

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

Regina v. Secretary of State for the Home Department
(Respondent) *ex parte* Al-Hasan (FC) (Appellant)
Regina v. Secretary of State for the Home Department
(Respondent) *ex parte* Carroll (FC) (Appellant)
(Conjoined Appeals)

ON
WEDNESDAY 16 FEBRUARY 2005

The Appellate Committee comprised:

Lord Bingham of Cornhill
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

HOUSE OF LORDS

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[2005] UKHL 13

LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the benefit of reading in draft the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood. I am in full agreement with it, and for the reasons which he gives I would allow both appeals and make the orders which he proposes.

LORD RODGER OF EARLSFERRY

My Lords,

2. I have had the privilege of considering in draft the speech which is to be delivered by my noble and learned friend, Lord Brown of Eaton-under-Heywood. Like him, I have not found this an easy case but, for the reasons he gives, I have come to the view that the appeal should be allowed.

3. In the hearing before the House the focus came to be, not on any background knowledge which Mr Copple would have had about the search, but on his presence when the governor approved the general order for a squat search. For that reason, while the Human Rights Act

1998 does not apply to this case, the decisions of the European Court of Human Rights, on the significance of an adjudicator's prior involvement in the subject of the dispute which he has to decide, may be helpful in formulating the approach of the common law in a case like the present.

4. As Lord Brown notes, in *Pabla Ky v Finland*, 22 June 2004, the complaint about the adjudicator's prior involvement was thin indeed and the application was rejected. The decision is worth noting, however, because, at para 29, the European Court emphasised, by reference inter alia to its decision in *McGonnell v United Kingdom* (2000) 30 EHRR 289, 307, para 51, that article 6(1) does not require that a member state should comply with any theoretical constitutional concepts as such. The question is always simply whether the requirements of the Convention are met in the particular case. Similarly, in a domestic law context, the question will turn, not on theoretical administrative or other concepts as such, but on whether the tribunal can be regarded as impartial and independent in the particular circumstances.

5. In *McGonnell v United Kingdom* the applicant owned land in the parish of St Martin's in Guernsey. He made a number of applications for planning permission for residential use, but they were all rejected. In about 1986 he moved into a converted packing shed on his land. In 1988 a draft Detailed Development Plan for the island was under consideration and, at the public inquiry, the applicant made representations to the effect that construction of a residential building on his land should be permitted. The inspector rejected that contention and supported the proposal in the draft development plan for the land to be zoned as an area reserved for agricultural purposes and in which development was generally prohibited. In 1990 the States of Deliberation, presided over by the Deputy Bailiff, Mr Graham Dorey, debated and adopted the development plan. Three years later the applicant made a formal application for a change of use for his land. The relevant planning committee rejected the application and the applicant appealed to the Royal Court, comprising the Bailiff, Sir Graham Dorey, and seven Jurats. The applicant's representative accepted that the written statement in the development plan provided for no development other than Developed Glasshouse, but he submitted that there were none the less reasons to permit a change of use in the particular case. The Royal Court dismissed the appeal.

6. The European Court of Human Rights held that there had been a violation of the applicant's article 6(1) right to have his civil rights determined by an independent and impartial tribunal. The European

Court took the view that the fact that the Bailiff had, in his former capacity, presided over the States of Deliberation when it adopted the development plan, was capable of casting doubt on his impartiality when, as the sole judge of law, he subsequently determined the applicant's planning appeal in the Royal Court. It is important to notice the way that the court identified the issue, at para 55:

“With particular respect to his presiding, as Deputy Bailiff, over the States of Deliberation in 1990, the Court considers that any direct involvement in the passage of legislation, or of executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist *to permit a variation from the wording of the legislation or rules at issue*” (emphasis added).

In the eyes of the European Court, the potential difficulty arose because the Royal Court, including the Bailiff, was not simply having to interpret and apply the development plan: it was being asked to permit a departure from the plan, whose provisions the Bailiff might be supposed, by reason of presiding over the States of Deliberation, to have supported.

7. In *Davidson v Scottish Ministers* 2004 SLT 895 an Extra Division of the Court of Session had to decide whether, having regard to section 21 of the Crown Proceedings Act 1947, it could grant an order for specific performance against the Scottish Ministers. One of the judges in the Extra Division had been Lord Advocate at the time when the Scotland Act 1998 was passing through your Lordships' House in its legislative capacity. During the passage of the Bill, the Lord Advocate resisted a proposed amendment, on the ground that it was unnecessary, because the Scottish Ministers were protected by the provisions of the Crown Proceedings Act 1947 which at present ensured that the Crown could not be subject to orders for specific performance. On that basis the proposed amendment was not pressed to a vote.

