Neutral Citation Number: [2016] EWHC 984 (Admin)

Case No: CO/5272/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/04/2016

Before :

LORD JUSTICE BEAN
MRS JUSTICE CARR

- -

Between :

THE QUEEN **on the application of JORDAN CUNLIFFE**	**Claimant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Defendant**

- -
- -

Mr Matthew Stanbury (instructed by **Swain & Co**) for the **Claimant**
Mr Ivan Hare (instructed by **GLD**) for the **Defendant**

Hearing date: 19 April 2016

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Approved Judgment

Lord Justice Bean :

1. Garry Newlove was murdered on 10 August 2007. A gang of youths were causing damage and behaving aggressively in the road outside his house. He attempted to restrain them but was set upon and repeatedly kicked while on the ground, causing injuries of such severity as to require him to be placed on a life support machine. He died two days later.

2. Five young men were tried for the murder in the Crown Court at Chester before Andrew Smith J and a jury. Three of the five were convicted. One of these was the present Claimant Jordan Cunliffe. He was born on 28 August 1991: he was thus just short of his 16th birthday at the time of the murder. He was sentenced to life imprisonment with a minimum term of 12 years, subject to the usual allowance for the time spent in custody prior to sentence: this gave a figure of 11 years and 184 days from the date of sentence.

3. Since Mr Newlove's murder, his widow Helen has campaigned on issues relating to the treatment of victims and their families in the criminal justice system. In 2010 she was created a life peer and in 2012 was appointed Commissioner for Victims and Witnesses (generally known as the Victims' Commissioner).

4. Mr Cunliffe sought permission to appeal out of time to the Court of Appeal Criminal Division ("CACD") against his conviction: this was refused by the full court (Moses LJ, Kenneth Parker J and Judge Bevan QC) [2010] EWCA Crim 2483. No application was made for permission to appeal against the minimum term of 12 years set by Andrew Smith J. However, while the application for leave to appeal against conviction was before the court it was noticed that the sentence should have been expressed as one of detention at Her Majesty's Pleasure ("DHMP") rather than one of imprisonment for life. The CACD accordingly allowed an appeal against sentence on that technical issue only. Otherwise Mr Cunliffe's application to the CACD was unsuccessful.

5. Offenders sentenced to DHMP may apply for a review of the minimum term set by the trial judge at the halfway point of that term and thereafter at two yearly intervals. The application leads to the compilation of a tariff review dossier by the National Offender Management Service ("NOMS"), which is then referred to a High Court judge whose decision takes the form of a recommendation to the Secretary of State. I shall return to the nature of the judge's decision later.

6. Mr Cunliffe's application was placed before Mitting J, whose recommendation, announced on 19th May 2015 [2015] EWHC 919 (Admin), was that the 12 year term should not be reduced. In the course of his judgment he referred to a five page statement dated 30th September 2014 submitted by Baroness Newlove of Warrington describing the impact which her husband's murder had had upon her family, in particular her three daughters, and said:-

> "She has asked that this statement is not made public or disclosed to the applicant, for particular reasons which have been notified to me by the Ministry of Justice. I accede to that request. What it does is to demonstrate graphically how deep and lasting the effect of the dreadful crime committed by the

> applicant and his associates has been; and inevitably, how unwelcome to his widow and daughters has been the need for them to prepare themselves for the outcome of my decision on this application."

7. On 10th July 2015 James Hough of NOMS emailed the applicant as follows:-

> "I am writing to confirm the outcome for your application for a review of tariff as an HMP detainee.
>
> The High Court has recommended that there will be no change to your current tariff. I enclose a copy of the court's recommendation.
>
> The Secretary of State has considered the recommendation and accepts it. This means that your minimum term remains 11 years and 184 days and will expire on 14th August 2019. The timing of your next Parole Board is unaffected. You will be eligible to apply for a further tariff review in two years time, from the date of the High Court decision."

