[QUEEN'S BENCH DIVISION]

*REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *Ex parte* HICKEY AND OTHERS (No. 2)

REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *Ex parte* MALONE

REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *Ex parte* BAMBER

REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *Ex parte* DAVIS

1994 Nov. 2, 3, 4, 7, 8; 28 Simon Brown L.J. and Buckley J.

Crime—Court of Appeal (Criminal Division)—Reference by Secretary of State—Disclosure of reports to Secretary of State—Secretary of State's refusal to refer case to Court of Appeal—Whether Secretary of State to disclose police or experts' reports on which refusal based—Criminal Appeal Act 1968 (c. 19), s. 17

The applicants in four cases had each applied to the Secretary of State for the referral of their convictions to the Court of Appeal under section 17 of the Criminal Appeal Act 1968.[1] In each case the Secretary of State ordered substantial police inquiries but in accordance with his usual policy he refused to disclose to the applicants any of the information thereby revealed before deciding whether to make a reference. In the event the Secretary of State decided not to refer any of the cases to the Court of Appeal. The Secretary of State was prepared to expand on the reasons for his decisions once they had been made but would not disclose any statements obtained in the investigations. The Secretary of State's policy when deciding whether to make a reference was to do so only when new evidence or some other substantial consideration which had not been before the court appeared to cast doubt on the safety of the conviction. The applicants applied for declarations that they should have been given fuller disclosure of the information from the police investigations ordered by the Secretary of State and/or mandamus to require disclosure. The applicant in the third case also sought leave to apply for an order of certiorari to quash the decision not to make a reference and the applicant in the fourth case also applied for an order of certiorari to quash the substantive decision against referral. In the second case the applicant sought an order of mandamus to require the Secretary of State to determine his application for referral under section 17 within such time as the court deemed fit.

On the applications:—

Held, granting the declarations and orders of certiorari sought but refusing other relief, that in considering whether to refer a case to the Court of Appeal under section 17 of the Criminal Appeal Act 1968 the Secretary of State should make a reference only where there was a new case to be heard because of substantial fresh evidence or other considerations; i.e. he should

[1] Criminal Appeal Act 1968, s. 17: see post, p. 739A–C.

make a reference whenever new material could reasonably be expected to cause the Court of Appeal to regard a verdict as unsafe; that, whilst his powers under section 17 were integral to the functioning of criminal justice, the Secretary of State's duty to disclose was not comparable to the prosecution's duty of disclosure in criminal proceedings; that petitioners should be able to make representations about material which had been revealed by the Secretary of State's inquiries in advance of his decision as to referral, subject to his power to control the extent of any exchanges that a petitioner might have with him; that there was no need for a general principle of confidentiality to encourage the co-operation of witnesses and there was no more of a requirement for disclosure than was demanded by fairness, although in exceptional cases a different approach might be justifiable; that, although the specific level of disclosure in a particular case depended on the facts, there should be sufficient disclosure to ensure that the petitioner could properly present his best case; and that, accordingly, in the circumstances, in the first, third and fourth cases it was appropriate to grant the declarations sought, but it was inappropriate in the second case to fix any time within which the Secretary of State should consider the application (post, pp. 741A–B, 743E–F, 744A–C, 745A–B, F–746C, D–E, 750C–E, 752H, 754D–F, 757E).

Dolling-Baker v. Merrett [1990] 1 W.L.R. 1205, C.A. and *Reg. v. Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531, H.L.(E.) applied.

Reg. v. Parole Board, Ex parte Wilson [1992] Q.B. 740, C.A. distinguished.

The following cases are referred to in the judgment of Simon Brown L.J.:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Dolling-Baker v. Merrett [1990] 1 W.L.R. 1205; [1991] 2 All E.R. 890, C.A.

Lloyd v. McMahon [1987] A.C. 625; [1987] 2 W.L.R. 821; [1987] 1 All E.R. 1118, C.A. and H.L.(E.)

Reg. v. Chief Constable of West Midlands Police, Ex parte Wiley [1995] 1 A.C. 274; [1994] 3 W.L.R. 433; [1994] 3 All E.R. 420, H.L.(E.)

Reg. v. Horobin and Wilcox (unreported), 7 April 1993, C.A.

Reg. v. Kearley (No. 2) [1994] 2 A.C. 414; [1994] 3 W.L.R. 413; [1994] 3 All E.R. 246, H.L.(E.)

Reg. v. Maguire [1992] Q.B. 936; [1992] 2 W.L.R. 767; [1992] 2 All E.R. 433, C.A.

Reg. v. Paris (1992) 97 Cr.App.R. 99, C.A.

Reg. v. Parole Board, Ex parte Wilson [1992] Q.B. 740; [1992] 2 W.L.R. 707; [1992] 2 All E.R. 576, C.A.

Reg. v. Secretary of State for Defence, Ex parte Sancto [1993] C.O.D. 144

Reg. v. Secretary of State for Education, Ex parte S., The Times, 20 July 1994; Court of Appeal (Civil Division) Transcript No. 959 of 1994, C.A.

Reg. v. Secretary of State for Health, Ex parte United States Tobacco International Inc. [1992] Q.B. 353; [1991] 3 W.L.R. 529; [1992] 1 All E.R. 212, D.C.

Reg. v. Secretary of State for the Home Department, Ex parte Cleeland (unreported), 8 October, 1987, Mann J.

Reg. v. Secretary of State for the Home Department, Ex parte Doody [1994] 1 A.C. 531; [1993] 3 W.L.R. 154; [1993] 3 All E.R. 92, H.L.(E.)

Reg. v. Secretary of State for the Home Department, Ex parte Duggan [1994] 3 All E.R. 277, D.C.

Reg. v. Secretary of State for the Home Department, Ex parte Garner (1990) 3 Admin.L.R. 33, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte McCallion [1993] C.O.D. 148, D.C.

Reg. v. Secretary of State for the Home Department, Ex parte Pegg [1991] C.O.D. 46, D.C.

Reg. v. Turnbull [1977] Q.B. 244; [1976] 3 W.L.R. 445; [1976] 3 All E.R. 549, C.A.

Secretary of State for the Home Department v. Thirukumar [1989] Imm.A.R. 402, C.A.

The following additional cases were cited in argument:

Bushell v. Secretary of State for the Environment [1981] A.C. 75; [1980] 3 W.L.R. 22; [1980] 2 All E.R. 608, H.L.(E)

Fraser v. Mudge [1975] 1 W.L.R. 1132; [1975] 3 All E.R. 78, C.A.

Kanda v. Government of Malaya [1962] A.C. 322; [1962] 2 W.L.R. 1153, P.C.

Mahon v. Air New Zealand Ltd. [1984] A.C. 808; [1984] 3 W.L.R. 884; [1984] 3 All E.R. 201, P.C.

Neilson v. Laugharne [1981] Q.B. 736; [1981] 2 W.L.R. 537; [1981] 1 All E.R. 829, C.A.

Ollett v. Bristol Aerojet Ltd. (Practice Note) [1979] 1 W.L.R. 1197; [1979] 3 All E.R. 544

Payne v. Lord Harris of Greenwich [1981] 1 W.L.R. 754; [1981] 2 All E.R. 842, C.A.

Pett v. Greyhound Racing Association Ltd. [1969] 1 Q.B. 125; [1968] 2 W.L.R. 1471; [1968] 2 All E.R. 545, C.A.

Reg. v. Chard [1984] A.C. 279; [1983] 3 W.L.R. 835; [1983] 3 All E.R. 637, H.L.(E.)

Reg. v. Chief Constable of the Thames Valley Police, Ex parte Cotton [1990] I.R.L.R. 344, C.A.

Reg. v. Gaming Board for Great Britain, Ex parte Benaim and Khaida [1970] 2 Q.B. 417; [1970] 2 W.L.R. 1009; [1970] 2 All E.R. 528, C.A.

Reg. v. Inner West London Coroner, Ex parte Dallaglio [1994] 4 All E.R. 139, C.A.

Reg. v. Kent Police Authority, Ex parte Godden [1971] 2 Q.B. 662; [1971] 3 W.L.R. 416; [1971] 3 All E.R. 20, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte G., The Times, 26 June 1990; Court of Appeal (Civil Division) Transcript No. 555 of 1990, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Georghiades 5 (1992) Admin.L.R. 457, D.C.

