Neutral Citation no. [2007] NICA 53

Ref: **KERL4824.T**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **05/12/07**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY C D FOR JUDICIAL REVIEW

Before Kerr LCJ, Campbell LJ and Higgins LJ

Ex tempore judgment

KERR LCJ

[1] The appellant has applied for what is described in his skeleton argument as interim relief. Two species of relief are claimed. The first is that he should be awarded compensation on the basis that his detention is in breach of his rights under article 5 (1) of the European Convention on Human Rights and Fundamental Freedoms. Secondly he applies for bail.

[2] Although this court quashed the decision of the Panel of Commissioners that it should not recommend the appellant's release to the Secretary of State, we specifically rejected the appellant's claim that his detention violated article 5 (4) of the Convention. The question whether there was a violation of article 5 (1) was not raised on the hearing of the appeal. Indeed, it is not mentioned in the notice of appeal although it featured in the Order 53 statement. It was not directly in issue before Girvan J, however, and he made no finding in relation to it.

[3] Mr Hutton, who appeared on behalf of the appellant, argued that, since this court has concluded that the Commissioners decision was to be quashed, the question of his article 5 (1) rights must now be addressed in order to determine whether he is entitled to compensation. It is also relevant, he says, to the question whether the appellant should be released on bail. Mr Hutton argues that if Girvan J had concluded that the decision of the Commissioners could not be upheld, the question of relief in the form of compensation because there had been a breach of article 5 (1) would have been canvassed before him. An application for bail would also have been made. Counsel suggests that, since Girvan J did not make a finding in the appellant's favour that there had been a violation of his article 5 (1) rights, the occasion for discussion of these issues did not arise.

[4] The claim that the appellant's article 5(1) rights have been breached rests on the assertion that, where detention on foot of a recall to prison has extended over a number of months without any form of judicial authorisation, it is *ipso facto* in violation of that provision. Mr Hutton claims that he can advance that claim as a result of this court's finding that the decision of the Commissioners should be quashed.

[5] In our judgment, it was entirely open to the appellant on the hearing of the judicial review application at first instance to advance the claim that his detention for several months without judicial authorisation was in breach of article 5(1). It was not necessary to wait for a finding that the Commissioners had erred in the manner in which they conducted the review hearing. Indeed it seems clear to us that if such an argument was to be advanced at all, its natural home was as an adjunct to the claim that the Commissioners had erred in their approach to the proof required to establish the facts on which their decision not to recommend his release was made.

[6] In as much, therefore, as the appellant's claim that he is entitled to be compensated or to be released on bail depends on the asserted violation of article 5 (1), it can only proceed where there has been a judicial determination of that issue. To put it bluntly, if the appellant claims that he is entitled to compensation or bail because his article 5(1) rights had been breached he must first secure judicial acceptance of the correctness of that assertion. In our judgment it is not open to the appellant to raise the issue of article 5(1) violation for the first time after the substantive appeal has been determined. This should have been canvassed before Girvan J and, if necessary, included in the notice of appeal so that the respondents and the Secretary of State could have the opportunity of meeting the case to be made on this issue. For that reason alone we refused to permit the argument to be advanced for the appellant.

[7] Quite apart from this consideration, however, this court has held in a judgment delivered on Monday of this week in the case of *Re William John*

Mullan that, unless detention between the expiry of the tariff period and the determination of the Commissioners is arbitrary, violation of article 5(1) does not arise. It has not been asserted in the present appeal that the appellant's detention is arbitrary in the sense in which that term has been used in Strasbourg jurisprudence.

[8] It was not immediately apparent from Mr Hutton's submissions, but after a number of exchanges with the court, it became clear that he was seeking to persuade us that we should not follow the finding that we had so recently made. That such an argument was audacious cannot be denied but it is obviously untenable and we will say no more about it. Having concluded that it is not open to the appellant at this stage to advance the argument that his detention contravenes the requirements of article 5(1) we must dismiss the application for compensation since that is the only basis on which that claim was made.

[9] Likewise, the application for bail cannot be considered on the basis that there had been a breach of article 5(1), but is it now open to this court to consider the application for bail on a different basis? We are not persuaded that the court has power to grant bail. We have in any event concluded that, since the appellant is on the first phase of the pre-release scheme and resides at the pre-release unit (although he works in the community and was able to attend the hearings that took place yesterday and today) bail should not be granted. The appellant will, if successful in completing this phase, move to the second phase when he will be accommodated in a hostel at weekends. If he completes that phase successfully, he will then be accommodated in the community on a supervised basis. It seems to us that this is a far more desirable way of giving the appellant the opportunity to demonstrate that he is fit to be rehabilitated into the community and it will also, on a structured basis, cater for the needs of society in terms of management of the risk that he may present, especially since a hostel place for phase two had been identified.