Trinity Term
[2019] UKSC 26
On appeal from: [2017] NIQB 121

JUDGMENT

In the matter of an application by Dennis Hutchings for Judicial Review (Northern Ireland)

before

Lord Reed, Deputy President
Lord Kerr
Lady Black
Lord Lloyd-Jones
Lord Sales

JUDGMENT GIVEN ON

6 June 2019

Heard on 14 March 2019

Appellant
James Lewis QC
Ian Turkington
(Instructed by McCartan Turkington Breen)

Respondent
Gerald Simpson QC
Richard Shields
(Instructed by Public Prosecution Service)

LORD KERR: (with whom Lord Reed, Lady Black, Lord Lloyd-Jones and Lord Sales agree)

Introduction

1. On Saturday 15 June 1974, in the late morning, an army patrol consisting of two military vehicles was travelling towards Benburb, County Tyrone. The vehicles contained members of the Life Guards regiment. The lead vehicle had six men on board. The commander of the patrol, who was travelling in that vehicle, was Dennis Hutchings, the appellant in this case.

2. As the patrol rounded a left-hand bend near a village called Eglish on what was a winding road, a young man came into view, standing on the left-hand side of the road. He appeared to be looking into the hedge at the side of the road. His name was John Paul Cunningham. Mr Cunningham appeared startled and confused. He ran across the road in front of the lead vehicle and climbed a gate into a neighbouring field. He then ran towards a metal fence which bordered the field.

3. The patrol came to a halt on the appellant's command. Most of the soldiers dismounted from the vehicles and took up defensive positions. Three members of the patrol, the appellant and two others, who have been referred to as B and E, pursued Mr Cunningham. Mr Hutchings and soldier E went towards the same gate that Mr Cunningham had climbed over. Soldier B went to a gateway further down the road. A number of shouted commands to Mr Cunningham to stop went unheeded. It later transpired that he had limited intellectual capacity. His mental age was judged to be between six and ten years. In a report by the Historical Enquiries Team (HET) (of which more below at para 9) it was said that he "was easily confused and may have had an inherent fear of men in uniform and armoured vehicles".

4. The case made by the prosecution is that when Mr Cunningham failed to stop, shots were discharged by the appellant and the soldier referred to as B. Mr Cunningham was hit and died at the scene. At the time that he fell, he was close to the metal fence. It has been established that he was running towards his home. HET concluded, after investigation, that he was unarmed; that he was shot while running away from the soldiers; and that there was no evidence that he presented a threat to them or to anyone else.

Background

5. In 1974 there was much terrorist activity in Northern Ireland. A large part of that activity was generated by the Provisional Irish Republican Army (PIRA). There were regular attacks on the security forces, including the British Army. The attacks frequently involved the use of firearms and explosives.

6. The Life Guards regiment was responsible in 1974 for security force operations in Cookstown, Dungannon and Armagh and surrounding districts. Cookstown and Dungannon are in County Tyrone, as are Benburb and Eglish. Benburb is some 18 miles from Cookstown and about eight miles from Dungannon. Eglish is a small village that lies between Dungannon and Benburb. It is about five miles from Dungannon to Eglish and approximately the same distance from Eglish to Benburb. An army report about the time that Mr Cunningham was killed stated that the threat level in these areas was particularly high. There were frequent army patrols of the roads between these various locations. Indeed, in the first two weeks of June 1974 some 38% of shooting incidents in the Life Guards' operational zone occurred in the area of Eglish. One of those attacks resulted in the death of a soldier in the Life Guards regiment.

7. Two days before Mr Cunningham was killed, members of the Life Guards, under the command of Mr Hutchings, came upon a group of men loading material into a vehicle. A "firefight", as it was described in the reports of the incident, ensued. Arms and explosives were discovered in the vehicle. This had occurred about three and a half miles from where Mr Cunningham was killed.

8. Following the killing of Mr Cunningham, a joint inquiry by the Royal Ulster Constabulary (RUC) and the Royal Military Police took place. The then Director of Public Prosecutions reviewed the statements that this inquiry generated and decided that there should be no prosecution of any of the military personnel involved.

9. HET was a body created in 2005 to examine historical offences that were committed during the period of terrorist violence in Northern Ireland and the state's reaction to it. It conducted an inquiry into Mr Cunningham's death. It concluded that this was "an absolute tragedy that should not have happened". It recommended, however, that no further action be taken in relation to the incident.

10. In 2015 a new body, the Legacy Investigation Branch, conducted a new investigation into Mr Cunningham's death. As a result of this, the appellant was arrested and taken to a police station in Northern Ireland where he was interviewed. He answered "no comment" to all questions put to him. He was subsequently

charged with two offences: the attempted murder of Mr Cunningham and attempting to cause him grievous bodily harm.

11. On 20 April 2016, the Director of Public Prosecutions issued a certificate pursuant to section 1 of the Justice and Security (Northern Ireland) Act 2007 directing that the appellant stand trial on these charges by a judge sitting without a jury. It is accepted that the certificate was issued without prior notice to the appellant. He was not given an opportunity to make representations as to whether it should be issued. The material and information which led to the issue of the certificate have not been disclosed to him. He was not informed of its having been issued until 5 May 2017.

