# Testing the limits of the common law right to trial by jury: a critical analysis of Re Hutchings

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Justice and Security (Northern Ireland) Act 2007 (c.6) s.1, s.7

***P.L. 88** The constitutional status of the right to trial by jury is reflected in its recognition as a fundamental right at common law. In Re Hutchings , this right was confronted by a far-reaching statutory provision empowering the Director of Public Prosecutions for Northern Ireland to issue a certificate ordering trial by judge alone if satisfied that trial by jury would pose a risk to the administration of justice. The power is accompanied by a partial ouster clause restricting judicial review to the narrowest of grounds. In confirming the breadth of the statutory provisions and degree of discretion granted to the Director, the Supreme Court's judgment in Re Hutchings is of special significance for a series of high-profile "legacy" cases in the prosecutorial pipeline in Northern Ireland. Beyond this local context, though, two issues highly relevant to contemporary public law debates emerge out of Re Hutchings . The article critically engages with each of these. The first is the status and implication of fundamental rights at common law—as distinct from rights driving from the European Convention of Human Rights—when confronted with statutory provisions that equip the decision-maker with expansive powers. The second is the ongoing issue of how the courts approach far-reaching partial-ouster clauses that limit the grounds upon which a discretion to abrogate a fundamental common law right can be challenged.*

 

## Introduction

Those who are unfamiliar with Northern Irish law would be forgiven for thinking that judge only trials are a remnant of the past. This is not the case, however. ***P.L. 89*** [1] Although no longer referred to as "Diplock courts",[2] judge only trials remain a contentious feature of Northern Ireland's criminal justice landscape.[3] In *Re Hutchings* [4] the common law right to trial by jury was confronted by an "unquestionably far reaching"[5] statutory power empowering the Director of Public Prosecutions for Northern Ireland (DPP) to issue a certificate ordering trial by judge alone if satisfied that trial by jury would pose a risk to the administration of justice. The power is accompanied by a partial ouster clause restricting judicial review to the narrowest of grounds. The Supreme Court in *Re Hutchings* upheld the DPP's exercise of his discretion to order a judge only trial. The court's interpretation of the provisions, contained in the Justice and Security (Northern Ireland) Act 2007 (2007 Act), confirms both the breadth of the statutory scheme and the far-reaching nature of the ouster clause. The consequence of the Supreme Court's interpretation of the statutory scheme is that defendants cannot expect to enjoy that most fundamental of common law rights in cases where the DPP exercises the power to limit trial by jury in accordance with the statutory scheme. The scope for reviewing the DPP's exercise of this power is, as a result of the court's judgment combined with the partial ouster clause, extremely limited.

The Supreme Court's judgment is of particular significance given the series of high-profile "legacy" cases in the prosecutorial pipeline in Northern Ireland.[6] These prosecutions involve former members of the British security services who, like the appellant in *Re Hutchings*, are due to stand trial for serious historic offences relating to Northern Ireland's armed conflict. The circumstances of these alleged offences are such that they are likely to give rise to the exercise of the DPP's discretion under the 2007 Act to abrogate the right to trial by jury. Beyond the immediate relevance to Northern Ireland, the judgment in *Re Hutchings* raises two specific issues highly relevant to contemporary debates in public law. The first is the status and implication of fundamental rights at common law when confronted with statutory provisions that appear to equip the decision-maker with expansive powers, in this case the right to trial by jury and the statutory scheme created by the 2007 Act. The second is the far-reaching nature of the partial ouster clause which is found in s.7 of the 2007 Act. In this article we critically reflect on these two issues in the context of the fundamental rights to trial by jury. We begin by introducing the background to *Re Hutchings* and analysing the judgments of the Northern Ireland Divisional Court and UK Supreme Court.

## The background to Re Hutchings

In 1974 the appellant, Mr Hutchings, was a soldier serving in the Life Guards regiment of the British Army. It was a time when the Provisional IRA's terrorist ***P.L. 90*** campaign was re-surfacing. The threat was particularly acute in the part of Country Antrim where the Life Guards operated. In June 1974, under the command of Mr Hutchings, the Life Guards were involved in a firefight with suspected members of the Provisional IRA. Some of the men were apprehended, while others escaped. Two days later the Life Guards came across a young man, Mr Cunningham, three and a half miles away from the scene of the firefight. He was suspected of being a terrorist. When confronted by the Life Guards, Mr Cunningham ran away and failed to stop when ordered to do so. He was shot five times and died of his injuries. Some of the shots were fired by Mr Hutchings. In 2005, the Historical Enquiries Team (HET) conducted an inquiry into Mr Cunningham's death.[7] Mr Cunningham was described as being an unarmed, vulnerable adult with a mental age of between 6 and 10. The HET concluded that his death was an "absolute tragedy that should not have happened". In 2015, after further investigation, Mr Hutchings was charged with attempted murder and committing GBH with intent.

In 2016 the DPP for Northern Ireland issued a certificate under s.1 of the 2007 Act in respect of Mr Hutchings' forthcoming trial. The legal effect of this certificate was to order Mr Hutchings' trial to take place before a judge alone, rather than before a judge and jury.[8] The power granted to the DPP in s.1(2) to issue a certification is broad one:

 

"The Director of Public Prosecutions for Northern Ireland may issue a certificate that any trial on indictment of the defendant (and of any person committed for trial with the defendant) is to be conducted without a jury if—

(a) he suspects that any of the following conditions [set out in s.1(3) -(6)] is met, and

(b) he is satisfied that in view of this there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury."

The DPP's discretion is galvanised by the partial ouster clause contained in s.7. The clause limits review of "any decision or purported decision" of the DPP to issue a certificate to dishonesty, bad faith or exceptional circumstances,[9] and subject to a claim under s.7(1) of the Human Rights 1998 (that a public authority has infringed a right enshrined in the European Convention on Human Rights).[10] In formulating s.7, Parliament replicated the language used by Lord Steyn in *R. v DPP Ex p. Kebilene* [11] in establishing the limits of the court's ability to interfere with decisions to prosecute.[12]

The DPP applied the two-stage test in s.1(2), as articulated in a letter to Mr Hutchings' solicitors some time after the decision was taken. First, he suspected condition 4 of s.1(6) of the 2007 Act was met: Mr Hutchings' alleged offences were committed "to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one person or group of persons towards another person or group of persons". Secondly, he was ***P.L. 91*** satisfied that there was risk to the administration of justice because of a possibility of a biased juror or jury having regard to the particular circumstances of the case. According to the judgment, the DPP's decision was based on information and commentary provided by the police, analysis of the facts and circumstances of the case, and the advice of senior counsel. The DPP also took into account the judicial observations in *Re Jordan* [13] and *Re McParland* [14] of the formidable difficulties in being satisfied that the risk of juror bias has been removed in security and terrorism cases in Northern Ireland.

