

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

R (on the application of Hammond) (FC) (Respondent)

v.

Secretary of State for the Home Department (Appellant)
(Criminal Appeal from Her Majesty’s High Court of Justice)

Appellate Committee

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

Counsel

Appellants:
Jonathan Crow
Kate Gallafent
(Instructed by Treasury Solicitor)

Respondents:
Edward Fitzgerald QC
Phillippa Kaufmann
(Instructed by Bhatt Murphy)

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ON
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HOUSE OF LORDS

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**R (on the application of Hammond) (FC) (Respondent) v. Secretary
of State for the Home Department (Appellant) (Criminal Appeal
from Her Majesty's High Court of Justice)**

[2005] UKHL 69

LORD BINGHAM OF CORNHILL

My Lords,

1. Under the procedure which obtained until 25 November 2002, it was for the Secretary of State for the Home Department, having received the written recommendation of the trial judge and the Lord Chief Justice, to determine the length of the punitive term of imprisonment to be served by an adult convicted of murder in England and Wales. In *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837 this procedure was held to be incompatible with article 6 of the European Convention on Human Rights, because determination of the length of a punitive term is in substance the imposition of sentence, the imposition of sentence forms part of a criminal trial, article 6 requires a criminal trial to be by an independent and impartial tribunal, and the Secretary of State is not an independent and impartial tribunal. This incompatibility was prospectively cured, with effect from 18 December 2003, by section 269 of the Criminal Justice Act 2003, which provides that the trial judge shall (subject to appeal in the ordinary way) determine the minimum term to be served by an adult murderer in much the same way as he passes sentence on every other convicted defendant. But there remained a transitional problem relating to (1) existing prisoners whose punitive terms had already been notified to them by the Secretary of State by 18 December 2003, (2) existing prisoners sentenced to mandatory life imprisonment before that date whose punitive terms had not yet been notified to them, and (3) those sentenced after that date for murders committed before that date. The respondent falls into the second of these classes, and challenges the compatibility with article 6 of the Convention of one of the statutory provisions governing determination of the minimum term which he must serve under the transitional

provisions of the 2003 Act. The compatibility of that provision is the issue in this appeal.

2. On 10 April 2003 the respondent was sentenced to life imprisonment on his conviction for murdering a 13-month old child. The conviction followed a contested trial before Judge Fabyan Evans and a jury at Middlesex Guildhall Crown Court. The evidence disclosed that the child had been the victim of extreme brutality. At the hearing when sentence was passed, counsel for the respondent made no effective attempt to mitigate. The judge did not announce the punitive term he proposed to recommend, but indicated that he would take account of the very young age of the victim, his view that she had been sexually abused and the age of the respondent (who was 22). In a written report dated 19 May 2003 the judge summarised the facts of the case, and recommended that he serve a punitive term of 25 years. He considered that the victim had suffered “ferocious treatment” at the respondent’s hands and referred to:

“indications from some of the available evidence that he has an uncontrollable temper, but that cannot explain the precision of the cigarette burns or the sexual abuse. He showed no emotion or remorse during the course of the police investigation, during the trial or after the verdict of the jury.”

3. In accordance with the practice adopted after the *Anderson* judgment and before commencement of the new statutory procedure, the Lord Chief Justice made no recommendation on the punitive term to be served by the respondent and the Secretary of State made no determination. But in the early months of 2004, after the new provisions had come into force, steps were taken to refer the respondent’s case to a judge of the High Court for determination of the minimum term which he should serve. This determination was to be made, as paragraph 11(1) of the Schedule 22 to the 2003 Act on its face requires, on consideration of the papers (including any written representations of the respondent), without an oral hearing, but the respondent’s solicitors contended that on the special facts of his case an oral hearing was essential. They accordingly obtained leave to apply for judicial review seeking:

“1. A declaration that in accordance with section 3 of the Human Rights Act 1988, paragraph 11(1) of Schedule 22 [to] of the Criminal Justice Act 2003 is to be read

subject to an implied provision that where it is necessary to comply with the existing prisoner's rights under article 6(1) of the European Convention on Human Rights, an oral hearing will be held.

2. In the alternative, a declaration that paragraph 11(1) of Schedule 22 [to the 2003 Act] is incompatible with the rights of existing lifers under article 6(1) because it confers no power for the High Court to hold an oral hearing in the determination of their minimum term."

The application came before the Queen's Bench Divisional Court (Thomas LJ, Richards and Fulford JJ) which, for reasons given in an admirably lucid and succinct judgment delivered by Thomas LJ, allowed it and made a declaration broadly to the effect of the first declaration sought: [2004] EWHC 2753 (Admin).

The legislation

4. When an adult is convicted of murder in England and Wales the court must impose a sentence of imprisonment for life. But the defendant is not, save in a small minority of cases, ordered to be detained for the rest of his or her life. Ordinarily, a term of imprisonment is set, which the defendant must serve to satisfy the requirements of retribution and general deterrence, the "tariff" or "punitive", now known as the "minimum", term. Section 269 of the 2003 Act empowers the court, on such a conviction being entered, to determine the minimum term to be served, or (more rarely) to order that the defendant shall never be released. Section 276 provides that Schedule 22 shall have effect in transitional cases.

5. In relation to existing prisoners whose minimum terms had been determined by the Secretary of State and notified to them before 18 December 2003 (class (1) in paragraph 1 above), paragraph 3 of Schedule 22 confers a right of application to the High Court for what is in effect a reconsideration of the Secretary of State's determination, and if no application is made that determination stands. Paragraph 6 of Schedule 22 applies to class (2), the class to which the respondent belongs, and requires the Secretary of State to refer the prisoner's case to the High Court for it to determine the earliest time at which the prisoner shall be entitled to be released, or that he shall never be entitled to be released. The High Court is not, by paragraph 8, to order a longer period of detention than, in its opinion, the Secretary of State would

have been likely to notify before December 2002, or to order that the prisoner shall never be released unless, in its opinion, the Secretary of State would have been likely to make such an order before December 2002. No detailed reference need be made to the provisions applicable to prisoners in class (3). Central to this appeal, however, is paragraph 11(1) of Schedule 22, which reads:

“(1) An application under paragraph 3 or a reference under paragraph 6 is to be determined by a single judge of the High Court without an oral hearing.”