The statutory provisions relating to the issue of certificates and challenges to their issue

12. The relevant parts of section 1 of the 2007 Act are these:

> "Issue of certificate
>
> (1) This section applies in relation to a person charged with one or more indictable offences ('the defendant').
>
> (2) The Director of Public Prosecutions for Northern Ireland may issue a certificate that any trial on indictment of the defendant (and of any person committed for trial with the defendant) is to be conducted without a jury if -
>
> (a) he suspects that any of the following conditions is met, and
>
> (b) he is satisfied that in view of this there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.
>
> …

(6) Condition 4 is that the offence or any of the offences was committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one person or group of persons towards another person or group of persons.

(7) In subsection (6) 'religious or political hostility' means hostility based to any extent on -

(a) religious belief or political opinion,

(b) supposed religious belief or political opinion, or

(c) the absence or supposed absence of any, or any particular, religious belief or political opinion.

(8) In subsection (6) the references to persons and groups of persons need not include a reference to the defendant or to any victim of the offence or offences."

13. The breadth of the power to direct that a trial be before a judge without a jury is immediately apparent from these provisions. The Director need only *suspect* that one of the stipulated conditions (in this case condition 4) is met and that there is a *risk* that the administration of justice might be impaired if there was a jury trial. The circumstances in which such a risk might materialise and the specific nature of the risk or the impairment to the administration of justice which might be occasioned are not specified. It can only be supposed that these matters were deliberately left open-ended. The type of decision which the Director must take can be of the instinctual, impressionistic kind. Whilst the Director must of course be able to point to reasons for his decision, one can readily envisage that it may frequently not be based on hard evidence but on unverified intelligence or suspicions, or on general experience. It may partake of supposition and prediction of a possible outcome, rather than a firm conclusion drawn from established facts.

14. The need, on occasions, for the Director's decision to depend on intuitive belief rather than studied analysis of evidence is also reflected in the fact that the circumstances covered by condition 4 are extremely wide. Offences committed *to any extent* (even if indirectly) in connection with or in response to religious or

political hostility of one person or group of persons are covered. The PIRA campaign in Northern Ireland in the 1970s was based on that organisation's political hostility to continuing British rule in that country. The incident that occurred a few days before Mr Cunningham was killed bore all the hallmarks of a PIRA operation. When this is considered with the incidence of terrorist activity in the area at the time, it is entirely unsurprising that the Director should have concluded that the offences with which the appellant is charged were connected (directly or indirectly) with or in response to the political hostility of members of PIRA against, as the Director put it in an affidavit, "those who believed that Northern Ireland should remain a part of the United Kingdom". That the soldiers who fired on Mr Cunningham suspected that he was a member of PIRA seems inescapable. (I shall have more to say presently about the Director's reasons for issuing the certificate.)

15. Section 7 of the Act provides:

> "Limitation on challenge of issue of certificate
>
> (1) No court may entertain proceedings for questioning (whether by way of judicial review or otherwise) any decision or purported decision of the Director of Public Prosecutions for Northern Ireland in relation to the issue of a certificate under section 1, except on the grounds of -
>
> (a) dishonesty,
>
> (b) bad faith, or
>
> (c) other exceptional circumstances (including in particular exceptional circumstances relating to lack of jurisdiction or error of law).
>
> (2) Subsection (1) is subject to section 7(1) of the Human Rights Act 1998 (claim that a public authority has infringed [a] Convention right)."

16. The "other exceptional circumstances" referred to in sub-paragraph (c) of subsection (1) are not specified but they must take their flavour from the preceding provisions to the effect that challenges will be entertained on the grounds of bad

faith and dishonesty and from the succeeding words of the sub-paragraph, which particularise "lack of jurisdiction or error of law". These are clear indications that, what has been described as the "full panoply of judicial review superintendence" (see *In re Shuker's and others' applications for judicial review* [2004] NIQB 20; [2004] NI 367 at para 25), is generally not available to challenge decisions by the Attorney General or the Director of Public Prosecutions as to the mode of trial for particular cases.

17. By virtue of section 8(3) of the Act the provisions in sections 1-7 are applied to offences committed before the Act came into force. The offences with which the appellant has been charged are therefore covered by those provisions.

18. Counsel for the appellant, Mr Lewis QC, drew our attention to the Explanatory Notes which accompany the 2007 Act. He pointed out that paragraph 7 of the Notes made it clear that it was anticipated that non-jury trial would be ordered in "a small number of exceptional cases" and claimed that paragraphs 22 and 23, which dealt with condition 4 in section 1(6), indicated that that provision should be construed narrowly. These paragraphs read:

> "22. Condition 4 is set out in *subsection (6)*. This covers circumstances where the offence occurred as a result of, or in connection with, sectarianism (ie in connection with religious belief or political opinion). *Subsection (7)* clarifies that 'religious belief and political opinion' includes their absence and any assumptions made about religious beliefs or political opinions. *Subsection (8)* provides that the persons and groups of persons referred to in subsection (6) need not include the defendant or victim.
>
> 23. A case that falls within one of the conditions will not automatically be tried without a jury - non-jury trial will only happen if the DPP(NI) issues a certificate because he is satisfied that there is a risk that the administration of justice might be impaired."

