Neutral Citation No.: [2008] NIQB | *Ref:* **HIG7294**

Judgment: approved by the Court for handing down | *Delivered:* **12/11/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

Between:

ANTHONY MONTGOMERY

Applicant;

-and-

THE GOVERNOR OF HER MAJESTY'S PRISON MAGHABERRY

Respondent.

In the matter of an application by Anthony Montgomery
For the issue of a writ of habeas corpus ad subjiciendum

_____

Higgins LJ and Girvan LJ

HIGGINS LJ

[1] This is an application for a writ of habeas corpus ad subjiciendum and judicial review seeking the immediate release of the applicant from Her Majesty's Prison, Maghaberry and an order of certiorari to bring up and quash a decision of the Northern Ireland Prison Service that the applicant's date of release from prison is 17 December 2008 and ancillary reliefs including a declaration that his date of release should have been 11 October 2008. The substance of the application is that the Northern Ireland Prison Service has erred in law in the calculation of the applicant's date for release. The court decided to hear the application for a writ of habeas corpus first as a matter of urgency. Having heard submissions from counsel the court ruled that the applicant's release date from the sentence imposed on 5 September 2008 should be calculated by reference to the entire period he was on remand in custody in respect of the complaint that he was in breach of a probation order imposed by the Crown Court. This ruling resulted in the applicant's release. It was stated at the time that reasons for that ruling would be given at a later date.

[2] The applicant was charged with burglary and remanded in custody on 19 January 2008. On 9 April 2008 an officer of the Probation Board made a complaint against the applicant that he was in breach of a probation order imposed by Belfast Crown Court on 5 December 2007 as part of a custody probation order in respect of a number of different offences. A warrant was issued and executed when the applicant appeared on remand on 9 April 2008 on the charge of burglary. The applicant was then remanded in custody on both the charge of burglary and the complaint of breach of the probation order. The applicant was remanded on the complaint initially to 11 April 2008 and thereafter on divers dates until 17 June 2008. At Belfast Magistrate's Court on 17 June 2008 the applicant was returned in custody to the Crown Court on the complaint that he was in breach of the probation order. At Belfast Magistrates' Court on the same date, 17 June 2008, the applicant pleaded guilty to the charge of burglary and was sentenced to 10 months imprisonment. He was adjudged by the Prison Authorities to be 'time served' in respect of the burglary charge on that date and the sentence was deemed to have been served. This was brought about because he had been remanded in custody from 19 January 2008. When this period of custody was deducted from the sentence of 10 months he was found to have no further period of custody to serve. He would ordinarily have been released. However as he was remanded in custody on the complaint of being in breach of the probation order he was returned to the 'Untried Class' at HMP Maghaberry. He remained on remand in custody on the breach of probation charge until he appeared at Belfast Crown Court on 5 September 2008. On that date the applicant was sentenced to 12 months imprisonment in respect of the breach of probation.

[3] The applicant was remanded from 19 January 2008 to 17 June 2008 on the charge of burglary and from 9 April 2008 to 5 September 2008 on the charge of breach of probation. The sentences imposed comprised 10 months and 12 months respectively but were neither consecutive nor concurrent and were passed by different Courts on different dates, almost three months apart. At 5 September 2008 the sentence in respect of the burglary had long expired and the applicant faced a single sentence of twelve months. It fell to the prison authorities to determine his release date from that sentence. In the calculation of that release date the applicant was given credit for the period spent on remand in custody from 17 June 2008 to 5 September 2008. The applicant was informed by the Prison Service that his release date from the sentence in respect of the breach of probation would be 17 December 2008. The applicant alleged that this date is incorrect and that the true date was 11 October 2008. It was alleged by the applicant that the period spent in custody on remand in respect of the complaint that he was in breach of the probation order from 9 April 2008 until he was sentenced on 5 September 2008 should be taken into account in the calculation of his release date and, if so done, would provide an effective release date of 11 October 2008 and not 17 December 2008. It was contended by the respondent that the applicant is

entitled to credit only for the period on remand between 17 June 2008 until 5 September 2008, when he was on remand on the breach of probation charge, but not for the period of time between 9 April 2008 and 17 June 2008 when he was also on remand for the burglary charge. It is alleged that this would be double counting which is not permitted.