8. The decision to accept Mitting J's recommendation was in accordance with a policy originally set out by the then Home Secretary in a letter to the Lord Chief Justice dated 2nd March 2006 that the judicial recommendations on tariff in every DHMP review case would be honoured. By a letter of 13th December 2007 it was confirmed that "the Lord Chancellor and Secretary of State for Justice is content to adopt the previous Home Secretary's position and therefore will honour the judicial recommendations in every [D]HMP review case". The evidence is that this remains the position to this day.

9. Mr Cunliffe consulted solicitors. By a letter before claim dated 27th August 2015 they sought disclosure of Baroness Newlove's victim statement; it appears that they and their client had been unaware of its existence until they received a copy of Mitting J's recommendation. They wrote:-

> "The victim impact statement should have been disclosed. In the absence of the statement the defendant had allowed a recommendation to be reached which falls foul of the requirements of procedural fairness. The defendant took no steps to correct the unfairness and has ultimately reached a decision that is procedurally unfair.
>
> The defendant has set out no detailed reasoning for accepting the recommendation of the court. The decision is terse and has led the claimant to feel that in all the circumstances the decision of the defendant does not meet the well established requirements of procedural fairness. This unfairness was compounded by the fact [that] the defendant did not invite further recommendations following receiving the recommendation of Justice Mitting following his decision which is now under challenge."

They sought disclosure of the statement and asked that a fresh decision be made after their client had had the opportunity to make further representations.

10. By a letter of 11th September 2015 Mr Hough replied:-

> "The decision to accede to Baroness Newlove's request that her VPS would not be disclosed to your client or made public and the decision to comment on the statement as part of the recommendation was a matter for the High Court and any challenge to that decision should be addressed to that court.
>
> The recommendation of Justice Mitting in the High Court fully addressed the criteria set out in R v Secretary of State for the Home Department ex parte Smith and it is clear from your recommendation (dated 19th May 2015 and emailed to you the same day) that his decision not to reduce your client's tariff was based on his view that your client, whilst making good progress, had not at the point of this recommendation, made exceptional progress. Justice Mitting considered representations on behalf of your client and the report of the professionals working with your client to make his assessment on the progress that your client had made. There was nothing in the recommendation that would cause the Secretary of State to do anything other than he has done in all other cases on tariff reviews for offenders detained at Her Majesty's Pleasure, agree with the considered recommendation of an independent judicial body.
>
> As such, the Secretary of State does not consider that your client has been subject to an unfair process and had your client any concerns about any reliance on Baroness Newlove's statement in the High Court then that matter should have been raised with the High Court on receipt of the recommendation on 19th May 2015."

11. The present claim for judicial review is brought on three grounds:

(1) that the Secretary of State's "blanket policy" to accept the recommendation of the High Court judge in every DHMP tariff review amounts to an unlawful fetter of his discretion: I shall call this the "blanket policy" argument;

(2) that the Secretary of State operated an unfair procedure in not inviting submissions from the Claimant before deciding whether to endorse the judge's recommendation; and

(3) that there was "a further element of unfairness" in that Baroness Newlove's victim personal statement was taken into account by the judge, who directed that it be withheld from the claimant, and the Secretary of State refused to consider for himself whether the statement should be disclosed.

Detention at Her Majesty's Pleasure

12. DHMP is currently imposed pursuant to section 90 of the Power of Criminal Courts (Sentencing) Act 2000. The terminology was first used in the Criminal Lunatics Act of 1800, which provided that an offender found to be insane was to be "kept in strict custody until His Majesty's Pleasure shall be known".

13. The same language was adopted when in 1908 Parliament abolished the sentence of death in relation to children and young persons. Section 103 of the Children Act 1908 provided:

> "Sentence of death shall not be pronounced on or recorded against a child or young person, but in lieu thereof the court shall sentence the child or young person to be detained during His Majesty's Pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and under such conditions as the Secretary of State may direct and while so detained shall be deemed to be in legal custody."

14. The Act of 1908 was followed by the Children and Young Persons Act 1933, section 53(1) of which, as amended by the Murder (Abolition of Death Penalty) Act 1965, provided:

> "A person convicted of an offence who appears to the court to have been under the age of 18 years at the time the offence was committed shall not, if he is convicted of murder, be sentenced to imprisonment for life… but in lieu thereof the court shall (notwithstanding anything in this or any other Act) sentence him to be detained during Her Majesty's Pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the Secretary of State may direct."