19. The judgment of the Divisional Court in the present case (Stephens LJ and Sir John Gillen [2017] NIQB 121) quoted from the Explanatory Notes - see para 14. But at para 34 the court observed that reliance on the Notes had to be approached with some caution, quoting Lord Steyn in *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956 at para 6 where he said that it was "impermissible … to treat the wishes and desires of the government about the scope of the statutory language as reflecting the will of Parliament." Mr Lewis criticised

this passage of the Divisional Court's judgment, suggesting that it unwarrantably abbreviated the relevant reasoning to be found in the speech of Lord Steyn. In particular, he focused on statements in para 5 of the speech where Lord Steyn said:

> "In so far as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible: see *Cross, Statutory Interpretation*, 3rd ed (1995), pp 160-161."

20. I find it unnecessary to embark on a discussion about the use to which the Explanatory Notes might be put in this instance because I consider that the language of the relevant statutory provisions is perfectly clear. Those provisions invest the Director of Public Prosecutions with wide powers for the reasons earlier discussed. If anything, the actual provisions are more precise in their formulation than the Explanatory Notes. Recourse to the latter is unnecessary for the proper interpretation and application of the pertinent parts of the statute.

21. As it happens, of course, nothing in the Explanatory Notes detracts from the interpretation to be placed on the statutory provisions, if they are analysed on a purely textual basis. Mr Lewis suggested that the reference to sectarianism in paragraph 22 of the Notes indicated that condition 4 was designed to cover situations of strife between the different communities in Northern Ireland. I do not accept that argument. Sectarianism can, of course, have the connotation of bigoted adherence to a particular sect but that is by no means its only possible meaning. The qualifying words in paragraph 22 of the Notes, "ie in connection with religious belief or political opinion", make it clear that "sectarianism", as it is used in the Notes, is sufficiently wide to embrace the circumstances in which Mr Cunningham was killed.

22. If Mr Hutchings and soldier B fired on Mr Cunningham, believing him to be a member of PIRA, that would be sufficient to satisfy the requirement that the offences which are alleged to be constituted by that shooting were "in connection with or in response to … political hostility of one person … towards another … group of persons", namely the British Army. And if the Director suspected that this was so (as, realistically, he was bound to, and indeed avers that he did), then the first requirement of section 1(2), in so far as it related to condition 4, was met.

Furthermore, if the Director was satisfied that, by reason of this circumstance, there was a risk that the administration of justice might be impaired if the trial were to be conducted with a jury, the second requirement of the subsection would likewise be fulfilled.

23. Mr Lewis invited this court to consider the legislative history of the 2007 Act, although he accepted that the conditions necessary for admission of ministerial statements, prescribed by the House of Lords in *Pepper v Hart* [1993] AC 593 were not fulfilled. It was permissible, indeed necessary, Mr Lewis argued, to look at ministerial statements in order to ascertain "the legislative intent" of the 2007 Act. He then took us to a number of statements made by the Parliamentary Under-Secretary of State for Northern Ireland, Paul Goggins MP, during the passage through the House of Commons of the Bill that ultimately became the 2007 Act. The purpose of this exercise was to promote the theory that the powers of the Director of Public Prosecutions under section 1 were confined to cases involving sectarianism in the connotation which Mr Lewis sought to place on it.

24. I find it unnecessary to set out the passages from Mr Goggins' statements to which Mr Lewis referred us. It is quite clear that the minister was responding to particular issues on which other members of the House had expressed concern. He did not attempt to outline a comprehensive charter of all the circumstances in which the Director's powers might be invoked. True it may be that the examples cited by Mr Goggins were of situations that might be described as sectarian in the connotation which Mr Lewis suggested was the correct one, but the minister did not at any point suggest that they were exhaustive of the circumstances in which the Director might exercise his powers under section 1. In any event, for the reasons given earlier, the legislative intent of the provisions of that section is abundantly clear from its terms. It is not open to the appellant to put a gloss on that intent by reference to Parliamentary statements which might appear to be at odds with that clear intent.

25. As to the second requirement of section 1, the Director of Public Prosecutions, Barra McGrory QC, deposed in his first affidavit that, in reaching his decision on that issue, he had taken into account judicial observations in *In re Jordan's Application* and in *In re McParland's Application*. On the basis of his consideration of those cases, he pronounced himself satisfied that there was a risk such as is provided for in section 1(2)(b).