[4] Credit for periods spent on remand in custody is provided for in Section 26 of the Treatment of Offenders (Northern Ireland) Act 1968, as amended. Section 26(2) states –

> "26.- (2) The length of any sentence of imprisonment or term of detention in a young offenders centre imposed on or ordered in relation to an offender by a court shall be treated as reduced by any relevant period, but where he was previously subject to a probation order, a community service order, an order for conditional discharge or a suspended sentence or order for detention in respect of that offence, any such period falling before the order was made or the suspended sentence or order for detention was passed or made shall be disregarded for the purposes of this section.
>
> (2A) In subsection (2) "relevant period" means-
>
> (a) any period during which the offender was in police detention in connection with the offence for which the sentence was passed; or
>
> (b) any period during which he was in custody-
>
> (i) by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to that sentence or the offence for which it was passed or any proceedings from which those proceedings arose; or
>
> (ii) by reason of his having been so committed and having been concurrently detained otherwise than by order of a court."

[5] It is clear from the wording of paragraph (2) that the length of any sentence of imprisonment or term of detention is to be reduced by the relevant period. The relevant periods are defined in paragraph (2A)(a) and

(b). For the purposes of this application the relevant period is provided for in paragraph 2(a)(i), that is, any period during which the offender was in custody by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to that sentence. A warrant was executed in respect of the applicant and he was committed to custody by an order of a Magistrate's Court and that committal was made in connection with proceedings relating to the sentence of twelve months imprisonment which was imposed on 5 September 2008. Therefore the applicant qualified for credit for a period on remand on the complaint that he was in breach of the probation order. The question is how much credit is he due on that complaint. The argument on behalf of the applicant is simple, namely that the applicant satisfied the conditions of the legislation and is entitled to credit for the entire period he was on remand on the breach of probation complaint. Until recently that is the way in which the prison service would also have calculated his release date. Credit for time spent on remand was calculated by reference to when the offence was 'first before the court'. In this instance that was 9 April 2008. Criminal law practitioners also understood this to be the approach taken by the Prison Service. It was the method of calculation applied in England and Wales until 1996.

[6] In September 2007 an issue arose within the Prison Service about remand time in respect of a different prisoner who was transferred from HMP Maghaberry to HMP Magilligan. The case was considered under the 1968 Act in conjunction with two cases in the Divisional Court in England and Wales (referred to simply as ex parte Evans and ex parte McMahon). Following consultation with their colleagues in England and Wales and legal advice, the Prison Service introduced new Guidance on the crediting of remand time, referred to as "crediting of 'relevant' remand time". This guidance was introduced and implemented in respect of all prisoners sentenced on or after 11 February 2008. After seeking further advice more guidance was issued on 30 July 2008. According to paragraph 7 of the affidavit of Miss Stinson of the Establishment Support Branch of the Prison Service this guidance applies –

> "the sentence calculation principles, determined by Evans whereby 'relevant' remand time pertaining to concurrent sentences (which wholly or partially overlap) is aggregated and deducted from the latest calculated date of release (i.e. the last sentence to expire) but on the condition that remand time can only be given once. It also applies principles derived from the unreported 1997 English decision in the case of McMahon."

[7] On 25 July 2008 Prison Service determined that these principles should be implemented with immediate effect for all sentenced prisoners in custody. Accordingly a "Sentence Calculation – NIPS Guidelines 2008" document was

issued on 30 July 2008. This refers to the legislation and Prison Rules and sets out the principles to be followed. Sample calculations are also included. This court is not concerned in this application with many of the examples given, rather with the particular circumstances relating to this applicant and the sentences imposed on him and the period he has spent on remand. However the court is concerned with the validity of the principles established by the Prison Service and the cases from which they are said to derive.

[8] The 2008 guidance identifies in paragraph D (i) three fundamental principles in relation to remand. These are stated to be -

a) credit must be given for any previous period of relevant police or remand custody,
b) credit is given for the totality of the period spent in custody,
c) credit is given once only.

Other sub-paragraphs of paragraph D are relevant –

> "(iv) Where a prisoner has spent time in custody awaiting trial for more than one offence and on conviction was sentenced to concurrent, or partly concurrent i.e overlapping, terms of imprisonment for those offences, the period by which the sentence is to be reduced is the total period that the prisoner spent in custody before sentence on remand or in police detention for any of those offences and not merely the period spent in custody in respect of the offence for which the longest sentence was passed or, if the sentences were imposed on different occasions, for which the sentence was to expire last (Evans and Reid).
>
> However, any such periods cannot be taken into account more than once, nor can any period be taken into account during which the prisoner was in custody for some reason unrelated to the offences for which he was sentenced.
>
> (viii) In the case of concurrent sentences imposed on different days, the terminal date or EDR will be the terminal date of the last sentence to expire which may or may not be the longest of the individual sentences."

