expired.
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> Where no representations are received, the tariff will be set in accordance with the original recommendation made by the Lord Chief Justice in that case. Where acceptance of the Lord Chief Justice's original recommendation would mean that the tariff had now expired, I shall refer those cases to the parole board immediately. Where the original recommendation made by the Lord Chief Justice was higher than the tariff set by Ministers, the tariff would not be increased.
>
> Where existing detainees wish to make representations, they can be made to the present Lord Chief Justice, who will then make a recommendation to me. I will then adopt his recommendation on what the tariff should be."

13. On 31 May 2000 the Secretary of State wrote to the appellant's solicitors informing them that the previous arrangements for reviewing the tariffs for those detained at Her Majesty's pleasure had been

replaced by the new tariff setting arrangements set up as a result of the judgment of the European Court in *V v United Kingdom* (1999) 30 EHRR 121. He said that either the appellant or his solicitors could submit representations for a reduction in the 18 year tariff. He attached to his letter a copy of a memorandum which explained in more detail how the new arrangements would affect the appellant. Details were given of the address to which any representations were to be submitted for consideration by the Lord Chief Justice if it was thought that the tariff should be set lower than 18 years.

14. On 11 August 2000 the appellant's solicitors submitted representations to the Secretary of State to enable his tariff to be reconsidered by the Lord Chief Justice. Reference was made in this document to the principles for the fixing of tariffs in the case of child offenders which were described in the speech of Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, Ex p Venables and Thompson* [1998] AC 407 (referred to collectively in the representations as "the welfare principle"). It was submitted that the welfare principle had never been considered or applied in the setting of the appellant's original tariff of 18 years, that a tariff of that length was excessive, that it was appropriate to allow a substantial discount in tariff to compensate for the lack of periodic review and that in the appellant's case it should be set at 12 years. In the concluding paragraph of this document the following points were made:

> "5.5 If it is not accepted that a tariff of 12 years is appropriate in the present case, it is submitted that Mr Dudson should be afforded an oral hearing of his case under the requirements of article 6 of the European Convention on Human Rights. It has already been established by the European Court that the fixing of tariff for an HMP detainee is a sentencing exercise which attracts the safeguards of article 6. The European Court has previously held that the fixing of sentence is an integral part of the trial process and as such, that it requires an oral hearing. See eg: [*Eckle v Federal Republic of Germany* (1983) 5 EHRR 1]. This also requires that the sentence be fixed within a reasonable period of time after trial. In the event that Mr Dudson's tariff is not fixed at 12 years and he is <u>not</u> afforded an oral hearing, we reserve the right to challenge the procedural aspects of this matter as well as the substantive level at which his tariff is set."

15. On 27 July 2000 the Lord Chief Justice issued a practice statement, *Practice Statement (Juveniles: Murder Tariff)* [2000] 1 WLR 1655, in which he explained the procedure that he proposed to follow when he was undertaking a fresh review of tariffs for those people such as the appellant, sentenced as juveniles, who were currently detained at Her Majesty's pleasure and in fresh cases pending the necessary change in the law. At p 1656 of the practice statement he said:

> "Before I make a recommendation to the Home Secretary, in both new and existing cases, I shall invite written representations from the detainees' legal advisers and also from the Director of Public Prosecutions who may include representations on behalf of victims' families.
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> …
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> Before the first such cases are put before me to make a recommendation to the Home Secretary, it is appropriate for the general principles which will guide me in recommending tariffs to be made public. This is because it is right that the process by which tariffs are set should be open to public scrutiny. When making recommendations to the Home Secretary in such cases, I will announce my reasons in open court after taking into account any written representations I receive."

No mention was made in this practice statement of any provision for the making of oral submissions to the Lord Chief Justice before he made his recommendation to the Home Secretary.