8. In those circumstances, the House held that, in his judicial capacity as a member of the Extra Division, the former Lord Advocate could not be seen to be impartial when deciding whether an order for specific performance against the Scottish Ministers was competent. In

the words of Lord Hope of Craighead, at p 907, para 56, as Lord Advocate, he had

“committed himself to the view, which in the Extra Division the Scottish Ministers too were advocating, that the effect of section 21 was that they were subject only to orders which were declaratory of the parties’ rights.”

Similarly, for Lord Cullen of Whitekirk, what was crucial was that, as a government minister, the Lord Advocate had been promoting the protection of the Scottish Ministers from judicial review. It was the exercise of that role, rather than any mere expression of view about the effect of section 21, that persuaded Lord Cullen that the judge was disqualified from sitting as a member of the Extra Division. Again, the decision in *Davidson v Scottish Ministers* rests on its own very particular circumstances which bring it within the general scope of the reasoning of the European Court in *McConnell v United Kingdom*.

9. As the facts of the present case demonstrate, however, people who are called on to adjudicate will often have substantial experience in the relevant field and will therefore be familiar with the background issues which they may have encountered previously in various roles. Indeed, the individuals concerned will often be particularly suited to adjudicate on the matter precisely because of the experience and wisdom on the topic which they have accumulated in those other roles. In many continental systems, at various stages of their careers judges spend time as legal civil servants in ministries, drafting and advising on legislation. Undoubtedly, when they return to the bench, it is expected that they will use their experience to enrich their work. Today, British judges draw on their previous work, whether as advocates, legal civil servants or academic lawyers. Therefore, they may well have to decide a point which they had argued as counsel, or on which they had written an article - or, even, which they had decided in a previous case. In various political or other contexts, judges may have publicly advocated or welcomed the passing of the legislation which they later have to apply. Judges who have served in some capacity in the Law Commissions may have to interpret legislation which they helped to draft or about which they helped to write a report. The knowledge and expertise developed in these ways can only help, not hinder, their judicial work.

10. It would be absurd, then, to suggest that in such situations their previous activities precluded the judges from reaching an independent

and impartial judgment, when occasion demanded. The authoritative decision in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 is a resounding rejection of any such approach. In any event, if proof were needed, experience confirms that judges are quite capable of acting impartially in such cases. Judges have not infrequently been party to decisions overruling their own previous decisions. Similarly, in *The "Rafaela S"* [2003] 2 Lloyd's Rep 113, 145, para 158, sitting in the Court of Appeal, Peter Gibson LJ freely admitted that he had taken a different view from the one adopted in a report which he had previously subscribed as Chairman of the Law Commission. In *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, Lord Mackay of Clashfern took part in a decision in which the House struck down a system adopted by a local authority for "starring" the essential milestones of their care plan adopted under the Children Act 1989. The appeal turned on identifying a cardinal principle of the Act - a piece of legislation for which Lord Mackay, as Lord Chancellor, had been the lead minister when the Bill was going through this House in its legislative capacity. More than that, as he explained, at p 327, para 108, he had actually given a lecture in which he suggested the idea of starring stages. At the beginning of the appeal, however, he informed counsel of this and they did not object to his sitting. So any question of apparent bias was resolved. Again, since Lord Mackay agreed with the decision to disapprove the starring system, the informed and fair-minded observer would have seen that he was well able to judge the matter independently and impartially when called upon to do so.

11. Nor should it be supposed that only professional judges are capable of the necessary independence of approach. That would be to disregard the realities of life in many organisations today. For example, on a daily basis, head teachers have to apply school rules which they have helped to frame. By virtue of their knowledge of the way the school works and of its problems, they will often be best placed to apply the rules sensitively and appropriately in any given situation. Again, it is not to be assumed that the head teachers' mere involvement in shaping the rules means that a fair-minded observer who knew how schools worked would conclude that there was a real possibility that they would not be able to apply the rules fairly. The same goes for managers in businesses and for officers in the Armed Forces who are committed to upholding the edifice of lawful orders on which the services rest. Equally, I have no doubt that an informed and fair-minded observer would regard prison governors, or their deputies, as being quite capable of interpreting and applying the prison rules fairly and independently, even though they are obviously committed to upholding them. In all these situations, if things do go wrong, the decision can be

judicially reviewed or challenged in an employment tribunal, as the case may be. The present case is an example of that safeguard in action.