[9] Applying the 2008 Guidance to the applicant it was determined that in the calculation of his release date in respect of the offence of burglary for

which he was sentenced to 10 months imprisonment on 17 June 2008 he was credited with remand time from 19 January 2008 until the date of sentence. This included the period 9 April 2008 to 17 June 2008 when he was also on remand in respect of the breach of probation. In the calculation of his release date from the sentence of twelve months imprisonment imposed on 5 September 2008 in respect of the breach of probation he was credited with remand time from 17 June 2008 to the date of sentence. He was not credited with the period on remand from 9 April 2008 to 17 June 2008 as it was determined that this period had been "consumed in the original 10 month sentence for burglary" (see paragraph 6 of the affidavit of Laurie Clements, a Court Co-ordinator and Sentence Calculator in the Prison Service).

[10] It is necessary therefore to consider the cases of Ex parte Evans and other cases dealing with the issue of remand time. In England and Wales the relevant statutory provisions relating to credit of remand time are to found in Criminal Justice Act 1967 and the Criminal Justice Act 1991. As originally enacted Section 67 of the 1967 Act provided –

> "S.67 (1) The length of any sentence of imprisonment imposed on an offender by a court shall be treated as reduced by any period during which he was in custody by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to that sentence or the offence for which it was passed or any proceedings from which those proceedings arose, but where the offender was previously subject to a probation order, an order for conditional discharge or a suspended sentence in respect of that offence, any such period falling before the order was made or suspended sentence passed shall be disregarded for the purposes of this section. . . .
>
> (4) Any reference in this Act or any other enactment (whether passed before or after the commencement of this Act) to the length of any sentence of imprisonment shall, unless the context otherwise requires, be construed as a reference to the sentence pronounced by the court and not the sentence as reduced by this section."

Section 104 of the Criminal Justice Act 1967 provided –

> "For the purposes of any reference in this Act, however expressed, to the term of imprisonment or other detention to which a person has been sentenced

> or which, or part of which, he has served, consecutive terms and terms which are wholly or partly concurrent shall be treated as a single term."

Section 67 was amended and in 1996 it provided –

> "(1) The length of any sentence of imprisonment imposed on an offender by a court shall be treated as reduced by any relevant period, but where he was previously subject to a probation order, a community service order, an order for conditional discharge or a suspended sentence in respect of that offence, any such period falling before the order was made or suspended sentence passed shall be disregarded for the purposes of this section. (1A) In subsection (1) above 'relevant period' means—(a) any period during which the offender was in police detention in connection with the offence for which the sentence was passed; or (b) any period during which he was in custody—(i) by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to that sentence or the offence for which it was passed or any proceedings from which those proceedings arose; or (ii) by reason of his having been so committed and having been concurrently detained otherwise than by order of a court."

Section 33(1) of the Criminal Justice Act 1991 provides -

> "As soon as a short-term prisoner has served one-half of his sentence, it shall be the duty of the Secretary of State . . . (b) to release him on licence if that sentence is for a term of 12 months or more."

A "short-term prisoner" is defined in sub-section 5 to mean a person serving a sentence of imprisonment for a term of less than four years.

Section 51(2) of the Criminal Justice Act of 1991 provides -

> "For the purposes of any reference in this Part, however expressed, to the term of imprisonment to which a person has been sentenced or which, or part of which, he has served, consecutive terms and terms which are wholly or partly concurrent shall be treated as a single term."

Section 41 of the Criminal Justice Act of 1991 provides under the heading 'remand time to count towards time served' -

> "S. 41 (1) This section applies to any person whose sentence falls to be reduced under section 67 of the Criminal Justice Act 1967 . . . by any relevant period within the meaning of that section ('the relevant period'). (2) For the purpose of determining for the purposes of this Part—(a) whether a person to whom this section applies has served one-half or two-thirds of his sentence; or (b) whether such a person would (but for his release) have served three-quarters of that sentence, the relevant period shall, subject to subsection (3) below, be treated as having been served by him as part of that sentence."

