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Tariff certified by the Secretary of State under Life Sentences (NI) Order 2001 on 01-04-08

THE QUEEN

-v-

VICTOR GRAHAM

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DECISION ON TARIFF

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Ruling by Kerr LCJ

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KERR LCJ

Introduction

[1] On 24 June 1992, following a trial before Murray LJ, sitting at Belfast Crown Court without a jury, the prisoner was convicted of the murder of Malachy Trainor at Rathcoole on 15 May 1989 and Samuel James Marshall at Lurgan on 7 March 1990. He was sentenced to life imprisonment on each of these charges. He was also convicted and sentenced to terms of imprisonment in respect of a number of other offences as set out below: -

Possession of firearms with intent	15 years
Assault and unlawful imprisonment (2 counts)	7 years (2 counts)
Conspiracy to murder (2 counts)	15 years (2 counts)
Collecting information useful to terrorists	7 years

Conspiracy to murder	7 years
Grievous bodily harm (7.1.89)	15 years
Possession of firearms with intent	5 years
AOABH (4 counts)	2 years (4 counts)
Conspiracy to assault	5 years
Possession of firearms with intent	5 years
Attempting to collect information	5 years
Robbery (2 counts)	10 years (2 counts)
Theft	1 year
Robbery	14 years
Attempted Robbery (2 counts)	14 years (2 counts)
Attempted Robbery	12 years
Membership of a proscribed organisation	10 years
Hijacking	10 years
Possession of firearms with intent (2 counts)	10 years (2counts)
Threats to persons	10 years
Arson of motor vehicles	3 years
Possession of information likely to be of use to terrorists	3 years

[2] The prisoner was first committed to custody on 8 October 1990. He was released on licence under the Northern Ireland (Sentences) Act 1998 on 28 July 2000 by which time he had served nine years and nine months'

imprisonment. At that stage the Sentence Review Commissioners concluded, in accordance with the provisions of the 1998 Act, that a period of 16 years would satisfy retribution and deterrence. On 22 August 2001 the prisoner's licence was suspended by the Secretary of State and on 7 October 2002 his licence was revoked.

[3] The prisoner appealed his conviction on the basis that the confessions on which his convictions were based should have been held to be inadmissible as they had been obtained unfairly. The essence of the objection to their admissibility was that they were obtained by an elaborate deception perpetrated on the prisoner by a number of RUC officers and that he only confessed because he hoped to become a 'supergrass'. The case was not made that the confessions were untrue. The trial judge had ruled after a lengthy *voir dire* hearing that the confessions were admissible. The Court of Appeal concluded that the allegations of alleged deception were entirely without foundation and that no plausible challenge to the veracity of the police evidence had been made out. His appeal was dismissed by the Court of Appeal on 18 January 1994.

[4] Although the prisoner was offered the opportunity to make oral representations through legal advisers on the tariff to be set under article 11 of the Life Sentences (Northern Ireland) Order 2001, he elected to have this determined on the papers. The tariff represents the appropriate sentence for retribution and deterrence and is the length of time that the prisoner will be required to serve before his case is sent to the Life Sentence Review Commissioners whose responsibility it will then be to assess his suitability for release on the basis of risk.

Factual background

[5] After having been arrested on suspicion of robbery the prisoner confessed to the murders and other offences during interviews with the police over the course of 7 days between 8 October and 14 October 1990.

The murder of Malachy Trainor

[6] The trial judge was satisfied with the Crown's account of the facts, which were based for the most part on the prisoner's confessions. In relation to the murder of Malachy Trainor the trial judge said:-

"The Crown have satisfied me that the basic facts are as follows: — shortly before 9.00 am on 15 May 1989 Malachy Trainor ("the deceased") accompanied by two of his employees, Cargin and Murphy, arrived in his silver Nissan car in Clonmore Green, Rathcoole, to do some joinery work on a block of flats there. He parked his car outside number 18. Very shortly after 9.00 am when the deceased was standing in the roadway beside his car, a red Escort van (registration number VOI 2133) travelling from the end of Clonmore Green at which numbers 32/36 are situated, drove past him and stopped. The back doors opened and a masked gunman with a revolver (a .38) leapt from the back of the van and fired a volley of shots at the deceased; at the same time a second gunman, who remained in the back of the van and was armed with a rifle (an AK 47) also fired a volley of shots at the deceased who was mortally wounded and died immediately on the road; 14 spent bullet cases were later found in the immediate area. After the shooting the van drove off at speed to Crossreagh Drive, then into Derrycool Way and on to Derry Kill where it stopped. There the gunmen alighted, ran through some derelict flats and into number 37 Doonbeg Drive (the home of the defendant Dunigan). The van was then driven to Glynn Park a little further away and was there abandoned. The van had been stolen the night before from one Jack Reynolds of 32 Braehill Road, Crumlin Road, Belfast.