12. Nothing in the decision of the House today casts any doubt on the validity of the decisions of such bodies taken in the ordinary way. The circumstances of the present case were most unusual, however. The appellants chose to challenge the lawfulness of the general order for a squat search which they had refused to obey. Since Mr Copple had been present when the governor approved that particular order, and had not dissented from that approval, an informed and fair-minded observer could infer that Mr Copple had thereby tacitly accepted that the order was lawful in the situation then facing the prison authorities. If so, that observer might further conclude that there was a real possibility that Mr Copple would be biased if he later had to adjudicate on the appellants' challenge to the validity of the self-same order. On this very limited ground, which is explained more fully by Lord Brown, I have come to the view that the appeal should be allowed.

BARONESS HALE OF RICHMOND

My Lords,

13. I have had the advantage of reading the opinions of my noble and learned friends, Lord Rodger and Earlsferry and Lord Brown of Eaton-under-Heywood, and I agree with them. In particular, I would wish to associate myself with the powerful observations of Lord Rodger. So powerful are they that they might have been thought to lead to a different conclusion in this case. I would like, therefore, to expand a little upon why they do not.

14. The inter-relationship between management and the fair administration of discipline in institutional settings and disciplined services has long been a source of concern. It used to be thought that the courts could not supervise the disciplinary actions of prison governors, chief constables, chief fire officers and the like, because to do so would interfere with the free and proper exercise of their disciplinary powers: see *R v Metropolitan Police Commissioner, Ex p Parker* [1953] 1 WLR 1150, 1155, *Ex p Fry* [1954] 1 WLR 730, 733, per Goddard LJ. Then it was held that the disciplinary decisions of prison Boards of Visitors could be distinguished from those of prison governors and were

amenable to judicial review: see *R v Board of Visitors of Hull Prison, Ex p St Germain* [1979] 1 QB 425. But it was still thought that the governor's role in maintaining good order and discipline within the prison was part of his overall function of managing the prison: see *R v Deputy Governor of Camphill Prison, Ex p King* [1985] 1 QB 735. In the words of Lawton LJ at p 749, it was thought that 'Management without discipline is a recipe for chaos.'

15. Others, however, had difficulty in drawing a logical distinction between the disciplinary functions of governors and Boards of Visitors: see *Re McKiernan's Application* [1985] NI 385. In England and Wales, the distinction was abolished by the decision of this House in *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533. Since then it has been clear that the functions of a governor adjudicating upon disciplinary charges are separate and distinct from his functions in running the prison; they are subject to the supervision of the courts in their compliance with the rules of natural justice. This distinction was perhaps even more important during the years following 1992 when all prison discipline was in the hands of the Governor.

16. Of course, as Newman J said at [2001] HRLR 731, para 38, it is inherent in the system of prison discipline that it is administered by those with responsibility for managing the prison. Sometimes it will not be possible to keep the two functions distinct. But in this case it could have been done. Giving the order and deciding upon its lawfulness could have been more clearly separated. Giving an order to search prisoners for illicit substances is part of the function of running the prison. In other contexts one would not normally expect the person who gave such an order also to adjudicate upon whether or not it was lawful, at least when the order was so sensitive and the consequences of an adjudication so serious. The lawfulness of a police officer's order to stop and search a suspect will not be decided by the police officer but by a court in any later proceedings resulting from it. The Deputy Governor in this case did not give the order but he was closely associated with it. The first reports about the indications given by the dogs and the negative findings of the search of the classroom area were made to him on the Friday. The decision to order a lock down search was made as a result. He was there on the Monday morning when the Governor approved the Principal Officer's decision to require prisoners to squat. In those circumstances, however professional the Deputy Governor was in his approach to his task, a fair-minded and informed observer would conclude that there was a real possibility that he would be pre-disposed to uphold the legality of the order. Although any other governor from within or outside the prison would have had to be briefed on the reasons for the

search, it must have been practicable for someone who had not been so closely associated with giving the order to have conducted the adjudications based upon it. For those reasons I agree that the appeals should be allowed.

LORD CARSWELL

My Lords,

17. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood. For the reasons which they have given I would allow the appeals and make the orders proposed.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

18. Strip searches are a normal part of prison life, particularly for category A prisoners in high security prisons. Squat searches, however, the most extreme and intrusive form of strip searches in which the prisoner is required to bend over or squat, are altogether less routine. They can only lawfully be ordered for good reason. Rule 39 (2) of the Prison Rules 1964 (SI 1964/388) (now replaced by the 1999 Rules), made under the Prison Act 1952, provides: "A prisoner shall be searched in as seemly a manner as is consistent with discovering anything concealed". Consistently with that rule the Prison Security Manual dictates the only circumstances in which a squat search may be ordered: "If you suspect there is anything concealed in the anal or genital area, ask [the prisoner] to bend over or squat."