For the purposes of this application the relevant legislation in Northern Ireland and England and Wales are comparable. I mention the additional sections in England and Wales as a number of the cases concerned the calculation of release dates by reference also to a prisoner's entitlement to release after serving one-half or two thirds of the sentence imposed.

[11] The case referred to in the guidance as Ex parte Evans is Regina v Governor of Brockhill Prison, Ex parte Evans and Regina v Governor of Onley Young Offender Institution, Rugby, Ex Parte Reid [1997] QB 443. It concerned two prisoners Michelle Evans and Paul Reid. Lord Bingham of Cornhill CJ gave the judgment of the Divisional Court in the course of which he considered several previous cases. These cases concerned, inter alia, whether time spent on remand was credited only to the specific offence on which the prisoner was remanded in custody ("the particular approach") or whether periods spent on remand were totalled and credited to the total sentence imposed ("the aggregate approach"). A further issue was whether remand time was deducted before the sentence or total sentence was halved in accordance with section 33 of the Criminal Justice Act 1991, or afterwards. The judgment opens with two statements of apparent general application. These are -

> "If a defendant spends time in custody awaiting trial for a single offence, and if on conviction he is sentenced to a term of custody, the term he is required to serve will be reduced by the period he spent in custody before sentence (unless during that pre-sentence period he was in custody for some reason unrelated to the offence for which he is sentenced).

> If he spends time in custody awaiting trial for more than one offence, and if on conviction he is sentenced to consecutive terms of custody, the total term he is required to serve will be reduced by the total period he spent in custody before sentence, subject to the same exception as before, at any rate so long as the period spent on remand for any offence does not exceed the period to be served of the consecutive sentence imposed for that offence."

In the third paragraph Lord Bingham CJ identified the problem that arose for consideration in the cases of Evans and Reid, in these terms –

> "These applications concern a third situation: where a defendant spends time in custody awaiting trial for more than one offence, and is on conviction sentenced to concurrent or overlapping terms of custody. To what extent is account to be taken, in assessing the term of custody to be served in pursuance of the sentence in that situation, of time spent in custody (otherwise than for some unrelated reason) before the sentences were imposed? That is the problem the court is now called upon to resolve."

[12] On 12 January Evans was sentenced to two years imprisonment for robbery, 9 months imprisonment for each of two burglaries and 3 months for assault occasioning actual bodily harm and all the sentences were ordered to be served concurrently. Between 20 June 1995 and 18 August 1995 she was on remand in custody on the burglary and assault charges, a total of 60 days. She was in police custody for 2 days in May 1995 in respect of the burglary charges (making 62 days on remand for the burglaries). Between 31 October and 11 January 1996 she was in custody on the charge of robbery alone, a period of 73 days. The Prison Governor identified the robbery as the longest sentence and deducted 73 days only as credit for time spent on remand (the particular approach). Evans wished to have the periods of 62 and 73 days aggregated and deducted from the total concurrent sentences of two years. She did not seek to count twice the 60 days spent on remand for the burglaries and the assault charges.

[13] On 7 May 1996 Reid was sentenced to multiple concurrent sentences of detention totalling 27 months as follows –

1. Handling – 9 months;
2. Burglary - 27 months;
3. Burglary - 27 months;

4. Burglary - 27 months;
5. Burglary - 27 months.

He spent three periods on remand –

a) 21 November 1995 to 17 January 1995 (58 days);
b) 20 January 1995 to 1 May 1995 (102 days) in respect of offences 2 and 3;
c) 9 December 1995 to 7 May 1996 (150 days) in respect of offences 2, 3 and 4, and from 11 March 1996 to 7 May 1996 in respect of offence 5 (58 days).

It was agreed that the sentence totalled 822 days from which the Governor deducted 58 days the period Reid was on remand in respect of offence 5. The applicant sought to deduct a total of 310 days spent on remand in respect of all the offences.

[14] In both cases the different sentences imposed were regarded as a single term by virtue of Section 51(2) and Section 104(2). (The corresponding provision in Northern Ireland to section 104 is Section 33 (the interpretation section) of the 1968 Act.) The respondents to the application in Ex parte Evans relied on a series of cases from 1982 to 1997 which were then analysed in turn. They were Reg. v Governor of Blundeston Prison, Ex parte Gaffney [1982] 1 WLR 696, Reg. v Secretary of State for the Home Office, Ex Parte Read [1987] 9 Cr App Rep(S) 206 and Reg. v Governor of Styal Prison, Ex Parte Mooney [1996] 1 Cr App R. (S) 74, Reg. v Secretary of State for the Home Department, Ex Parte Naughton [1997] 1 WLR 118.