Reg. v. Ward [1993] 1 W.L.R. 619; [1993] 2 All E.R. 577, C.A.

Wiseman v. Borneman [1971] A.C. 297; [1969] 3 W.L.R. 706; [1969] 3 All E.R. 275, H.L.(E.)

APPLICATIONS for judicial review and for leave to apply for judicial review.

REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *Ex parte* HICKEY (NO. 2) AND OTHERS

Michael Hickey, Vincent Hickey and James Robinson applied, with the leave of Laws J. given on 20 January 1994, for judicial review by way of, inter alia, declarations (1) that the decision of the Secretary of State for the Home Department on 16 August 1993 not to disclose any of the documents which had been before him when he made his decision not to refer their convictions on 19 February 1979 for murder to the Court of Appeal under section 17 of the Criminal Appeal Act 1968 was wrong, and

A (2) declarations that the Secretary of State should have disclosed the case against a referral being made as well as any expert material in their favour and that he could disclose the documents without the consent of the chief constable of the investigating police force.

The grounds upon which relief was sought were, inter alia, that the applicants should know the case against them as a matter of natural justice, that fairness required disclosure where there had been an adverse B decision as any errors in the material revealed could then be corrected, that the Secretary of State's decision could not be fully understood without disclosure and that the Secretary of State was entitled to undertake disclosure without the permission of the police as it was his duty to disclose material as a matter of fairness.

The facts are stated in the judgment of Simon Brown L.J.

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REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *Ex parte* MALONE

Paul Malone applied, with the leave of Harrison J. given on 12 August 1994, for judicial review by way of an order of mandamus to require the Secretary of State for the Home Department to make disclosure of D material pertaining to points both for and against his case that his conviction on 31 March 1987 for robbery should be referred to the Court of Appeal and to require the Secretary of State to make a decision as to referral within such time as the court deemed fit.

The grounds upon which relief was sought were, inter alia, that by delegating inquiries for the purposes of section 17 of the Criminal Appeal Act 1968 to the Police Complaints Authority, who were carrying out their E own investigations based on the same facts, the Secretary of State had caused the test under section 17 to be confused by extraneous factors which had made for unwarranted delay, that by waiting until the inquiries of the Police Complaints Authority had been concluded the Secretary of State had improperly fettered his powers and that the Secretary of State should have given priority to concluding the section 17 issue where the F applicant's liberty was at stake.

The facts are stated in the judgment of Simon Brown L.J.

REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *Ex parte* BAMBER

Jeremy Nevill Bamber applied, with the leave of Latham J. given on G 28 June 1994, for judicial review by way of declarations that the Secretary of State had acted unlawfully in refusing to reveal in advance the substance of points for and against his petition for the referral of his conviction on 28 October 1986 for murder to the Court of Appeal and that he had acted unlawfully in failing to disclose an expert's report or the grounds upon which it had been founded or the methodology, experience and thinking upon which it had been founded in advance of the decision.

H The grounds upon which relief was sought were that it had been established that the duty of a public body to act fairly could include a requirement for disclosure in advance of decision making and that the Secretary of State should undertake disclosure to the full extent governing its availability in the Crown Court so that it should include anything that assisted the defence.

On a renewed application for leave to apply for judicial review the applicant sought an order of certiorari to quash the decision of the

Secretary of State for the Home Department of 25 July 1994 that his conviction for murder should not be referred to the Court of Appeal.

The grounds upon which relief was sought were similar to those in the applicant's first application but also that when writing to refuse to grant advance disclosure the Secretary of State had displayed misunderstanding and confusion about expert evidence adduced by the applicant.

The facts are stated in the judgment of Simon Brown L.J.

REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *Ex parte* DAVIS

Sammy Davis applied, with the leave of Brooke J. given on 22 March 1994, for judicial review by way of an order of certiorari to quash the decision of the Secretary of State for the Home Department on 22 February 1991 that his case should not be referred to the Court of Appeal and the Secretary of State's decision of 27 January 1993 not to disclose witness statements obtained to assist the Secretary of State in making his decision, and declarations that the Secretary of State could order disclosure of statements in the context of a petition under section 17 of the Criminal Appeal Act 1968 irrespective of their ownership and that such statements were normally to be disclosed where it was in the interests of justice.

The grounds upon which relief was sought were, inter alia, that the Secretary of State's duty of fairness required that he should disclose statements from investigations ordered by him, that such statements were not subject to public interest immunity, that the statements were obtained at the Secretary of State's behest so that it was appropriate that disclosure should be his decision, that the Secretary of State had misdirected himself as to the facts that had led to the applicant's conviction and that the Secretary of State could not have made a proper decision as to the consistency of the evidence of the complainant in the applicant's case.

The facts are stated in the judgment of Simon Brown L.J.

Edward Fitzgerald for the applicants, Michael Hickey, James Hickey and Robinson.

Frederic Reynold Q.C. and *Richard Clayton* for the applicant, Malone.

D. M. Harris Q.C. and *Graham Wood* for the applicant, Bamber.

Nicholas Blake Q.C. for the applicant, Davis.

Stephen Richards for the Secretary of State.

Cur. adv. vult.

28 November. The following judgments were handed down.

SIMON BROWN L.J. Section 17 of the Criminal Appeal Act 1968 is a key provision in our criminal justice legislation. Miscarriages of justice can happen. Following trial on indictment there can be only a single application for leave to appeal. If that application or the appeal fails, section 17 alone provides the mechanism for unlocking the door back into the criminal appeal system. These four cases focus on section 17. They are not the first challenges to the Secretary of State's exercise of this power. But they are the first directed specifically to the determinative process—the fairness of the Secretary of State's procedures. Whether all or any of them in fact involve a miscarriage of justice is not for us to say. Each

A applicant, however, protests his innocence and complains that the Secretary of State has dealt unfairly with his application for a section 17 reference.

Let me at once set out the section, emphasising for convenience those parts with which these challenges are most directly concerned:

> "17(1) *Where a person has been convicted on indictment*, or been
> B tried on indictment and found not guilty by reason of insanity, or been found by a jury to be under disability, the Secretary of State may, if he thinks fit, at any time either—(*a*) refer the whole case to the Court of Appeal and the case shall then be treated for all purposes as an appeal to the court by that person; or (*b*) if he desires the assistance of the court on any point arising in the case, refer that point to the court for their opinion thereon, and the court shall
> C consider the point so referred and furnish the Secretary of State with their opinion thereon accordingly. (2) A reference by the Secretary of State under this section may be made by him either on an application by the person referred to in subsection (1), or without any such application."

In a recent 12-month period, we are told, the Secretary of State
D received 725 applications for a section 17 reference. Fifty-five per cent. of these he was able to dispose of without any inquiry; the petitions (as colloquially they are called) raised no point worthy of investigation. In 20 per cent. he made minor inquiries, referring the case back to the police for examination of their own documentation or, at most, clarification from a single witness. In 25 per cent. he ordered more substantial police inquiries.

E According to the Report of the Royal Commission on Criminal Justice (Viscount Runciman, Cm. 2263 (1993)) (and subsequent figures provided by Mr. Richards) the Secretary of State refers to the Court of Appeal on average fewer than 10 cases per annum. The great majority of these succeed. In the 30 cases referred to the court in the years 1989–93 inclusive which have thus far been disposed of, it appears that all but three of the
F convictions were quashed.

In the four cases now before the court the Secretary of State has ordered substantial police inquiries. The central ground of complaint which each case raises is that, having done so, he then failed—and, indeed, as a matter of policy routinely refuses—to afford the applicant an opportunity to respond to the information his inquiries elicited; instead, the Secretary of State proceeds to a substantive decision upon the various
G petitions, a decision very likely on the statistics to be adverse.

Before turning to examine this essentially procedural challenge in greater detail, it is convenient first to note the broad policy adopted by the Secretary of State towards the substantive exercise of his section 17 power. As appears from the Secretary of State's evidence in these cases (and indeed in a number of decided cases) it is that:

H
> "the Secretary of State does not normally exercise his power to refer a case to the Court of Appeal unless there is some new evidence or other consideration of substance which has not been before the court (and which was not previously available to be brought before the court) and which appears to cast doubt on the safety of the conviction."