19. On Monday, 23 November 1998 a squat search was ordered of all 184 prisoners held on F and G wings of HMP Frankland, a high security dispersal prison holding some 550 prisoners. The previous Friday, two dogs trained in arms and explosives detection had given positive indications within one of the prison's classrooms, a classroom used only by prisoners from those two wings. A search of the classroom and the

surrounding area having revealed nothing, it was decided to carry out a lock-down search of both wings with the prisoners confined to their cells.

20. These two appellants, both then long-term category A prisoners, were on the affected wings and amongst those ordered to squat (although in the event the search was called off after 94 prisoners had been searched). The appellants, however, unlike the rest, refused to obey the order. Mr Carroll refused on the ground that he had not been given proper reasons for it; Mr Al-Hasan (formerly known as Anthony Steele) on the ground that a reasonable suspicion was required and there was none in his case.

21. Disciplinary proceedings were brought against both appellants under rule 47 (19): “A prisoner is guilty of an offence against discipline if he . . . (19) disobeys any lawful order”.

22. Rule 48 (3) requires that: “every charge shall be inquired into by the Governor”. The Governor appointed to hear the charges against these appellants was Deputy Governor Copple. Separate adjudications were held, respectively on 17 December 1998 and 2 March 1999, in each case following adjournments to enable the prisoner to obtain legal advice (although each was refused legal representation for the hearing). In both cases there was no dispute that the order had been disobeyed; the defence of each was rather that the order had not been “lawful”. Mr Copple ruled in both cases that the order was lawful and accordingly found both appellants guilty, findings later upheld by the Secretary of State. The penalty imposed on Mr Carroll was two additional days detention, ten days cellular confinement and ten days stoppage of earnings. He was at the time serving a sentence of 15 years for offences of robbery and assault. Mr Al-Hasan was penalised by the stoppage of 15 days earnings and the forfeiture of certain privileges. He was and remains a life sentence prisoner, serving four life sentences for offences committed whilst in prison.

23. Both appellants brought judicial review proceedings seeking to quash the findings of guilt recorded against them. The challenges were advanced on a wide-ranging basis, asserting breaches of Articles 5 (4) and 6 of the European Convention on Human Rights, and breaches of the common law principles of natural justice. The challenges were heard together and failed both before Newman J in the Administrative Court

on 16 February 2001 and before the Court of Appeal (Lord Woolf CJ, Tuckey and Arden LJ) on 19 July 2001: [2002] 1 WLR 545.

24. The Court of Appeal heard the appeals together with another appeal (from the Divisional Court) by a third prisoner, Mr Greenfield, who was also challenging an adjudication. Since the three appeals were thought to involve a number of common issues, your Lordships too heard them together. By then, however, the respondent Secretary of State had conceded—following the judgment of the Grand Chamber of the European Court of Human Rights in *Ezeh and Connors v United Kingdom* (2004) 39 EHRR 1—that Mr Greenfield’s adjudication had breached article 6 so that the only real issue left in his case was a claim for damages under section 8 of the Human Rights Act 1998. By the conclusion of the three-day hearing before your Lordships, the arguments had narrowed still further and it had become clear that no real overlap remained between Mr Greenfield’s appeal and those of these two appellants, Mr Carroll and Mr Al-Hasan. Judgment is therefore being given separately in Mr Greenfield’s case ([2005] UKHL 14).

25. As now appears, these appellants’ appeals raise essentially just one issue, an issue common to both. Put at its simplest the issue is whether these adjudications are properly to be regarded as vitiated by apparent bias on Mr Copple’s part, in particular having regard to his earlier involvement in the events leading to the decision to order a squat search. As, moreover, will shortly appear, this only became an issue—only, indeed, *could* become an issue—once the challenge had been launched and Mr Copple (very properly) had given his detailed account of the facts of the case.