26. The decision in the Court of Appeal in the *Jordan* case referred to by Mr McGrory is reported at [2014] NICA 76; [2016] NI 116 as *In re Jordan's Applications for Judicial Review*. Mr McGrory also mentioned the decision of the High Court in that case but it is sufficient, I believe, for present purposes to focus on the judgment of the Court of Appeal delivered by Sir Declan Morgan LCJ. The

case concerned (among other things) the risk of jury bias in an inquest into the shooting of Pearse Jordan by a member of the RUC in 1992. At para 90 of the judgment the following passage appears:

> "… There are formidable difficulties in being satisfied that the insidious nature of bias has been removed in security and terrorist type cases.
>
> It is necessary to confront directly the need to ensure that jury verdicts emerge unconstrained by tribal loyalties. A coroner must be satisfied that there will be a sensitively constructed distance between prejudice and justice.
>
> The existence of a real risk of a biased juror or jury will outweigh any other factor.
>
> Mere reduction of the risk is insufficient. The coroner must be satisfied that the steps taken have reduced that risk to a remote or fanciful possibility. …"

27. Other factors which, the court considered, should be taken into account by a coroner in seeking to eliminate the risk of bias on the part of the inquest jury were mentioned in the Court of Appeal judgment but they are not directly relevant to the present case. The important point to be drawn from that decision, in relation to the present case, is that three Court of Appeal judges, all highly experienced in the administration of justice in Northern Ireland, stated unequivocally and unanimously that formidable difficulties attended the need to be satisfied that the risk of bias has been removed in security and terrorist type cases; that the reality that tribal loyalties could imperil the chances of a proper verdict had to be confronted; that the risk of a biased juror was the most important factor to be considered by the coroner; and that the real (as opposed to the remote or fanciful) possibility of jury bias should govern the coroner's decision on the question.

28. Mr Lewis suggested that an inquest and a criminal trial were not analogous in relation to the need to avoid jury bias. In the former, he suggested, a unanimous verdict was required, whereas a majority verdict could be returned in a criminal trial. Moreover, the system of empanelling juries introduced by the 2007 Act which abolished the right to peremptory challenge to possible jurors and disclosure of their names and addresses reduced the risk of jury tampering and partisanship.

29. I do not accept these arguments. The fact that a majority verdict can be delivered in a criminal trial might reduce the risk of partisan verdicts; there is no reason to suppose that it will eliminate it. Likewise, the abolition of peremptory challenges and disclosure of jury panel members' names and addresses. On the question of jury tampering (to which, more obviously, these measures were primarily directed) it is right to record that Mr Gerald Simpson QC, who appeared for the Director, confirmed that the possibility of jury tampering was not a concern in this case. It was the prospect of a partisan outcome to the case which underlay the Director's decision.

30. The *McParland* case to which the Director referred is *In re an application by Patrick McParland and John McParland for Judicial Review* [2008] NIQB 1. It concerned a challenge to section 10 of the 2007 Act which had inserted a new provision (article 26A) into the Juries (Northern Ireland) Order 1996 (SI 1996/1141) restricting the disclosure of information about jurors. It was argued that the new arrangements in effect brought about trial of defendants by a secret tribunal and that this constituted a breach of article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) since it infringed the guarantees of a public hearing and of trial within a system containing sufficient guarantees of impartiality.

31. The Divisional Court rejected that argument. At para 37, it observed, "[t]he existence of the risks identified by the juries' sub-group of juror intimidation, of partisan juries and of perverse jury verdicts has not been seriously disputed by most commentators …".

Discussion of the statutory provisions relating to the issue of certificates

32. The powers available to the Director of Public Prosecutions are unquestionably far-reaching. It is unsurprising that this should be so. When one has regard to the difficulties described by the Court of Appeal in *Jordan* in eliminating the risk of bias *and* of being confident of having done so, the need for wide-ranging powers is obvious. What were described by that court as "tribal loyalties" present a particular problem. These are often difficult to detect and may routinely be disavowed by most of the population. But experience has shown that they can operate to bring about unexpected, partisan outcomes. The dangers that they present to the achievement of a scrupulously fair trial are undeniable.

33. Taking effective precautions against jury bias presents, as the Court of Appeal in *Jordan* said, formidable difficulties. These difficulties are particularly acute in cases which involve attacks on the security forces or where members of the security forces have fired on individuals. Such cases are almost invariably highly charged, and they give rise to strong feelings in both sides of the community.

Apprehension that jury trial in such cases might put the goal of a fair trial in peril is unavoidable.

34. It is important to focus on the need for a fair trial. Trial by jury is, of course, the traditional mode of trial for serious criminal offences in the United Kingdom. It should not be assumed, however, that this is the unique means of achieving fairness in the criminal process. Indeed, as the Court of Appeal's statements in *Jordan* show, trial by jury can in certain circumstances be antithetical to a fair trial and the only assured means where those circumstances obtain of ensuring that the trial is fair is that it be conducted by a judge sitting without a jury.

35. So-called "Diplock trials" took place in Northern Ireland between 1973 and 2007. No one suggests that this mode of trial failed to deliver fairness of process, by reason of the fact that the trial took place before a judge sitting without a jury. Although article 6 of ECHR (which guarantees a right to a fair trial) is not prayed in aid by the appellant in this case, it is interesting to reflect that it has been held that this article does not require trial by jury. As the European Commission of Human Rights observed in *X and Y v Ireland* (Application No 8299/78) (1980) 22 DR 51, para 19, "… article 6 does not specify trial by jury as one of the elements of a fair hearing in the determination of a criminal charge".