The policy is said not to be inflexible: exceptionally the Secretary of State may consider referring a case for another reason (perhaps despite the new

material having previously been available to be brought before the court). In applying the policy the Secretary of State will look at the case in the round; that, indeed, is implicit in his requirement that the "new evidence or other consideration . . ." must be "of substance . . ." and must appear "to cast doubt on the safety of the conviction." If it is plain that the new material could not conceivably have resulted in a different verdict and that any appeal must fail, then obviously no reference will be made.

This policy has been approved by the courts in a series of past judicial review challenges: see *Reg. v. Secretary of State for the Home Department, Ex parte Cleeland* (unreported), 8 October 1987, *Reg. v. Secretary of State for the Home Department, Ex parte Garner* (1990) 3 Admin.L.R. 33, *Reg. v. Secretary for the Home Department, Ex parte Pegg* [1991] C.O.D. 46 and *Reg. v. Secretary of State for the Home Department, Ex parte McCallion* [1993] C.O.D. 148. None of these earlier challenges in fact involved new evidence; rather they sought to challenge the Secretary of State's substantive decisions on other grounds (such as a subsequent change in the law). All failed, and in rejecting them the courts pointed to the width of the discretion afforded by section 17 of the Criminal Appeal Act 1968 and the difficulty of mounting a successful judicial review challenge, not least on *Wednesbury* grounds (see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). As Bingham L.J. put it in *Ex parte Cleeland*, 8 October 1987:

> "The decision to refer is that of the Secretary of State if he thinks fit. The use of that language does not, of course, make his decision proof against judicial review but it does make it quite plain that the decision is entrusted to him and it is one with which this court should not, in my judgment, at all readily interfere unless strong grounds for doing so are shown."

Without in any way dissenting from that view I nevertheless think it permissible in the context of the present challenges to point to certain concerns recently expressed by the Royal Commission on Criminal Justice. In Chapter 11 of their report, entitled "Correction of Miscarriages of Justice," the Royal Commission quote Sir John May's conclusion upon his inquiry into the Maguire case (*Reg. v. Maguire* [1992] Q.B. 936) that the Secretary of State's policy

> "is a limiting one and has resulted in the responsible officials within the Home Office taking a substantially restricted view of cases . . . the approach of the Home Office was throughout reactive, it was never thought proper for the department to become proactive." (See p. 182.)

Their recommendation that responsibility for alleged miscarriages of justice be entrusted to a new body, to be established independently of both government and the courts, is based on the incompatibility of the Home Secretary's present role with the doctrine of the separation of powers. They point out that:

> "The scrupulous observance of constitutional principles has meant a reluctance on the part of the Home Office to inquire deeply enough into the cases put to it . . ."

and conclude:

> "that it is neither necessary nor desirable that the Home Secretary should be directly responsible for the consideration and investigation

A of alleged miscarriages of justice as well as being responsible for law and order and for the police."

I would suggest that the Secretary of State should not feel over-inhibited by constitutional constraints when considering the exercise of his section 17 power. Provided only and always that there indeed exists substantial new evidence or other considerations in the case and that he B will not, therefore, be inviting the court merely to re-examine essentially the selfsame case as it will already have rejected, the Secretary of State should to my mind ask himself this question: could the new material reasonably cause the Court of Appeal to regard the verdict as unsafe? If it could, then I would expect him without more ado to refer the case for hearing as an appeal. This surely is the policy of the legislation: any other approach risks the executive usurping rather than promoting the function C of the court. If that approach causes him to refer more cases than at present and perhaps with a lower proportion resulting in successful appeals, so be it; it would at least reduce the risk of worthwhile appeals being pre-empted and miscarriages perpetuated by a possible over-reluctance to invite the court's reconsideration of jury verdicts.

That, however, all goes essentially to the Secretary of State's approach D to the substantive decision to be taken once his inquiries are complete. Save in one case, that really is not here the issue. Rather these cases turn on the Secretary of State's determinative process and it is to that that I must now turn.

The Secretary of State's policy and almost invariable practice with regard to his determination of petitions under section 17 of the Criminal Appeal Act 1968 is this. He will set in train, generally through the police, E whatever inquiries he thinks necessary following consideration of the petition (and any supplementary representations); then, without referring the matter back to the petitioner, he will proceed to a substantive decision. He issues a reasoned decision letter and may be prepared on request to expand upon those reasons. The decision letter, however, indicates only in summary form the information available to the Secretary of State and his F process of reasoning. Again as a matter of policy and almost invariable practice he declines to disclose actual statements of evidence obtained in the inquiry.

The fairness of that policy is challenged by the applicants in two central respects. First they contend they should have the opportunity to make representations upon the fresh material revealed by the Secretary of State's inquiries before, rather than after, an adverse decision is taken G against them. Second, they maintain that in certain cases disclosure of more than merely the gist of the fresh material (the most that appears from the decision letter) is required to enable effective representations to be made.

Those in broad terms are the battle-lines within which these applications are being contested: what should be the extent of disclosure H made by the Secretary of State of the results of his inquiries, and when should it be made?

The principles applying to a challenge of this nature are not in doubt. Most I gratefully take from the speech of Lord Mustill in *Reg. v. Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531:

(i) It is not enough for the applicants:

"to persuade the court that some procedure other than the one adopted by the decision-maker would be better or more fair. Rather,

> they must show that the procedure is actually unfair. The court must constantly bear in mind that it is to the decision maker, not the court, that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made." (See p. 561.)

As Lord Mustill had said a little earlier in his speech, at p. 560 it is not "the task of the court to say how it would choose to operate the scheme if given a free hand. The only issue is whether the way in which the scheme is administered falls below the minimum standard of fairness."

(ii) The court is nevertheless the ultimate arbiter of what fairness requires.

(iii) The court "will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness." (Lord Bridge of Harwich in *Lloyd v. McMahon* [1987] A.C. 625, 703.)

(iv) "The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type." (See *Ex parte Doody* [1994] 1 A.C. 531, 560E.)

(v) "What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. . . . An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken." (See p. 560.)

(vi) "Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. . . . Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer." (See p. 560.)

Applying those principles to the present motions the applicants point to a number of recent decisions in a related area—cases concerning the actual period of imprisonment to be served by convicted prisoners—in which the courts have held that fairness demands the adoption of more open procedures. As Lord Mustill said in *Reg. v. Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531, 561:

> ". . . I find in the more recent cases on judicial review a perceptible trend towards an insistence on greater openness, or if one prefers the contemporary jargon 'transparency,' in the making of administrative decisions."

Notable amongst these cases are, first, *Reg. v. Parole Board, Ex parte Wilson* [1992] Q.B. 740, in which the Court of Appeal held that a discretionary life prisoner had to know what was said about him before the Parole Board reached a decision whether or not to recommend him for release on licence and in the result declared: "That the applicant is entitled to be informed of all reports that will be placed before the Parole Board in its consideration of this case."

Second, *Ex parte Doody* [1994] 1 A.C. 531 itself, where the House of Lords held that, before the Secretary of State sets the date of first review of a mandatory life sentence prisoner's sentence, he must afford him the

opportunity to make written representations as to the period to be served for the purposes of retribution and deterrence, having first informed him of the period recommended by the judiciary and of any other opinion expressed by the judiciary relevant to that issue.

Third, *Reg. v. Secretary of State for the Home Department, Ex parte Duggan* [1994] 3 All E.R. 277, in which the Divisional Court applied *Reg. v. Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531 and held that, after initial categorisation, category A life sentence prisoners should, in respect of subsequent annual reviews, be told the gist of reports and given the opportunity to comment upon them, classification as category A of itself defeating a prisoner's prospects for release on parole and thus directly affecting his liberty.

Those cases, of course, start from the premise that the prisoner has been rightly convicted and sentenced. How much more compelling, submit these applicants, are the requirements of fairness given that they seek to question the very basis of their incarceration. The Secretary of State, be it remembered, once the initial appeal process has been exhausted, has exclusive control over their access to the courts. The system of decision-making in their cases should surely be no less open. That is the central submission; its strength is obvious.