Mr Hutchings wished to be tried in Northern Ireland by a jury, not by a judge alone, for his alleged crimes. He therefore sought judicial review of the DPP's decision. First, it was argued that the DPP had erred in law and misdirected himself as to the appropriate legal standard. It was emphasised that the 2007 Act 's explanatory notes state that non-jury trials would be confined "to a small number of exceptional cases" and, while accepting that the *Pepper v Hart* [15] criteria were not satisfied, counsel for Mr Hutchings sought to rely on statements made by the Under-Secretary of State for Northern Ireland during the passage of the Bill. These statements, it was submitted, suggested that condition 4 was designed to cover situations of sectarian strife *between the different communities* in Northern Ireland. It was not intended, therefore, to extend to wider situations such as Mr Hutchings', involving the British Army. Secondly, it was submitted that the DPP had failed to act in a procedurally fair way. The DPP waited over a year to inform Mr Hutchings of his decision to issue a certificate, he did not give Mr Hutchings an opportunity to make representations before the decision was made, and did not provide him with reasons or with the material upon which the decision was based.

The Northern Ireland Divisional Court dismissed Mr Hutchings' appeal.[16] The Divisional Court held that the DPP enjoyed wide powers under the 2007 Act and stated that the tests for the exercise of the power were set at a "modest level".[17] A degree of institutional deference had to be shown to the DPP as a "highly experienced former criminal law practitioner".[18] The Divisional Court did, however, urge the DPP to set out in greater detail the nature of his reasoning for why he thought the two statutory tests in s.1(2) were satisfied. Having held the DPP exercised his power lawfully, the Divisional Court deemed it unnecessary to consider the application of the ouster clause in s.7(1).[19]

## The judgment of the Supreme Court

Mr Hutchings appealed to the Supreme Court. The first issue for the court was whether condition 4 in s.1(6) of the 2007 Act —part of the first test laid out in s.1(2)(a) —applied in the circumstances of Mr

 

Hutchings' case. In a unanimous judgment, the Supreme Court answered in the affirmative.[20] Giving the unanimous judgment of the court, Lord Kerr stated that the Divisional Court was ***P.L. 92** "unquestionably right" that the wording of condition 4 vests the DPP with wide powers.[21] Parliament's intent was "abundantly clear" from the wording itself; no recourse was needed to the Under-Secretary's parliamentary statements. They did not, his Lordship held, amount to a comprehensive statement of all the circumstances in which the DPP's powers might be invoked.[22] Lord Kerr declared that exercise of the power was not confined to "bigoted adherence to a particular sect" but to the wider circumstances in which Mr Cunningham was killed, that is to say, the killing of a suspected member of the Provisional IRA by members of the British Army.[23] Counsel for Mr Hutchings' approach to "sectarianism" for the purposes of condition 4 was thus rejected.

The Supreme Court proceeded to interpret the second limb of the test in s.1(2). The court downplayed the status and implications of Mr Hutchings' right to trial by jury, opting instead to place greater importance on the imperative of ensuring he received a fair trial. "The fundamental right", Lord Kerr insisted, "is the right to a fair trial".[24] The "incontestable reality" was that Mr Hutchings would still receive a fair trial by judge alone. Indeed, trial by jury could "in certain circumstances be antithetical to a fair trial".[25] This analysis served to re-cast the defendant's common law right to be tried by a jury as just one interest that co-existed with what Lord Steyn has previously referred to as the "triangulation" of interests that include the interests of the victim, their family and the public.[26] The Supreme Court proved reluctant to endorse the Northern Irish Court of Appeal's analysis in *Re Arthurs' Application for Judicial Review* in which Girvan LJ recognised the right to trial by jury as a "constitutional right" that consequently required s.1 to be construed "narrowly".[27] Lord Kerr observed that any such right was not absolute, was restricted by the express provisions of the 2007 Act and, ultimately, that the "right must yield to the imperative of ensuring that the trial is fair".[28]

With the right to a fair trial seen to be taking priority over—or as distinct from—the right to trial by jury, the court interpreted s.1 as bestowing not only remarkably broad discretion on the DPP, but as imposing no requirement at all of any objective or evidential basis for the "risk" upon which the statute requires the decision to correspond. Lord Kerr's description of the nature of the decision-making process the DPP was permitted to adopt is worth setting out in full:

"The type of decision which the Director must take can be of the *instinctual, impressionistic kind*. Whilst the Director must of course be able to point to reasons for his decision, one can readily envisage that it may frequently *not be based on hard evidence but on unverified intelligence or suspicions, or on general experience*. It may partake of supposition and prediction of a possible outcome, rather than a firm conclusion *drawn from established facts*. ***P.L. 93*** " [29]

Significantly, though, even the requirement for the DPP to be able to point to reasons for his decision was strictly qualified by his Lordship's observation that the DPP's decision "does not readily admit of scrutiny of the reasoning underlying it".[30] With these wide perimeters put in place, the Supreme Court had little difficulty in proceeding to find that the DPP had acted within the power conferred upon him by Parliament. The DPP's explanation letter, provided a year after the decision was made and which contained only brief reference to a broad class of materials relied upon, was described by Lord Kerr as setting a "clear basis" for a conclusion that was "entirely unsurprising" in light of the judicial observations of the challenges of eliminating bias in jury trials in *Re Jordan* and *Re McParland*.

Finally, Mr Hutchings' procedural argument failed too. Counsel for Mr Hutchings had argued that he ought to be provided with the DPP's reasons for the decision, the material on which it was based, and an opportunity to make representations. Lord Kerr stated, however, that s.7(1) of the 2007 Act "set the scene" for procedural fairness. His Lordship firmly rejected the argument that the right to trial by jury somehow amounted to an "exceptional circumstance" for the purposes of s.7(1) or that the decision to issue a certificate could be meaningfully distinguished from the decision to prosecute so as to warrant greater scrutiny of the DPP's decision than is typically permitted.[31] Lord Kerr returned to a central theme of the judgment—the nature of the decision-making process. "Quite apart from the statutory prohibition"

 

on a challenge to the failure to disclose, his Lordship stated that there were sound reasons for limiting the most basic tenets of procedural fairness. First, in many cases the material upon which the DPP makes his assessment will be highly sensitive material obtained from the police or security services and thus confidential and non-disclosable. Secondly, the nature of the DPP's decision is "instinctual or impressionistic" and thus "not susceptible of ready articulation".[32] Capturing the overall tenor of the judgment, Lord Kerr described the exercise of the DPP's power to issue a certificate to be "[i]n reality … a case management decision aimed at ensuring the relevant end result of a fair trial".[33]

### Analysing the judgment

The Supreme Court's approach to the first stage of the statutory test was surely correct. The requirements set out in *Pepper v Hart* were not met and ought, in the first place, to have precluded consideration of the parliamentary statements that counsel for Mr Hutchings presented to the court.[34] Having reviewed this material nonetheless, the court was right to conclude that the statements did not challenge the undoubted breadth of the terms in condition 4. We respectfully submit, however, that two key aspects of the judgment are worth exploring in greater detail. The first aspect concerns trial by jury. Given the constitutional status of the right to trial by jury, the court ought to have adopted a more demanding interpretation of ***P.L. 94*** the second stage of the test. This is the part which governs the DPP's exercise of the discretion conferred on him by Parliament. The second aspect we wish to explore is the partial ouster clause contained in s.7(1) of the 2007 Act.