16. On 2 July 2001 the appellant's solicitors wrote to the Secretary of State noting with concern that no decision had yet been made in respect of the appellant's tariff. They said that the delay was adversely affecting the appellant's progress through the prison system and had direct implications for his potential future release on licence. They asked for confirmation that a decision would be forthcoming immediately, reserving the right to issue proceedings if they did not hear from him within the next 21 days. On 14 August 2001 the Secretary of State sent a memorandum to the appellant stating that the Lord Chief Justice had decided to consider representations from the Crown Prosecution Service on behalf of the victim's family in his case and enclosing copies of the documents from the Crown Prosecution Service that would be before him when he considered his tariff. Copies were attached of prison reports which the Lord Chief Justice would have before him. He was told that any comments that he or his legal

representatives might have on this material or on a report covering his most recent period of imprisonment were to be sent to the Secretary of State within two months of the date of that memorandum.

17. On 9 November 2001 the appellant's solicitors submitted further representations to the Secretary of State for inclusion with the papers for the Lord Chief Justice. They said that the appellant wished them to be considered in conjunction with those which had previously been submitted on his behalf in August 2000. They contained various comments on the statements by made by the members of the victim's family and in the prison reports. Reference was made to the detailed representations which had previously been made on his behalf. It was again submitted that a tariff period of 12 years was appropriate in his case. Receipt of these further submissions was acknowledged in a reply dated 13 November 2001, in which it was stated that the Lord Chief Justice would give full consideration to the appellant's case as soon as possible and that the appellant would be informed of his decision in due course. No mention was made in this reply of any provision for an oral hearing, nor was any further request made for one either by the appellant or by his solicitors.

18. On 29 January 2002 the Lord Chief Justice delivered his decision on the appellant's tariff and his reason for it in open court. He concluded his statement with these words:

> "Although I do not question the tariff which was set, Dudson has made significant progress in detention and it is possible to recognise this by reducing the tariff to 16 years."

On 20 March 2002 the appellant was given a copy of a transcript of this decision and informed that the Secretary of State had accepted the Lord Chief Justice's recommendation.

19. On 28 March 2002 the appellant's solicitors wrote to the Secretary of State expressing their concern at the fact that the procedural issues which they had identified in their representations had not been addressed. The issues to which they drew attention related to the way in which the welfare principle should be addressed, and in particular to the need to take account of future welfare. No mention was made in this letter of the request that had been made in the original representations

for an oral hearing in the event that the appellant's tariff was not fixed at 12 years. They submitted further representations on the appellant's behalf on 24 June 2002. By a letter dated 23 August 2002 they were informed that these representations had been rejected.

The Strasbourg jurisprudence

20. In the Court of Appeal Lord Phillips of Worth Matravers MR observed that the jurisprudence of the European Court on the question whether there should have been an oral hearing was sparse: [2004] 3 WLR 341, 365, para 82. Having examined the cases that had been referred to he said, at p 366, para 86, that by far the most relevant European Court decision was *Easterbrook v United Kingdom* (2003) 37 EHRR 812. Mr Owen QC for the appellant agreed. He put at the forefront of his argument the proposition that this decision contained a clear statement of principle that a life prisoner was entitled to an oral hearing before his tariff was set.

21. The applicant in *Easterbook v United Kingdom* was a discretionary life prisoner. His tariff had been set at 16 years by the Home Secretary after consulting the judiciary. His lawyers asked for the period to be reduced and requested an oral hearing before the Lord Chief Justice. Some months later, in August 1998, they were told that the Lord Chief Justice had revised the opinion that had been given earlier, that he was now recommending a tariff of 12-13 years but that no oral hearing would be allowed. In November 1998 they were told that the Home Secretary had decided on a tariff of 12½ years. He complained of the delay in the procedure by which his tariff was set. He submitted that it was contrary to article 6(1) for the decision to be taken by the executive in an administrative procedure and not by the judiciary. He also complained that the procedure was fundamentally flawed as it failed to provide for a public hearing. The government accepted that the delay in fixing the tariff was a violation of article 6(1). But they submitted that, as the tariff had expired by the date of the application to the European Court, it was no longer relevant to have an oral hearing in regard to it.