It is these last four words which are critical.

The issue

6. The Secretary of State, through counsel, accepts that there will be some cases, however few, under paragraph 3 or paragraph 6 of Schedule 22 in which fairness will require that there be an oral hearing before the minimum term to be served by an existing prisoner is finally determined by the court. I take this acceptance to acknowledge that in such cases an opportunity to call evidence, or for the prisoner to testify, or for his counsel to address the court in mitigation, may be necessary if the court is to adjudicate fairly. But there is, he submits, nothing in article 6 of the European Convention or the Strasbourg jurisprudence on it to suggest that this opportunity need be afforded before the first instance court. He submits, correctly, that the right of appeal against sentence conferred by section 9 of the Criminal Appeal Act 1968, as amended, applies to an order made by the High Court under paragraphs 3 or 6 of Schedule 22. He submits, again correctly, that on any such appeal there will be an oral hearing and section 23 (permitting the Court of Appeal to receive additional evidence if they think it necessary or expedient in the interests of justice to do so) will apply. On such an appeal, the Court of Appeal will have the power provided in section 11(3) of the 1968 Act:

“On an appeal against sentence the Court of Appeal, if they consider that the appellant should be sentenced differently for an offence for which he was dealt with by the court below may?

- (a) quash any sentence or order which is the subject of the appeal; and

(b) in place of it pass such sentence or make such order as they think appropriate for the case and as the court below had power to pass or make when dealing with him for the offence;

but the court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below.”

The Secretary of State contends that in denying a paragraph 6 (class (2)) existing prisoner an oral hearing at first instance paragraph 11(1) of Schedule 22 is not incompatible with article 6 because such a hearing is available in the Court of Appeal, and on a correct understanding of the Strasbourg authorities it is the fairness of the proceedings as a whole which must be judged. Thus any deficiency at first instance is remedied on appeal, and there is no incompatibility.

7. The respondent, through counsel, accepts that the requirements of fairness will not, in the unusual context of paragraph 3 applications and paragraph 6 references, require an oral hearing in every case. In many of such cases, counsel will have addressed the trial judge on the length of the punitive term which that judge should recommend, will have had the opportunity to call evidence at that stage, will have had the opportunity to address written submissions to the Secretary of State, and may have nothing to draw to the attention of the High Court judge making the paragraph 3 or paragraph 6 determination which cannot quite fairly be considered on paper. But such a determination is an imposition of sentence, to be regarded as part of the criminal trial. A criminal trial is, in all save unusual circumstances, required by article 6 of the Convention to be held in public, with the defendant present and having the opportunity, through his legal representative or himself if appearing in person, to call evidence and make submissions relevant to the issue to be decided. In some paragraph 3 applications and paragraph 6 references, however small the minority of cases, fairness will require that such an opportunity be granted at first instance, and paragraph 11(1) of Schedule 22 is incompatible with article 6 in denying that opportunity in all cases, including those where fairness does require such a procedure. This incompatibility is not remedied by the possibility of appeal, since an appeal lies only with the leave of the Court of Appeal (section 11(1) of the 1968 Act) or a certificate of the judge who passed sentence (section 11(1A)), and leave would or might not be granted if the Court of Appeal considered, on the material before it, that the minimum term set by the High Court judge was not manifestly excessive or if the High Court judge did not recognise that fairness

required an oral hearing. In any event, the Court of Appeal could not quash the High Court judge's decision on the ground that there had been no oral hearing, and the prisoner would lose the opportunity, which should be open, of an oral hearing before the judge and the Court of Appeal. The respondent does not accept that the incompatibility of paragraph 11(1) of Schedule 22 can be remedied by an oral hearing in the Court of Appeal, even if the European Court, viewing the proceedings overall and in retrospect, might hold that there had been no violation of article 6.

8. In the present application, the courts have not been asked to consider whether the respondent's is one of those rare cases in which fairness will require an oral hearing. That is a question to be considered in the future, by the High Court or the Court of Appeal, or both, depending on the outcome of the appeal.

The European Convention and the authorities

9. The issue before the House turns wholly on the interpretation and application of article 6. Paragraph 11(1) of Schedule 22 is not ambiguous or unclear. It stipulates that on a determination under paragraph 3 or paragraph 6 the High Court judge must act without an oral hearing. But for the Convention there would be no escape from that provision, even if it operated unfairly. So the solution to the problem before the House must be found in the Convention and the authorities on it.

10. Article 6 is entitled "Right to a fair trial", and provides (so far as material for present purposes):

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law: ...

3. Everyone charged with a criminal offence has the following minimum rights: ...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

The article guarantees a fair trial to a defendant on the determination of a criminal charge against him or to a party whose civil rights and obligations are to be determined. This is a right which member states undertake to secure to everyone within their jurisdiction. The requirements particularised in article 6(3) are standard conditions of a fair trial, but they are not in themselves absolute: while the overall fairness of a trial cannot be compromised, the constituent rights within article 6 are susceptible to limited qualification in some circumstances: see *Brown v Stott* [2003] 1 AC 681, 693, 704, and the authority cited at pp 693-702. The European Court for its part assesses the fairness of proceedings in national jurisdictions retrospectively, since applicants are required to exhaust their national remedies before resorting to it, and the Court repeatedly asserts and follows the practice of making its assessment on an overall consideration of the national proceedings, viewed as a whole: see, among many examples, *Edwards v United Kingdom* (1992) 15 EHRR 417, paras 33-34; *Mialhe v France (No 2)* (1996) 23 EHRR 491, para 43; *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, para 59. Thus the Court will assess the overall fairness of the national proceedings viewed as a whole, but will not undertake the task before the House in this appeal, of deciding whether a provision of national legislation is compatible with article 6. This was made clear in *Adolf v Austria* (1982) 4 EHRR 313, 324-325, para 36, where the Court, citing *Guzzardi v Italy* (1980) 3 EHRR 333, 361, para 88, and *X v United Kingdom* (1981) 4 EHRR 188, 202, para 41, said:

“As to whether section 42 of the Penal Code is in itself compatible with the Convention, the Court would recall its established case law:

‘in proceedings originating in an individual application, [the Court] has to confine its attention, as far as possible, to the issues raised by the concrete case before it.’