The point is perhaps underlined, although not I think really strengthened, by reference to the statutory context in which this power is exercised. The Court of Appeal (Civil Division) in *Reg v. Secretary of State for the Home Department, Ex parte Garner*, 3 Admin.L.R. 33, characterised the power as "an extension of a convicted person to appeal against his conviction and/or his sentence" and accordingly found it a "*criminal cause or matter*" such as to deprive it of jurisdiction to entertain the appeal. (One consequence of this, of course, is that any appeal from us would lie only to the House of Lords.) Counsel submits therefore that the Home Secretary's powers under section 17 of the Criminal Appeal Act 1968 are an integral part of the just functioning of the overall process of criminal justice. That submission I accept. I cannot, however, accept its suggested corollary, that the Secretary of State owes to the petitioner duties of disclosure comparable to those owed by the prosecution to the defence in the course of criminal proceedings. Whatever else may be said about the Secretary of State's administrative function under section 17, clearly it involves no form of adversarial process akin to trial.

In response to this central argument, Mr. Richards points to certain distinctions between the present cases and the prisoner cases to which I have referred. In the first place, he stresses the wide range of issues that can arise in criminal trials and may have to be considered when examining the safety of a conviction. These are to be contrasted with the far narrower issues arising respectively in *Reg. v. Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531—the tariff term appropriate to reflect the requirements of retribution and deterrence—and in both *Reg. v. Parole Board, Ex parte Wilson* [1992] Q.B. 740 and *Reg. v. Secretary of State for the Home Department, Ex parte Duggan* [1994] 3 All E.R. 277—the prisoner's dangerousness. The problems of prior disclosure are, he submits, substantially greater.

Secondly, he stresses that the process of review by the Secretary of State is a continuing one. A decision not to make a section 17 reference has, he says, no definitive significance: the Secretary of State is clearly not functus officio. Provided only and always that the Secretary of State gives a properly reasoned decision which in turn opens the way to further

representations by the petitioner, nothing, he submits, is lost by the failure to disclose the result of his inquiries prior to a decision. Or if it is, the balance of advantage nevertheless favours that approach. Either way, he argues, it is not actually unfair.

I remain unpersuaded by either of these arguments. Rather, there seem to me compelling reasons why, whatever the practical difficulties to be resolved (and to these I shall return), petitioners should, *before* the Secretary of State's decision, be given a specific opportunity to make effective representations upon whatever material has been revealed by his inquiries. Inquiries will presumably only be made if the petition itself raises one or more points of sufficient substance to cast doubt on the safety of the conviction. If the inquiries appear to resolve those points against the petitioner, elementary fairness surely requires that he should then have the opportunity to address these fresh obstacles in his path before an adverse decision is taken against him. Once it is conceded that section 17 determinations are reviewable (and it is), principle dictates that, absent powerful countervailing considerations, advance disclosure is required. It is required in the interests both of fairness and informed decision-making. Without it an adverse decision may not be right; and even if it is, it will certainly not be fair.

It is no sufficient answer to say that the process of review is continuous. An adverse decision is not a negligible event. In a high-profile case it is likely to have attracted wide publicity. Clearly it represents the culmination of a specific and often intensive investigatory process. Strive as the Secretary of State may to avoid becoming defensive and entrenched in his view, it is difficult to suppose that he can remain as open-minded as if no clear decision had been taken. It is difficult to suppose too that with competing claims on his resources further representations could generate the same momentum towards a fresh decision as representations made in the course of a single determinative process.

Let me then turn to the practical difficulties which Mr. Richards argues would attend any practice of prior disclosure. These, he emphasises, are not mere arguments of convenience but rather reflect genuine public interest concerns. First amongst these is a concern about manageability and delay. It is, submits the Secretary of State, difficult to see how a procedure involving positive consultation with the petitioner could be prevented from sliding into lengthy debate about the merits. This would be both administratively cumbersome and productive of unwelcome delays. Plausible though at first blush these concerns may appear, I have ultimately found them chimerical. True, the introduction of a further stage into the decision-making process will inevitably delay the substantive decision. But the Secretary of State's existing practice merely postpones that stage until after the decision is taken, when representations can and will be made in response to the reasoned decision letter. Surely it is fairer and not significantly more burdensome to advance this stage. If it is said that this would needlessly delay those decisions by which a reference is granted, I would reply that the statistics reveal those to be few indeed and that the Secretary of State can if he wishes introduce a new regime of prior disclosure on a "minded to refuse" basis, as in asylum cases. There too the courts have held that only the highest standards of fairness will suffice: see *Secretary of the State for the Home Department v. Thirukumar* [1989] Imm.A.R. 402. Why should not comparable standards apply here?

As to the risk of being drawn inexorably into a long debate on the merits, that too seems more apparent than real. After all, the matter rests

with the Secretary of State. Plainly he can control the extent of any exchanges. Generally, perhaps, he would afford the petitioner only one opportunity to reply. If, however, that in turn prompted further inquiries, the Secretary of State might well think it appropriate to return to the petitioner a second time. Once the Secretary of State decides that the process has exhausted its usefulness he can end it. The petitioner's only redress then would be by way of an application for judicial review and he could expect a decided reluctance on the court's part to intervene—the lack of finality in the decision-making process would in that context obviously be of great importance. In any event it is hardly in the petitioner's interest to delay a substantive decision unnecessarily, as for example by a judicial review challenge. He, after all, wants a speedy reference with a view to regaining his liberty.

The next public interest concern urged by the Secretary of State is that of confidentiality. This plainly goes rather to the level of disclosure required than to when it is given, although to some extent these issues overlap: the greater the disclosure the more likely it will attract a detailed and thus time-consuming response. The Secretary of State's evidence warns of grave difficulties in adopting the procedures proposed by the applicants. It is said that they would risk compromising an implicit duty of confidentiality to witnesses who assist in the Secretary of State's inquiries, that witnesses have expectations of privacy, and that

> "If the Secretary of State were to operate a procedure involving, overall, a significantly greater degree of openness towards petitioners, expectations [of witnesses] would be different. Whatever formal safeguards for confidentiality were adopted under such a procedure, it seems likely that in fact potential witnesses and informants would be altogether more cautious, and that some would be reluctant to come forward or to answer questions."

I confess to finding all this wholly unpersuasive, and certainly an insufficient basis for maintaining in place what I regard as the significantly too closed procedure presently operated. I have no doubt that fairness requires not merely prior disclosure but a substantial increase in the level of disclosure made. The Secretary of State accepts that in none of the present cases was any specific assurance of confidentiality given to anyone participating in the police inquiries. As it seems to me, it seldom will be. We are told indeed that lay witnesses in these inquiries make formal witness statements: they must accordingly recognise at least the possibility of being called in further legal proceedings. A plea for some general principle of confidentiality to encourage co-operation with police inquiries is thus unconvincing. Essentially, as the applicants submit, it invites the creation of something akin to the very public interest immunity class claim which the House of Lords so recently abolished in *Reg. v. Chief Constable of West Midlands Police, Ex parte Wiley* [1994] 1 A.C. 274.

I accept Mr. Richards's submission that the courts will not impose a greater requirement for openness and disclosure than fairness actually demands: if disclosure of confidences is not "necessary," because the interests of fairness can be satisfied in some other way, then the court will not order it in this context any more than in ordinary civil litigation: see *Dolling-Baker v. Merrett* [1990] W.L.R. 1205. *Reg. v. Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531 itself exemplifies this principle by envisaging, at p. 564, disclosure on occasion of the gist of the judge's advice rather than its verbatim quotation. But

the submission assumes at the very least a tacit understanding of confidence in the first place, and some positive value in its preservation, and that I doubt would often exist.

All that I have thus far said with regard to confidentiality goes to the vast majority of police inquiries. Obviously, there may be exceptional cases where a different approach is justifiable. If, for example, information is elicited from an informer, that clearly would be protected on a conventional public interest immunity basis. Similarly if the Secretary of State perceives a real risk of intimidation, and I well recognise this will on occasions occur in an effort to persuade witnesses to change their evidence, such a risk should properly be reflected in the level of disclosure decided upon: witnesses must above all be kept safe.

But these sorts of concerns should, in my judgment, be met on an ad hoc basis. I cannot accept that they arise commonly enough to justify distorting the whole process.