26. The facts most directly relevant to the issue are these. The initial decision to carry out a search of all prisoners and their cells on F and G wings was taken, as already indicated, on Friday, 20 November 1998 following the failure to find in or around the classroom the substances suggested by the trained dogs to be there. The decision was taken by the Governor, Mr Woods, and was relayed to Principal Officer Markham who was made aware of the indications from the dogs and of the security implications of the search. For good reasons (of no materiality on this appeal) it was decided to postpone the search until after the weekend. On the Monday morning Principal Officer Markham instructed a number of prison officers to carry out the search. He explained to them that the items being searched for were of a kind that could threaten the security of the prison and were of a nature that could be hidden in the anal or genital areas of the prisoners being searched. In

the course of that morning Governor Woods was briefed in relation to the search and he specifically approved the decision to require the prisoners to squat as part of the search. Mr Copple himself was present when this approval was given.

27. At the first instance hearing before Newman J and again before the Court of Appeal it appears that the major thrust of the fairness challenge related less to Mr Copple's own prior involvement in the actual decision-making process than to his background knowledge of the general circumstances in which the search had come to be ordered. It is instructive to see how the Court of Appeal, in a lengthy and impressive judgment which had to deal also with a host of other issues, dealt with this particular issue, [2002] 1 WLR 545, 562-563:

57. The first specific allegation made by Mr Fitzgerald is that Deputy Governor Copple was not an appropriate person to conduct the adjudication. It is not suggested that he was motivated by any personal bias or malice against Mr Fitzgerald's clients. It is, however, submitted that because of his background knowledge, he should have disqualified himself. If he was required to do so, then it would mean that it would be necessary for a governor to be transferred from another prison to conduct the adjudication. It is not disputed by Mr Sales that in the appropriate circumstances this can be done. However, it is clearly inconvenient to do this and can have disadvantages.

58. We have already set out the extent of Deputy Governor Copple's knowledge. Mr Fitzgerald in his additional submissions sought to establish there was here a credibility issue and issues which required resolution of disputes of fact. There was ground for challenging the bona fides of the order for a squat search. However, we do not consider that this is a realistic assessment of the situation. Mr Sales accepts that there has to be cause for a squat search. However, it is far fetched to suggest that there was not cause for the governor of the prison to come to the decision that the search was necessary and that there were not circumstances where the material for which the search was taking place could have been secreted in intimate parts of the prisoner's body.

59. Because category A prisoners were involved and it was important to protect sources of information, any

adjudicating officer would need background information of the sort that Deputy Governor Copple had in order to rule on the admissibility of questioning of witnesses. This is analogous to the situation which was considered in *R v Board of Visitors of Frankland Prison, Ex p Lewis* [1986] 1 WLR 130. The board of visitors no longer has disciplinary powers but, although those powers were greater than those of the governor, the powers were of a similar nature. As was pointed out in that case (at p135) it can assist the achievement of justice in disciplinary proceedings for the adjudicator to have knowledge of the workings of a particular prison.

60. Here this was the situation in relation to Deputy Governor Copple. Because the lawfulness of the order was being challenged, it was apparent there could be questions which required, if they were answered, the revelation of information which the prison could reasonably wish to remain confidential in the interests of security. For example, in prisons, sources of information are vital to the maintenance of security and control. They have to be protected because they can readily lead to the revelation of the existence of an informer. If questioning is only curtailed in those situations where there is an informer, this will result in identifying that there is an informer in those cases where the questioning is curtailed. This would in itself be a reason for being circumspect before allowing the questioning which was refused by Deputy Governor Copple. The nature of the information here made curtailment necessary. There was sensitive information involved. As Newman J stated:

‘even if the question was apt to open up a line of defence, then in my judgment there was a clear and legitimate interest in ensuring that the sensitive security information was not disclosed to the claimant and Deputy Governor Copple was sufficiently independent and indeed well placed, because of his knowledge of the security information, to decide whether fairness required the question to be answered.’

61. Like Newman J, we would reject the submission that unfairness occurred through the refusal to permit questions. In applying the approach that justice must not only be done but be seen to be extended to

prisoners, the reasonable onlooker must be assumed to know of the needs for security and control in prison. In our judgment the reasonable onlooker would conclude that not only was Deputy Governor Copple in a position to provide a just hearing, he did so and justice was seen to be done. If it were necessary for a reasonable onlooker to do so, he would be entitled to take into account the fairness of the whole procedure, including the fact that the courts could supervise how the adjudication was carried out on an application for judicial review.