## *The right to trial by jury*

### The principle of legality

Before proceeding it is necessary to say something about common law rights and the principle of legality. As Baroness Hale puts it, common law rights are "on the march"[35] and have become an increasingly prominent feature of the public law landscape. In a succession of cases, the Supreme Court has relied—to differing extents—on the courts' inherent jurisdiction to recognise, develop, and enforce common law constitutional rights. The most explicit link between common law rights and the courts' inherent jurisdiction was made by Lord Reed in *R. (on the application of A) v British Broadcasting Corp*, in which his Lordship stated it is for the courts to determine the ambit of this jurisdiction and the requirements of the common law, subject to any statutory provision.[36] Most common law rights will correspond to a right recognised in the European Convention on Human Rights (the Convention). It will therefore be possible to rely upon the Human Rights Act 1998 to enforce them. The right to trial by jury does not feature in the Convention, which is unsurprising given the fact that trial by jury does not feature in some civilian legal systems.[37] The right to a fair trial is enshrined in art.6 of the Convention. The common law right to trial by jury cannot, however, simply be subsumed within the overarching right to a fair trial. To do so would be to undermine the longstanding nature of the right, and the fact that it is intended to guarantee fairness by way of a specific process. The long-standing protection of fundamental rights by the courts means that, "the common law may go further than the Convention",[38] just as "it was not the purpose of the Human Rights Act that the common law should become an ossuary".[39] The exceptional nature of trial by judge alone—departing as it does from a fundamental right—is reflected by the fact that the relevant provisions of the 2007 Act must be re-authorised at two-year intervals by way of an order made by the Secretary of State.[40] It is also noteworthy that an accused who is convicted after trial by judge alone has an automatic right of appeal, something which does not apply to one who is convicted by a jury.[41]

The fact that trial by jury does not correspond to a right enshrined in the Convention means that the interpretative obligation in s.3 of the Human Rights Act 1998 is inapplicable. At common law the analogous interpretative technique is the principle of legality. This principle requires a provision of primary legislation to be interpreted narrowly, so as to permit the least restriction possible to the ***P.L. 95*** common law right that is consistent with the ordinary meaning of the words and the purpose of the statute. As enunciated by Lord Hoffmann in *Ex p. Simms*,

 

”the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words.” [42]

Trial by jury has been a feature of the criminal trial for centuries. It is therefore not a right that has only recently been recognised by the common law. This is significant. As Philip Sales has argued, if a fundamental right is identified clearly in advance of the act of legislation, it is plausible to infer that, when Parliament legislated, it meant to do so taking that right into account without needing to say so explicitly.[43] In enacting the 2007 Act, Parliament intended to abrogate a defendant’s right to trial by jury. That fact does not, however, absolve a court of the obligation to construe the relevant provisions in a way which takes into account the fundamental right involved. To put the point another way, the principle of legality ought to govern the construction of the 2007 Act, even though Parliament intended explicitly to curtail the right to trial by jury.

## Fairness—the role played by art.6

In his judgment, Lord Kerr makes repeated reference to the imperative of ensuring that Mr Hutchings’ trial is fair. The core of his Lordship’s analysis was not the right to trial by jury at common law; rather “[t]he fundamental right is to a fair trial”.[44] His Lordship’s view was that a trial without a jury was the only way to achieve fairness. His Lordship did not, however, articulate what he meant by fairness or how fairness should be assessed in these circumstances. Article 6(1) of the Convention enshrines the right to a fair trial, but his Lordship did not invoke any of the jurisprudence which considers how fairness ought to be assessed. The approach to be taken under art.6 is now well established. The court must evaluate whether the “essence of the right”[45] has been violated. In practice the court will examine the impact that breach of the individual fair trial guarantee had on the overall fairness of the trial. As a result of this approach, there can be inconsequential breaches of art.6.[46] His Lordship did not conduct the same kind of exercise in this case. In one sense, this is to be expected, given that the DPP’s decision to issue a certificate authorising a judge-only trial is *not* one that engages art.6,[47] and there is no right to a jury trial enshrined in the Convention.[48] Nevertheless, there is something lacking about Lord Kerr’s approach to “fairness”. Though his Lordship insisted the right to trial by jury “must yield to the imperative of ensuring that the trial is fair”,[49] there was no structured analysis of how abrogating the right to trial by jury would impact on the fairness of Mr Hutchings’ trial. Such an analysis ***P.L. 96*** would have been expected had the case concerned the violation of a fair trial guarantee enshrined in the Convention. An assumption was made that trial by jury would be inimical to fairness, as it could potentially result in Mr Hutchings being tried by a jury that was not impartial. However, this consideration was given primacy without any consideration of how a jury contributes to a fair trial. Three observations may be made about the Supreme Court’s approach.

First, if the aspect of procedural fairness that is being abrogated is not one that has a parallel in art.6(3), then it is not one of the minimum rights guaranteed by the Convention. As a result, it is not something the court has to weigh in the balance when it is assessing whether the defendant’s right to a fair trial has been violated. To put the point another way, violation of the common law right to trial by jury has no bearing, in art.6 terms, on whether Mr Hutchings would receive a fair trial. It is as though the common law right does not exist. How abrogating the right to trial by jury impacted upon Mr Hutchings’ *common law* right to a fair trial is not something that featured in the court’s analysis. Secondly, the Supreme Court’s approach demonstrates that, methodologically, the assessment of fairness at common law, that is when it is divorced from art.6, lacks structure. This perhaps reflects the fact that assessing whether breach of one of the minimum rights contained in art.6(3) is a familiar process in comparison to assessing what, if any, impact breach of a common law right has upon the overall fairness of a trial. Thirdly, the court’s notion of fairness permits a broad calculus for determining the scope of the “fundamental right to a fair trial”. In fleshing out the right’s content, Lord Kerr incorporated the (unspecified) interests of groups mentioned by Lord Steyn in *Attorney General’s Reference (No.3 of 1999)*, namely: “the victim, his or her family, and the public”.[50] This, we respectfully submit, risks travelling beyond the original target of Lord Steyn’s remarks, which concerned the purpose of the criminal law as an aid to

 

interpretation of s.64(3B) of the Police and Criminal Evidence Act 1984. Further still, according to Lord Kerr the determination of whether the right to trial by jury must yield to the imperative of fairness was not limited to consideration of the trial itself but extended much further to whether it "would place the fairness of the *criminal justice process* at risk".[51]

Collectively, then, our concern lies with the transparency of the court's formulation of "fairness" for the purpose of determining the fundamental right to a fair trial at common law existing outside of the typical art.6 determination. This is compounded by the court's seemingly unguarded willingness to incorporate unspecified interests that could be deployed in future to diminish the rights of the accused in the name of collective security and victims' "rights" in the criminal process as a whole.

