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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY SEAN PEARSE McAULEY

FOR JUDICIAL REVIEW

Before: Kerr LCJ and Weatherup J

KERR LCJ

Introduction

[1] The applicant, Sean Pearse McAuley, was arrested on Saturday 31 May 2003 and taken to Musgrave Street police station where members of the Police Service for Northern Ireland questioned him. He was then charged with a number of offences. Some of these were what are known as scheduled offences. These are offences of the type listed in Schedule 9 to the Terrorism Act 2000. The applicant was brought before a magistrates' court on Monday 2 June 2003. An application was made for bail. The learned resident magistrate held that he did not have power to admit the applicant to bail on the scheduled offences; only judges of the High Court or the Court of Appeal may grant bail in such cases.

[2] Bail applications can be listed before the High Court on every weekday. From 31 January 2004 first time bail applications will be heard on Saturdays also. The bail office accepts until noon every day applications (including those sent by facsimile transmission) for hearing the following day. Applications received after noon are normally heard on the second next working day but the presiding judge may allow an application received after noon to be heard the day after it is lodged, where there are exceptional grounds for doing so. The noon cut off point was chosen to allow papers to

be processed and to afford the prosecuting authorities sufficient time to arrange for the presentation of their case.

[3] Bail applications were made on behalf of the applicant to the High Court on 26 June 2003, 21 August 2003 and 11 November 2003. Bail was refused on each occasion.

[4] By this application for judicial review the applicant seeks a declaration that the provisions of section 67 (2) of the 2000 Act (which allows bail to be granted only by a judge of the High Court or the Court of Appeal, or by the judge of the court of trial on adjourning the trial of a person charged with a scheduled offence) are incompatible with article 5 of the European Convention on Human Rights (ECHR). Alternatively, the applicant claims that section 67 (2), in depriving the applicant of the opportunity to apply to the magistrate for bail, discriminates against him in violation of article 14 of ECHR since, if he had been charged with these offences in England and Wales, he could have applied to a magistrate for bail.

Section 67

[5] Part VII of the Terrorism Act 2000 (comprising sections 65 – 113) applies only to Northern Ireland. In so far as is material section 67 provides: -

> "**67.** - (1) This section applies to a person who-
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> (a) has attained the age of fourteen, and
>
> (b) is charged with a scheduled offence which is neither being tried summarily nor certified by the Director of Public Prosecutions for Northern Ireland as suitable for summary trial.
>
> (2) Subject to subsections (6) and (7), a person to whom this section applies shall not be admitted to bail except-
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> (a) by a judge of the High Court or the Court of Appeal, or
>
> (b) by the judge of the court of trial on adjourning the trial of a person charged with a scheduled offence."

The ECHR provisions

[6] The material parts of article 5 of ECHR are: -

> '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 a procedure prescribed 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 his 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.'

[7] Article 14 provides: -

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Re McKay's application

[8] In *Re McKay's application for judicial review* [2002] NI 307 the Divisional Court dealt with a similar challenge to that made in the present case. It was held that there was nothing in the text of article 5 of the convention or in the jurisprudence of the European Court of Human Rights (ECtHR) which required that the court before which an arrested person must be brought should be the same court that has power to grant him bail. The arrested person had to be brought promptly before a court or an officer authorised to exercise judicial power. He must also have the opportunity to apply for bail. It was not essential that these two separate and distinct rights be vindicated at the same time or in the same forum. Provided that the arrested person was brought promptly before a court which had the power to review the

lawfulness of the detention and that he or she had the opportunity to apply without undue delay for release pending trial, the various requirements of article 5(3) were met.

The arguments

[9] Mr Larkin QC for the applicant submitted that *McKay* had been wrongly decided. He suggested that article 5 required that the detained person should be brought automatically before a court that had power not only to review the legality of the detained person's arrest and detention but also to admit him to bail. He relied on the decisions of ECtHR in *Caballero v UK* [2000] 30 EHRR 643 and *SBC v United Kingdom (Application no. 39360/98)* which, he suggested, established the principle that the court before which a detained person was first brought should have power to consider the 'merits of his detention'. This phrase, Mr Larkin suggested, embraced the issue of bail as well as the lawfulness of arrest and detention; the court before which he was brought ought therefore to be able to examine the question whether the detained person should be released on bail as well as whether his detention was lawful.

[10] Mr Larkin argued alternatively that there had been a breach of article 5 and article 14 when read together in that the applicant had been less favourably treated than a person facing the same charges in England and Wales and that such less favourable treatment was not justified.