That brings me to the altogether more difficult question of the precise requirements of just disclosure in this area of decision-making. A good deal of the argument before us was devoted to this, in particular with regard to expert evidence, police evidence, complainants' evidence and the like. Does fairness demand that experts' reports, police statements, further statements from central witnesses and so forth be disclosed verbatim, or will the gist do? What does the gist, the substance, really consist of? Should disclosure be made only of adverse material or is it necessary to disclose favourable fresh evidence too? These questions I propose to address in the context of the four individual cases now before us. It is one thing to decide against the broad background of these cases what generally are the requirements of procedural fairness in this field, quite another to rule on the specific level of disclosure to be made, which must inevitably depend upon the facts of a particular case. The guiding principle should always be that sufficient disclosure should be given to enable the petitioner properly to present his best case. That can only be done if he adequately appreciates the nature and extent of the evidence elicited by the Secretary of State's inquiries.

As already stated, it is not for us to decide—we are not, indeed, in any position to decide—whether any of these cases constitute actual miscarriages of justice. I shall indicate only the bare bones of each, fleshing them out only so far as necessary either to help identify the requirements of fair disclosure or to deal with other specific issues which variously they raise. Such summaries as I attempt must necessarily be highly selective—perhaps, indeed, misleadingly simplistic. But to attempt any fuller exposition of these cases, all of which have been explored in great depth over many years, would grossly overload this judgment.

Hickey, Hickey and Robinson

These three applicants are serving life sentences for the murder of Carl Bridgewater, a 13-year-old schoolboy, on 19 September 1978 at Yew Tree Farm. Together with Patrick Molloy they were convicted (Molloy of manslaughter) on 19 February 1979 following a 25-day trial. They were convicted also of aggravated burglary. All four applied for leave to appeal. Before that application could be heard, however, Molloy died. On 2 December 1981 the Court of Appeal refused the application. On 15 October 1987 the Secretary of State exercised his power under section 17 of the Criminal Appeal Act 1968 to refer the convictions back

to the Court of Appeal. In 1989, following a 42-day hearing, the Court of Appeal dismissed the appeals, the court's judgment extending to 240 pages. On 7 June 1991 solicitors acting for the three applicants and for Molloy's estate (an appeal being open in respect of a deceased appellant via a section 17 reference although not by way of original appeal—see *Reg. v. Kearley (No. 2)* [1994] 2 A.C. 414, 422) petitioned the Secretary of State for a further reference. On 2 February 1993 that petition was refused. On 20 January 1994, following a contested hearing lasting $1\frac{1}{2}$ days, Laws J. granted leave to move for judicial review, his decision being the precursor of leave in the other cases now before us. Leave was confined to the applicants' claim for declaratory relief, their claim that the Secretary of State should make known to them in advance of his decision the substance of any points he is minded to decide against them and those he accepts go in their favour. No application was made to quash the adverse determination of 2 February 1993. A further petition dated 8 June 1993 had, indeed, already been submitted and, since Laws J.'s grant of leave, two more petitions have now been submitted, respectively dated 1 February and 8 June 1994.

Although, as stated, there is no challenge to the determination of 2 February 1993 as such, it is necessary to indicate something of the basis of the applicants' first petition, and instructive to consider the terms of its rejection.

The petition of 7 June 1991 was based upon fresh evidence relating to two particular issues: first and foremost, the reliability of a written confession by Molloy and of police evidence of the interview which immediately preceded it; second, the veracity of a particular witness, Ritter, who gave evidence at trial and before the Court of Appeal that he had overheard incriminating remarks made by Robinson in the presence of Michael Hickey when all three were fellow prisoners.

As to Molloy's statement, the applicants submitted reports from an expert psychologist and three experts in linguistics all of whom concluded that the statement did not represent Molloy's language, and that still less could he have dictated it in virtually identical language to that recorded by the police as spoken by him during the previous interview. The psychologist concluded that there was "less than a one in a million chance that the degree of correspondence between Molloy's statement and his interview would have occurred in the circumstances described by the police."

On the Secretary of State's instructions, the matters raised in the petition were investigated by Chief Superintendent Baxter of the Merseyside Police. As later appeared, three further experts were consulted: Dr. Sheppard, Mr. Britton and Dr. Hardcastle. All, however, that the decision letter of 2 February 1993 said in that regard was:

> "The submissions of experts in linguistics and of a psychologist which you forwarded with your petition have been fully and carefully considered but nothing in them has been found which would appear to touch the safety of Mr. Molloy's conviction."

It was not until several months later that the applicants' solicitors learned from Dr. Sheppard himself that he had been consulted by Chief Superintendent Baxter and that, so far from casting doubt on the conclusions reached by the applicants' experts, he fully supported them.

To this day all that has been vouchsafed with regard to the expert evidence is this, taken from the Secretary of State's affidavit:

> "The Secretary of State considered the expert opinions submitted by the applicant ... the Secretary of State also considered the opinions of Dr. Sheppard, who had been asked by the Merseyside Police to comment on the opinions put forward by the applicants and whose advice tended to support the opinions of the applicants' experts. The Secretary of State also considered the opinions of two other experts, Mr. Britton and Dr. Hardcastle, from whom the Merseyside Police had also sought comments. The observations of these experts raised doubts about the reliability of some of the methods used by the applicants' experts and about the reliability of their conclusions."

Now is not the time to canvas the merits or demerits of the applicants' expert evidence, as to whether in truth it casts doubt on the safety of their convictions. There are points to be made on either side. For the applicants it is said that the reliability of Molloy's statement was not before the Court of Appeal in 1989, first because there was not then available the evidence suggesting a tendency to fabrication on the part of the interrogating police officers. That only emerged later when, as members of the notorious West Midlands Serious Crimes Squad, their corrupt practices began to be exposed; second and in any event because Molloy's conviction was not then before the court and the jury had received the conventional warning to ignore Molloy's confession in so far as it implicated the applicants. Mr. Fitzgerald submits, however, that the jury would have needed to be "bloodless professors of jurisprudence" to have acquitted these applicants given that Molloy chose not to challenge his statement in the hope (later realised) that it would procure him a verdict of manslaughter instead of murder. Since 1989, however, the Court of Appeal has come to recognise that the admission in evidence of an inadmissible confession by a co-accused which inculpates an appellant is itself a ground for allowing an appeal. As Lord Taylor of Gosforth C.J. said in *Reg. v. Paris* (1992) 97 Cr.App.R. 99, 107 (and later repeated in *Reg. v. Horobin and Wilcox* (unreported), 7 April 1993:

> "Finally, despite the strict logic mentioned above, whilst a defendant may have to accept the admission of evidence relevant only to another accused where they are jointly tried, he should not have to suffer the admission of prejudicial evidence in a trial which is not admissible against anyone."

The applicants contend that their expert evidence (supplemented as it now is by Dr. Sheppard's reports), properly understood, casts grave doubts upon the reliability of Molloy's confession and its implication of them in the events at Yew Tree Farm. They suggest that the police have changed their account completely to accommodate some of the more obvious flaws in their original evidence revealed by the experts; yet these changes themselves put them in serious breach of the Judges' Rules whilst still not meeting all their difficulties.

Mr. Richards disputes the suggestion that the police have changed their account and argues that in any event, however precisely Molloy's confession came to be recorded, he later accepted it as a substantially true account of the events at Yew Tree Farm.

A Turning briefly to the witness Ritter, the applicants obtained a statement from a retired prison officer named Gibson to the effect that, after the Court of Appeal judgment in 1989, Ritter clearly gave him to understand that his evidence, although accepted by the courts, had been false. As to this, the decision letter simply said:

> "[Ritter] has been seen by the police investigation team and he
> B continues to stand by the testimony he gave at trial and on appeal. Other prison officers do not support Mr. Gibson's version of events."

That was expanded upon in the respondent's affidavit as follows:

> "This matter was thoroughly investigated by the Merseyside Police during their inquiry. 23 members of prison staff, including Governor Grades, made statements which bore upon the credibility of
> C Mr. Gibson's account of his conversation with Mr. Ritter or on Mr. Gibson's general reliability. Mr. Ritter himself, when interviewed by the Merseyside Police, stood by his testimony."