[15] Having reviewed these cases Lord Bingham CJ stated that "sentence" in sections 31 of the Criminal Justice Act 1991 must be interpreted in the light of section 51(2) which required any reference to a term of imprisonment, however expressed, to be treated as a single term even though it was made up of consecutive or wholly or partly concurrent terms. The length of the term is dependent on the sentence pronounced by the court and in the case of consecutive sentences the single term is the total of the sentences imposed consecutively whether passed on the same or different occasions. In the case of concurrent sentences the single term is the longest of the sentences whether imposed on the same or different occasions or the sentence which expires last.

[16] At page 460 Lord Bingham stated his conclusions and page 461 said –

> "As we read them, section 51(2) and section 104(2) focus attention on the overall term ordered to be served as distinct from the terms, whether consecutive or concurrent, which contribute to or go to make up that overall term. Thus sentences of nine months' and nine months' consecutive are to be regarded as a single term of 18 months' and the

> period to be served is nine months, not 4½ months and 4½ months. On this construction it would, at first blush, seem illogical and inconsistent to revert to consideration of the individual sentences contributing to or making up the overall term in order to determine what period of custody on remand is to be set against each. The argument for doing so essentially rests on the singular language ("that sentence or the offence for which it was passed") in section 67(1A). But by section 6(c) of the Interpretation Act 1978 words in the singular include the plural unless the contrary intention appears. Since section 67(1A) applies to single as well as multiple sentences there was good reason to use the singular. Does a contrary intention appear? In our judgment it does not: as already indicated, we consider that logic and consistency support application of the statutory rule of interpretation. Considerations of justice point in the same direction. Time spent in custody in relation to any of the offences for which sentence is passed should serve to reduce the term to be served, subject always to the condition that time can never be counted more than once."

It is clear that these remarks were made and intended to be made in the context of a term of imprisonment, whether concurrent or consecutive, whether imposed on the same or a different occasion, which term, that is a single term, was then being served.

[17] It is helpful to recount the circumstances in the earlier cases which were analysed in Ex parte Evans. In Reg. v Governor of Blundeston Prison, Ex parte Gaffney [1982] 1 WLR 696 the applicant was sentenced on the same day to concurrent sentences of 37 months for Offences A and 36 months for Offences B. For Offences A he was held in custody for a short period and for Offences B for 2 months, the periods being separate. The issue was whether he could count against the sentence for Offences A (the longest sentence) both periods spent in custody or only the short period. It was held that he was entitled to credit for the short period only against the sentence for Offences A. Lane LCJ observed that the result might be unjust but the court was forced to so rule by the wording of the Act. In Reg. v Secretary of State for the Home Office, Ex Parte Read [1987] 9 Cr App Rep(S) 206 the applicant sought a reduction in sentence as the application of the remand rule required him to spend a year longer in custody than his co-accused, who was sentenced to the same terms of imprisonment. In November 1977 he was remanded in custody for robbery A. In November 1978 his co-accused was arrested for robbery A. They were both convicted and sentenced to 15 years imprisonment. In July