Accordingly, the Court’s task is not to review *in abstracto* under the Convention the provision of domestic law

challenged by Mr Adolf but to review the manner in which that provision was applied to him.”

If, however, as in *Twalib v Greece* (1998) 33 EHRR 584, 607-609, paragraphs 52-57, a specific feature is found to be a necessary condition of the fairness of a proceeding and national law precludes fulfilment of that condition, a finding of violation will follow and the inference must be drawn that the national law which precludes fulfilment of the condition is incompatible with article 6.

11. In defining the autonomous meaning, for Convention purposes, of “civil rights and obligations” in article 6(1), the Court has chosen to give the expression a broad meaning, so as to embrace some administrative and disciplinary decisions. This has the consequence that decisions in fields such as this are routinely made in the first instance by bodies that do not have and are not intended to have the independence and impartiality to be expected of a judicial tribunal as required by article 6(1). This was, it would seem, true of the Provincial Councils considered in *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1 and *Albert and Le Compte v Belgium* (1983) 5 EHRR 533, of the Social Insurance Office which featured in *Döry v Sweden* (Application No 28394/95) (unreported) 12 February 2003, of the planning authorities whose decisions were challenged in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 and of the rehousing manager who featured in *Runa Begum v Tower Hamlets London Borough Council (First Secretary of State intervening)* [2003] UKHL 5, [2003] 2 AC 430. The Court has not, however, held that the making of an initial decision by a body which does not meet Convention standards of independence and impartiality necessarily taints or invalidates the further stages of decision-making consequent on that initial decision: *Le Compte, Van Leuven and De Meyere v Belgium* 4 EHRR 1, para 51(a). But, as it was put in *Albert and Le Compte v Belgium* 5 EHRR 533, 542, para 29:

“in such circumstances the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1).”

Thus, in cases such as *Le Compte* and *Albert* much of the argument turned on whether the Belgian Court of Cassation had the competence and provided the guarantees necessary to remedy deficiencies at lower levels.

12. The Court has distinguished between bodies making administrative and disciplinary decisions of the character just considered and what it has called “courts of the classic kind”, “integrated within the standard judicial machinery of the country”, and has described a criminal court as “a proper court in both the formal and the substantive meaning of the term”: *De Cubber v Belgium* (1984) 7 EHRR 236, 248, paragraph 32. Such a court must be independent (*Findlay v United Kingdom* (1997) 24 EHRR 221) and it must be, and appear to be, impartial, in the subjective and objective senses defined by the Court (*De Cubber*, 7 EHRR 236, 243-246, paras 24-30). The Court has given guidance on some of the main constituent elements of a fair criminal trial. Thus, in *Colozza v Italy* (1985) 7 EHRR 516, 523, para 27, it said that:

“the object and purpose of [article 6] taken as a whole show that a person ‘charged with a criminal offence’ is entitled to take part in the hearing. Moreover, subparagraphs (c), (d) and (e) of paragraph (3) guarantee to ‘everyone charged with a criminal offence’ the right ‘to defend himself in person’, ‘to examine or have examined witnesses’ and ‘to have the free assistance of an interpreter if he cannot understand or speak the language used in court’, and it is difficult to see how he could exercise these rights without being present.”

An adversarial procedure, with equality of arms and proper disclosure between prosecution and defence, has similarly been seen as fundamental to the fairness of a criminal trial (*IJL, GMR and AKP v United Kingdom* (2000) 33 EHRR 225, 254, para 112).

13. In non-criminal cases such as *Le Compte* and *Albert*, above, the Court has attached very considerable importance to the article 6 requirement that the hearing be in public. In criminal cases this requirement is no less important. In *Riepan v Austria* Reports of Judgments and Decisions 2000-XII, para 27 the Court reiterated:

“that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of article 6.”

Just as criminal trials of the classic kind must be before independent and impartial tribunals (*De Cubber*, 7 EHRR 236, 248-249, paras 32-33; *Findlay*, 24 EHRR 221, 246, para 79), so do they require “the same kind of fundamental guarantee in the form of publicity” (*Riepan*, para 40). The Court has held that the entitlement to a public hearing ordinarily implies a right to an oral hearing (*Göç v Turkey* Reports of Judgments and Decisions 2002-V, p 193, para 47; *Döry v Sweden* 12 February 2003 para 37), although this is a right which may be waived and there may be exceptional circumstances that justify dispensing with such a hearing (*ibid*). According to the dissenting minority in *Göç*, the Court’s case law lays down three criteria for determining whether there are “exceptional circumstances” which justify dispensing with a public hearing:

“there must be no factual or legal issue which requires a hearing; the questions which the court is required to answer must be limited in scope and no public interest must be at stake.”

Article 6(1) primarily concerns courts of first instance (*De Cubber* p 248, para 32), and it is clearly applicable to the imposition of sentence (*Findlay*, p 243, para 69). The Convention jurisprudence would appear to support the respondent’s contention that an oral hearing should, where fairness requires it, be held before a minimum term is set for an existing prisoner such as the respondent, and thus to show that paragraph 11(1) of Schedule 22 is incompatible with the Convention.