I repeat, it is not for us to seek to resolve these disputes. They merely provide the context in which the Secretary of State's procedures under section 17 of the Criminal Appeal Act 1968 must now be considered and
D from which lessons can be learned.

Mr. Richards came close to conceding that the decision letter of 2 February 1993 was inadequate and that having regard to the complexities of the case it should have been altogether more fully reasoned. That is particularly obvious with regard to the experts' evidence; but, in respect of Ritter too, he acknowledges that the letter should have condescended
E to particulars by indicating, for example, how many (if any) of the other 23 prison officers were present at the time of Ritter's exchange with Gibson and in what way their evidence undermines Gibson's. Mr. Richards further recognises that the change in the law brought about by the decisions in *Reg. v. Paris,* 97 Cr.App.R. 99 and *Reg. v. Horobin and Wilcox* (unreported), 7 April 1993, imposes a new focus on the case. All these considerations are, he says, now before the Secretary of State
F together with the three further petitions. There will need to be further inquiries made in which the fresh matters will be examined and old points revisited. Clearly that is right although, as already indicated, before taking his fresh decision the Secretary of State should first make fuller prior disclosure of the evidence obtained on the last investigation and disclosure too of the results of his further inquiries.

G Our attention was drawn to two authorities specifically directed to the need for the disclosure of experts' reports: *Reg. v. Secretary of State for Health, Ex parte United States Tobacco International Inc.* [1992] Q.B. 353 and *Reg. v. Secretary of State for Education, Ex parte S.,* The Times, 20 July 1994. They represent opposite ends of the spectrum, fairness being held to require disclosure in one but not the other. To my mind, however, each turned very much on its own facts and in the end they provide little
H assistance upon the point as it arises in the present context.

I do not say that fairness will always and inevitably demand prior disclosure of full experts' reports. This is not an area where it is either possible or appropriate to lay down hard and fast rules. A less sweeping and absolute approach is called for than has been introduced into the Parole Board regime following *Reg. v. Parole Board, Ex parte Wilson* [1992] Q.B. 740. Almost without exception, however, I suggest that so far as experts are concerned this be done. Why not?

What lessons then are to be learned from the course taken thus far in *Hickey*? Primarily this: that the manner in which the petitioners' expert evidence was dealt with was plainly most unsatisfactory.

This sort of evidence, above all others, is surely most fairly (and indeed most conveniently) dealt with by way of verbatim disclosure. Questions of confidentiality or intimidation can hardly arise. And rather than risk the problems and delays of misunderstanding, it must surely be better to allow the petitioners' experts to see precisely what the Secretary of State's experts have said than to attempt instead a summary of their views. They, after all, will have had the benefit of the petitioners' experts' reports in full.

Mr. Richards contends for a different approach to the disclosure of experts' reports depending on whether they contain new material or merely informed analysis (the appraisal of existing material). But even assuming (which I doubt) that these are in truth discrete categories, I see little advantage in distinguishing between them. I repeat, it is difficult to see why experts' reports should not routinely be disclosed.

I have no doubt that Dr. Sheppard's report should have been disclosed. He himself was clearly outraged that it was not—it had not indeed even been mentioned. The Secretary of State should, I believe, alert petitioners to the existence of favourable, as well as adverse, new material—whether verbatim or as to its gist being ultimately a matter for him.

So much for experts. As for police witnesses, prison officers and the like, there may again be compelling reasons for verbatim disclosure, but not necessarily so. In Hickey's case it now seems to me imperative to disclose in full the police officers' later explanations as to how precisely they came to record Molloy's interview and statement; quite unnecessary on the other hand to go to the same lengths with regard to the 23 prison officers who comment on the Ritter/Gibson issue.

Bamber

Bamber is serving a life sentence for the murder of five members of his family at the family farm in Essex on 7 August 1985. The five who died were his adoptive parents Ralph and June Bamber, their adopted daughter Sheila Caffell, and her six year old twin sons. He was convicted on 28 October 1986. His application for leave to appeal was refused by the Court of Appeal on 20 March 1989. On 24 September 1993 he petitioned the Secretary of State for a reference under section 17 of the Criminal Appeal Act 1968, relying in particular upon expert evidence (to which I shall return). During the Secretary of State's consideration of his petition, the applicant requested disclosure of any conflicting expert's report which the Secretary of State might receive. When that was refused the applicant applied for judicial review, leave being granted by Latham J. on 28 June 1994. The Secretary of State then proceeded to a substantive determination on 25 July 1994 by which he refused to make a reference. The applicant then sought to challenge that too. Leave as to that, however, was refused by Auld J. following an inter partes hearing on 6 October 1994. Before the court now, therefore, are, first, the procedural challenge and, second, a renewed application for leave to move for judicial review in respect of the substantive decision.

Bamber's defence at trial was that he had not been at the farm and that it was Sheila Caffell, who had some history of mental instability, who had shot first her adoptive parents and two children and then herself.

A prominent feature of the evidence was a silencer which had clearly been attached to the weapon when the parents and children were shot but which upon the undisputed evidence could not have been attached had Sheila Caffell used it upon herself. The defence case was, therefore, that having killed the other four, Sheila Caffell first removed the silencer (which was later found in its box in the gun cupboard some distance from her body) and then shot herself.

Part of the prosecution case was that blood inside the silencer, the result of backspatter, was Sheila Caffell's. If it was, that clearly was decisive against the defendant. The point plainly loomed large in the jury's thinking because the only question they asked during the entire eight hours of their deliberations was one directly relating to it. The question was whether the blood inside the silencer "was a perfect match of Sheila's blood" and whether there was a "chance of the blood group being June and Ralph's mixing together." The answer given was that the blood grouping was consistent with it being Sheila Caffell's blood and that the possibility of it being a mixture of her parents' blood was remote. That exchange followed the jury's overnight stay at a hotel; two hours later they convicted by majority verdict of ten to two.

The basis of the applicant's petition in 1993 was a report from Mr. Mark Webster, a forensic biologist, suggesting that the blood sample taken from inside the silencer may after all have been a heterogeneous mixture of June and Ralph Bamber's blood and not Sheila Caffell's. He further suggested that, assuming there still remains in the silencer sufficient blood of suitable quality, it would now be possible to carry out high sensitivity D.N.A. profiling tests to resolve the issue.

That report was shown to the forensic scientist who had given evidence for the Crown at trial and his comments were sent to the applicant's solicitors. A further submission in response was prepared by counsel and the Secretary of State thereafter consulted Dr. Scaplehorne, the head of the Forensic Science Service, who in turn sought the views of colleagues with the appropriate expertise and in due course reported back to the Home Office.

It was at that stage that the applicant sought, and the Secretary of State refused, disclosure of Dr. Scaplehorne's report. The Home Office was prepared to indicate only that the report had concluded that the possibility of the blood being a heterogeneous mixture was "unlikely," and that the feasibility of further testing was being considered. The applicant's solicitors then suggested a meeting between the experts but that too was refused. It was then that the first judicial review application was made and leave granted.

The decision letter of 25 July 1994 was a very different document from its counterpart in the Hickey case. It extends to 11 pages and deals in great detail first with a number of disparate representations earlier made on Bamber's behalf by various bodies and then with Mr. Webster's report. The letter takes issue with the petitioner's claim that the prosecution case "was wholly dependent on the accuracy of the blood grouping tests," pointing out rather that the jury had three main areas to determine:

> "the credibility of Julie Mugford's evidence, the evidence for Sheila Caffell carrying out the shootings, and the evidence as to whether there was any telephone call from Ralph Bamber to [the applicant] asking for help."

A number of telling points are made against the thesis that Sheila Caffell herself carried out the shootings and it is clear that the Secretary

of State has looked at the case in the round. Towards the end of the letter appears this:

> "Where the cogency of representations in any given cases casts doubt on the safety of a conviction and where that doubt is capable of being resolved by forensic tests, the Home Office would consider initiating such tests. The Home Secretary has given very careful thought to the question of further tests in [the applicant's] case but on present information and in the context of the evidence as a whole he is not persuaded that it would be an appropriate course for the Home Office to commission such tests. However, the Home Secretary stands ready to consider any additional scientific evidence which those acting for [the applicant] may decide to submit at some future date."