1979 both were charged with robbery B and bailed, but not released as they were sentenced prisoners. In November 1979 both were convicted of robbery and sentenced to 18 years imprisonment reduced on appeal to 16 years imprisonment. The longest sentence was 16 years for robbery B and neither had been on remand for that offence and the applicant was not credited with time spent on remand in respect of robbery A. He sought a reduction of his 16 year sentence on the basis that the evidence for robbery B emerged from the trial of robbery A in respect of which he had been on remand for 18 months and that time spent on remand was in reality for robbery B. His application was refused. It was observed that to apply the applicant's argument to all cases would render the statutory provision difficult to apply when Parliament must have intended that credit for periods on remand in custody should be easy to apply. The next case was Reg. v Governor of Styal Prison, Ex Parte Mooney [1996] 1 Cr App R. (S) 74. On 29 November the applicant was sentenced for 19 offences. He was sentenced to 30 months concurrent for each of six burglaries, 6 months concurrent for each of eight thefts, for four going equipped for theft 12 months and for a further burglary a sentence of one day. All the sentences were ordered to run concurrently with each other, the longest of which was 30 months. One of the six burglaries for which he received 30 months was committed on 14 September 1993. Between February and September 1993 he spent 13 days in police custody for various of these offences, but not for the burglary on 14 September 1993. Between March and April 1993 he spent 15 days on remand in relation to one or more of the offences. In all he was in custody for 28 days but not in respect of the burglary committed on 14 September 1993. The Court was under the impression that section 104(2) had been repealed and rejected the submission that the phrase 'sentence of imprisonment' should be read as 'term of imprisonment' and held that section 67 required a particular approach following Ex Parte Gaffney and Ex Parte Read. The next case was Reg. v. Secretary of State for the Home Department, Ex Parte Woodward and Wilson (unreported) which was heard in June 1996. Woodward spent 143 days on remand before being sentenced to 33 months in custody. He served part of that sentence, absconded and committed further offences. He was rearrested and given a further three and a half years which was ordered to be served concurrently with the remainder of the sentence of 33 months imposed before he absconded. The issue was whether he was entitled to credit for the 143 days spent on remand as against the sentence of three and a half years when that period on remand was not in connection with the proceedings which led to the three and a half years sentence. Wilson spent 84 days on remand in custody for offences A and was then released on bail. Whilst on bail he committed further offences B, was arrested and then spent 160 days in custody awaiting trial on all charges. He was sentenced to concurrent sentences for all the offences totalling three and a half years. The issue was whether he was entitled to credit for the total number of days spent in custody (244) against the three and a half year sentence imposed for all the offences A and B or whether the 84 days spent in custody awaiting trial on

offences A could be credited against offence A only. The court held that the issue was resolved by looking at the wording of section 67 (and not section 104(2)) and that section clearly envisaged the particular approach. The Court agreed with the approach adopted in Ex Parte Mooney.

[18] Applying the approach adopted in Ex parte Evans Lord Bingham CJ commented on what the outcome in each of those earlier cases should have been. Had his approach been applied in Ex parte Gaffney the applicant would have gained the benefit of his second and longer period in custody, as he would if sentences of 19 and 18 months had been passed. In Ex parte Read the applicant would not have had to serve a year longer than his equally guilty co-defendant. In Ex parte Mooney the fact that the applicant had spent no time in custody for one of her many offences would not have deprived her of the benefit of the time she had spent in custody on all the others. In Ex parte Woodward, 24 June 1996, the applicant would have gained the benefit of the 143 days he spent on remand, although only once. In Ex parte Wilson the applicant also would have gained the benefit of the full period spent on remand and not only part.

[19] Another case which was considered by the Court in Ex parte Evans was Reg. v Secretary of State for the Home Department, Ex Parte Naughton [1997] 1 WLR 118. The applicant spent 81 days on remand in custody for a drugs offence before being released on bail. Later he was arrested for burglary and spent a further 239 days for both the burglary and the drugs offences before being sentenced on the same day to 18 months consecutive for each. Adopting the particular approach the applicant submitted that he was entitled for credit of 239 days against each sentence of 18 months. The respondent challenged the contention that he was entitled to credit twice. Simon Brown LJ rejected the adoption of the particular approach to consecutive sentences and this caused him to doubt that the particular approach to concurrent sentences adopted in Ex Parte Gaffney was in fact correct. He stated that if the result in Ex Parte Gaffney lead to the result contended for by the applicant in relation to consecutive sentences then he would hold that Ex Parte Gaffney was not correct in the approach to be adopted in concurrent sentences. The approach contended for in relation to consecutive sentences was regarded as absurd. Lord Bingham CJ commented that this decision, on its facts, was plainly correct and that the court rightly rejected the submission that the applicant could double-count the 239 days spent in custody simultaneously for both the cannabis and burglary offences. He also commented that the facts of Ex parte Naughton did not require the court to choose between the particular and aggregate approaches, though it was assumed that the former was preferred by that court.

[20] The issue whether concurrent and consecutive sentences were to be treated as one term came before the House of Lords in Regina v Secretary of State for the Home Department and Another, Ex parte Francois 1999 1 A.C.