36. It is, of course, to be remembered that the system of trial introduced as a result of Lord Diplock's report (*Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland* (1972) (Cmnd 5185)), required the trial judge to give a reasoned judgment if the defendant was convicted. And that a defendant, upon conviction, was entitled to an automatic right of appeal, not only on points of law but on the factual conclusions reached and inferences drawn by the trial judge. These remain features of trials without a jury since the 2007 Act - section 5(6) and (7).

37. The statement made by Lord Judge CJ in *R v Twomey* [2010] 1 WLR 630 at para 10 (relied on by the appellant) that, "[i]n this country trial by jury is a hallowed principle of the administration of criminal justice ... properly identified as a *right*, available to be exercised by a defendant unless and until the right is amended or circumscribed by express legislation" must be viewed against this background. In the first place, although the Lord Chief Justice described entitlement to trial by jury as a right, he did not suggest that this was an absolute right; indeed, he accepted that it could be constrained in certain circumstances. Secondly, and self-evidently, the right has in fact been restricted by the express provisions of the 2007 Act. Finally, where trial by jury would place the fairness of the criminal justice process at risk, the right must yield to the imperative of ensuring that the trial is fair.

38. In this context, the triangulation of interests identified by Lord Steyn in *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91, at p 118 is pertinent. He said this about the various interests which are served by a criminal trial:

> "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public."

39. The requirements of a fair trial are not determined by having regard to a defendant's interests exclusively. As Lord Steyn said, it is in the interests of everyone that serious crime be properly investigated and effectively prosecuted. Notably, of course, the appellant has not claimed that his trial for the offences with which he is charged will not be fair, if conducted by a judge sitting without a jury. Such a claim could not be sustained in light of the experience of trials before "Diplock courts" and of the safeguards which are in place by reason of section 5(6) and (7) of the 2007 Act.

40. Consideration of the appellant's claim that he should not be denied the right to a jury trial must therefore proceed on the basis that he will receive a fair trial or, at least, that if he does not, he will have an automatic right of appeal to the Court of Appeal where any suggestion that there has been unfairness can be fully ventilated and examined. This incontestable reality influences the approach to be taken, not only to the proper interpretation of section 1 of the 2007 Act, but also to the appellant's argument that he was entitled to be given reasons for the issue of the certificate and to be consulted about the Director's proposed course of action before it was decided to issue the certificate. That is an argument to which I shall turn in paras 53 and following.

41. The appellant argued that the Director of Public Prosecutions had been wrong in the claim that he made in his first affidavit, that it was the intention of Parliament that section 1(6) of the 2007 Act should be interpreted broadly. Mr Lewis pointed out that this was at odds with the judgment of the Divisional Court in an earlier Northern Ireland case, *Arthurs' (Brian and Paula) Application* [2010] NIQB 75 where at para 31, Girvan LJ had said, "[t]he strong presumption that a right to jury trial is not intended to be taken away will … lead to a strict construction of any statutory restriction or limitation on the right to a jury trial." That statement appears to have been based on an argument addressed to the court by Raza Husain QC, appearing for applicants who challenged the issue by the Director of Public

Prosecutions of a certificate that their trial on a series of fraud charges be conducted by a judge without a jury. Mr Husain had relied on the statement by Lord Judge CJ in a passage in the case of *Twomey* which appeared later in his judgment from that quoted at para 37 above. At para 16 of *Twomey*, Lord Judge CJ had said:

> "The right to trial by jury is so deeply entrenched in our constitution that, unless express statutory language indicates otherwise, the highest possible forensic standard of proof is required to be established before the right is removed. That is the criminal standard."

42. Of course, in *Twomey* the court was dealing with a case where the prosecution was seeking trial without a jury where it was claimed that there was a real danger of jury tampering and that is not the position here. But, if one proceeds on the premise that section 1(1) of the 2007 Act requires to be strictly or narrowly construed, this does not affect the interpretation which I consider the provision must be given.

43. The Divisional Court in the present case dealt with this issue at para 41 of its judgment:

> "In our view the assertion of the Director that it was the intention of Parliament to provide that 'the subsection should be broadly interpreted', whilst it could have been more felicitously worded, does not necessarily contradict the proposition put forward in *Arthurs'* case that it is necessary to construe section 1 narrowly and strictly. The wording of condition 4 is such that Parliament clearly intended to include a broad reach of circumstances whilst at the same time recognising that any legislation removing jury trial needs to be tightly construed."