…

In Statement 2 Graham gave a detailed account of his part in the murder of Malachy Trainor, *i.e.* that he was one of the two UVF gunmen who riddled the defenceless Trainor with bullets and thereby killed him instantly as Trainor stood in the street beside his car preparing to start work on the flats in Clonmore Green in the early morning of 15 May 1989. As I have explained, Graham spent a great deal of his time in

> the witness box in the voir dire explaining to the Court how he made every effort to give the police truthful and accurate statements of the many crimes, including the murder of Trainor, which he had committed, and then in the main trial he refused to answer any questions about the truth of those statements."

The murder of Samuel Marshall

[7] In relation to the murder of Samuel Marshall the trial judge said: -

> "The Crown have satisfied me that the basic facts are as follows:-about 7:30 pm on 7 March 1990 Samuel James Marshall (I refer to him as "the deceased") left the RUC station in Lurgan with two other men called Duffy and McCaughey — the station being situated at the junction of North Street and Wellington Street — all three having been at the station to sign the bail book. As they walked up North Street to the T-junction where Kilmaine Street runs into North Street from the left they became aware of a red Rover car passing them on its way northward up North Street. As the deceased and his two companions reached the T-junction I have just mentioned, two gunmen, each armed with a rifle, alighted from the car, made their way towards the T—junction, and started firing at the deceased Marshall and his two companions. Duffy managed to escape along Kilmaine Street, McCaughey ran back down North Street but the deceased was mortally wounded by the hail of bullets and died instantly at the gable wall one sees as one makes a left turn from North Street into Kilmaine Street. The scene of the crime is clearly seen in photograph [2) in album [J]. The red Rover car was found about 8.11pm that evening abandoned and burnt out on Halliday's Bridge on the Ml. It had been hi—jacked the previous evening from its owner Brian Jackson (a taxi driver) at his home 12 Tynedale Gardens, Belfast by a trio of masked men two of whom kept the owner and his wife and children

> prisoner while the car was driven away by a fourth member of the gang who received the keys from the third member. The registration number of the car was WIJ 2349.
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> …
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> In statement 3 Graham tells of his joining other UVF members in using masks and a gun to hi-jack Brian Hunter's red Rover car which, to his knowledge, was to be used for a UVF job and to imprisoning Brian Hunter and his wife for a time to secure the success of the hi-jacking. In Statement 3 Graham says (and I quote) he "had a fair idea it [*i.e.* the car] was for a hit" ("he had a fair idea it was for a hit") which is established paramilitary jargon for a shooting. He refused to answer questions about the truth of his statement and, moreover insofar as it deals with the hi-jacking and the false imprisonment it is wholly inconsistent with the facts which earlier in this judgment I have found to be established by independent evidence. In the result I draw the inference under Article 4 that Statement 3 insofar as it deals with Graham's part in the Marshall murder is true, and in particular that Graham knew full well that he was aiding and abetting other UVF members in a murder — a murder which turned out to be that of Samuel Marshall the next day in Lurgan."

Personal background of the prisoner

[8] The only information available about the prisoner's personal background is that contained in the RUC report on accused person (Form 41/1), completed at about the time he was committed for trial. There it was noted that he had been educated at the Boys Model School in Ballysillan. His main employment since leaving school had been as a labourer but he was unemployed at the time of his arrest. It was recorded that he had married an Indian girl in order to allow her to obtain immigration status to reside in the United Kingdom. He lived with the girl for a period and had received payment for contracting marriage with her. He has no children. The prisoner has an extensive record for theft/burglary/robbery offences

over an eleven year period from 1978 to 1989. He has no previous convictions for violence against the person. Mr Graham was aged 29 years and eight months when the murder of Malachy Trainor took place and thirty and one half years when Mr Marshall was killed. He is now forty-nine.

Representations

[9] No representations have been received from the families of the murdered men and the prisoner's solicitors have indicated that he does not wish to make written submissions, being apparently, happy to accept the assessment of the sentence review commissioners.

[10] That assessment has, of course, been overtaken by the prisoner's subsequent arrest and the suspension of his licence. This does not mean, however, that that assessment is irrelevant to the determination of the minimum period to be served in this case. I dealt with this issue in *Brady* where, considering the implications of *R v Flynn and others*, I said:-

> "20. In *R v Flynn and others* each of the appellants had been notified of a date on which their cases would be considered by the Parole Board for Scotland and each therefore could, in the words of Lord Bingham of Cornhill, "hope, realistically, that he might be considered safe to release" at that time. Section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993, as amended by Convention Rights (Compliance) (Scotland) Act 2001, and Schedule 1 to the 2001 Act swept away the previous regime whereby a prisoner sentenced to life imprisonment had his tariff fixed by a minister, after receiving advice from the Parole Board. The punitive part of the life sentence was to be fixed by a judge in open court and would be subject to appeal in the normal way.
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> 21. The introduction of these changes had the consequence that prisoners who had already received an indication that their cases were to be considered by the Parole Board could no longer expect that their release would depend on a favourable indication by

> that body. The Privy Council held the High Court, when specifying the punishment part of the life sentence to be served by each of the appellants, could take account of and give appropriate weight to the Parole Board hearing dates formally notified to them.
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> 22. *A fortiori* it appears to me that I must take into account the indication given to this prisoner by the Sentence Review Commissioners. I am not bound to fix the minimum period at that level but I must give due weight to the fact that the prisoner considered that this was the period that he would be required to serve to satisfy the requirements of retribution and deterrence."