15. Neither the 1908 Act nor the 1933 Act gave any express guidance as to the duration of a sentence of DHMP. This was left to the Secretary of State to determine. It was the practice for the Secretary of State to obtain the advice of the trial judge and the Lord Chief Justice before fixing the minimum term (generally known as the tariff) to be served before release could be considered. From about 1983, the tariff was intended to reflect the penal element of the sentence, that is, the period of detention judged necessary to meet the requirements of retribution and general deterrence.

16. Under the provisions of the Criminal Justice Act 1991, the release of a person sentenced to DHMP was dependent on the Secretary of State exercising a discretion whether or not to refer a case to the Parole Board and then deciding whether or not to adopt any recommendation made by the Board that the detainee should be released. Section 28 of the Crime (Sentences) Act 1997 provided that it was to be for the Parole Board, not the Secretary of State, to decide whether it was safe to release a detainee serving a sentence of DHMP. This was introduced to give effect to the decision of the European Court of Human Rights ("ECtHR") in *Hussain v United Kingdom* (1996) 22 EHRR 1.

17. Meanwhile, in a case of exceptional notoriety in 1993, a two year old boy, James Bulger, had been murdered by Jon Venables and Robert Thompson. Each of the killers was aged

10 at the time of the murder: had they been a year younger they could not have been prosecuted at all. Following their conviction in the Crown Court before Morland J and a jury each was sentenced to DHMP. Morland J recommended a tariff period of 8 years; Lord Taylor of Gosforth CJ, 10 years. Following a campaign in the Press and elsewhere for a whole life or at least a very long tariff period the Home Secretary fixed the tariff at 15 years. In a decision given on 12th June 1997 (*R v Secretary of State for the Home Department, ex parte Venables and Thompson* [1998] AC 407) the House of Lords decided that the Home Secretary's decision was vitiated by unfairness.

18. The House also held that the policy adopted by the Home Secretary in 1993 whereby the tariff period fixed in the case of a young offender sentenced to DHMP would in no circumstances be varied by reason of matters occurring subsequently to the commission of the offence was unlawful and that the Secretary of State was bound to keep under review the minimum period to be served. Lord Browne-Wilkinson said that the Home Secretary "must at all times be free to take into account as one of the relevant factors the welfare of the child and the desirability of re-integrating the child into society", and added (at 499H):-

> "The extent to which this is possible must depend, in the case of a young child at least, on the way in which that child is maturing through his formative years**.** If the child is making exceptional progress and it is clear that his welfare would be improved by release from detention, that is one of the factors the Secretary of State must take into account and balance against the other relevant factors of retribution, deterrence and risk. The child's welfare is not paramount, but it is one of the factors which must be taken into account."

19. On 10th November 1997, following the decision of the House of Lords, the Secretary of State announced the policy which he would in future adopt after the initial fixing of the minimum or tariff term, to give effect to the judgment:

> "Officials in my department will receive annual reports on the progress and development of young people sentenced under s 53(1) whose initial tariff has yet to expire. Where there appears to be a case for considering a reduction in tariff, that will be brought to the attention of Ministers.
>
> When half of the initial tariff period has expired, I or a Minister acting on my behalf will consider a report on the prisoner's progress and development, and invite representations on the question of tariff, with a view to determining whether the tariff period originally set is still appropriate. In complex and difficult cases, I shall seek the assistance of my Rt Hon friend the Secretary of State for Health in securing independent professional advice (that is to say, independent of those already charged with the care of the offender) on the young offender's condition and development.
>
> Any request for a review of tariff before it expires will be considered on its merits, whether that request is made by or on

> behalf of the offender or by one of the agencies or individuals responsible for his or her care.
>
> In considering requests, inviting representations, and in conducting reviews, I will look for evidence of:
>
> significant alteration in the offender's maturity and outlook since the commission of the offence;
>
> risks to the offender's continued development that cannot be sufficiently mitigated or removed in the custodial environment;
>
> any matter that calls into question the basis of the original decision to set tariff at a particular level (for example about the circumstances of the offence itself or the offender's state of mind at the time);
>
> together with any other matter which appears relevant."