## Towards an alternative interpretation

The discretion conferred upon the DPP by Parliament is expansive. Parliament's objective was clear and not in doubt. Nevertheless, the Supreme Court's excessive focus on the overall fairness of Mr Hutchings' trial downplayed the constitutional status of the right to trial by jury, which is firmly established in the case law of ***P.L. 97*** the House of Lords, as well as the Northern Ireland Court of Appeal. Marshalling this case law, we want to propose an alternative interpretive approach to s.1(2)(b) based on a stricter interpretation of "risk". A stricter interpretation is necessary to reflect the fact that trial by jury is a fundamental right recognised at common law, for fundamental rights are "tool[s] to produce interpretive effects".[52] Respect for this right ought to require the DPP to go beyond the loose kind of "impressionistic" or "instinctual" justification of which the Supreme Court approved. Rather, there should be an obligation imposed upon the DPP to *clearly establish or plainly justify* the risk upon which his decision was based; this is likely to require precisely the kind of "hard evidence" and "established facts" that the court dismissed as superfluous to its analysis of the legality of the DPP's decision-making under s.1(2)(b).

The proper starting point ought to have been Mr Hutchings' constitutional right to trial by jury. The jury has long been lauded as the embodiment of fairness and practical wisdom.[53] But more fundamentally, "the system of trial by judge and jury is of *constitutional* significance".[54] The jury has been variously described as "the norm on which criminal justice is based",[55] "an integral and indispensable part of the criminal justice system"[56] and "a bastion of the criminal justice system against domination of the state and a safeguard of the liberty of its citizens".[57] There are four qualities, distinct from trial by judge alone, which characterise the jury's role. The first is its competency as a decision-maker. Comprised of those drawn from different generations, socio-economic circumstances, occupations, ethnicities and religions, it benefits from common-sense and life experience that can be brought to bear on issues such as the credibility of the accused and witnesses. The second is its insulation from prejudicial information relating to the circumstances of the alleged offence, and also from wider public debate because its decision-making takes place in a private, protected, deliberative forum.[58] Thirdly, by injecting democratic input into a trial process heavily, if not entirely, dominated by legal practitioners fluent in the technicalities of the law and its procedural norms, the jury performs a well-recognised legitimating function.[59] Finally, the rules of criminal evidence have been developed in a system where there is a clear division of labour between the judge and the jury. For example, if the judge rules that evidence should not be admitted—on the basis that its prejudicial effect outweighs its probative value for example—the jury will never know of its existence and their deliberations will not be tainted by it. The applicable rules are intended to ensure that that the jury performs its role without being exposed to prejudicial evidence.

The impartiality of the jury is, of course, crucial to its role of acting as fact finders "entirely unconnected with the events under examination, and wholly disinterested … free from being influenced by anything other than the evidence adduced at court".[60] Yet as the House of Lords has observed, preconceptions and ***P.L. 98*** prejudices are to be expected from jurors. The point is that these must be, and we must assume unless the contrary is proven are, set aside by jurors so as to enable them to fulfil their civic duty without prejudice.[61] The starting point is that all members of the jury are presumed to be impartial unless and until there is proof to the contrary.[62] Indeed, there are safeguards in place to ensure, as far as is practically possible, that such prejudice is set aside. As Lord Rodger stated in *Mirza*:

 

”The risk that those chosen as jurors may be prejudiced in various ways is, and always has been, inherent in trial by jury … The legal system does not ignore these risks: indeed it constantly guards against them … the law supposes that, when called upon to exercise judgment in the special circumstances of a trial, in general, jurors can and do set their prejudices aside and act impartially.” [63]

The safeguards include the random selection of jurors; the oath jurors swear (or the affirmation they make); the direction given to jurors to discard any prejudices they may have had and to approach the case with an open mind; the solemn atmosphere of the trial and reminders from the trial judge to the jury of their crucial responsibility in deciding whether the prosecution has discharged its burden of proof; the possibility for jurors to allege misconduct or bring bias to the attention of the judge.[64] Such allegations can be considered, investigated and dealt with by the trial judge.[65]

The constitutional status of the right to trial by jury, grounded in these qualities and protected by these safeguards, is reflected in its recognition as a fundamental right at common law.[66] As stated in full by Sir Declan Morgan CJ in *Re Arthurs' Application*:

”The right of an indicted defendant to a jury trial is a right recognised by the common law and it is a right which is commonly described as being in the nature of a constitutional right … The *strong presumption* that a right to jury trial is not intended to be taken away will … lead to a *strict construction* of any statutory restriction or limitation on the right to a jury trial.” [67]

The fact that trial by jury has been recognised as a common law right has implications for how a provision that abrogates trial by jury ought to be construed. As Sir Declan Morgan CJ recognised, the principle of legality dictates that any statutory restriction or limitation on the right to trial by jury ought to be construed strictly. Doing so does not usurp Parliament's law-making role or undermine the intention underpinning the statutory scheme. Such an approach simply gives effect to the principle of legality, which is the constitutional background against which Parliament legislates. ***P.L. 99***

## Connecting with the case law under s.44 of the Criminal Justice Act 2003

This is not heresy, as a strict construction has been applied to other statutory provisions which abrogate the right to trial by jury. This is demonstrated by a series of cases concerning s.44 of the Criminal Justice Act 2003. This provision permits the prosecution to apply for trial by judge alone in cases of suspected jury tampering. The first of two conditions requires the trial judge to be “satisfied” that there is “evidence of a real and present danger that jury tampering would take place”.[68] In *Twomey*,[69] Lord Judge CJ held that:

”The right to trial by jury is so deeply entrenched in our constitution that, unless express statutory language indicates otherwise, *the highest possible standard of proof is required to be established* before the right is removed.” [70]

In *J*,[71] his Lordship reaffirmed the criminal standard of proof of a real and present danger of jury tampering and stated that the court must be “sure (not that it entertains doubts, suspicions or reservations) that the statutory conditions are fulfilled”.[72] In the Privy Council case of *Misick*,[73] Lord Hughes stated that the Court of Appeal in *Twomey* and *J* had not had the benefit of argument from the parties as to what the most appropriate standard of proof ought to be in the context of predictive conditions involving the weighing of different factors. While casting some doubt on whether the criminal standard was the correct one to apply in such circumstances, Lord Hughes stated