28. Those paragraphs in the Court of Appeal's judgment to my mind provide a convincing answer to the main argument then being advanced on behalf of these two appellants, namely that Mr Copple, by the very fact that he knew of the security concerns which had occasioned the search, was thereby disqualified from hearing the charges through being unable to adjudicate fairly upon them. As the Court of Appeal pointed out, it was clearly necessary that sensitive security information was not disclosed to the prisoners in the course of the adjudications and, to guard against that risk, any governor trying these charges would necessarily have had to be given in advance of the hearing precisely the same sort of background information about the search as Mr Copple already had. Principal Officer Markham, for example, had to be told by Mr Copple not to answer a question put by Mr Carroll: "What were these items that intelligence indicated could threaten the security of the establishment?" These adjudications could not properly have been conducted by a governor unaware of the background. So much, indeed, Mr Fitzgerald QC on behalf of these appellants now accepts.

29. What, however, Mr Fitzgerald does not accept is that Mr Copple could properly decide the central question raised by the prisoners on these adjudications, the legality or otherwise of the orders to squat. He could not bring the necessary degree of independence and impartiality to that task. Mr Carroll's defence to the charge against him was in terms: "a blanket order that everyone must squat is illegal". That, therefore, was the critical issue on which Mr Copple had to rule. Having been present when the general order for a squat search was approved by the governor, could he properly do so? Or might he reasonably be supposed to have pre-judged the issue? That precise question, although seemingly raised below as part and parcel of the natural justice challenge, appears not to have been addressed by the Court of Appeal. Perhaps it was lost sight of amidst the myriad other arguments advanced. Be that as it may,

it is now, as already indicated, the principal issue for your Lordships' decision on the present appeal.

30. The common law test for bias has been authoritatively settled by the recent decisions of this House in *Porter v Magill* [2002] 2 AC 357 and *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187:

“The question is whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased”.

31. Unknown to the appellants at the time of these adjudications, or indeed at the time when their judicial review proceedings were first brought, Mr Copple not merely knew of the background to this search but had actually himself been present when the squat order was approved. This fact only emerged when Mr Copple gave his statement in Mr Al-Hasan's case on 5 July 2000 (rather oddly it did not appear in his earlier statement of 15 May 2000 in Mr Carroll's case). How would the fair-minded observer regard that? Would he think there was a real possibility that, Mr Copple having at the very least acquiesced in the order for a squat search, he would later at the adjudication stage be predisposed to find it lawful?

32. In addressing this all-important question it is helpful to take note of a line of recent authority culminating in the decision of this House in *Davidson v Scottish Ministers* 2004 SLT 895. In *Davidson* the House affirmed the decision of the Second Division of the Court of Session to set aside decisions made by an Extra Division of that Court on the ground that they were vitiated by apparent bias and want of objective impartiality on the part of one member of the Court, Lord Hardie. What essentially had happened was that the Extra Division had been called upon to decide as a question of law whether section 21 of the Crown Proceedings Act 1947 prevented the Scottish courts from ordering specific performance against the Scottish Ministers as part of the Crown. Some three years earlier Lord Hardie as Lord Advocate had assured the House of Lords in its legislative capacity that such was indeed the position. In reaching its conclusion the House examined a number of cases in the European Court of Human Rights concerning the circumstances in which a judge's prior involvement in the eventual question for decision could be said to raise doubts as to the domestic court's independence and impartiality.

33. In *Procola v Luxembourg* (1995) 22 EHRR 193, for example, the court concluded, perhaps not surprisingly, that as four of the five members of the *Conseil d'Etat* had previously contributed to an advisory opinion on the lawfulness of a proposed new regulation, their subsequent ruling confirming its lawfulness breached article 6 (1). I need cite only para 45 of the court's judgment:

“45. The Court notes that four members of the *Conseil d'Etat* carried out both advisory and judicial functions in the same case. In the context of an institution such as Luxembourg's *Conseil d'Etat* the mere fact that certain persons successively performed these two types of function in respect of the same decisions is capable of casting doubt on the institution's structural impartiality. In the instant case, Procola had legitimate grounds for fearing that the members of the Judicial Committee had felt bound by the opinion previously given. That doubt in itself, however slight its justification, is sufficient to vitiate the impartiality of the tribunal in question, . . .”

34. A similar conclusion was reached by the Court in *McGonnell v United Kingdom* [2000] 30 EHRR 289, concerning the Bailiff of Guernsey's determination of an appeal which turned upon the application of a development plan in which he had personally been involved whilst in government. Again, a single paragraph of the court's judgment suffices:

“57. The Court thus considers that the mere fact that the Deputy Bailiff presided over the States of Deliberation when DDP6 was adopted in 1990 is capable of casting doubt on his impartiality when he subsequently determined, as the sole judge of the law in the case, the applicant's planning appeal. The applicant therefore had legitimate grounds for fearing that the Bailiff may have been influenced by his prior participation in the adoption of DDP6. That doubt in itself, however slight its justification, is sufficient to vitiate the impartiality of the Royal Court, . . .”.