20. Venables and Thompson took their case to the ECtHR. In *V v United Kingdom* (2000) 30 EHRR 121, at [109-114], the Court held, among other things, that the Secretary of State's role in setting the minimum period of detention breached Article 6(1) of the European Convention on Human Rights ("ECHR"), since he was not independent of the executive.

21. Parliament gave effect to the judgment in *V* by inserting section 82A in the Powers of Criminal Courts (Sentencing) Act 2000 (by section 60 of the Criminal Justice and Courts Act 2000). This section, which came into force on 30th November 2000, made the initial setting of the minimum term to be served by a detainee an entirely judicial exercise.

22. As regards those sentenced to DHMP before this provision came into force, the Secretary of State announced his policy to Parliament on 13th March 2000:

> "For existing cases, I propose a fresh review of tariffs in line with the principles in the judgment [in *V v United Kingdom*]… Where existing detainees wish to make representations, they can be made to the present Lord Chief Justice, who will then make a recommendation to me. I will then adopt his recommendation on what the tariff should be."

23. The question then arose as to whether the duty of periodic review identified by the House of Lords in *Venables and Thompson* applied to persons sentenced to DHMP whose initial minimum terms were set by the trial judge under the new regime. As Lord Woolf CJ noted in *Practice Statement (Crime: Life Sentences)* [2002] 1 WLR 1789 at [27] the Home Secretary took the view that the duty of continuing review did not apply in such cases. That stance was held to be wrong in *R (Smith) v Secretary of State for the Home Department* [2006] 1 AC 159. The House of Lords rejected an argument on behalf of the detainees that under what was described as the "informal ad hoc procedure" the role of the Lord Chief Justice was only advisory and that authority to decide remained with the Secretary of State. Lord Bingham accepted a submission

on behalf of the Home Secretary that this was "to mistake form for substance, appearance for reality".

24. *R (Dudson) v Secretary of State for the Home Department* [2006] 1 AC 245 was decided on the same day as *Smith* and by the same Appellate Committee of the House of Lords. It was another case about the nature of the review by the Lord Chief Justice of a tariff originally set by the Secretary of State. Lord Bingham said:

> "… the review which the Lord Chief Justice was called upon to conduct was no ordinary sentencing exercise. It was procedurally unique. The trial had established the facts of the crime and the extent of the appellant's culpability. Those matters were not to be re-opened. But the Lord Chief Justice was invited to consider, following the decision of the European Court [of Human Rights] in *V v United Kingdom* (1999) 30 EHRR 121 whether the minimum term previously ordered by the Secretary of State to be served by the appellant judged against the scale of sentences imposed for crimes of this kind and seriousness and taking account of the appellant's response to custody, was too long. Thus the procedure was more closely analogous to an appeal than to a first instance decision… As established by the decision of the House in *R (Smith) v Secretary of State for the Home Department* [2006] 1 AC 159 the Lord Chief Justice's decision does not preclude a further reduction in the appellant's minimum term if he makes truly exceptional progress for which no allowance is made."

25. In the present case James Hough, Team Leader of the Public Protection Casework Section of NOMS, stated that when considering how best to give effect to the judgment in *Smith* the Secretary of State "was reluctant to take decisions on reducing tariffs without judicial advice. Encouraged by the House of Lords' comments on the role of the LCJ previously, we agreed a very similar process whereby the cases would be referred to a senior judge who would recommend a new tariff that would endorsed by the Secretary of State in all cases."

26. Mr Hough added that the entitlement to apply for review at the halfway point of a minimum term in the case of detainees sentenced before 30th November 2000 was subsequently extended to apply to all DHMP detainees, irrespective of when they were sentenced.

27. I should note at this point that High Court judges have also been involved since 2005 in the review of tariffs which had been set by the Secretary of State in the cases of adult offenders sentenced to life imprisonment for murder. This has been in accordance with schedule 22 to the Criminal Justice Act 2003. The decision is that of the judge. Schedule 22 allows the offender to seek leave to appeal to the CACD. The Secretary of State is not involved at all, even nominally.