In refusing leave to challenge that decision, Auld J. rejected the applicant's contentions, first, that the Secretary of State had misdirected himself on factual matters on the scientific issues and, second, that he should have given some advance indication of how he was minded to decide the petition. The judge concluded that the reasons now given in the decision letter are adequate and that it could have made no difference had the applicant had them earlier.

Before us Mr. Reynold urges these two contentions afresh and argues that we should be wary of refusing leave on the discretionary ground that relief would be futile: this is, he submits, a case where procedural unfairness has been demonstrated and where the appearance of justice is itself of importance.

Mr. Richards resists the application for leave on the ground that the Secretary of State has clearly reached the view that, whatever might be revealed by new D.N.A. techniques, looking at the case overall there can be no doubt whatever as to the safety of this conviction. It is a beguiling submission. But one problem with it is that the Home Secretary apparently thought it necessary to engage in a substantial scientific debate which, albeit inconclusive thus far, he apparently recognises could even now possibly assist this limb of the applicant's case. Why embark on it at all if he was satisfied that no section 17 reference would in any event be appropriate? Why not have the courage of his convictions? Why not state his conclusion in categoric terms in the decision letter? Why instead appear to leave the scientific issue open for possible future consideration?

I confess to having wavered a good deal on the applicant's renewed application for leave. In common with Auld J., I find it difficult to suppose that the Secretary of State will ever come to a different conclusion on the central issue of whether to make a reference. The scientific challenge I admit to having a great deal of difficulty in understanding: I cannot help feeling that if Mr. Webster had a sound argument he would have presented it somewhat less obscurely. And in one sense of course it is academic whether we quash the July decision or not: provided only that, consistently with our ruling that the Secretary of State's expert reports should generally be disclosed in full, Dr. Scaplehorne's report will in any event now be shown to the applicant's advisers, there is nothing to stop the Secretary of State deciding the matter afresh in the light of such further response as Mr. Webster may make. Quashing might, therefore, be thought to achieve little. On the other hand, given, as I would hold, that the Secretary of State should in fairness have made advance disclosure of Dr. Scaplehorne's report, the principled approach is surely to grant leave to move. Mr. Richards indicated that the Secretary of State was not in an immediate

position to meet a substantive challenge: rather he would wish to file evidence. I for my part hope that in the light of this judgment he will in fact do no such thing. Far better that he should concede the challenge and reach an early fresh determination. If, indeed, he is satisfied that there should be no reference irrespective of whatever further D.N.A. testing might reveal, let him say so in a fresh decision letter. In that case, there would be no point in continuing the scientific debate. Otherwise, let him reconsider his decision in the light of Mr. Webster's response to Dr. Scaplehorne's report. He may then perhaps after all choose to discover whether D.N.A. testing can illuminate the case.

Malone

Malone was arrested on 1 May 1986 and on 31 March 1987 convicted in the Crown Court at Liverpool on four counts of armed robbery for which he was sentenced to a total of 15 years' imprisonment. His application for leave to appeal was refused by the Court of Appeal on 17 June 1988. He then petitioned the Secretary of State for a reference under section 17 of the Criminal Appeal Act 1968, alleging in particular that exhibit DHH/1—a purportedly contemporaneous record of statements he had made in a police car on the day of his arrest—had been fabricated. On 8 March 1991 that petition was refused. The Secretary of State laid great stress on the terms in which the Court of Appeal had dismissed the application for leave, including this passage from the judgment:

> "Even if those matters [relating to the authenticity of DHH/1] had been decided by this court in favour of the defendant, which, let us make it perfectly clear, they are not, then we should have had no hesitation at all, for reasons which are already clear, in saying that there had been no miscarriage of justice in this case. The matter was proved by the prosecution quite plainly and we have no doubt at all that, if this expert [a handwriting expert] had been called, there would have been no difference in the verdict of the jury."

On 15 June 1992 the applicant's solicitors submitted a second petition which, let me make it clear at once, remains undetermined to this very day. This second petition has now come to be supported by no fewer than seven experts, four mounting an apparently devastating attack on the reliability of DHH/1 and three whose reports were directed towards undermining other important features of the Crown's evidence. Let me briefly explain. Security photographs were taken at one of the robberies, it being common ground that all four robberies were committed by the same man. One of the applicant's experts deduces from these photographs that the robber can have been no taller than 5 feet 11·8 inches; the applicant is 6 feet 1 inch. The other two experts say that clothing, including shoes, allegedly recovered by the police from the applicant's home, matching the witnesses' description of clothing worn by the robber, did not in fact fit him. The jeans would not have fitted as the security photographs showed the robber's jeans fitted. The shoes would have been very uncomfortable even for a short time and, had they in fact been the applicant's, would have shown signs of wear quite different to those which they had actually suffered.

It would be wrong, however, to give the impression that all the evidence now goes one way. On the contrary, there remain formidable obstacles in the applicant's path, not least the fact that, other identification evidence apart, he was seen driving away from the vicinity of one of the

robberies in circumstances sufficiently arresting to cause a witness to note his car number.

Following receipt of the second petition, the Secretary of State instructed the Cheshire police to make inquiries. In about November 1992, in the light of their preliminary investigations, the Deputy Chief Constable of Cheshire appointed a senior officer in the Metropolitan Police to conduct a formal investigation into the allegations made in the petition, to be supervised by the Police Complaints Authority. That investigation suffered long delays, largely it appears because of personnel changes in the investigating team. The complete report was only received by the Home Office on 2 September 1994. Meanwhile, on 6 April 1994, the Home Office had refused to disclose to the applicant such earlier experts' reports as they had received and on 12 August 1994 Harrison J. granted leave to move for judicial review.

By this application the applicant seeks essentially two things: one, a substantive section 17 decision without further delay, second, the opportunity to make representations, supported if appropriate by further expert evidence, upon any material discovered by the Secretary of State's inquiries to be adverse to the case for a reference. The tension between the two is, of course, obvious, and Mr. Harris for the applicant makes it plain that his first priority is for prior disclosure, with a view to the Secretary of State's decision following speedily upon whatever representations he may then make. Mr. Richards indicates that the Home Office is very conscious of the delay and that the case now has high priority: advice is presently being prepared for ministers and the final decision is expected in some four to six weeks. Given the need for prior disclosure (unless perhaps the advice were in favour of a reference), that decision may now need to be delayed. But clearly the case must, and I have no doubt will, continue to enjoy the highest priority. In those circumstances it would clearly be inappropriate to make any sort of timetabled order for mandamus. Nor do I accede to Mr. Harris's invitation to adjourn the mandamus application so that it may hang like a Damoclean sword over the Secretary of State's head. What we have said will, I have no doubt, ensure appropriate prior disclosure with a view to an early decision thereafter.

Davis

On 24 July 1987 Davis was convicted of rape by a majority verdict of ten to two and sentenced to six years' imprisonment. He was a man of previous good character, a Ghanaian who had lived in this country (albeit for the most part in breach of immigration control) since 1974. Leave to appeal was granted, but on 18 January 1988 his appeal was dismissed, the proviso being applied.

After a "Rough Justice" programme, the organisation Justice took up Davis's case and on 4 April 1990 submitted a petition for a reference under section 17 of the Criminal Appeal Act 1968. Inquiries were made by the Metropolitan Police. The petition was rejected initially on 22 February 1991 and then again, following further representations, on 14 October 1992. Justice, and later B. M. Birnberg & Co., solicitors, continued to press for a reference and, more particularly, for disclosure of witness statements taken in the course of the investigation. The Home Office's final letter of refusal in that regard, dated 14 February 1994, includes this passage:

> "You ask for clarification of our position regarding disclosure of statements made to the police in the course of inquiries carried out at

A the request of the Home Office. We take the view that statements made by witnesses to the police are the property of the force concerned and their disclosure in the absence of legal proceedings is a matter for the chief officer of the force . . . There is in this case no legal obligation upon the Home Office to disclose, and in so far as there may be any discretion in the matter, no grounds in our view for our departing from normal policy in such circumstances of not B disclosing statements made to the police."

Judicial review proceedings immediately followed and leave was granted by Brooke J. on 22 March 1994. Meanwhile, I should note, the applicant had served his sentence and been deported to Ghana, leaving his wife and children behind.

