

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY IHAB SHOUKRI FOR
JUDICIAL REVIEW**

Before Kerr LCJ and Weatherup J

WEATHERUP J

[1] This is an application for judicial review of a decision of the Resident Magistrate sitting at Belfast Magistrates' Court on 12 June 2003, by which he remanded the applicant in custody on two charges, namely, murder and membership of a proscribed organisation, the Ulster Freedom Fighters. As these are scheduled offences the RM did not have power to grant bail to the applicant. The applicant then applied to the High Court for bail. However the issue that arises does not concern the power to grant bail in the Magistrates' Court but rather the nature of the inquiry that ought to have been undertaken by the RM before deciding whether to remand the applicant on the charges. Mr Closkey QC and Mr McCreanor BL appeared for the applicant and Mr Morgan QC and Mr Maguire BL appeared for the respondent.

[2] The applicant's grounds for judicial review alleged a breach of Article 5(4) of the European Convention of Human Rights whereby a person deprived of his liberty by arrest or detention is entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court. The applicant contended that a breach of Article 5(4) arose because the RM prevented the applicant from mounting an effective challenge to the legality of his detention, declined to investigate in sufficient depth and to a sufficient degree the grounds for continued detention, failed to observe the requisite procedural requirements or adopt a truly adversarial hearing, prevented meaningful responses to material questions and conducted a hearing that was cursory, superficial and inadequate. In addition the applicant

contended that the RM erred in relation to the burden of proof and deprived the applicant for a fair hearing.

[3] Article 5 provides for the right to liberty and security of the person –

“(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with the procedure proscribed by law-

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent him committing an offence or fleeing after having done so.

(3) Everyone arrested or detained in accordance with the provisions of paragraph (1)(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time, or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if his detention is not lawful.”

[4] Article 5(3) is concerned with those arrested or detained in accordance with Article 5(1) (c). There are two distinct rights under Article 5(3) the first being a right to be brought promptly before a judicial officer and secondly a right to trial within a reasonable time and to be granted bail unless there are relevant and sufficient reasons to justify continued detention.

[5] Article 5(4) enables a person in detention to test the validity of his detention and has been described as “the habeas corpus provision of the Convention” (*Clayton & Tomlinson “The Law of Human Rights”,* para 10.145). Article 5(4) applies to any ground of detention and so is not limited to arrest and detention under Article 5(1) (c). The right to take proceedings arises on the application of the detained person and is not automatic. It requires a determination ‘speedily’, which is a lesser degree of urgency than being brought before a judicial officer ‘promptly’ under Article 5(3). It requires determination by a “court”, thus importing independence from the executive and the parties, the application of judicial procedures and the power to order release.

[6] This judgment awaited the decision of the European Court of Human Rights in *McKay v United Kingdom*, now delivered by the Grand Chamber on 3 October 2006. In that case the applicant had been arrested and charged with the scheduled offence of robbery and so the RM had no power to grant bail upon his appearance in the Magistrates' Court. He was granted bail in the High Court the following day. He challenged the compliance of that procedure with Article 5(3) of the Convention. The ECtHR held that there had been no violation of Article 5(3).

[7] The ECtHR completed an analysis of Article 5(3) which is summarised as follows -

(a) Article 5(3) is structurally concerned with two separate matters, namely the early stages following an arrest when an individual is taken into the power of the authorities and the period pending eventual trial before a criminal court during which the suspect may be detained or released with or without conditions. These two limbs confer distinct rights and are not on their face logically or temporally linked (para 31).

(b) The first stage arising under Article 5(3) is described as 'the arrest period' when there must be protection of the detained person through judicial control. That judicial control must satisfy the requirements of promptness and automatic review and include the specified characteristics and powers of a judicial officer (para 32).

(c) The first requirement of judicial control is that the review by the judicial officer should be prompt to allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty. Reference was made to *Brogan v United Kingdom* [1998] 11 EHRR 439 where periods of more than four days in detention without appearance before a Judge were held to be a violation of Article 5(3) (para 33).

(d) The second requirement of judicial control is the automatic nature of the review which cannot depend on the application of the detained person and in this respect must be distinguished from Article 5(4) which gives a detained person the right to apply for release (para 34).