44. There is certainly an argument that, contrary to the Divisional Court's view, the Director's assertion was at odds with what Girvan LJ said in *Arthurs*. But whether the Director erred is neither here nor there, provided he acted within the powers actually available to him and provided that, if he did indeed misapprehend the proper approach to the interpretation of section 1, that misapprehension was, in the event, immaterial to the decision that he took. On the true ambit of the Director's powers, what matters is the interpretation placed on the section by the courts. And the Divisional Court is unquestionably right that the wording of condition 4 invests the Director with a wide range of powers. Whether the section requires to be construed narrowly or broadly, the intrinsic breadth of the powers remains intact. Even if, therefore, the Director was wrong in his assertion that Parliament intended

that the section should be interpreted broadly, there is no reason automatically to assume that this led to him exercising his powers in a manner that was not available to him on a proper construction of the provision. On the facts of this case, it is clear from the reasons that the Director has given for issuing the certificate that he was bound to have made the same decision if he had considered that section 1 required to be construed narrowly. If, indeed, it was an error on the part of the Director to consider that section 1 should be given a broad interpretation (on which I do not feel it necessary to express an opinion) it cannot be said that such an error would vitiate his decision for the reason that he was certain to reach the same decision, whatever view he took of the appropriate mode of interpretation of section 1.

45. As to the reasons that he decided to issue the certificate, these were first conveyed to the appellant's solicitors in a letter dated 10 May 2017 from the Director's office. It contained the following passages:

> "I can advise you that the Director suspected that condition 4 in section 1 of the 2007 Act was satisfied on the basis of information provided by the police coupled with a commentary and assessment of that information, an analysis of the facts and circumstances of this case and the advice of senior counsel. In this way the Director formed the requisite suspicion.
>
> In view of the suspicion which he formed in relation to condition 4, the Director was satisfied that there was a risk that the administration of justice might be impaired if the trial were to be conducted with a jury. This risk arises from the possibility of a biased juror or jury, having regard to the particular circumstances of this case.
>
> The Director further considered whether the risk to the administration of justice could be mitigated by application to the court to screen the jury, sequester the jury or transfer the trial to a different venue. The Director was satisfied that there remained a risk that the administration of justice might be impaired on the basis that, even if granted, these measures might not be sufficiently effective in preventing or significantly reducing the potential risk posed to the administration of justice in this case."

One may observe that it is extremely unfortunate that more than a year was allowed to pass before the issue of the certificate was brought to the attention of the appellant and his advisers. Quite apart from the obvious desirability of informing any

defendant promptly of such a significant decision as to the mode of his trial, the challenge to his decision would, presumably, have materialised much sooner and the delay in the trial would have been greatly reduced.

46. Mr Lewis suggested that the reference in the final paragraph of this letter to sequestration of the jury suggested that the possibility of jury tampering was present to the Director's mind but was not fully articulated. He argued that this, among other reasons, illustrated the inadequacy of the explanation given as to the basis on which the decision to issue the certificate was taken. This argument is more germane to the claim that the appellant should have been provided with reasons and been consulted before the decision was made to issue the certificate, an argument which I shall consider in the next section of the judgment. I should say, however, that I do not accept the argument. The nature of the risk is plainly stated in the second paragraph quoted above. It is that the possibility of a biased juror or jury existed. It might seem unusual to consider the question whether such a risk could be mitigated by sequestering the jury, but it is to be expected that the Director felt it prudent to examine every possibility before deciding to issue the certificate. It is certainly not untoward that he should advert to this before deciding that the only way in which to avert the risk that the administration of justice would be impaired was by issuing the certificate.

47. On the question whether the Director acted within his powers, the letter sets out a clear basis on which to conclude that he did. He formed the necessary suspicion on the basis of information received from the police and commentary on that information. He also took the advice of senior counsel. These are all entirely conventional steps to allow him to consider the question whether he suspected that condition 4 was met.

48. Likewise, the risk that the administration of justice would be impaired was directly addressed by the Director and a clear conclusion was arrived at. For the reasons given earlier, that conclusion was entirely unsurprising, in light of the circumstances described in the *Jordan* and *McParland* cases. Indeed, it is difficult to envisage how any other view could have been formed.

49. The reasons for reaching his decision were again set out in two affidavits filed by the Director in the proceedings. In the first of these, he said that, in arriving at his conclusion, he recognised that there could be no suggestion that a soldier was any part of the "sectarian divide" in Northern Ireland, nor that he was involved in any proscribed organisation. He pointed out that the legislative framework makes it clear that references to persons and groups of persons need not include the defendant.

50. He stated that he suspected that the offence was committed as a result of or in connection with or in response to the political hostility of one person or group of persons towards another person or group of persons; namely in connection with or in response to the political hostility of members (or suspected members) of PIRA towards those who believed that Northern Ireland should remain a part of the United Kingdom. In other words, the Director followed faithfully the wording and essence of the legislative provisions. This is completely in keeping with the terms of section 1 of the Act.

51. On the second limb of section 1(2), the Director deposed that he had taken into account what had been said in the cases of *Jordan* and *McParland* and, having considered all the material with which he had been provided and having carefully analysed the facts, and having obtained senior counsel's opinion, he was satisfied that there was a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.

52. All of this is unexceptionable and in compliance with the legislation. There is no reason to suppose that the Director's approach to the question whether the certificate should be issued was other than as prescribed by the statute. (The second affidavit filed by the Director relates to evidence which, he understood, was to be adduced by the prosecution on the trial of the appellant. It is not germane to the issues which arise on the appeal.) I have concluded, therefore that the Director acted within the powers conferred on him by the 2007 Act and that the appellant's contention to the contrary must fail.