”what is quite apparent is that the court in *Twomey*, and in the other English cases, was concerned to ensure that there was no departure from trial by jury unless the necessity for it was *clearly established*.” [74]

 

Significantly, Lord Hughes remarked, in the context of the right to trial by jury "[d]eparture from [trial by jury] must be confined to whatever classes of case or circumstance for which the legislation provides, *and must be plainly justified*".[75]

This line of case law, we submit, establishes three core dimensions of the right to trial by jury. While these points have arisen out of the courts' analysis of s.44 of the 2003 Act specifically, they reflect the fact that trial by jury is a right and thus apply irrespective of the particular statutory context. First, there is a constitutional right to trial by jury recognised at common law; secondly, while this is a qualified right, subject to limitations by Parliament, the principle of legality mandates that such limitations be strictly construed by the courts given the normative force of the right; thirdly, the right requires that any statutory criteria which must be satisfied are "clearly established" or the restriction was "plainly justified". The requirement to prove that any statutory criteria are satisfied enables the court to establish whether or not the power was exercised in a way which ***P.L. 100*** respects the right. In order for the defendant—and ultimately a court—to be capable of ascertaining whether the decision to restrict his or her right to trial by jury has been exercised in a way which is lawful, he or she must be provided with the material upon which the decision-maker relied—or at least a sufficient quantity of it—to know how the decision-maker came to the conclusion that the statutory criteria were "clearly established" or the restriction was "plainly justified". To expect the court to conduct an evaluative review of the DPP's decision is entirely consistent with the style of reasonableness review routinely undertaken where fundamental rights are interfered with. As argued by Craig, both reasonableness and proportionality require the court to judge the weight and balance accorded to relevant factors by the decision-maker.[76] We respectfully submit that the Supreme Court's central focus in *Re Hutchings* on the overall fairness of the trial led it to overlook the three points just listed and to adopt an approach that under-appreciated that trial by jury is a common law right which ought to have informed how the statutory conditions were construed.

In practical terms, what does this mean for how the crucial term of s.1(2)(b) of the 2007 Act —that the DPP is "satisfied … there is a risk"—ought to have been interpreted? We are mindful, of course, that Parliament neither chose to replicate the more demanding criteria of "evidence of a real and present danger" of jury partiality found in the 2003 Act, nor did it accept the amendment, moved in the House of Lords, that would have required the DPP to consider "it likely" that the administration of justice might be impaired by a jury trial. Parliament did, however, require "a risk" to be present before the DPP may issue a certificate. Parliament could have simply required the DPP to be "satisfied a certificate is so required" or that "it is expedient to ensure the effective administration of justice" to issue a certificate. The approach of the court is to treat "satisfaction there is a risk" as an entirely subjective decision—one that can be based on mere "instinct", "impression", "unverified intelligence or suspicions", or "on general experience". Applying the standard adopted by Lord Hughes in *Misick*, the right to trial by jury requires the "risk" apparent to the DPP to be "clearly established" and "plainly justified" to the court. This would suggest a requirement for there to be some objective basis for the DPP's decision. This stands firmly at odds with Lord Kerr's description; that is to say, proof of hard evidence and verified intelligence that such a risk does in fact exist.

Applying this stricter construction of "a risk" to the facts in *Re Hutchings*, it would require the DPP to provide the court with more compelling and comprehensive evidence of the "risk" he perceived than was provided to Mr Hutchings and ultimately to the court. It is submitted that such an approach would not impose too great a burden upon the DPP (the material could be gisted if sensitive), nor would it undermine the effectiveness of the statutory scheme. The DPP stated that, in reaching his decision, he considered the observations of the Northern Ireland Court of Appeal in *Jordan*.[77] Yet it is difficult to see how *Jordan* can be relied upon to substantiate the assertion that a risk exists in the case of Mr Hutchings. First, the decision in *Jordan* is now almost five years old and there was no consideration of the extent to which the observations made in that case about ***P.L. 101*** the risk of partisan juries in Northern Ireland remain accurate. Secondly, the court did not conduct an assessment of the risk posed by a jury trial, but rather noted that "it would be idle to ignore the problems of both jury intimidation and perverse verdicts in Northern Ireland". Thirdly, the material the court in *Jordan* relied upon to support this statement dated

 

as far back as the Diplock Report of 1972, as well as more recent material, such as a consultation paper from 2006. Again, there was no consideration of the extent to which Northern Irish society may have changed since this material was produced. Fourthly, the court in *Jordan* preceded its discussion with an analysis of the need to counterbalance the risk of jury tampering and perverse verdicts provided by Sir Brian Kerr CJ, as he was then, in *McParland's Application*. In that case his Lordship stated that

"a measure of trust must be reposed in the conscientiousness and sense of civic duty of those who serve on juries in this jurisdiction. Happily, in the vast majority of cases, that trust had not been betrayed." [78]

So too are the reasons provided by the DPP rather circular, such as his explanation to Mr Hutchings' solicitor that "the risk arises from the possibility of a biased juror or jury, having regard to the particular circumstances of the case".[79] Finally, it is unclear what material senior counsel or the police could possibly have provided to the DPP so as to establish a risk of juror bias. It seems unlikely these were social scientific studies revealing how ethno-national prejudices impact upon juror decision-making in Northern Ireland in the context of the criminal trial. As the Independent Reviewer of the 2007 Act has noted, based on his analysis of a sample of decisions made by the DPP to issue non-jury trial certificates,

"in many cases it should be possible, without disclosing sensitive intelligence, to give a fuller explanation rather than rely on a simple reference to a Condition specified in the non-jury trial certificate." [80]

### Procedural fairness and the ouster clause

As has already been mentioned, the impact of the Supreme Court's construction of s.1 must be assessed in light of the partial ouster in s.7 of the 2007 Act. Before turning to an analysis of s.7, it is worth setting the provisions out in full:

> (1) "No court may entertain proceedings for questioning (whether by way of judicial review or otherwise) any decision or purported decision of the Director of Public Prosecutions for Northern Ireland in relation to the issue of a certificate under section 1, except on the grounds of—
>
> (a) dishonesty,
> (b) bad faith, or ***P.L. 102***
> (c) other exceptional circumstances (including in particular exceptional circumstances relating to lack of jurisdiction or error of law).
>
> (2) Subsection (1) is subject to section 7(1) of the Human Rights Act 1998 (c. 42) (claim that public authority has infringed Convention right)."