(e) The third requirement of judicial control involves two limbs, being the characteristics of the judicial officer and the powers of the judicial officer. The characteristics of the judicial officer require guarantees of independence from the executive and the parties. The powers of the judicial officer must extend to ordering release after

hearing the individual and reviewing the lawfulness of and justification for the arrest and detention (para 35).

(f) The review of the lawfulness of and justification for the arrest and detention involves both a procedural and a substantive requirement. The procedural requirement gives the detained person the right to be heard. The substantive requirement requires a review of the merits of the detention (para 35).

(g) The review of the merits of the detention concerns the lawfulness of the detention and the existence of reasonable suspicion that the applicant has committed a criminal offence. It does not, as a matter of automatic obligation, cover the release of the applicant pending trial with or without conditions for reasons other than lawfulness and reasonable suspicion. In other words, this review is not a bail hearing but is a necessary preliminary to a bail hearing (para 36). It is the scope of the automatic obligation to review the merits of the detention that is at the heart of this application for judicial review.

(h) The second stage arising under Article 5(3) is described as 'the pre-trial or remand period' where there is presumption in favour of release (para 41).

(i) Continued detention can be justified in a given case only if there are specific indicators of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (para 42).

(j) The court must ensure that the pre-trial detention of an accused person does exceed a reasonable time (para 43).

(k) It is good practice and highly desirable in order to minimise delay, that the judicial officer who conducts the first automatic review of the lawfulness and the existence of a ground for detention also has the competence to consider release on bail. However, it is not a requirement of the Convention and there is no reason in principle why the issues cannot be dealt with by two judicial officers within the requisite time frame.

(l) Accordingly the ECtHR was satisfied that it was in compliance with Article 5(3) to have the remand before the RM and the bail application before the High Court. The "requisite time frame" for the bail application was the four day period referred to in *Brogan v UK*.

As that time limit had been observed there had been no breach of Article 5(3).

[8] The instant case concerns the first right under Article 5(3) of the Convention to be brought promptly before a judicial officer. There is no issue as to the promptness of the review by the court or the automatic nature of the review by the court or of the independence of the court. The issue concerns the exercise of the powers of the court in reviewing the lawfulness of and the justification for the arrest and detention of the applicant. The review of the merits of detention must be capable of examining lawfulness issues and whether or not there is a reasonable suspicion that the arrested person has committed an offence.

[9] On 11 June 2003 the applicant was charged with murder and membership of a proscribed organisation. On 12 June 2003 he appeared at Belfast Magistrates' Court. The investigating officer stated that he could connect the applicant with the charges. The investigating officer was cross-examined by counsel for the applicant and it was established that the applicant had been arrested on the same charges on an earlier occasion and had been released without being charged as there had been insufficient evidence to charge him at that time. The applicant was later re-arrested and put on an identification parade but was not identified by the witness. The applicant was then interviewed on two occasions. The applicant's solicitor stated that no evidence was put to him at the last interview that had not already been put, but the investigating officer replied that that was incorrect as new evidence had been put to the applicant. The applicant's solicitor avers that counsel then asked the investigating officer about the nature of the new evidence and the RM intervened to disallow the questioning. The RM remanded the applicant on the charges to 19 June 2003. On that date the further remand of the applicant was opposed on the basis of insufficient evidence to charge the applicant. The RM further remanded the applicant.

[10] On 20 June 2003 the High Court heard the application for bail. The grounds for the murder charge were outlined as being that the applicant had been identified as the passenger in a car that collected the victim from his home on the last occasion he was seen alive and that a similar car was seen about one and a half hours later at the scene where the victim's body was later found. The grounds of the membership charge were outlined as being the statement of a senior police officer and this was disregarded on the bail application. The High Court found that there were reasonable grounds for the charge against the applicant and refused bail on the grounds of the risks of reoffending and interference with witnesses.