22. The court held that there had been a breach of article 6(1) regarding the procedure adopted in fixing the applicant's tariff. Its reasoning is set out on pp 817-818, para 28:

> "The court notes that the Government accept that there was unreasonable delay in the fixing of the applicant's tariff, over nine years, which is not compatible with the requirement under article 6(1) that sentencing, as part of the determination of a criminal charge, be completed within a reasonable time. The Government disputed however that any issue arose from the fact that the tariff was fixed by the Secretary of State since he followed the recommendations of the judiciary. The court would observe that the sentencing exercise carried out in criminal cases must necessarily be carried out by an independent and impartial tribunal, namely, a court offering guarantees and procedure of a judicial nature. It was not a court that fixed the applicant's tariff in a public, adversarial hearing and in the circumstances it is not sufficient to satisfy the fundamental principle relating to the separation of powers that the member of the executive who issued the decision was guided by judicial opinion."

23. Two points emerge from an examination of this decision. The first is that the government did not seek to challenge the applicant's proposition that the procedure was flawed because it failed to provide for a public hearing. Its case was this criticism was no longer relevant. The second is that, as the final sentence of its reasoning indicates, the court's decision was based on the fundamental point that the principle of the separation of powers had been breached. It did not express any view on the question whether the judicial opinion which had guided the decision maker was itself flawed because there was no oral hearing. In my opinion Mr Sales was right to observe that the case does not bear the weight which Mr Owen sought to place upon it.

24. Mr Owen then said that there was no statement in the Strasbourg case law to the effect that it was compatible with article 6(1) in the criminal context for a decision in regard to sentence to be made without an oral hearing. Developing this submission, he said that there was entitlement under article 6(1) to an oral hearing in every case, and every time, a decision was taken about a prisoner's tariff or at least that the question whether there ought to be an oral hearing had to be considered by the decision-taker. This argument makes it necessary to examine more closely what the jurisprudence of the Strasbourg Court does and does not say on this matter. But in order to set the context for this examination the nature of the proceedings which are under scrutiny must first be identified.

25. The first thing to notice is that what article 6(1) requires is that there must be a fair and public hearing. But it does not say that there must always be an oral hearing at every stage in the proceedings if this requirement is to be satisfied. The starting point, then, must be that it is not disputed that the appellant had a fair and public hearing at his trial. All the facts that were relevant to the nature of the crime and its gravity, and to the part that retribution and deterrence were to play in his sentence, were open to public scrutiny at that stage. The proceedings that are now under scrutiny are the result of the setting up of a regime for dealing with transitional cases which was devised to meet the criticism that the tariff for those sentenced to be detained during Her Majesty's pleasure should not have been set by the executive but should have been the result of an independent assessment by the judiciary.

26. The system which was to be adopted for dealing with past cases was announced by the Secretary of State in public. They were to be dealt with by the Lord Chief Justice as the head of the judiciary of England and Wales according to a procedure which he in his turn made public by means of his practice statement. There was no question of there having to be a new trial of the facts before him. He was not entering upon untrodden territory. A tariff had already been set in the light of views which had been expressed to the Home Secretary by the judiciary. What the Lord Chief Justice was being required to do was to consider each case afresh in the light of facts which had already been determined at the trial and commented on by the judiciary and the written representations that might be placed before him. Essentially his task was to assess where, given the going rate for the setting of tariffs for adult murderers, the appellant's case should be placed on the scale given his age at the time of the murder and his progress since he was taken into custody. This was a highly unusual process which, in the light of the views on tariff which had already been expressed by the judiciary, can best be described as a process of review. The fundamental question is what the guarantee of fairness in article 6(1) requires in these circumstances.