35. In *Pabla Ky v Finland* (*Application No. 47221/99*), a decision of the European Court of Human Rights dated 22 June 2004, the Court's decision went the other way. The complaint there was that a member of

the Finnish Parliament had sat as an expert member of the Court of Appeal. The barrenness of the complaint on the particular facts of that case appears clearly from paragraph 34 of the Court's judgment:

“34 Accordingly, the Court concludes that, unlike the situation examined by it in the cases of [*Procola* and *McGonnell*], [the Member of Parliament] had not exercised any prior legislative, executive or advisory function in respect of the subject-matter or legal issues before the Court of Appeal for decision in the applicant's appeal. The judicial proceedings therefore cannot be regarded as involving ‘the same case’ or ‘the same decision’ in the sense which was found to infringe Article 6.1 in the two judgments cited above. The Court is not persuaded that the mere fact that [the Member of Parliament] was a member of the legislature at the time when he sat on the applicants' appeal is sufficient to raise doubts as to the independence and impartiality of the Court of Appeal. While the applicant relies on the theory of separation of powers, this principle is not decisive in the abstract.”

36. Those authorities I have found helpful. The others cited to us I confess I have not. *R v Board of Visitors of Frankland Prison Ex p Lewis* [1986] 1 WLR 130 (the case discussed in paragraph 59 of the Court of Appeal's judgment) goes essentially to the degree of background knowledge the tribunal may properly have when adjudicating on a prison disciplinary charge, no longer at issue on these appeals. That is true also of the unreported first instance decisions in *R v HM Prison Service Ex p Hibbert* (16 January 1997) and *R v Deputy Controller of HM Prison Buckley Hall Ex p Thomas* (20 June 2000). As for such cases as *Sengupta v Holmes* [2002] EWCA Civ 1104 and *Saraiva de Carvalho v Portugal* (Application No. 15651/89 decided on 23 March 1994), these address the very different question of how far a judge may properly have had some prior *judicial* involvement in a case he ultimately has to decide.

37. I return, therefore, against the background of the relevant case law, to the critical question: how would a fair-minded observer regard these appellants' adjudications? Would he think it a real possibility that Mr Copple, having been present when the squat search order was confirmed by the governor, would be predisposed thereafter to find it lawful? Would he, in the language of the Strasbourg Court, feel “doubt,

however slight its justification”, about Mr Copple’s impartiality, “legitimate grounds for fearing” that Mr Copple may have been influenced by his prior participation in the decision-making process?

38. In resisting the appeal, Mr Sales for the respondent Secretary of State submits that on the particular facts of this case the answer to those questions is “no”: the line, he submits, was not crossed. Mr Copple, he contends, had not here been exercising “any legislative, executive or advisory function” (*Pabla Ky*) in respect of the squat order whose legality he was later being required to adjudicate upon. He was merely present when Governor Woods gave his approval to the order. Mr Sales further argues that in assessing the objective appearance of the fairness of these adjudications regard must be had to the statutory context in which they were held. Parliament has charged governors and their deputies with the task of adjudicating on prison disciplinary offences. True, as the Court of Appeal noted in para 57 of its judgment, another governor can always be brought in from another prison, but this is a most exceptional and no doubt inconvenient course. Regard should also be had, submits Mr Sales, to the existence of other institutional constraints and safeguards surrounding the adjudicative process: the requirement for the Secretary of State to confirm any finding of guilt, the possibility of complaint to the Prison Ombudsman, and, most significantly of all, the availability of judicial review by which the legality of any disputed order can be tested. Finally, Mr Sales reminds us, both courts below (including in particular a Court of Appeal presided over by Lord Woolf with all his expertise and experience in this field of law) found nothing intrinsically unfair in Mr Copple adjudicating on these charges; in determining the objective impression given by these adjudications, he submits, the House should give due weight to these earlier findings.

39. For my part I have not found this an easy case. There is undoubted force in Mr Sales’s arguments and there can be no question but that Mr Copple himself undertook these adjudications in the best of good faith and without any thought whatever that his earlier involvement in the matter could in any way be regarded as having compromised his independence and impartiality. On balance, however, I have come to the conclusion that the bias argument is here made good. At the end of the day it seems to me that by the very fact of his presence when the search order was confirmed, Mr Copple gave it his tacit assent and endorsement. When thereafter the order was disobeyed and he had to rule upon its lawfulness, a fair-minded observer could all too easily think him predisposed to find it lawful. After all, for him to have decided otherwise would have been to acknowledge that the governor

ought not to have confirmed the order and that he himself had been wrong to acquiesce in it.