[11] The scope of an RM's review of the merits of detention has been considered by a Divisional Court in Northern Ireland on a number of occasions in recent years. In *Re Kerr's Application* [1997] NI 225, the applicant was charged with possession of documents likely to be useful to terrorists and was remanded in custody at the magistrates' court. He applied for judicial review of the refusal of the DPP to inform him of the nature and details of the charges against him from the time at which he

was charged, which the applicant contended was an aspect of his right to a fair trial. Carswell LCJ stated at page 230G:

“It was held in *R v Guest ex parte Metropolitan Police Commissioner* [1961] 3 All ER 1118, that when it remands an accused the court does not have to take evidence connecting him with the offence. It will normally satisfy itself that there is sufficient reason for it to remand him (compare the observations of Hutton J in *Re McAleenan’s Application* [1985] NI 469 at 502). In practice this is generally done by the investigating officer informing the court on oath that his inquiries are continuing and that he believes he can connect the accused with the offence.”

In rejecting the applicant’s claim, Carswell LCJ stated that it was not considered a necessary constituent of the applicant’s right to a fair trial that he should receive the details sought nor was it considered unfair to him that he had not received them between charge and preliminary inquiry.

[12] A Divisional Court returned to the subject in *Re Valente’s Application* [1998] NI 341, where a magistrate refused to allow a solicitor to cross-examine the officer in charge of a case as to the existence and adequacy of the evidence grounding the charges against the applicant. The investigating officer had given evidence that he believed he could connect the accused with the charges and he stated that the nature of the evidence was forensic identification and circumstantial. Carswell LCJ in dismissing the application for judicial review of the magistrate’s decision stated at page 345D -

“The time honoured material submitted to magistrates’ courts is a statement on oath by the investigating officer that he believes that he can connect the accused with the crime with which he is charged. Magistrates commonly accept this as sufficient to justify them in remanding accused persons, and in our opinion they are quite entitled to do so. There may be some exceptional occasions on which more detailed evidence may be required. We are reluctant to lay down any hard and fast rule, as it is a matter for the discretion of the court in every case.”

[13] Most recently *Re McAuley’s Application* [2005] NIQB 5 considered the scope of the first strand of Article 5(3) and after referring to *Re Valente’s Application* it was stated at paragraph 24 -

“The magistrates’ court is therefore empowered to - and should, where required to - examine whether there is a reasonable suspicion grounding the arrest of the detained

person; whether there is a proper basis for charging him with the offence on which his remand is sought; and whether there has been procedural due process.

A defendant must be brought before the magistrates' court and the magistrates' court must, where necessary, examine fully the basis for the arrest and detention of the accused person ..."

[14] The RM must be satisfied as to the lawfulness of and reasonable suspicion for the detention. As stated in *Re McAuley's Application* the RM should be satisfied on reasonable suspicion, the proper basis for charging and procedural due process. At the remand stage that should not normally require the hearing of evidence. The investigating officer will inform the court of the belief that the detained person can be connected to the charges. The detained person will probably have been interviewed and the relevant circumstances, while they may well be disputed, will have been referred to by police to some extent, subject to the requirements of any ongoing investigation. The representative of the prosecution should be in a position to provide additional information as may be required in relation to grounds for reasonable suspicion and lawfulness of detention. There may be exceptional cases where more detailed information is required. Ultimately it is a matter for the RM to be satisfied on the lawfulness of and the reasonable suspicion for the detention.

[15] In the instant case the applicant had been arrested on a previous occasion in relation to the murder and was then released as there had been insufficient evidence to prefer charges. He was later rearrested in relation to the murder and put on an identification parade but was not identified. The police believed they had new evidence against the applicant and he was charged. At the remand hearing before the RM the police contended that new evidence had been put to the applicant at interview but this was disputed on behalf of the applicant. The above circumstances amounted to an exceptional case that required further information as to the lawfulness of and reasonable suspicion for the detention of the applicant.

[16] The applicant contended that the circumstances of the remands amounted to a breach of Article 5(4). The nature of Article 5(4) has been discussed at paragraph [5] above. As set out above the relevant provision in the present case was the first strand of Article 5 (3).

[17] The applicant applied for bail in the High Court and further information was furnished in relation to the circumstances concerning the applicant. Subsequently the applicant was further remanded by the magistrates' court. Events have moved on and beyond the finding made above in relation to the review of detention by the RM it is not considered necessary to make any order.