14. As in the administrative and disciplinary cases considered above, however, the Court, reviewing the overall fairness of the proceedings in question, has not held that a violation of an article 6 requirement at an early stage of criminal proceedings is necessarily irremediable. In *Adolf v Austria* 4 EHRR 313 the presumption of the applicant’s innocence was infringed by a lower court, but this was held to be fully remedied by the decision of a higher court. In *Edwards v United Kingdom* 15 EHRR 417 the prosecution failed to make proper disclosure at trial, but its failure was remedied by a full hearing in the Court of Appeal. As it was put in *Kyprianou v Cyprus* (Application No 73797/01) (unreported) 27 January 2004, para 43:

“it is possible for a higher tribunal, in certain circumstances, to make reparation for an initial violation of the Convention.”

15. The circumstances in which a higher tribunal may make reparation for an initial violation of the Convention at a lower level have been identified by the Court in a number of cases. Thus in *De Cubber* the defect related to the impartiality of the first instance court and (7 EHRR 236, 249, para 33) it was held that:

“the Court of Appeal did not cure that defect since it did not quash on that ground the judgment of 29 June 1979 in its entirety.”

In *Colozza v Italy* 7 EHRR 516, 525, para 31-32 the Convention was violated by a court’s trial of the applicant in his absence without notice to him, and this was never redressed by the higher courts since his case:

“was at the end of the day never heard, in his presence, by a ‘tribunal’ which was competent to determine all the aspects of the matter.”

In *Findlay* 24 EHRR 221, 246, para 79, the court-martial’s lack of independence could not be corrected by any subsequent review proceedings. It was noted in *Twalib v Greece* that there were (33 EHRR 584, 604, para 40) “serious shortcomings in the fairness of the proceedings at first instance”, which were partly remedied on appeal, but not wholly, since the applicant was obliged to be legally represented in the Court of Cassation, he had no means to pay for legal representation and legal aid was unavailable. In *Rowe and Davis v United Kingdom* 30 EHRR 1, unlike *Edwards v United Kingdom* 15 EHRR 417, a prosecution failure to make full disclosure at trial was not remedied by review in the Court of Appeal, which lacked the trial judge’s ability to assess and monitor the evidence. It was held in *Riepan v Austria* that the lack of publicity at first instance could not be remedied by anything less than a complete re-hearing before the appellate court, which had not occurred. In *Condron v United Kingdom* (2001) 31 EHRR 1, a trial judge’s failure to direct the jury adequately on the drawing of inferences from the applicants’ silence was not remedied by a subsequent hearing in the Court of Appeal: the Court of Appeal was concerned with the safety of the applicants’ convictions, not with

whether they had in the circumstances received a fair trial, and (p 24, para 65):

“In the Court’s opinion, the question whether or not the rights of the defence guaranteed to an accused under article 6 were secured in any given case cannot be assimilated to a finding that his conviction was safe in the absence of any enquiry into the issue of fairness.”

In *Kyprianou v Cyprus*, 27 January 2004, where the applicant’s complaint related to the independence and impartiality of the first instance court, the defect was not remedied by review of the decision by the Supreme Court. It was held (para 44):

“There was no retrial of the case by the Supreme Court. As a court of appeal, the Supreme Court did not have full competence to deal de novo with the case, but could only review the first instance judgment for possible legal or manifest factual errors. It did not carry out an ab initio, independent determination of the criminal charge against the applicant for contempt of the Assize Court. Furthermore, the Supreme Court found that it could not interfere with the judgment of the Assize Court, accepting that that court had a margin of appreciation in imposing a sentence on the applicant.”

16. It is plain beyond argument that the imposition of sentence at first instance is part of a criminal trial and ought in any ordinary case to take place in public at a hearing at which the defendant is present and represented and able to participate. That is a basic condition of fairness. I am prepared to accept, in agreement with counsel and the Divisional Court, that in the unique situation addressed by paragraphs 3 and 6 of Schedule 22, fairness will not, in many cases, require an oral hearing, to which many existing prisoners may in any event waive their right. In those cases where fairness does require an oral hearing, however, and the respondent’s case may or may not be one such, it seems to me that paragraph 11(1), in precluding the possibility of an oral hearing at first instance, is incompatible with the Convention. I would accept that there might be cases in which the Court, reviewing the course of proceedings retrospectively to assess their overall fairness, might hold that a hearing in the Court of Appeal had remedied the lack of an oral hearing at first instance and that there had, in the event, been no violation. But even if

that were an inevitable result I doubt if it would entitle one to regard paragraph 11(1) as compatible, and in my view there are a number of reasons why such a result is by no means inevitable. First, there would be no oral hearing at all unless leave to appeal were granted, and it might or might not be granted. Secondly, the ordinary grounds for granting leave to appeal against sentence are that a sentence is manifestly excessive or wrong in principle. It must be very doubtful, given the express terms of paragraph 11(1), that leave could or would be given on the ground that denial of an oral hearing was unfair. Thirdly, the Court of Appeal would be concerned to resolve whether the term imposed by the judge was manifestly excessive or wrong in principle. It would not focus its attention on the fairness of the procedure, mandated by statute, by which the term had been determined. It could not quash the determination on grounds of unfairness, nor remit the case to a High Court judge with jurisdiction to remedy the previous unfairness by holding an oral hearing. Fourthly, the function of the Court of Appeal on hearing sentence appeals is not to conduct a hearing de novo. It is a court of review. It gives weight to the order made at first instance, and substitutes its own decision only if persuaded that the first instance decision is erroneous to a significant extent. Fifthly, the prisoner loses what the Convention, combined with domestic law, should afford him: an oral hearing before the term is determined and the opportunity, if arguable grounds of appeal are shown, to challenge that determination at an oral appellate hearing. Where a prisoner faces the prospect of imprisonment for the whole of his life (Schedule 21 to the 2003 Act, paragraph 4(1)) or for a very lengthy period (paragraph 5(1)) and fairness requires an oral hearing, this is not an entitlement of which he should be lightly deprived.