28. In the case of DHMP detainees, by contrast, the procedure is extra-statutory and the judge's decision takes the form of a recommendation to the Secretary of State. It is common ground between Mr Stanbury for the Claimant and Mr Hare for the Secretary of State that the substantive recommendation of the judge cannot be the subject of an

appeal (because the Court of Appeal only has jurisdiction where this is created by statute) nor of judicial review (because the High Court cannot judicially review itself); but it can be challenged on proper judicial review grounds once the Secretary of State has issued his decision. There is a dispute, to which I shall return, on whether the same applies to an ancillary decision of the judge such as a refusal to disclose, or to direct disclosure of, a victim personal statement.

The basis of periodic review of a minimum term of DHMP

29. In the Home Secretary's statement to Parliament of 10th November 1997, set out at [19] above, he announced the policy which he would adopt in reviewing tariffs in the case of DHMP detainees. The concluding sentence of the statement refers to four types of evidence which could be considered: (i) significant alteration in the offender's maturity and outlook since the commission of the offence; (ii) risks to his continued development that cannot be sufficiently mitigated or removed in the custodial environment; (iii) any matter calling into question the basis of the original decision to set the tariff at a particular level; and (iv) any other matter which appears relevant. On the other hand, the actual decision in *Smith* was, in the words of Lord Bingham, that the progress of DHMP detainees sentenced before 30th November 2000 should remain subject to "continuing review for reconsideration of the minimum term imposed if clear evidence of exceptional and unforeseen progress is reasonably judged to require it" ([17]).

30. It is not clear to me whether judges can be asked to make recommendations for the reduction of minimum terms of DHMP originally set by the trial judge on grounds other than clear evidence of exceptional and unforeseen progress. Some published decisions on tariff reviews suggest that they can, although we were not shown any decision in which an application for a reduction on any other ground has been successful. It is unnecessary to decide the point in this case since I agree with Mitting J that exceptional and unforeseen progress was the real basis on which he was asked to review the Claimant's minimum term.

The blanket policy

31. For the claimant Mr Stanbury argues that (a) the reduction of the tariff element of a sentence of DHMP is an exercise of executive clemency; (b) Article 6 of the ECHR is not engaged, as the tariff review is not part of the sentencing exercise; (c) once it is established that Article 6 does not apply, the Secretary of State is under a public duty to decide for himself whether to accept the judge's recommendation, even if he will almost always accept it; (d) for him to proceed otherwise would constitute acting under dictation and/or offend the principle that a decision-maker must not fetter his own discretion.

32. For propositions (a) and (b) Mr Stanbury relies in particular on a passage of the speech of Lord Bingham in *Smith* at [13]:

> "I sympathise entirely with the desire of the Secretary of State to have nothing to do with the setting of a minimum term, whether in connection with the initial imposition of the sentence of HMP detention or subsequently. It should however be observed that the authorities on article 6, whether in Strasbourg or the United Kingdom, have so far considered the application of article 6 only in relation to the

initial setting of the minimum term. While it would obviously be wrong for that term to be subsequently increased by executive decision, it does not follow that the same considerations necessarily apply to a reduction, even if pursuant to a review mandated by domestic law. A reduction in the sentence imposed by a court is a well-recognised exercise of executive clemency."

33. But this must be read together with other passages in Lord Bingham's speech:

i) the next sentence in [13]:

> "If the Secretary of State should prefer the decisions on whether to reduce the minimum sentence to be taken by the judiciary, it is open to him to adopt the same informal procedure for seeking the advice of the Lord Chief Justice as he has done for the purpose of reconsidering the original minimum terms";

ii) the passage from [14] in which he said:

> "The Secretary of State has publicly bound himself to accept and give effect to the advice of the Lord Chief Justice. He has done so. His good faith is not in doubt. I am content to treat the Lord Chief Justice as making the effective decision.";

iii) [16] in which he said:

> "The respondent's case, as I understood it, envisaged a continuing power in the Secretary of State to reduce the minimum term of a pre- 30 November 2000 HMP detainee even though the term had been set by the Lord Chief Justice. As I have already suggested, such a procedure might well be a legitimate act of executive clemency, violating no domestic statute or Convention principle. But I fully understand the Secretary of State's reluctance to be drawn back into any routine process of adjudication, and that should in my view be respected. A routine process of monitoring the progress of detainees is, however, undertaken by his officials anyway, and it imposes no undue burden on him to require a review which, if the Secretary of State thinks fit, may be on the advice of the Lord Chief Justice if, in the case of any of the 114 pre- 30 November 2000 HMP detainees still in custody pending completion of their minimum term, there is clear evidence of exceptional and unforeseen progress such as may reasonably be judged to call for reconsideration of the detainee's minimum term. The decision of the Secretary of State not to seek the advice of the Lord Chief Justice should not be readily susceptible to challenge."

34. Article 6 of the ECHR applies to the initial setting of a minimum term of DHMP, since that is part of the sentencing process (*V v UK)*; whereas Article 5(4) applies to decisions about whether the detainee can be released once that minimum term has expired *(Hussain v UK).* Periodic reviews are both chronologically and logically between the two. For my part I do not think it matters whether the Secretary of State's "blanket policy" under scrutiny in this case is required in order to give effect to Article 6, Article 5(4), or neither. I would put the matter in more simple terms. By the time *Smith* was decided, the concept of fettering discretion or acting under dictation was well established in domestic public law and the members of the House of Lords who heard the case (Lords Bingham, Nicholls, Hoffmann and Hope and Baroness Hale) would hardly have been unaware of it. Nevertheless they evidently saw no unlawfulness in the executive's policy of handing over the effective decision on the initial review of every DHMP tariff to a senior judge and agreeing to be bound by the result. I cannot see why the same policy in respect of periodic reviews should be treated differently as a matter of public law.

35. Mr Stanbury accepted – in my view correctly - that if the blanket policy were indeed unlawful, it would follow that the Secretary of State has a discretion to reject a recommendation of a judge on a periodic review that the tariff period *should* be reduced. Such a decision would no doubt lead to a judicial review application as a matter of routine. The third decision-maker (the judicial review judge) would then be asked to say that the second decision-maker (the Secretary of State) was acting unlawfully in departing from the recommendation of the first decision-maker (the tariff review judge). As I see it this is a rather dismal prospect.

36. The Secretary of State does retain the general power of executive clemency, a more modern description of the royal prerogative of mercy, usually exercised on compassionate grounds such as grave illness. As Lord Bingham said in *Smith,* that procedure could have been used in DHMP cases to reduce (though not to increase) a tariff fixed by the Lord Chief Justice. But Lord Bingham did not say that the detainee had or should have any *right* to have the Lord Chief Justice's decision second-guessed by the executive. That would be inconsistent with the judicial recommendation being described as the effective decision.

37. I would refuse the application for judicial review of the decision not to reduce the Claimant's tariff made on the basis of the "blanket policy".

38. In the second ground of claim Mr Stanbury submits that the Secretary of State should have invited representations from the Claimant before deciding whether to accept the judge's recommendation. In my view this adds nothing to ground (1). If the blanket policy is lawful, nothing could be achieved by inviting submissions from the detainee as to why the judge's recommendation should not be followed.

The victim personal statement

39. Victim personal statements are now an established feature of sentencing in the criminal courts. As Mr Stanbury rightly submitted, in some cases they are of great importance (for example where a judge passing sentence for a serious sexual offence has to assess the level of harm caused to the victim). They have also become part of the material considered by the Parole Board when deciding whether, and if so with what restrictions, an offender can safely be released into the community. A statement

made at the stage of sentencing must be served in good time on the defendant's solicitor or the defendant if unrepresented (Criminal Practice Direction F.3(b)). Any statement made or information given to the Parole Board may be withheld from the prisoner in certain exceptional circumstances; but rule 8(3) of the Parole Board Rules provides that in such a case, unless the chair of the panel directs otherwise, it must be served on the prisoner's representative or a special advocate. Where the panel chair decides that any information or report withheld by the Secretary of State should be disclosed to the prisoner or the prisoner's representative, the Secretary of State may withdraw the information or report; in that event rule 8(6) provides that "nobody who has seen that information or report shall sit on a panel which determines a case".