40. It was not Mr Fitzgerald's primary argument that Mr Copple, quite apart from his own acquiescence in the order, would in any event have been inclined to uphold its legality in deference to the governor's position as his superior officer. Rather he assumes that Mr Copple was sufficiently independent of the governor to have reached his own independent view of the order's legality when eventually this came to be questioned at the adjudications. This assumption carries with it, however, the further assumption that, had Mr Copple had any doubts about the order when initially it fell for confirmation by the governor on the Monday morning, he would have felt able, indeed obliged, to question it and if necessary disassociate himself from it at the time. In short, any argument that Mr Copple might in any event on the adjudication have been expected to rubber-stamp the governor's order is really subsumed in the main argument that he had already by then committed himself to its validity.

41. From all this it follows that to have avoided the appearance of bias Mr Copple would either have had to make plain at the adjudications that he himself had actually been present when the squat search order was confirmed (rather than give the impression, as he appears to have done, that he had known nothing of it) and sought the prisoners' consent to his nevertheless hearing the charges, or alternatively stood down to enable them to be heard by a different governor (if necessary from another prison) without any such previous involvement in the case.

42. There remains only the question of what relief should follow upon this conclusion. Mr Fitzgerald submitted that the findings of guilt must now be quashed and deleted from the respective appellant's disciplinary records. Mr Sales contests this, submitting that in the event no possible injustice was done to these appellants: as was later clearly established by the Court of Appeal's judgment, and indeed is not now disputed, this search order was in fact perfectly lawful. It cannot sensibly be supposed, therefore, that there could have been any different outcome to the adjudications whoever had heard them.

43. On this question I entertain not the slightest doubt that Mr Fitzgerald is right. Indeed it seems to me clear both as a matter of principle and authority that once proceedings have been successfully impugned for want of independence and impartiality on the part of the

tribunal, the decision itself must necessarily be regarded as tainted by unfairness and so cannot be permitted to stand. There are decisions to this effect both ancient and modern of the highest authority. Over 150 years ago in *Dimes v Grand Junction Canal* (1852) 3 HLC 759 the House of Lords set aside Lord Chancellor Cottenham's decree affirming the Vice-Chancellor's decision in favour of a company in which Lord Cottenham himself was a shareholder. As Lord Campbell said at p 793:

“No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. . . . and it will have a most salutary influence on [inferior] tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside.”

44. Only recently, in *Millar v Dickson* [2002] 1 WLR 1615, 1624, Lord Bingham of Cornhill took the same view with regard to a number of decisions reached by temporary sheriffs contrary to article 6 of the Convention:

“There is indeed nothing to suggest that the outcome of any of these cases would have been different had the relevant stages of the prosecution been conducted before permanent instead of temporary sheriffs. There is no reason to doubt that the conduct of all the temporary sheriffs involved was impeccable, and no reason to suppose that any of the accused suffered any substantial injustice. But . . . it is in my view clear from authority that the right of an accused in criminal proceedings to be tried by an independent and impartial tribunal is one which, unless validly waived by the accused, cannot be compromised or eroded.”

So too here: the findings of guilt against these appellants must now be expunged.

45. For completeness I add only this. If your Lordships share my view upon these appeals, they will owe their success entirely to well established principles of common law. Both adjudications took place before the Human Rights Act 1998 came into force. They cannot, therefore, be impugned under domestic law by reference to the Convention: the non-retrospectivity of the Act is now, of course, firmly established—see most recently *In re McKerr* [2004] 1 WLR 807. There can accordingly be no question of any award of damages in these cases even supposing, which may be doubted, that, had a successful challenge been available under the Convention, there then would have been. As it happens, neither appellant will in fact have served any additional days detention pursuant to these adjudications. The order that Mr Carroll serve two additional days was in the event nullified by a combination of circumstances, namely his own decision on 16 October 1998 to postpone a Parole Board review of his case coupled with his eventual release on licence on 21 February 2001 on the recommendation of the Parole Board prior to his mandatory release date. Mr Al-Hasan as a life sentence prisoner could not be, and was not, ordered to serve additional days; and his offences, it is acknowledged, were such that the adjudication can have no possible impact upon whatever may be the final release date in his case.

46. These observations, however, are by the way. Limited though the effect of these adverse adjudications was upon these appellants, they are entitled to have them set aside.