17. I agree with the Divisional Court that paragraph 11(1) is incompatible with the Convention. The Secretary of State expressly accepted that, if the House reached that conclusion, paragraph 11(1) should be read subject to an implied condition that the High Court judge has the discretion to order an oral hearing, where such hearing is required to comply with a prisoner's rights under article 6(1) of the Convention. Thus the discretion may be exercised when, and only when, an oral hearing is necessary to meet the requirement of fairness. Thus no argument was addressed to the scope of the interpretative duty imposed by section 3 of the 1998 Act, and it is unnecessary to form an opinion whether the Divisional Court's interpolation, if challenged, would be sustainable.

18. For these reasons, and those given by my noble and learned friends Lord Hoffmann and Lord Brown of Eaton-under-Heywood, I would dismiss this appeal.

LORD HOFFMANN

My Lords,

19. In *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 this House decided that the law by which the Home Secretary had the power to determine the minimum period of a mandatory life sentence which had to be served before a prisoner was eligible for release on licence was incompatible with the principle of the separation of powers as expressed in article 6 of the European Convention on Human Rights. In response to this decision, Parliament passed section 269 of the Criminal Justice Act 2003 which, in respect of offences committed on or after the date upon which it came into force (18 December 2003), transferred the power to the trial judge.

20. Schedule 22 to the 2003 Act contains transitional provisions for prisoners who had committed offences before the commencement date for which, on conviction, they were liable to a mandatory life sentence. They fall into three categories: (1) those whose minimum periods had already been fixed and notified to them by the Home Secretary (2) those who had been sentenced but not yet notified of their minimum periods (3) those who had not yet been sentenced. This appeal is concerned with the second category.

21. Paragraph 6 of the Schedule requires that in the case of a prisoner in the second category, the Home Secretary must refer his case to the High Court to fix the minimum period. Thus the new procedure satisfies the principle of the separation of powers which was infringed in the *Anderson* case. But paragraph 11 of the Schedule provides that the reference is to be determined “by a single judge of the High Court without an oral hearing”. The question in this appeal is whether this procedure does not infringe another requirement of justice, namely that it should be done in public.

22. The *Anderson* case decided that the determination of the minimum period forms part of the process of sentencing. That is why it is a matter for the judicial rather than the executive branch of government. The same reasoning leads to the conclusion that it is part of the trial and that the accused is prima facie entitled to a public hearing not only on the question of his guilt or innocence but also, when convicted, on the determination of his sentence. I say prima facie because it is accepted there may be exceptional cases in which no public hearing is required. Cases of references under paragraph 6 will often be exceptional in this way because there may already have been an opportunity for the prisoner's counsel to address the judge in mitigation before he recommended a minimum term to the Home Secretary and a further oral hearing would serve no purpose. But Mr Crow, who appeared on behalf of the Home Secretary, accepted that there could be cases in which justice required an oral hearing but paragraph 11(1) did not allow it.

23. Mr Crow submits, however, that the absence of an oral hearing before the determination of sentence can be put right by an appeal. If the prisoner appeals against the length of the minimum sentence, he will be given an oral hearing in the Court of Appeal. The court will even be able to allow him to adduce fresh evidence if it considers it appropriate to do so. In that way he will achieve an oral hearing and, taking the proceedings before the judge and the Court of Appeal together, he will have had a public hearing before his sentence is finally determined. This, says Mr Crow, should satisfy the Strasbourg court that United Kingdom law complies with article 6.

24. The Divisional Court did not think that this was right and nor do I. The hearing before the judge and the hearing in the Court of Appeal have different functions. The function of the judge is to determine the minimum period. The function of the Court of Appeal is to decide whether the sentence was one which the judge could lawfully and properly impose. In the case of a prisoner who says that justice demanded that his minimum period should not have been fixed without an oral hearing, his complaint is not primarily that the judge has imposed too long a sentence. He is saying that the judge should not have imposed any sentence without giving him an oral hearing. No doubt he hoped that if there had been an oral hearing, he would have been given a shorter sentence. But his challenge is to the procedure and not to the substantive decision. If this complaint is a good one, it is hard to see how matters can be mended by the fact that the prisoner had an oral hearing in the Court of Appeal. The only way to give him the hearing to which he was entitled would be to remit the matter for an oral

hearing before the judge. But that would be precluded by paragraph 11(1) and in any case the Court of Appeal has no power to remit the question of sentence to the judge.

25. Such a conclusion seems to me in accordance with the Strasbourg jurisprudence. In *Riepan v Austria* Reports of Judgments and Decisions 2000-XII the applicant had been convicted of a criminal offence at a private hearing within the prison in which he was serving a sentence for earlier crimes. He appealed to the Court of Appeal, where a public hearing took place but his appeal was dismissed. The European Court said (at para 40) that it had in earlier decisions rejected the submission that in ordinary criminal proceedings a defect at first instance in the “tribunal’s independence and impartiality” could be remedied at a later stage: see *De Cubber v Belgium* (1984) 7 EHRR 236; *Findlay v United Kingdom* (1997) 24 EHRR 221. The accused was entitled to “a first-instance tribunal that fully met the requirements of article 6.1”. It went on to say:

“The court considers that a normal criminal trial requires the same kind of fundamental guarantee in the form of publicity. As stated above, by rendering the administration of justice transparent, the public character of a criminal trial serves to maintain confidence in the courts and contributes to the achievement of the aim of article 6.1, namely a fair trial. To this end, all the evidence should, in principle, be produced in the presence of the accused at a public hearing with a view to adversarial argument ... Given the possible detrimental effects that the lack of a public hearing before the trial court could have on the fairness of the proceedings, the absence of publicity could not in any event be remedied by anything other than a complete re-hearing before the appellate court.”