27. Mr Sales said that the relevant principles were those to be derived from authorities which address the position in an appeal in a criminal case rather than those which address the position in a trial at first instance. In *Delcourt v Belgium* (1970) 1 EHRR 335, para 25 the court said that the protection afforded by article 6 did not cease with the decision at first instance and that, while the contracting states were not compelled to set up courts of appeal, where such courts were instituted it was required to ensure that person amenable to the law enjoyed before them the fundamental guarantees contained in that article. But in *Fejde*

v Sweden (1991) 17 EHRR 14, 25, para 26, repeating a point that it made in *Delcourt v Belgium*, para 26, the court said that the manner of the application of article 6 to proceedings before courts of appeal depends on the special circumstances of the proceedings involved. It was stressed that account must be taken of the entirety of the proceedings in the domestic legal order and of the role that the appellate court was performing in those proceedings. At p 27, para 31, the court said:

> "Provided a public hearing has been held at first instance, the absence of such hearing before a second or third instance may accordingly be justified by the special features of the proceedings at issue."

28. Various examples can be cited to illustrate the application of this principle. In *Monnell and Morris v United Kingdom* (1987) 10 EHRR 205 the applicants had unsuccessfully sought leave to appeal against conviction and sentence. The Court of Appeal dismissed their applications at a hearing at which, in accordance with the normal procedure, they were neither present nor represented. It ordered that part of the time that they had spent in custody after conviction should not count towards service of the sentences that had been imposed on them at first instance. The court rejected the applicants' submission that there had been a breach of article 6 because they were not given the opportunity to be present in person and to submit oral arguments as to why they should not be subjected to an extension of their deprivation of liberty. At p 225, para 68, it said that the interests of justice and fairness could be met by the applicants being able to present relevant considerations through making written submissions.

29. In *Göç v Turkey*, Application no 36590/97, decision of the Grand Chamber, judgment of 11 July 2002 (unreported), the applicant alleged that he had been falsely imprisoned and tortured and otherwise ill-treated by the police while he was in custody for which he had sought compensation. He complained that the court of first instance had denied him an oral hearing at which he could present his own direct evidence of the distress and anxiety which he had experienced. The Grand Chamber held by a majority of 9 to 8 that the refusal of an oral hearing had violated article 6(1). In para 47 of its decision the majority observed that, according to the court's established case law, in proceedings before a court of first and only instance the right to a "public hearing" in the sense of article 6(1) entailed an entitlement to an oral hearing unless there were exceptional circumstances that justified dispensing with such

a hearing. The question was how this test was to be applied, given that the proceedings that were under challenge were before a court of first instance. In para 51 the majority said that the essentially personal nature of the applicant's experience, and the determination of the level of compensation required that he be heard and that these factors outweighed the considerations of speed and efficiency on which, according to the government, the relevant law on which an oral hearing had been denied to him was based.

30. This case, in which the Grand Chamber was so narrowly divided, is of particular interest in view of the reasons which were given for the dissent by the minority. At p 20 they observed that the court's case law had never required oral proceedings in all circumstances. Having referred to various authorities, they said:

> "That case-law lays down three criteria for determining whether there are 'exceptional circumstances' which justify dispensing with a public hearing: there must be no factual or legal issue which requires a hearing; the questions which the court is required to answer must be limited in scope and no public interest must be at stake."

At p 21 they added this comment:

> "Requiring domestic courts to hold a hearing every time a claim raising no particular problems is submitted to them might practically frustrate the objective of complying with the 'reasonable time' requirement in article 6(1) of the Convention."

31. In *Hoppe v Germany* (2002) 38 EHRR 285 the applicant complained that he had been denied a fair hearing in appeal proceedings concerning his right of access to his daughter contrary to article 6(1). Rejecting this complaint, the court said at p 299, paras 62-63:

> "62. The court recalls further that article 6(1) requires in principle that a hearing be held. The question therefore arises whether a departure from this principle could, in the circumstances of the case, be justified at the appeal stage.

> 63. The manner in which article 6 of the Convention applies to proceedings before courts of appeal depends on the special features of the domestic proceedings viewed as a whole. Even where the court of appeal has jurisdiction both over the facts and in law, article 6 does not always require a right to a public hearing, irrespective of the nature of the issues to be decided. The publicity requirement is certainly one of the means whereby confidence in the courts is maintained. However, there are other considerations, including the right to a trial within a reasonable time and the related need for an expeditious handling of the courts' case load, which must be taken into account in determining the necessity of public hearings in the proceedings subsequent to the trial at first instance level. Provided a public hearing has been held at first instance, the absence of a hearing before a second or third instance may accordingly be justified by the special features of the proceedings at issue."