There are three points which are immediately evident once this provision is set out in full. First, the ouster encompasses not only decisions of the DPP, but also "purported decisions", namely those made without jurisdiction. This is intended to ensure that the ouster survives the House of Lords' judgment in *Anisminic Ltd v Foreign Compensation Commission*,[81] in which it was held—through "reasoning which came close to intellectual sleight of hand"[82] —that the word "determination" in s.4(4) of the Foreign Compensation Act 1950 should not be construed as including everything which purported to be a determination but was not in fact a determination because the Foreign Compensation Commission had misconstrued the provisions defining its jurisdiction.[83] As a result of how the partial ouster is drafted, the DPP's decision to issue a certificate can only be challenged on the grounds enumerated in s.7 of the 2007 Act, even though there may be other bases for challenging its legality. As the Northern Ireland Divisional Court stated in *Re Shuker's Application for Judicial Review* "the full panoply of judicial review superintendence"[84] is generally unavailable to challenge the DPP's decision to issue a certificate for a non-jury trial. Secondly, the grounds are only partially enumerated. Lord Kerr stated,[85] however, that the third category—"other exceptional circumstances"—must take its meaning from the preceding words of the sub-paragraph. Thirdly, the ouster does not extend so far as to preclude an individual from bringing a judicial review on the ground that the DPP's decision to issue a certificate violated a Convention right. This is a crucial feature of the scheme created by the 2007 Act, as it ensures it is Convention compliant. Its practical import is limited, however, as it is difficult to see which Convention rights are implicated

 

by the DPP's decision to issue a certificate. There is no Convention right to trial by jury, and the decision to issue a certificate does not constitute the determination of a "civil right or obligation", as that phrase has been interpreted by the European Court of Human Rights,[86] so art.6 is inapplicable. The decision *not* to issue a certificate for a judge only trial, however, may be challenged on art.6 grounds by a defendant who believes that he or she would not be tried by an independent and impartial tribunal were he or she to be tried by a jury. For reasons that were discussed earlier, Mr Hutchings has a right to a fair trial, but not a right to be tried by a jury, as this is not enumerated in art.6(3). Because trial by jury is not one of the minimum guarantees to which Mr Hutchings was entitled, ***P.L. 103*** the court did not have to consider how, in art.6 terms, removing the jury would impact on the overall fairness of his trial.

The ouster clause in s.7 of the 2007 Act is distinct from those which have troubled the Supreme Court in recent years. The ouster clauses considered by the Supreme Court in both *R. (on the application of Evans) v Attorney General* [87] and *R. (on the application of Privacy International) v Investigatory Powers Tribunal* [88] purported to oust the High Court's supervisory jurisdiction altogether. By way of contrast, s.7 of the 2007 Act narrows the grounds upon which the DPP's power to issue a certificate can be challenged. As a result of how the provision is drafted it is not, generally speaking, open to a defendant to argue that the DPP's decision to issue a certificate was a nullity by reason of: (i) lack of jurisdiction, (ii) irregularity, (iii) error of law, or (iv) breach of natural justice. Lord Kerr stated that "other exceptional circumstances" ought to be construed narrowly, so it is unlikely that the courts would be willing to treat this as a back door through which these grounds of review could be imported wholesale. There are references to lack of jurisdiction and error of law in s.7(1)(c), but they are subject to an exceptionality threshold. As a result, it may be inferred that Parliament did not intend that every error of law should constitute a ground upon which the DPP's decision may be challenged.

In *R. (on the application of Privacy International) v Investigatory Powers Tribunal*,[89] citing Baroness Hale's judgment in *R. (on the application of Cart) v Upper Tribunal*,[90] Lord Carnwath stated that it is ultimately for the courts, not the legislature, to determine the limits set by the rule of law to the power to exclude judicial review. As a result of the degree of specificity with which s.7 of the 2007 Act is drafted, Parliament's intention is, in the words of Lord Neuberger in *R. (on the application of Evans) v Attorney General*, "crystal clear".[91] There is no scope for saying, by way of an "intellectual sleight of hand" or otherwise, that Parliament intended the High Court to supervise the DPP's exercise of his discretion to order a judge only trial.

It is surprising that provisions such as s.7 of the 2007 Act have not generated greater scrutiny. There can be no doubt that narrowing the grounds upon which a discretion to abrogate a fundamental common law right can be challenged has implications for the rule of law; all the more so given that the ouster insulates not a statutory tribunal, which may be characterised as being the alter ego of the High Court, from judicial supervision, but the DPP. Section 7 of the 2007 Act demonstrates, however, that there will be instances where parliamentary sovereignty trumps the rule of law, as the provision does not admit of any ambiguity in its intended application. The track record of ouster clauses being upheld by the courts is not good. In fact, it is difficult to think of any ouster clause which has survived judicial scrutiny.[92] Section 7 of the 2007 Act provides the executive with an "exclusionary formula",[93] which it is not implausible to suggest may be increasingly relied upon in future, given the courts' attitude towards language of a more ***P.L. 104*** general—all be it more comprehensive—nature. In *Re Hutchings* the Supreme Court confirmed the far-reaching nature of partial ouster clauses such as this, and indicated that it will give them the far-reaching effect Parliament intended.

Before leaving discussion of the partial ouster clause, it is worth pointing out, that through its reference to s.7 of the Human Rights Act 1998, it contains an exception for rights guaranteed by the Convention. It does not, however, contain a similar exception for common law rights. This substantiates the point that common law rights provide less protection than Convention rights and are much more vulnerable to being undermined.

 

## Conclusion

*Re Hutchings* highlights the exceptional issues that continue to confront Northern Ireland's criminal process. Mr Hutchings' prosecution, of course, throws up much wider political, or "transitional justice" issues. The most significant of these is whether former members of the security services ought to be granted amnesties for crimes allegedly committed in the operational context of Northern Ireland's conflict[94] —and what legal implications this might have for ex-combatants who would likely, as a matter of law, enjoy a similar amnesty.[95] But given that prosecutions of the security services *are* currently taking place, one of the central questions arising now is whether defendants can exercise their right to trial by jury without jeopordising the administration of justice. As a matter of law, the answer is to be determined by the DPP, acting under the wide powers granted to him by s.1 of the 2007 Act, as interpreted by the Supreme Court in *Re Hutchings*. Future cases involving the prosecution of members of the army and security services for conflict-related offences will fall within condition 4 of the 2007 Act. The second limb of the test in the 2007 Act then becomes key—that is whether there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury. In critically analysing the decision in *Re Hutchings* and the issues of public law that arise, our target has been neither the decision arrived at by the DPP, nor the normative debate as to whether such prosecutions should be brought.[96] Rather, our concern is a principled one—the legal accountability of broad executive discretion—and the mechanics through which this ought to be achieved—the principle of legality in the context of fundamental rights at common law.