The procedural argument

53. The principal argument made on behalf of the appellant was that he ought to have been provided with the reasons that the Director of Public Prosecutions was minded to issue a certificate and with the material on which his consideration of that question was based. Further, it was claimed that the appellant should have been given the opportunity to make representations on whether a certificate should be issued, in advance of any decision on the matter.

54. Section 7 of the 2007 Act sets the scene for any discussion of this argument. The exceptionality of a permissible challenge to the decision of the Director is prominent in the terms of the section. A curtailment of the full spectrum of judicial review challenge was obviously intended. It was expressly provided that a challenge was only admissible on grounds of bad faith, dishonesty or other exceptional circumstances. Bad faith and dishonesty clearly do not arise here. Where, then, does the appellant's challenge find its place in the "exceptional circumstances" category?

55. Mr Lewis seeks to place it there by reference to what he claims is the fundamental right to a jury trial. But, for the reasons earlier discussed, this will not do. The fundamental right is to a fair trial. There is a right to trial by jury, as Lord Judge CJ said in *Twomey*, but that alone is not enough to shift the appellant's case into a condition of exceptionality - particularly in the context of a statute whose very purpose is to prescribe the circumstances in which someone can be denied the right to a jury trial.

56. This is pre-eminently a situation where something is required beyond a claim that there is a right to a jury trial, if the circumstances of the individual case are to be regarded as exceptional. This point is reinforced by the examples of exceptional circumstances given in section 7(1)(c) of "lack of jurisdiction or error of law". There is no question of lack of jurisdiction here, much less an error of law by the Director in having recourse to the powers that were available to him under section 1. To come within the rubric "exceptional circumstances", it behoves the appellant to be able to point to something which truly distinguishes his case from the general. I consider that he has failed to do that.

57. Quite apart from the statutory imperative requiring that there be exceptional circumstances in the absence of bad faith or dishonesty, the decision whether to issue a certificate is obviously one which should not be subject to the full spectrum of conventional judicial review challenge. Unlike most decisions taken in the public law arena, it is not founded exclusively on the evaluation and weighing of hard evidence. It will usually be motivated by sensitive information which cannot be disclosed. It is a decision which the Director of Public Prosecutions must take according to his personal reaction to the material with which he has been presented and his own estimation of the matters at stake. In sum, a decision to issue a certificate does not readily admit of scrutiny of the reasoning underlying it because it will usually be of the impressionistic and instinctual variety, for the reasons earlier explained.

58. Many of these factors were in play in the *Arthurs* and *Shuker* cases. *Arthurs* was a case in which a challenge similar to that involved in the present appeal had been made. Girvan LJ, delivering the judgment of the Divisional Court, drew an analogy between this species of decisions and decisions whether to prosecute. At para 25 he brought together various authorities touching on this subject:

> "In its reasoning [in *Shuker*] the court was heavily influenced by well established limitations on the review of the prosecutorial decisions by the DPP emerging from the authorities such as *In re Adams* [2001] NI 1, *R v Director of Public Prosecutions, Ex p Treadaway* The Times 31 October 1997 and *R v Director of Public Prosecutions, Ex p Manning*

[2001] QB 330. The approach to the judicial review of prosecutorial decisions was subsequently succinctly stated by Lord Bingham and Lord Walker in *Sharma v Brown-Antoine* [2007] 1 WLR 780, 788:

> 'It is ... well established that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy. The language of the cases shows a uniform approach: 'rare in the extreme' (*R v Inland Revenue Comrs, Ex p Mead* [1993] 1 All ER 772, 782); 'sparingly exercised' (*R v Director of Public Prosecutions, Ex p C* [1995] 1 Cr App R 136, 140); 'very hesitant' (*Kostuch v Attorney General of Alberta* (1995) 128 DLR (4th) 440, 449); 'very rare indeed' (*R (Pepushi) v Crown Prosecution Service* [2004] Imm App R 549, para 49); 'very rarely': *R (Bermingham v Director of the Serious Fraud Office* [2007] 2 WLR 635, para 63.) In *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 371 Lord Steyn said:
>
> > 'My Lords, I would rule that absent dishonesty or mala fides or exceptional circumstances, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review.'
>
> It is apparent that the statutory language in section 7 is inspired by the principle of exceptionality applicable in the context of prosecutorial decisions. Section 7 gives statutory recognition to the common law reticence in the scrutiny of decisions made in the field of prosecutorial decision-making. The wording lends support to the contention put forward by Mr Maguire and Mr Perry [counsel for the Director of Public Prosecutions] that a decision made by the Director under section 1 of the 2007 Act is intended to fall within the band of prosecutorial decision-making."