26. This case is in my opinion a rejection of Mr Crow’s submission. It is necessary, however, to distinguish two lines of the authority in which the Strasbourg court has held that deficiencies in the trial process may be remedied by the proceedings on appeal. The first concerns cases in which the irregularities at the trial have not related to fundamental questions such as the impartiality of the tribunal or the public character of the hearing but rather to matters affecting the accuracy of the decision. Thus in *Edwards v United Kingdom* (1992) 15 EHRR 417 the prosecution had failed to disclose to the applicant, before his trial and conviction for robbery and burglary, that the fingerprints of a neighbour

had been found at the premises and that one of the victims who had caught a fleeting glimpse of the burglar had then failed to identify him in an album of police photographs. The Court of Appeal said that there had been some “slipshod police work” but that it was satisfied that disclosure would have made no difference to the outcome and that the convictions were safe. The Strasbourg court said that although there had been a defect in the trial proceedings, it was remedied by the subsequent procedure in the Court of Appeal. The Court of Appeal made a fair examination of whether the non-disclosure had mattered and came to the conclusion that it did not. Such a case is obviously very different from one in which the first instance procedure is fundamentally flawed.

27. The other cases which must be distinguished are those in which article 6 has been held to apply to administrative and disciplinary decisions. The doctrinal peculiarities of this jurisprudence have been discussed in *R (Alconbury Developments Ltd v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 and *Runa Begum v Tower Hamlets London Borough Council (First Secretary of State intervening)* [2003] 2 AC 430. They arise from the fact that although one of the main purposes of article 6 is to maintain the principle of the separation of powers and the basic principles of justice which must be observed by the judicial branch of government, the Strasbourg court has held the article applicable to executive and domestic decisions as well. The position which the court has now reached could be equally well expressed by saying that executive and domestic decisions are *not* subject to article 6 but that (1) there must be adequate judicial review of such decisions and (2) article 6 applies to the proceedings for judicial review. This is not, however, the way the court has chosen to express itself. It says that, in principle, administrative and disciplinary decisions *are* subject to article 6, but that the most fundamental requirements of article 6 may be omitted (such as the impartiality of the tribunal and the public nature of the hearing) provided that (1) there is adequate judicial review and (2) the proceedings for judicial review comply with article 6. Mr Crow is therefore right to say that in these cases a right of appeal or review can make up for a fundamental failure of the first decision-maker to comply with article 6. But this doctrine is confined to administrative and disciplinary cases in which the principle of the separation of powers does not require the decision to be made by the judicial branch of government. It has no application to what the European Court in *Riepan v Austria* (at para 40) called “proceedings before courts of a classic kind”.

28. There is one more curious feature of the Strasbourg jurisprudence to which I would draw attention. The court has always held that the terms “determination of ... civil rights and obligations” or of a “criminal charge” have an “autonomous” meaning applicable to all Member States, whether or not the domestic law would regard the proceedings as falling within one or other of those descriptions. But in *De Cubber v Belgium* 7 EHRR 236, para 32 the court appeared to be saying that the question of whether article 6 applied with full force or in the attenuated form in which it is applied to administrative decisions or domestic tribunals depends upon whether the domestic law would regard the case as ordinary civil or criminal proceedings appropriate for decision by the judicial branch of government. This criterion has been repeated in subsequent cases: see, for example, *Riepan* at para 40. But I must respectfully say that I find it illogical to look to domestic law on this point. The preservation of the principle of the separation of powers is a fundamental purpose of article 6 and it would be strange if a Member State could avoid the full requirements applicable to “classic” judicial proceedings by characterising the relevant decision in domestic law as “administrative”. The questions of whether article 6 applies in full strength, in attenuated form, or not at all, should each receive answers founded on autonomous principles.

29. It follows that paragraph 11(1), in excluding the possibility of an oral hearing, is incompatible with Convention rights. The Divisional Court decided that the incompatibility could be removed by construing the sub-paragraph, pursuant to section 3 of the 1998 Act, to be subject to an implied qualification which gives the High Court a discretion to order an oral hearing when this is necessary to satisfy the prisoner’s rights under article 6. Neither side challenged this proposition and your Lordships are therefore not asked to decide whether such a bold exercise in “interpretation” is permissible. For these reasons, as well as those of my noble and learned friends, Lord Bingham of Cornhill and Lord Brown of Eaton-under-Heywood, I would dismiss the appeal.

LORD RODGER OF EARLSFERRY

My Lords,

30. I agree with my noble and learned friends that, for the reasons that they give, the appeal should be dismissed. Since the point was not argued, however, I am not to be taken as holding that section 3 of the

Human Rights Act 1998 was warrant for the interpretation of paragraph 11(1) of Schedule 22 to the Criminal Justice Act 2003 adopted by the Divisional Court.

31. In terms of article 6(1) of the European Convention a state party guarantees that, in the determination of any criminal charge against him, everyone is entitled to a fair and public hearing by an independent and impartial tribunal “as a matter of fairness”: *Monnell and Morris v United Kingdom* (1988) 10 EHRR 205, 225, para 67. It is the right to the public hearing that involves the right to an oral hearing. The Secretary of State accepts that the guarantee applies to the determination and imposition of sentence. This is hardly surprising since sentencing in secret is one of the most obvious and dangerous abuses that article 6 is designed to root out. So “article 6(1) concerns primarily courts of first instance” (*De Cubber v Belgium* (1984) 7 EHRR 236, 248, para 32) and in a normal criminal case the accused is entitled to a first instance tribunal that fully meets the requirements of article 6(1) in the form of publicity (*Riepan v Austria* Reports of Judgments and Decisions 2000-XII, para 40). The Secretary of State’s argument that the lack of an oral hearing in a first instance criminal trial can be made good by an appeal hearing in public must therefore be rejected as inconsistent with both principle and authority.