32. In *Bulut v Austria* (1996) 24 EHRR 84 it was held that there had been no violation of article 6(1) where there had been no oral hearing of the applicant's appeal by the Supreme Court which it rejected summarily on the ground that the appeal was manifestly without merit. The European Court was not satisfied that the appeal had raised questions of fact bearing on the assessment of the applicant's guilt or innocence that would have necessitated a hearing. That case is to be contrasted with *Botten v Norway* (1996) 32 EHRR 37, where the court held that article 6 had been violated. The Supreme Court had had to make its own assessment of facts relating to the applicant's personality and character on which it did not have the benefit of an assessment by the lower court and which could not properly have been examined without hearing him in person. In both cases the court made it clear that the application of article 6(1) depended upon the special features of the proceedings.

33. In *Arnarsson v Iceland* (2003) 39 EHRR 426 too it was held that article 6 had been violated. The applicant had been acquitted of the criminal charge against him at first instance. This decision was reversed on appeal by the Supreme Court after an oral hearing at which it heard submissions from the prosecution and from the applicant's lawyer. But the issues which it had to determine were predominantly factual in nature and they were complex. In para 30 the court reiterated the point made in its earlier jurisprudence that the manner of the application of article 6(1) to proceedings before courts of appeal depends on the

special features of the proceedings involved, and that account must be taken of the entirety of those proceedings in the domestic legal order and of the role of the appellate court therein. In para 36 it said it did not consider that, having regard to what was at stake for the applicant, the issues to be determined by the Supreme Court could as a matter of fair trial have been examined properly without a direct assessment of the evidence given by the applicant in person.

34. None of these cases is directly comparable with the process of review that was being undertaken by the Lord Chief Justice in this case at the request of the Home Secretary. But it is possible to extract from them the following principles. What is at issue is the general right to a "fair and public hearing" in article 6(1). There is no absolute right to a public hearing at every stage in the proceedings at which the applicant or his representatives are heard orally. The application of the article to proceedings other than at first instance depends on the special features of the proceedings in question. Account must be taken of the entirety of the proceedings of which they form part, including those at first instance. Account must also be taken of the role of the person or person conducting the proceedings that are in question, the nature of the system within which they are being conducted and the scope of the powers that are being exercised. The overriding question, which is essentially a practical one as it depends on the facts of each case, is whether the issues that had to be dealt with at the stage could properly, as a matter of fair trial, be determined without hearing the applicant orally.

Application of these principles to this case

35. Mr Owen laid much stress on the fact that the setting of the appellant's tariff was part of the sentencing process and that there had been no oral hearing as to this matter under the defective procedure under which it was originally set by the Home Secretary. He also pointed out that what Lord Woolf CJ was being required to do was to take account of later developments in the light of the principles which had been described in *R v Secretary of State for the Home Department, Ex p Venables and Thompson* [1998] AC 407. This was not something which Potts J was required to do. It was a fresh exercise which involved the scrutiny by the Lord Chief Justice of new material which had not previously been taken into account by the judiciary. The Strasbourg case law to the effect that the application of article 6(1) depended upon the special features of the proceedings assumed that there had been a satisfactory examination of the case at first instance. That was not what had occurred here.