In its interpretation of "risk", the Supreme Court has permitted the DPP to make an "instinctual, impressionistic kind" of decision, which "may frequently not be based on hard evidence but on unverified intelligence or suspicions, or on general experience". The Supreme Court's approach stands in marked contrast to how provisions which abrogate common law rights have typically been construed. The court's atypical construction of the 2007 Act is explained by its unwillingness to recognise that trial by jury is a common law right and that provisions which impact ***P.L. 105*** upon that right are subject to the principle of legality. The alternative approach we have advanced in this article, which we respectfully submit sits more comfortably with earlier dicta on the right to trial by jury, is to construe the satisfaction of risk test as requiring the DPP to *clearly establish* or *plainly justify* the risk upon which his decision was based. As a matter of policy, such an approach would also inject greater transparency into the prosecutorial process relating to conflict-related offences. The general concern in the legal community in Northern Ireland about the opaqueness of the arrangements for issuing a non-jury trial certificate thus remains a live issue—one recognised by the Independent Reviewer of the 2007 Act as "well founded".[97] The approach taken by the Supreme Court has, if anything, served to underscore the importance of the recommendations made by the Independent Reviewer that

"the PSNI, after consultation with the PPS, could place in the public domain a detailed document explaining the difficulties associated with this option and the reason why, in the prevailing circumstances, juror protection measures do not provide an easy alternative to non-jury trials in Northern Ireland." [98]

As to the more general point of the protection of fundamental rights at common law, *Re Hutchings* demonstrates that the courts may be willing to respect a significant degree of legislative and executive encroachment when it comes to a provision which abrogates a common law right. Had trial by jury been enumerated in art.6(3) of the Convention, the Supreme Court's approach, both methodologically and substantively, would have been very different. In *Osborn v Parole Board* Lord Reed stated that "human rights continue to be protected by our domestic law, interpreted and developed in accordance with the [Human Rights Act 1998] when appropriate".[99] Whilst this may be true, this case demonstrates that common law rights can seem impoverished by comparison to those enshrined in the Convention. The effect of the Supreme Court's interpretation of the 2007 Act in *Hutchings* is that Convention rights have, in fact, superseded common law rights. The vulnerability of common law rights is compounded by the fact that Parliament may, after so many years of trying, finally have found an "exclusionary formula" that will not be subject to judicial circumvention. The courts may be willing to adopt a permissive attitude to such provisions when they feature only rarely in the statute book. Whether this

 

attitude will be maintained should provisions such as s.7 of the 2007 Act become a more regular feature in legislation remains to be seen ***P.L. 106*** .

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## Footnotes

1 There has been an average of 18 non-jury trial certificates (and one refusal) issued per year in Northern Ireland since 2007. See *D. Seymour, Eleventh Report of the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007 (TSO, 2019), para.17.3*.

2 Diplock courts were introduced by the Northern Ireland (Emergency Provisions) Act 1973 for defendants charged with terrorist-related offences. For discussion, see *J. Jackson and S. Doran, Judge Without Jury—Diplock Trials in the Adversary System (Oxford: Oxford University Press, 1995)*.

3 In 2018, the Bar of Northern Ireland expressed concern about the fact that the 2007 Act gives the DPP the power to act on suspicion, that there is no requirement for him to give reasons for his decision, and the limited grounds for challenging the DPP's decision. It urged the Secretary of State to consider aligning the system with that which applies in England and Wales under s.44 of the Criminal Justice Act 2003 (discussed below). See *Seymour, Eleventh Report of the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007, para.18.1*.

4 *Re Hutchings Application for Judicial Review [2019] UKSC 26*, on appeal from *[2017] NIQB 121*.

5 *Re Hutchings [2019] UKSC 26* at [32].

6 The prosecution of "Soldier F" for alleged offences arising out of Bloody Sunday is perhaps the most widely known example of such a case.

7 The HET is an investigative team within the Police Service of Northern Ireland established to produce reports on conflicted-related offences.

8 Justice and Security (Northern Ireland) Act 2007 (2007 Act) s.5(1).

9 2007 Act s.7(1)(a) -(c).

10 2007 Act s.7(2).

11 *R v DPP Ex p. Kebilene [2000] 2 A.C. 326*.

12 See Lord Morgan CJ in *Re Arthur's Application [2010] NIQB 75* at [25].

 

13 *Re Jordan's Application for Judicial Review [2014] NICA 76*.

14 *Re McParland's Application for Judicial Review [2008] NIQB 1*.

15 *Pepper v Hart [1993] A.C. 593*.

16 *Re Hutchings [2017] NIQB 121*.

17 *Re Hutchings [2017] NIQB 121* at [30].

18 *Re Hutchings [2017] NIQB 121* at [32].

19 *Re Hutchings [2017] NIQB 121* at [82].

20 *Re Hutchings [2019] UKSC 26*. Lord Kerr delivered a judgment with which Lord Reed, Lady Black, Lord Lloyd-Jones and Lord Sales concurred.

21 *Re Hutchings [2019] UKSC 26* at [44].

22 *Re Hutchings [2019] UKSC 26* at [24].

23 *Re Hutchings [2019] UKSC 26* at [22].

24 *Re Hutchings [2019] UKSC 26* at [55].

25 *Re Hutchings [2019] UKSC 26* at [34].

26 *Re Hutchings [2019] UKSC 26* at [38].

27 *Re Arthurs' Application for Judicial Review [2010] NIQB 75* at [31].

28 *Re Hutchings [2019] UKSC 26* at [37].

29 *Re Hutchings [2019] UKSC 26* at [13], emphasis added.

30 *Re Hutchings [2019] UKSC 26* at [57].

31 See prosecutorial discretion cases including *Sharma v Brown Antoine [2007] 1 W.L.R.780*.

32 *Re Hutchings [2019] UKSC 26* at [63].

33 *Re Hutchings [2019] UKSC 26* at [64].

34 The three criteria that comprise the rule "should be strictly insisted upon" (Lord Bingham in *R. (on the application of Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] 2 A.C. 349* at [392D-E]).

35 Lady Hale, "UK Constitutionalism on the March?", keynote address to the Constitutional and Administrative Law Bar Association Conference, 12 July 2014, text available at: https://www.supremecourt.uk/docs/speech-140712.pdf [Accessed 16 October 2020].

36 *R. (on the application of A) v British Broadcasting Corp [2014] UKSC 25; [2015] A.C. 588* at [27].

 

37 See the Grand Chamber of the European Court of Human Rights in *Taxquet v Belgium (2012) 54 E.H.R.R. 26*.

38 Lord Mance in *Kennedy v Charity Commission [2014] UKSC 20; [2015] A.C. 455* at [46].

39 Lord Toulson in *Kennedy [2015] A.C. 455* at [133].

40 See s.9 of the 2007 Act. In August 2019, the non-jury trial provisions were extended until 31 July 2021.

41 See s.5(7) of the 2007 Act.

42 *R. v Secretary of State for the Home Department Ex p. Simms [2000] 2 A.C. 115* at 131.