32. It appears that the respondent is actually now seeking to pursue an appeal against conviction. But at the stage when the case was heard by the Divisional Court he had indicated that he would wish the High Court judge, when setting the minimum term, to consider evidence, including his own oral evidence, about his involvement in the killing of which he had been convicted, since at the trial he had denied any such involvement. The predicament of an accused who has denied being involved in the offence before the jury return their verdict but then wishes to advance submissions about the circumstances in mitigation of sentence is unenviable but not unfamiliar. Perhaps because the respondent said that he wished to lead evidence, in the hearing of the appeal frequent reference was made to an oral hearing as an opportunity for witnesses to give oral evidence and, indeed, to the possibility of the Court of Appeal hearing such evidence. In the British systems oral evidence is, of course, at the forefront, but in other systems to which article 6 applies it plays a less prominent role. Nor is article 6 concerned with the form of the evidence, but rather with securing that the procedure is “adversarial” in the sense that the evidence should be produced in the presence of the accused at a public hearing “with a view to adversarial argument”: *Riepan*, para 40. In other words, the defence

should have the opportunity at a public hearing to put the accused's position and to challenge the evidence advanced against him.

33. Although the guarantee of a public hearing in article 6(1) is extremely important, the European Court has recognised that exceptional circumstances may justify dispensing with it. In *Göç v Turkey* Reports of Judgments and Decisions 2002-V p 193, the dissenting judges noted three criteria: there must be no factual or legal issue which requires a hearing; the questions which the court is required to answer must be limited in scope and no public interest must be at stake. None of the cases on which the judges based this useful summary involved criminal proceedings and *Göç* itself involved civil proceedings within the meaning of article 6(1). Lord Hope of Craighead referred to the summary in *R (Dudson) v Secretary of State for the Home Department* [2005] 3 WLR 422, 432, para 30, when deciding that it was not necessary for there to be an oral hearing when the Lord Chief Justice was reviewing the minimum term previously ordered by the Secretary of State in a case where the claimant had been sentenced to be detained during Her Majesty's pleasure. Both my noble and learned friend, Lord Bingham of Cornhill, at p 424E, para 2, and Lord Hope, at p 434A, para 34, were at pains to stress that the operation on which the Lord Chief Justice had been engaged was very different from sentencing at first instance. There is nothing in the cases to suggest that such exceptional circumstances have so far been found to exist in first instance criminal proceedings. This is presumably because such proceedings will, more often than not, involve disputed factual or legal issues and the public interest will generally be at stake. But the Divisional Court has explained all the reasons why the circumstances in which the High Court judge is called on to fix the minimum period in cases like the present make this too a very unusual exercise. Moreover, counsel for the respondent accepted that in many cases of this kind an oral hearing would not be required. It is, however, unnecessary to explore the matter further since the House is affirming the declaration of the Divisional Court that the High Court judge has the discretion to order an oral hearing where such a hearing is required to comply with article 6(1) - in other words, whenever fairness requires.

34. I would comment on one other matter which surfaced during the hearing. Read without the benefit of the Divisional Court's gloss, paragraph 11(1) of Schedule 22 would prevent the judge from holding an oral hearing. It is this statutory bar which means that the guarantee in article 6(1) is violated, since in such a system the prisoner is not "entitled" to an oral hearing. Resort has therefore to be had to the Human Rights Act. Where, however, the legislation permits a judge to

hold an oral hearing, the prisoner is “entitled” to that hearing in an appropriate case and the guarantee is given effect. If, in that situation, a judge wrongly declines to hold an oral hearing, the guarantee in article 6(1) operates by the Court of Appeal quashing the relevant proceedings on the ground of the judge’s erroneous decision and holding as full a hearing as is necessary to do justice in the circumstances. I respectfully agree with what my noble and learned friend, Lord Brown of Eaton-under-Heywood, is going to say on this matter.

LORD CARSWELL

My Lords,

35. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Bingham of Cornhill, Lord Hoffmann and Lord Brown of Eaton-under-Heywood. I agree with their reasons and conclusions and for those reasons I too would dismiss the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

36. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I agree with him that this appeal should be dismissed and there is comparatively little that I wish to add.

37. The central issue raised on the appeal is whether paragraph 11(1) of Schedule 22 to the Criminal Justice Act 2003, a provision which on its face denies the sentencing judge any possibility of an oral hearing even when he considers this essential for the fair determination of a mandatory life prisoner’s minimum term, is compatible with the prisoner’s right to a fair trial, more particularly to “a fair and public hearing”, under article 6 of the European Convention on Human Rights. It is the Crown’s somewhat surprising contention that it is, a contention founded on the proposition that the prisoner in such a case will obtain

his fair and public hearing when he appeals to the Criminal Division of the Court of Appeal. Such an appeal, submits Mr Crow, whether it is analysed as curing an initial violation of article 6 or as averting such a violation in the first place, ensures that the proceedings as a whole are to be regarded as fair and public and thus compliant with the Convention. Certainly, he submits, following an appeal the prisoner would have no sustainable complaint before the European Court of Human Rights (“ECtHR”).

38. In examining this argument it is necessary to put aside the thought that an oral hearing (particularly one at which evidence is adduced) before the sentencing judge would plainly be altogether more convenient and cost-effective than such a hearing before the Court of Appeal: expediency and compatibility, Mr Crow reminds us, are two different things. I put aside too a number of possible difficulties in the prospective appellant’s path: the need for leave to appeal, the need to persuade the Court of Appeal that oral evidence is “necessary or expedient in the interests of justice” within the meaning of section 23(1) of the Criminal Appeal Act 1968, and the burden of satisfying the Court of Appeal that the minimum term fixed by the sentencing judge was manifestly excessive.