40. I do not understand why it is thought appropriate to invite the submission of an updated victim personal statement when a judge is being asked to consider a review of a minimum term on the grounds that the detainee has made exceptional progress in prison. The judge is not being asked to express a view about the correctness of the original sentence, nor on the degree of risk which the detainee would present if released. If it is indeed possible for a judge conducting a periodic review of the tariff in a DHMP case to be asked to reduce it on the grounds of any matter that calls into question the basis of the trial judge's decision on the minimum term, then different considerations might apply. But that is not the present case.

41. If in the course of a DHMP tariff review a statement is obtained or received from the victim or the victim's family, it must be wrong for the judge to consider the statement without its contents being disclosed to the offender. The natural justice issue is simple but fundamental. No one, least of all a judge, should make a decision about how long someone should remain in custody for a criminal offence on the basis of submissions or allegations the substance of which has not been disclosed to the prisoner. It may be that in wholly exceptional circumstances, such as where disclosure of the information would imperil the safety of the victim's family or jeopardise national security, disclosure can properly be withheld or some form of redaction used; but in such a case a special procedure would have to be adopted analogous to that set out in rule 8 of the Parole Board Rules.

42. With great respect to Mitting J, I consider that the victim personal statement in this case should not have been considered by him if Baroness Newlove was unwilling to have it disclosed. It would have been better if the statement had never been placed before the judge until Baroness Newlove was given the opportunity either to withdraw it or to agree to its disclosure.

43. The procedure adopted was to this extent unfair. It would have been unfair even if the murder victim's widow was not a member of the House of Lords and did not hold the post of Victims' Commissioner; but Mr Stanbury is right to submit that the perception of unfairness is increased on the facts of this case.

44. We have not seen the statement. I will assume that its effect was properly summarised by Mitting J as set out in [6] above. He said that it demonstrated the very serious continuing impact of the murder on Mr Newlove's family and how unwelcome it was to them to have to prepare for a decision on the review of the Claimant's minimum term. But neither of these factors could be relevant to the issue of whether or not Mr Cunliffe had made exceptional progress in detention, and Mitting J did not suggest that they were.

45. The test of exceptional progress is a high one. Mitting J found that while the Claimant's progress had been good it had not been exceptional. On the basis of the relevant material, that is to say the reports in the tariff review dossier, I consider that his finding was not only correct but inevitable.

46. Accordingly, despite the procedural unfairness, I would not order that the decision of the Secretary of State refusing to reduce the Claimant's minimum term should be quashed and taken again.

47. This leaves the application for judicial review of the refusal of the Secretary of State to disclose the victim personal statement. Mr Hough, in his evidence, says that "the Court [i.e. Mitting J] decided not to make the statement public and the Secretary of State did not interfere with that decision because the view was taken that this was a decision for the Court, as part of its own processes – rather than for the Secretary of State". This is an entirely understandable standpoint, and I have a good deal of sympathy for the difficult position in which Mr Hough found himself. But I was not attracted by Mr Hare's submission that Mr Cunliffe's solicitors ought to have written to the judge, on receipt of the recommendation, to request that the victim personal statement be disclosed to them, that they should have the opportunity to make representations about it, and that the judge should then reconsider his recommendation.

48. If I had thought that the victim personal statement could possibly have had an effect on the outcome of the Claimant's periodic review, I would have ordered that the substantive decision be quashed and that another judge should reconsider the tariff review and make a fresh recommendation to the Secretary of State, after Baroness Newlove had been asked whether she wished the statement to be withdrawn altogether from the review or disclosed to the Claimant as well as to the judge. But on the view which I take as to the inevitability of Mitting J's findings and recommendation I consider that such an exercise would be futile. I would therefore not make such an order in this case.

Mrs Justice Carr:

49. I agree. In relation to the procedure adopted by Mitting J, it is clear that the victim personal statement was irrelevant to the issue (of exceptional and unforeseen progress) before him. Whilst there was procedural error, there was thus no material unfairness such as to justify quashing of the Secretary of State's decision to refuse to reduce the Claimant's minimum term.