36. On the other hand, looking to the stage that had been reached in the sentencing process by the time of the review by Lord Woolf CJ, it is clear that most of the issues which were relevant had already been determined at the trial. No challenge was being made to the assessment by Potts J of the part which the appellant had played in the murder. His determination of the length of the detention that was necessary to meet the requirements of retribution and general deterrence in the appellant's case, and Lord Taylor of Gosforth CJ's agreement with his recommendation in what he described as an exceptionally grave case, could not be ignored by Lord Woolf CJ. These views had been formed in the light of the evidence which had been led in public at the trial. The issues which Lord Woolf CJ was being required to determine now were not, of course, confined to a fresh assessment of the extent of the appellant's criminality. He had to review the appellant's behaviour after conviction, the reports of those who had been responsible for his case at HMP Wandsworth and the representations that had been received from the victim's family. He also had to review the representations that had been received from the appellant's solicitors. But it is important to note that he was not being required to make findings of fact based on this material. What he was being required to do was to make an assessment of the extent to which an adjustment of the tariff was needed in the light of these further factors.

37. It is not obvious, given the comparatively limited nature of this exercise, that an oral hearing was needed to equip the Lord Chief Justice with the information that he needed for the proper conduct of this exercise. I would attach particular importance to the fact that it was not suggested by the appellant's solicitors that an oral hearing was required so that the appellant could appear in person before the Lord Chief Justice and give evidence. The request for an oral hearing was made solely on the ground that this procedure was a normal part of the sentencing exercise. Mr Owen did not dispute that its sole purpose was to enable the appellant's solicitors to make oral representations on his behalf. But they had been given an ample opportunity to submit these representations in writing, so it is unlikely that any information that they would have been able to provide at an oral hearing would have added anything. This is not a situation where procedural fairness required there to be an oral hearing before a final decision was made: contrast *R (West) v Parole Board* [2005] UKHL 1; [2005] 1 WLR 350, 362-363, para 35, per Lord Bingham of Cornhill; p 370, paras 64-68, per Lord Hope of Craighead. All the signs are that an oral hearing in this case would have been a formality.

38. Account must also be taken of the nature of the procedure that the Secretary of State had devised for dealing with those persons who had already been sentenced as juveniles. As he told Parliament on 13 March 2000, there were already about 250 such detainees, with the possibility of more cases going through the courts before the necessary changes in the law could be introduced. He had decided that the review in these cases should be conducted by the Lord Chief Justice. He could have decided that they should be dealt with instead by a High Court judge, at least in the first instance. But there were very good reasons for preferring that this exercise should be conducted by the Lord Chief Justice himself, in view of the central role which he plays in the maintenance of fairness and consistency when the minimum periods that life prisoners must serve in custody are being fixed.

39. The essential task for the Lord Chief Justice was to determine, in the light of his experience, where on the scale each one of these detainees should be placed in the light of the particular facts of each case. The magnitude of the task that he was being asked to perform must not be underestimated. This was, as Lord Phillips of Worth Matravers MR observed in the Court of Appeal [2004] QB 1341, 1372, para 92, a very substantial burden, to be performed in addition to his existing heavy judicial duties as Lord Chief Justice. He had to have regard to the public interest as well as the interests of each detainee, and he had to have regard to the requirement that this exercise had to be carried out within a reasonable time as article 6(1) of the Convention requires. There is no doubt that if he had undertaken to conduct each one of these proceedings orally it would greatly have enlarged his task, and inevitably it would have caused much delay. Moreover it has not been shown that any good purpose would have been served by adopting this procedure generally, as all relevant material was being disclosed and a sufficient opportunity was being given for representations to be made in writing. It was, of course, open to him to ask for an oral hearing in a particular case if, in the light of his experience, he thought that this was necessary. The requirement that the matter should be dealt with in public was served by the issuing of the practice statement which explained the procedure that was to be adopted, and by the fact that the decisions on the tariff in each case were delivered by the Lord Chief Justice himself in open court.

Conclusion

40. Taking all these special features of the proceedings into account, I would hold that the absence of an oral hearing in this case did not

violate article 6(1) of the Convention. There is no need in these circumstances to answer the questions whether, if there was a right to an oral hearing, it had been waived or to consider what relief the appellant should have been given if he had the right and it was not waived. I would dismiss the appeal.

BARONESS HALE OF RICHMOND

My Lords,

41. For the reasons given in the opinion of my noble and learned friend, Lord Hope of Craighead, with which I agree, I too would dismiss this appeal.