43. In that case the applicant was sentenced on 5 August 1993 for various offences of dishonesty to a total of 19 months' imprisonment. On 7 January 1994, at another court, he was sentenced for drug offences to a total of four years' imprisonment consecutive to the 19 months. The Prison Service treated the 19-month term and the four-year term as a single term for the purposes of section 33 of the Criminal Justice Act 1991, so that the applicant's non-parole release date would be 19 April 1997. The applicant sought judicial review of that decision, contending that the two groups of sentences should be treated separately, resulting in release dates of 19 May 1994 and 13 January 1997 respectively. The Divisional Court of the Queen's Bench Division dismissed his application and as did the House of Lords on appeal. It was held that by section 51(2) of the Act of 1991 consecutive or concurrent terms of imprisonment, whether passed by the same court on the same occasion or not, were to be treated as one term for the purposes of Part II of the 1991 Act.

[21] In giving the leading opinion of the House Lord Slynn stated at page 52:

> "In the Divisional Court [1997] 2 Cr.App.R.(S.) 359, 364 Simon Brown L.J. considered that the point in this case had been decided in Reg. v. Governor of Brockhill Prison, Ex parte Evans [1997] Q.B. 443 dealing with concurrent sentences (see also Reg v Secretary of State for the Home Department, ex parte Naughton [1997] 1 W.L.R. 118 dealing with consecutive sentences). Those cases were dealing with the question as to how time spent in custody on remand was to be treated but it is clear in Ex parte Evans that the Divisional Court accepted that the aggregation required by section 51(2) applies whether the sentences are imposed on the same or on different occasions. Whether or not the Divisional Court in the present case was bound by that decision (as the applicant contended) in my opinion the Divisional Court in Ex parte Evans on that point and the Divisional Court in the present case came to the right conclusion."

It will be noted that each of these cases concerned sentences which were imposed either concurrently or consecutively to each other and were passed on the same or on different dates.

[22] It was submitted by Mr Larkin QC, who with Mr Scoffield, appeared on behalf of the applicant that the factual circumstances of this case are different from those considered in Ex parte Evans. While not disputing that assertion Dr McGleenan, who appeared on behalf of the respondent, relied on

that part of the judgment of Lord Bingham CJ in which he stated that no period on remand could be counted twice. It was submitted that a period on remand could be counted once and once only, regardless of the circumstances. Consequently the applicant having already had the benefit of the period from 9 April to 17 June 2008 credited towards his sentence on the burglary charge it could not be taken into account again in computing the earliest date of release from the sentence imposed for the breach of probation. In addition Dr McGleenan submitted that the imposition of the sentence of 10 months imprisonment on 17 June 2008 had the effect of converting the entire period of remand from 19 January 2008 to 17 June 2008 to a term of imprisonment for the burglary offence. Therefore during the period from 9 April 2008 to 17 June 2008 the applicant was notionally in custody serving a sentence of imprisonment. The use of the word 'only' in section 26 (2A)(b)(i) precluded the applicant having the benefit of a period in which he was in custody serving a sentence for another offence.

[23] The crucial factor in Ex parte Evans was that the proper interpretation of the relevant statutory provisions referred to above was that any reference to a sentence or sentences of imprisonment (or term or terms of imprisonment) were to be regarded as a single term, whether made up of consecutive, or wholly or partly concurrent sentences. The interpretation section of the Treatment of Offenders Act 1968, section 33(2) is to the same effect. It provides –

> "(2) For the purposes of any reference in [the Prison Act in relation to a sentence imposed before 1st March 1976 and] this Act to a term of imprisonment or to a term of detention in a young offenders centre, consecutive terms or terms which are wholly or partly concurrent shall be treated a single term." (This section has been amended by the Criminal Justice Order (Northern Ireland) 2008 with effect from 25 September 2008)

Where such a single term is being considered (whether made up of concurrent or consecutive sentences) the offender is entitled to have all periods of remand in custody credited towards that single term. It is in that context that Lord Bingham CJ stated that time spent in custody can never be counted twice. Where concurrent and consecutive sentences are treated as a single term, remand periods for different offences are aggregated and count towards the single term (whether concurrent or consecutive). Remand periods for different offences are not counted against the sentence for each offence, where the sentence is a single term, as that would result in the remand period being counted twice. It is clear that Lord Bingham's interpretation of the relevant statutory provisions is correct where concurrent and consecutive sentences are treated as a single term.