59. The appellant contends that there is a fundamental difference between a decision whether to prosecute and a decision whether to issue a certificate under section 1 of the 2007 Act. It is submitted that "there is no right not to be prosecuted unlike the right to be tried by a jury"; that a person facing a decision as to whether he will be charged has not "had legal machinery or process instigated against him" whereas the decision to remove the right to trial by jury occurs when a person has

already been charged and is under the jurisdiction of the court; that an individual under charge has a fundamental right to trial by jury, which the opposing party, the Director of Public Prosecutions, unilaterally changes without recourse to the court; that before a decision to prosecute is made the prosecutor will have given the putative defendant the opportunity on arrest (by way of caution), or at interview (by way of caution and questioning), of making representations as to why he should not be charged; that the decision whether to issue a certificate is statutory whereas a decision to prosecute is non-statutory; that the difficult area of public interest is evaluated by the prosecutor when deciding to charge but there is no public interest component to the issue of a certificate under the 2007 Act; and that a decision to prosecute is a procedural step which is not adjudicatory of rights, while the decision to remove the right to a jury trial is adjudicatory.

60. While some, at least, of these matters point up the differences between the mechanics of a decision whether to prosecute and a determination that the trial should take place before a judge sitting without a jury, they do not signify when one concentrates on the nature of the decision-making process. A prosecutor faced with the task of deciding whether to initiate a prosecution must evaluate material not disclosable to the person who might be charged; similarly, the Director, in deciding whether to issue a certificate, will have recourse to materials which are not revealed to the person who will be affected by it. A decision whether to prosecute is dependent on an individual's reaction to and judgment on the material available as to the possible outcome of proceeding; likewise, the Director's decision on the possible consequences of proceeding with a trial with a jury. Both decisions may involve consideration of material which is not only non-disclosable but which may be of a highly sensitive nature. As Girvan LJ said in para 24 of *Arthurs*, the parallels between the two species of decision are obvious. Moreover, it can be no coincidence that the 2007 Act, in imposing restrictions on the availability of judicial review adopted the language of Lord Steyn in *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, a decision relating to the permissibility of challenge to a decision to prosecute.

61. In any event, I should say that at least three of the appellant's vaunted points of distinction are not, in my view, valid. First, the question of whether the decision is made on foot of a statutory provision or on a non-statutory basis is irrelevant. Secondly, it is plainly wrong to suggest that there is no public interest in the determination of whether the trial should proceed before a judge without a jury. To the contrary, it is a critical part of the decision about the issue of a certificate that the Director consider whether the administration of justice would be impaired. This may have a different focus from the public interest at stake in deciding whether to prosecute but both decisions plainly call on the prosecutor's judgment as to where the public interest lies. Finally, the decision whether to issue a certificate is no more adjudicatory in nature than is the decision to prosecute. Neither involves a weighing of competing interests in the sense that an individual's wish not to be prosecuted or

his wish to be tried by a judge and jury are pitted against the public interest in ensuring that the administration of justice is maintained.

62. In this case, I can conceive of no circumstances which could be said to be exceptional coming within the use of that term in section 7(1)(c) of the 2007 Act. This is especially so since it is open to the appellant even now to make representations to the Director of Public Prosecutions. Mr Simpson, on behalf of the Director, confirmed to this court that if representations were received, these would be considered.

63. Of course, the appellant complains that effective representations cannot be made in the absence of information about the material on which the Director made his decision and the reasons that he decided as he did. Quite apart from the statutory prohibition on a challenge to the failure to disclose explanations other than on the limited grounds contained in section 7(1)(c), there are two sound reasons that the appellant should not succeed in this argument. First, in many cases involving the issue of a certificate, information will have been received by the Director from the police or other members of the security services which must, for obvious reasons, remain confidential. Secondly, the nature of the decision that the Director takes, as I have already explained, will usually be of an instinctual or impressionistic character, not susceptible of ready articulation.

64. But the truly important point to make here is that section 1 qualifies, if not indeed removes, the right to trial by a jury. Hence, the issue of a certificate does not itself remove the right (it is the statute which has done that). In reality the issue of a certificate under section 1 partakes of a case management decision aimed at ensuring the relevant end result of a fair trial. Viewed from this perspective, it is of obvious importance that elaborate, protracted challenges to the issue of a certificate under section 1 are wholly to be avoided, where possible. It is, no doubt, with this consideration in mind that section 7 circumscribed the opportunity for judicial review challenge. Such challenges have the potential to undermine the objective of the legislation to ensure that trials take place in accordance with the requirements of article 6 of ECHR (both as to fairness and to promptness).

65. That is not to say that there will never be occasion where some information can be provided which would assist in the making of representations by a person affected by the issue of a certificate. I refrain from speculation as to how or when such an occasion might arise. I am entirely satisfied, however, that it does not arise in the present case.

Conclusion

66. The Divisional Court certified the following question for the opinion of this court:

> "Does a true construction of section 4 of the 2007 Act [this should be condition 4 in section 1(1) of the Act], namely an offence or offences committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one person or group of persons towards another person or group of persons, include a member of the armed forces shooting a person he suspected of being a member of the IRA?"

67. The arguments on the appeal before this court have ranged well beyond the single issue raised in the certified question and, perhaps inevitably, this judgment has also dealt with matters outside its scope. But, for the reasons that I have given, I would answer the certified question, "yes" and dismiss the appeal.