39. The root question arising is whether or not, assuming the prisoner can indeed be assured of a full, fair and public hearing leading to a just sentence (minimum term) on appeal, an inability to secure such a hearing at first instance would be incompatible with the Convention. It is, of course, only if a legislative bar on the sentencing judge’s power to hold an oral hearing would be incompatible with the prisoner’s Convention rights that section 3 of the Human Rights Act 1998 could be invoked, in the manner agreed by both parties to be possible if required, to avoid such incompatibility.

40. In examining the Strasbourg jurisprudence it is necessary to bear in mind that the only concern of the ECtHR is to decide whether, having regard to whatever domestic proceedings there may have been, the complainant is the victim of an unremedied violation of a Convention right. Before even one comes to consider the extensive case law on article 6, three other Convention articles should be noted: article 13 which requires that “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority”, article 34 which allows the court to receive applications from anyone “claiming to be the victim of a violation”, and article 35 (1) which provides that “the court may only deal with the

matter after all domestic remedies have been exhausted.” Provided that the national courts have remedied any violation (certainly where they have at the same time acknowledged that there has been a violation of the Convention) the court is unlikely even to regard the complainant as a victim. It is hardly surprising, therefore, that, when one comes to consider the article 6 case law, one finds a certain looseness of expression and perhaps even some apparent inconsistency of approach as to whether, in those applications to Strasbourg which have failed, that is because the domestic appeal process is found to have avoided a Convention violation or merely to have remedied it.

41. It is now clear that, so far as administrative or disciplinary tribunals are concerned, there is compliance with article 6 so long as the requisite guarantees (of an independent and impartial tribunal, a fair and public hearing and the like) are provided, if not at the initial decision-making stage, then on a subsequent review or appeal (by a tribunal with the jurisdiction to undertake a sufficient merits hearing)—see, for example, *Albert and Le Compte v Belgium* (1983) 5 EHRR 533 and, domestically, *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 and *Runa Begum v Tower Hamlets London Borough Council (First Secretary of State intervening)* [2003] 2 AC 430.

42. With regard, however, to “courts of the classic kind . . . within the standard judicial machinery of the country” (see *De Cubber v Belgium* (1984) 7 EHRR 236, 248, para 32) the circumstances in which the basic ingredients of a fair trial guaranteed by article 6, if lacking at first instance, will thereafter be found sufficiently provided instead in subsequent proceedings is less clear. There are many considerations in play. If the first instance court was lacking in independence or impartiality, *Findlay v United Kingdom* (1997) 24 EHRR 221 suggests that that defect may be quite simply irremediable. In other cases much will depend on whether the appeal constitutes a complete rehearing or is otherwise capable of providing full redress for whatever deficiencies were found in the proceedings below.

43. For the reason already given, moreover, even when a subsequent appeal *is* found to have made good any deficiencies in the initial court proceedings, it is often unclear whether, in finally concluding that article 6 has not been breached, the court is finding an initial violation to have been remedied or is holding rather that article 6 allows for deficiencies at first instance providing always that they are remedied on appeal. Some of the Strasbourg judgments talk in terms of the subsequent

procedure remedying “defects” (for example, *Edwards v United Kingdom* (1992) 15 EHRR 417, 432, para 39) or “serious shortcomings” (*Twalib v Greece* (1998) 33 EHRR 584, 604, para 40) in the original trial. Others, however, notably cases where the court is *rejecting* the state’s contention that the defects have been remedied and is finding a breach of article 6 (as in *De Cubber* itself, *Colozza v Italy* (1985) 7 EHRR 516 and *Kyprianou v Cyprus* (Application No 73797/01) (unreported) 27 January 2004, the language is that of making reparation for an initial violation of the Convention. Take this, for example, from *De Cubber* 7 EHRR 236, 249, para 33:

“The possibility certainly exists that a higher or the highest court might, in some circumstances, make reparation for an initial violation of one of the Convention’s provisions: this is precisely the reason for the existence of the rule of exhaustion of domestic remedies, contained in article 26 [now article 35(1)]. Thus, the *Adolf* judgment of 26 March 1982 [*Adolf v Austria* (1982) 4 EHRR 313] noted that the Austrian Supreme Court had ‘cleared . . . of any finding of guilt’ an applicant in respect of whom a District Court had not respected the principle of presumption of innocence laid down by article 6 (2).”

44. As I have explained, it matters not to the ECtHR whether a violation has been remedied by the domestic courts or there has never been a violation in the first place: in either event the article 6 complaint will fail.

45. For my part, notwithstanding the doubts expressed by Lord Bingham in paragraph 16 above, I am inclined to conclude (and am certainly prepared in Mr Crow’s favour to assume) that, if the sentencing judge had the power to hold a normal hearing but, wrongly as the Court of Appeal thereafter held, thought it unnecessary to exercise it to achieve a fair determination of the prisoner’s minimum term, a full appeal hearing at which any necessary oral evidence would be adduced would then operate to remedy the first instance failure and would avoid a successful application to Strasbourg whether or not the appeal was properly to be analysed as making reparation for an initial violation.

46. It by no means follows, however, that the same view can be taken of a case where the sentencing judge himself recognises his inability to reach a fair determination without an oral hearing but is prevented from

holding one by a legislative bar. It seems to me one thing to hold that a judge's misjudgement is remediable by an effective appeal; quite another to hold that the state can deliberately require a number of first instance determinations to be made unfairly on the basis that this unfairness will then be remedied on appeal.

47. In my judgment paragraph 11(1) is plainly incompatible with the prisoner's article 6 rights, at any rate in those cases where the sentencing judge recognises that fairness requires an oral hearing. I would accordingly construe it, in much the same way as did the Divisional Court, as being subject to an implied condition that the judge has the discretion to order an oral hearing whenever he believes such a hearing to be required in the interests of fairness.