43 P. Sales, "Rights and fundamental rights in English law" (2016) 75 C.L.J. 86.

44 *Re Hutchings [2019] UKSC 26* at [55].

45 *Al-Khawaja v United Kingdom (2012) 54 E.H.R.R. 23*.

46 L. Hoyano, "What is balanced on the scale of justice? In search of the essence of the right to a fair trial" [2014] Crim. L.R. 4, 8.

47 As accepted in *Re Arthurs' Application for Judicial Review [2010] NIQB 75*.

48 *Twomey, Cameron and Guthrie v United Kingdom (67318/09 & 22226/12), unreported, 28 May 2013, European Court of Human Rights* at [30].

49 *Re Hutchings [2019] UKSC 26* at [37]

50 *Attorney General's Reference (No 3 of 1999) [2001] 2 A.C. 91*, Lord Steyn, at [118].

51 *Re Hutchings [2019] UKSC 26* at [37], emphasis added.

52 Sales, "Rights and fundamental rights in English law" (2016) 75 C.L.J. 86, 90.

53 See, most famously, Sir William Blackstone, who heralded the jury as "the glory of the English law": *W. Blackstone, Commentaries on the Laws of England, 8th edn (1778), Vol. 3, p.379*.

54 *R. v Mirza [2004] UKHL 2; [2004] 1 A.C. 1118* at [7], per Lord Steyn (emphasis added).

55 *Misick v The Queen [2015] UKPC 31; [2015] 1 W.L.R. 3215* at [53], per Lord Hughes.

56 *Mirza [2004] 1 A.C. 1118* at [7], per Lord Steyn.

57 *Mirza [2004] 1 A.C. 1118* at [144], per Lord Hobhouse.

58 See Lord Hope in *Mirza [2004] 1 A.C. 1118* at [113].

59 See, e.g. the Supreme Court of Canada in *R. v Stillman [2019] SCC 40* at [28].

60 *Misick [2015] 1 W.L.R. 3215* at [55], per Lord Hughes.

61 *Mirza [2004] 1 A.C. 1118*. See also Lord Bingham in R v Abdroikov and others [2007] UKHL 37, at [23].

62 *Sander v UK (2000) 31 E.H.R.R 44*, at [25].

 

63 *Mirza [2004] 1 A.C. 1118* at [152].

64 These safeguards are discussed in *Mirza [2004] 1 A.C. 1118* by Lord Slynn at [50]-[52]; Lord Hope at [59]–[60], [126] and [141]–[143]; and by Lord Rodger at [151]–[156].

65 *Archbold: Criminal Proceeding, Evidence & Practice, edited by M. Lucraft (London: Sweet and Maxwell, 2020), para.4-266*.

66 So too is it included in the bills of rights of other common law jurisdictions, e.g. art.11(f) of the Canadian Charter of Rights and Freedoms.

67 *Re Arthurs' Application for Judicial Review [2010] NIQB 75* at [31], emphasis added.

68 Criminal Justice Act 2003 s.44(4).

69 *R. v Twomey [2009] EWCA Crim 1035; [2010] 1 W.L.R. 630*.

70 *R. v Twomey [2010] 1 W.L.R. 630* at [16]

71 *R. v J [2010] EWCA Crim 1755; [2011] 1 Cr. App. R. 5*.

72 *R. v J [2011] 1 Cr. App. R. 5* at [8].

73 *Misick [2015] 1 W.L.R. 3215*.

74 *Misick [2015] 1 W.L.R. 3215* at [49], emphasis added.

75 *Misick [2015] 1 W.L.R. 3215* at [53], emphasis added.

76 P. Craig, "The Nature of Reasonableness Review" (2013) 66(1) C.L.P. 131.

77 *Jordan's Application [2014] NICA 76*.

78 Sir Brian Kerr CJ in *McParland's Application (2008) NIQB 1* at [46] cited in *Jordan's Application [2014] NICA 76* at [83].

79 See the reference in *Re Hutchings [2019] UKSC 26* at [45].

80 *D. Seymour, Tenth Report of the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007 (TSO, 2018), para.23.3*.

81 *Anisminic Ltd v Foreign Compensation Commission [1969] 2 A.C. 147*.

82 *S. Sedley, Lions Under the Throne (Cambridge: Cambridge University Press, 2015), p.42*.

83 It was not until the subsequent case of *O'Reilly v Mackman [1983] 2 A.C. 237*, in which Lord Diplock, speaking on behalf of a unanimous House, summarised the effect of the House of Lords' earlier judgment, that the broader view of Anisminic was endorsed. This broader view was, however, prefigured by Lord Diplock's speech in *Re Racal Communications Ltd [1981] A.C. 374*.

84 *Re Shuker's Application for Judicial Review [2004] NIQB 20* at [25].

85 *Re Hutchings [2019] UKSC 26* at [16].

 

86 This was the conclusion of the court in *Re Arthurs' Application for Judicial Review [2010] NIQB 75*, in which Girvan LJ made the observation that not every step in the process which ultimately culminates in a criminal trial falls within the scope of art.6.

87 *R. (on the application of Evans) v Attorney General [2015] UKSC 21; [2015] A.C. 1787*.

88 *R. (on the application of Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22; [2020] A.C. 491*.

89 *Privacy International [2020] A.C. 491* at [131].

90 *R. (on the application of Cart) v Upper Tribunal [2011] UKSC 28; [2012] 1 A.C. 663*.

91 *Evans [2015] A.C. 1787* at [58].

92 A partial ouster clause was upheld by the House of Lords in *Smith v East Elloe RDC [1956] A.C. 736*.

93 *De Smith's Judicial Review, edited by H. Woolf et al, 8th edn (London: Sweet and Maxwell, 2018), para.4-031*.

94 *L. Mallinder et al, The Historical Use of Amnesties, Immunities, and Sentence Reductions in Northern Ireland (Ulster University, Transitional Justice Institute, 2016), Research Paper No.16-12*.

95 *K. McEvoy, Amnesties, Prosecutions and the Rule of Law in Northern Ireland (TSO, 2017), Briefing Paper, Defence Select Committee, House of Commons*.

96 The Independent Reviewer of of the 2007 Act has observed that the decision of the DPP to issue non-jury trial certificates is "very thorough and meets high professional standards" and the statutory criteria are "applied with some rigour": *Seymour, Eleventh Report of the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007, paras 19.5 and 22.5*.

97 *Seymour, Tenth Report of the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007, para.22.14*.

98 *Seymour, Tenth Report of the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007, para.23.2*.

99 *Osborn v Parole Board [2013] UKSC 61; [2014] A.C. 1115* at [57].

 