[24] In the instant case the applicant was sentenced on different dates to sentences which were neither consecutive nor concurrent. They were free-standing sentences and in respect of each the applicant had spent partly concurrent periods on remand. The sentences could not in any way be regarded as a single term. How periods of remand in such unusual (though not unique) circumstances should be treated was not considered in Ex parte Evans or any of the other cases to which we have been referred. In those circumstances it is necessary to consider the language of the statute. By section 26(2A) he is entitled to have his sentence of imprisonment reduced by any relevant period during which he was in custody by an order of a court made in connection with any proceedings relating to that sentence. The applicant was remanded in custody in connection with the complaint that he was in breach of the probation order for which breach he was sentenced. He was remanded in connection with that complaint from 9 April 2008. Coincidentally he was in custody on remand on the burglary charge for which he was given credit when sentenced on that charge. As was stated in Ex parte Naughton (and approved in Ex parte Evans) the use of the word 'only' in Section 2A(b)(ii) is intended to preclude any account being taken of periods in custody unrelated to the offence or offences for which the relevant sentence or sentences were passed. The period 9 April to 17 June 2008 could not be said to be unrelated to the complaint that he was in breach of probation as he was remanded in custody by a court of competent jurisdiction on that complaint. The fact that he was also on remand on another offence does not alter the position. Nor can that period on remand be regarded notionally as a term of imprisonment. This is a criminal statute and where the liberty of the subject is concerned it should be interpreted strictly and in accordance with the clear words of the section. It is clear that the applicant was on remand between 9 April 2008 and 17 June 2008 (and until 5 September 2008) in connection with the complaint that he was in breach of probation and was entitled to have his sentence on that complaint reduced by the entire amount that he was on remand on foot of the complaint. For these reasons we concluded that the applicant should be released immediately.

[25] As has been observed the applicant's case is unusual, though not unique. Sentencing courts should be aware of any periods spent by an offender on remand and in connection with which offence or offences. The fact that an offender has been on remand in connection with the offence for which he is to be sentenced is always a relevant factor and where appropriate can be taken into account in determining the appropriate sentence. Equally a sentencing court should be aware whether a period of remand in custody was solely in connection with the offence for which the offender is to be sentenced or whether it overlapped with, or was concurrent with, remand in custody for other offences. Depending on the individual circumstances of the offender and the offences (and whether he was guilty of them and what sentence was imposed), the fact of concurrent or overlapping remand periods may in itself

be a factor to be taken into consideration in determining the appropriate sentence. Whether it is will be a matter for determination by the sentencing court, but the court should at least be made aware of such remand periods.

[26] As was indicated earlier in this judgment we were referred to the guidance issued by the Prison Service and to various examples included in it. No arguments have been addressed to this court relating to the correctness of the guidance in other circumstances. It is stated that they are based on the decision in Ex parte Evans. To the extent that they are based on the judgment of Lord Bingham and relate to concurrent sentences or consecutive sentences passed on the same or on different dates and which are to be treated as a single term, there is no reason to doubt that an approach based on that judgment would be correct. Sentencing courts should take account of the approach of the Prison Service to time spent on remand in custody and the decision in Ex parte Evans in relation to concurrent and consecutive sentences. Furthermore sentencing courts should take account of this decision in relation to free-standing sentences where there have been overlapping or concurrent periods on remand in custody.

[27] Other submissions relating to an offender's legitimate expectation and Articles 5 and 7 of the European Convention on Human Rights were made briefly to the court. However in the particular circumstances of this case it is not considered necessary to address them.

[28] At the outset of his submissions Dr McGleenan questioned whether this application was truly a criminal cause or matter which would justify the application being heard by a Divisional Court. He submitted that it concerned an arithmetical exercise in the calculation of an offenders earliest release date. Mr Larkin QC referred to the discussion on this issue between the court and counsel in Ex parte Evans. All three experienced counsel representing both the applicants and the Secretary of State for the Home Department were of the opinion that it was a criminal cause or matter which justified a hearing by a Divisional Court. Initially Lord Bingham expressed some reservations about this issue but finally concluded that counsel were correct in their approach. It is noteworthy that the other cases analysed (and overruled) in Ex parte Evans (with the exception of Ex parte Read which was an appeal to the Court of Appeal against sentence) and Ex parte Evans itself, were all heard by Divisional Courts. In addition Ex parte Francois was also heard by a Divisional Court and no issue was raised in or by the House of Lords as to the correctness of that Divisional Court making the decision at first instance. This application raised an issue relating to the length of time an offender will spend in custody following a sentence imposed by the Crown Court for breach of a probation order imposed earlier by that court for various criminal offences. In those circumstances we consider that the application relates to a criminal cause or matter and the court so ruled at the outset of the hearing.