C This is the one case where not only are the Secretary of State's procedures impugned but so too is the substantive decision on *Wednesbury* grounds. I must therefore set out something of the facts of the case although, once again, the summary can only be brief.

At about noon on 2 November 1986 Miss Frank, a young Swedish tourist, was raped by a black man in a minicab office in north London. Davis was at that date working part-time as a minicab driver near Manor D House underground station. Miss Frank reported the rape to the police some time after 8.30 that evening and the following day, during her third police-escorted tour of the north London area, identified the premises where Davis worked. He was the only black man who did work there. He was taken to the police station, confronted by Miss Frank and thereupon identified. There was no identification parade and the judge's failure to E give the jury any *Turnbull* warning (see *Reg. v. Turnbull* [1977] Q.B. 244) was the misdirection which, but for the application of the proviso, would have resulted in the conviction being quashed. The crucial question was whether Miss Frank had correctly identified the minicab premises. The Court of Appeal was convinced she had, and on that basis applied the proviso. What above all convinced the Court of Appeal was that Miss Frank had at some point during her tours of the area mentioned to F the police a highly distinctive chalk direction sign leading to the premises and that, she said, was how eventually she came to find them. She referred to the sign in her later written statement. Precisely when and in what terms she had first mentioned it to the police, however, is not clear and one suggestion made is that she may in fact have noticed it during one of her earlier tours.

G At trial Miss Frank's identification of the minicab office was questioned essentially by reference to, first, its physical features and surroundings and, second, the circumstances in which she had come to use that particular office, some half-hour's walk as it was from the friend's house from which she was travelling. The fresh evidence at the heart of the section 17 petition challenges the correctness of Miss Frank's identification H of the premises by reference to her movements *after* the rape, a matter scarcely touched on at trial. The gradual emergence of this evidence must be charted in rather more detail. The starting point is Miss Frank's original statement, in which she said:

> "I then [after the rape] walked out onto the street and asked somebody where the nearest bus-stop was. They pointed to the stop but I can't remember where it was. Maybe I crossed the street but I can't remember as the only thing I was thinking of was to get away

from this area. I was now crying quite a bit. I then went over to the bus-stop and stood at the end of the queue."

At trial she said:

"All I was thinking about was what had happened and I just wanted to get away from that area to get to my hotel again so I asked somebody if they knew where the nearest bus-stand was and they pointed in the direction. I can't remember but I came to the bus-stop and stood at the back of the line."

Justice made various inquiries in the light of the particular bus journey which Miss Frank had described, detailing both the type of bus and its destination. In their petition of 4 April 1990 they pointed out that Miss Frank could not after all have taken a bus to King's Cross from Manor House. The Home Office's first decision letter of 22 February 1991 said that Miss Frank had been interviewed again and had given a statement to the Swedish police expressly stating that she did not catch the bus from outside the minicab premises; it quoted just this passage from her statement:

"I have been asked could I have got on that bus at the stop immediately outside the minicab office. I definitely did not, I left that area before catching the bus."

Justice returned to the issue on 8 July 1991, complaining that without seeing Miss Frank's new statement it was difficult to comment in detail upon it. Their inquiries had revealed, however, that the nearest point at which Miss Frank could have begun the bus journey she described was approximately 1·4 miles from the applicant's office.

In the further decision letter of 14 October 1992, the minister meets that point thus:

"Miss Frank has also confirmed to the police that she ran for some minutes after leaving the office where the rape took place, although she cannot estimate the distance she might have covered."

There was then a further exchange between Justice and the minister in which the former spoke of "the apparent fundamental shift in Miss Frank's evidence . . ." and of their "considerable difficulty in commenting on this aspect of the case and making detailed representations about the bus evidence in the absence of sight of [Miss Frank's two statements]." The minister disputed that there had been any such "fundamental shift in her evidence" and concluded:

"In her earlier statement and in her evidence at court, Miss Frank said that she 'just wanted to get away from the area.' In view of this it does seem unlikely that she would have stayed in the vicinity of [the applicant's] office waiting for a bus."

Mr. Blake criticises this last response on the basis that it really turns Miss Frank's earlier account on its head: she had said at first that she went to the "nearest bus-stop . . ." to get away from the area, i.e. to get away by bus; now she was saying that she had run away from the area with a view to catching a bus. That run, moreover, would have taken her directly past Manor House tube station and also past a considerable number of other bus-stops; why did she not use these? Mr. Blake further criticises the use of the word "confirmed" in the second decision letter:

there had been no previous suggestion that Miss Frank had run away for some considerable distance.

I have to say that the facts of this particular case cause me some considerable unease. Nothing in the Secretary of State's evidence takes the matter any further. I would certainly have liked to see the fullest possible account of Miss Frank's interviews and statements subsequent to trial. To my mind they cried out for verbatim disclosure. It is tempting simply to order such disclosure now, so that those acting for the applicant can make whatever further representations may then become necessary. I cannot suppose, however, and Mr. Richards does not suggest, that this more detailed material would in fact make the Secretary of State's position any the more understandable. It therefore seems to me necessary to form a view on the decision as it stands. I regret to say that I find it irrational. Any judge considering this case as an application under section 31(1) of the Criminal Appeal Act 1968 would, I believe, unhesitatingly grant leave. Whatever his personal reservations as to its ultimate prospects of success, he would surely regard the case as one properly arguable on appeal, one that should rightly be determined by the full court. Similarly, if the Secretary of State were to ask himself the question I suggested earlier—could the new material reasonably cause the Court of Appeal to regard the verdict as unsafe?—in my judgment he could only reasonably have answered "Yes."

In refusing this section 17 reference I conclude that he has failed to recognise the force of the new material now placed before him. Either that, or he has wrongly approached the exercise of his section 17 power, adopting an unacceptably high threshold of arguability as the test for a reference. I would quash his past refusals and invite a speedy fresh decision in the light of this judgment.

As in the other cases, I think no other specific relief is required: the judgment will merely speak for itself.

Footnote

As stated, the argument before Laws J. at the leave stage in the Hickey case occupied $1\frac{1}{2}$ days. Much of this was devoted to a jurisdictional issue: Mr. Richards submitted that the court could not properly entertain what he argued was a free-standing procedural challenge—an application to quash a refusal to disclose material before any substantive decision had been taken. The argument was based upon Otton J.'s decision in November 1992 refusing Malone's first application for leave to mount a similar challenge. Otton J., founding his judgment on the very different case of *Reg. v. Secretary of State for Defence, Ex parte Sancto* [1993] C.O.D. 144, ruled that such an application is "Premature . . . in effect, an application for discovery in an administrative process."

It is sufficient for present purposes to note that Mr. Richards no longer maintains this stance. Rather he now accepts that the court does indeed have jurisdiction to intervene in advance of a substantive section 17 decision. I have no doubt that his concession is rightly made. The court's jurisdiction to entertain a procedural challenge cannot be limited to ex post facto review. Albeit not hitherto expressly decided, the court's recognition of this position is implicit in decisions such as *Reg. v. Parole Board, Ex parte Wilson* [1992] Q.B. 740. That is not to say, however, that the courts will readily intervene to regulate procedures in advance of a substantive decision. Generally, no doubt, they will in their discretion

refuse to do so. The present cases, however, are clearly exceptional. To decline relief here on grounds of prematurity would plainly be wrong.

BUCKLEY J. I agree.

Applications allowed with costs.
Legal aid taxation.
Leave to appeal refused.
Certificate under section 1(2) of the Administration of Justice Act 1960 that points of law of general public importance were involved in the decision, namely: "(1) To what extent does fairness require disclosure, to a petitioner, of material obtained by the Secretary of State as a result of inquiries made by him or on his behalf in the course of considering a petition that a case be referred to the Court of Appeal under section 17 of the Criminal Appeal Act 1968? (2) To what extent does fairness require that any such disclosure be made before the decision by the Secretary of State under section 17 of the Act of 1968 rather than by way of the reasons given in support of the decision when made?"

Solicitors: Taylor Nichol; Glaisyers, Birmingham; Edwards Frais & Abrahamson, Liverpool; B.M. Birnberg & Co.; Treasury Solicitor.

[Reported by DURAND MALET ESQ., Barrister]