Practice Statement

[11] In *R v McCandless & others* [2004] NICA 1 the Court of Appeal held that the *Practice Statement* issued by Lord Woolf CJ and reported at [2002] 3 All ER 412 should be applied by sentencers in this jurisdiction who were required to fix tariffs under the 2001 Order. The relevant parts of the *Practice Statement* for the purpose of this case are as follows: -

> *"The normal starting point of 12 years*
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> 10. Cases falling within this starting point will normally involve the killing of an adult victim, arising from a quarrel or loss of temper between two people known to each other. It will not have the characteristics referred to in para 12. Exceptionally, the starting point may be reduced because of the sort of circumstances described in the next paragraph.
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> 11. The normal starting point can be reduced because the murder is one where the offender's culpability is significantly reduced, for example, because: (a) the case came close to the borderline between murder and manslaughter; or (b) the offender suffered from mental disorder, or from a mental disability which lowered the degree of his criminal responsibility for the killing, although not

affording a defence of diminished responsibility; or (c) the offender was provoked (in a non-technical sense), such as by prolonged and eventually unsupportable stress; or (d) the case involved an overreaction in self-defence; or (e) the offence was a mercy killing. These factors could justify a reduction to eight/nine years (equivalent to 16/18 years).

The higher starting point of 15/16 years

12. The higher starting point will apply to cases where the offender's culpability was exceptionally high or the victim was in a particularly vulnerable position. Such cases will be characterised by a feature which makes the crime especially serious, such as: (a) the killing was 'professional' or a contract killing; (b) the killing was politically motivated; (c) the killing was done for gain (in the course of a burglary, robbery etc.); (d) the killing was intended to defeat the ends of justice (as in the killing of a witness or potential witness); (e) the victim was providing a public service; (f) the victim was a child or was otherwise vulnerable; (g) the killing was racially aggravated; (h) the victim was deliberately targeted because of his or her religion or sexual orientation; (i) there was evidence of sadism, gratuitous violence or sexual maltreatment, humiliation or degradation of the victim before the killing; (j) extensive and/or multiple injuries were inflicted on the victim before death; (k) the offender committed multiple murders.

Variation of the starting point

13. Whichever starting point is selected in a particular case, it may be appropriate for the trial judge to vary the starting point upwards or downwards, to take account of aggravating or mitigating factors, which relate to either the offence or the offender, in the particular case.

14. Aggravating factors relating to the offence can include: (a) the fact that the killing was planned; (b) the use of a firearm; (c) arming with a weapon in advance; (d) concealment of the body, destruction of the crime scene and/or dismemberment of the body; (e) particularly in domestic violence cases, the fact that the murder was the culmination of cruel and violent behaviour by the offender over a period of time.

15. Aggravating factors relating to the offender will include the offender's previous record and failures to respond to previous sentences, to the extent that this is relevant to culpability rather than to risk.

16. Mitigating factors relating to the offence will include: (a) an intention to cause grievous bodily harm, rather than to kill; (b) spontaneity and lack of pre-meditation.

17. Mitigating factors relating to the offender may include: (a) the offender's age; (b) clear evidence of remorse or contrition; (c) a timely plea of guilty.

Very serious cases

18. A substantial upward adjustment may be appropriate in the most serious cases, for example, those involving a substantial number of murders, or if there are several factors identified as attracting the higher starting point present. In suitable cases, the result might even be a minimum term of 30 years (equivalent to 60 years) which would offer little or no hope of the offender's eventual release. In cases of exceptional gravity, the judge, rather than setting a whole life minimum term, can state that there is no minimum period which could properly be set in that particular case.

> 19. Among the categories of case referred to in paragraph 12, some offences may be especially grave. These include cases in which the victim was performing his duties as a prison officer at the time of the crime or the offence was a terrorist or sexual or sadistic murder or involved a young child. In such a case, a term of 20 years and upwards could be appropriate."

Conclusions

[12] This is clearly a higher staring point case. The prisoner's culpability was exceptionally high and both victims were entirely vulnerable – in the words of the trial judge, they were defenceless. Quite apart from these considerations, however, there are present in this case several factors such as have been instanced in paragraph 12 of the *Practice Statement*. The killings were politically motivated. The victims were targeted because of their religion. More than one murder was committed.

[13] There are two significant aggravating factors relating to the offence: (a) the fact that the killings were planned; (b) the use of a firearm in each instance. No mitigating factors have been canvassed and I have been quite unable to detect any.

[14] Because three factors present in paragraph 12 of the *Practice Statement* arise in this case, it is necessary to consider the invocation of paragraph 18. It is also required that due effect be given to paragraph 19 since these were plainly terrorist crimes. Having reflected on these, and bearing in mind the expectation that the prisoner will entertain as a result of the assessment of the Sentence Review Commissioners, I have concluded that the minimum period in his case must be twenty-two years. This will include the time spent on remand.