[11] For the respondent Mr Maguire submitted that the opportunity to review the lawfulness of a detained person's arrest and detention satisfied the objective of the first part of article 5 (3) – (the automatic review of the lawfulness of the arrest and detention). The requirement that an arrested person be brought automatically before a judge or other officer authorised by law to exercise judicial power was disjunctive of the requirement (under the second part of article 5 (3)) that he be entitled to release on bail pending trial. Provided the applicant had the opportunity to apply for bail the requirements of article 5 (3) in relation to release pending trial were also satisfied.

[12] In resisting the applicant's arguments under article 14 Mr Maguire relied on *Magee v United Kingdom* [2001] 31 EHRR 822. He suggested that ECtHR in that case had recognised that article 14 will not apply where different legislative arrangements have been made for different constituent parts of the United Kingdom reflecting the conditions obtaining in each part. Alternatively he argued that if there had been an interference with the applicant's article 14 rights such interference was justified because of the difficulties that would confront magistrates if they were required to deal with bail in scheduled cases.

The objective of article 5 (3)

[13] In *Schiesser v Switzerland* (1979) 2 EHRR 417, ECtHR said that article 5 was "designed to ensure that no one should be arbitrarily dispossessed of his liberty" (paragraph 30). To like effect is the court's observation in *Brogan & others v United Kingdom* (1988) 11 EHRR 117 that article 5 "enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty". In *Çakici v Turkey* (Application no. 23657/94) the court expanded on this theme in the following passage: -

> "104. The Court has frequently emphasised the fundamental importance of the guarantees contained in Article 5 for securing the rights of individuals in a democracy to be free from arbitrary detention at the hands of the authorities (see, amongst others, the *Kurt* judgment [of 25 May 1998, *Reports of Judgments and Decisions* 1998-III] cited above, pp. 1184-85, § 122). In that context, it has repeatedly stressed that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrary detention (see, amongst other authorities, the *Chahal v. the United Kingdom* judgment of 15 November 1996, *Reports* 1996-V, p. 1864, § 118). To minimise the risks of arbitrary detention, Article 5 provides a corpus of substantive rights intended to ensure that the act of deprivation of liberty is amenable to independent judicial scrutiny and secures the accountability of the authorities for that measure. As the Court previously held in the *Kurt* case (*Kurt* judgment cited above, p. 1185, § 124), the unacknowledged detention of an individual is a complete negation of these guarantees and discloses a most grave violation of Article 5. Given the responsibility of the authorities to account for individuals under their control, Article 5 requires them to take effective measures to safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since."

[14] These references emphasise the essential purpose of the guarantees contained in the first part of article 5 (3). It is to ensure that individuals are not subject to arbitrary arrest and unjustified detention. To counteract such abuse of power ECtHR's jurisprudence has developed the principle that the bringing of an arrested person before a court that can review the lawfulness of detention must be automatic and state provided – see, for instance *McGoff v Sweden* (Application No 9017/80). Thus an arrested person must be brought before a judicial officer who will determine the lawfulness of his arrest and detention without the need for an application by him.

[15] *Caballero v United Kingdom* concerned Section 25 of the Criminal Justice and Public Order Act 1994. This provided inter alia that a person who was charged with rape, having previously been convicted of such an offence or culpable homicide, should not be granted bail. The European Commission of Human Rights (ECmHR) held that this constituted a violation of article 5 (3). Mr Larkin relied particularly on paragraphs 45 to 47 of the Commission's decision which state: -

> "45. In the present case, the Commission notes that the applicant had previously been convicted of manslaughter and was then charged with attempted rape in January 1996. Therefore, and it is not disputed, the applicant fell within the scope of section 25 of the 1994 Act which had come into effect in April 1995. Accordingly, the Commission observes that, while the applicant was brought before a magistrate whose independence the Commission has no reason to doubt, the possibility of any consideration by a judge of the pre-trial release of the applicant and of, accordingly, his release on bail had been excluded in advance by the legislature.
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> 46. The Government relies on the remaining powers of the Magistrates' Court. The Commission notes the powers to dismiss the proceedings against the applicant on the basis of insufficient evidence and on the basis that there had been an abuse of process if the accused had not been properly charged together with the power to release an applicant pursuant to successful habeas corpus proceedings based on the lack of a reasonable basis for arrest. However, and while these are important controls on the reasonableness of an accused's arrest, the Commission considers that they do not amount to

> the guarantee under article 5 (3) of a judicial consideration of all the particular facts of a case which militate for and against the continuation of pre-trial detention.
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> 47. In any event, the Commission considers that any application based on insufficient evidence, which application the Government submits can be made at the committal hearing, would fall foul of the 'promptly' requirement of article 5 (3) of the Convention. A habeas corpus action challenging the reasonableness of the suspicion upon which the arrest was made could be brought immediately on arrest but would not comply with the principle that the article 5 (3) hearing must take place at the initiative of the State. In view of the preparation necessary for an abuse of process claim and its non-automatic nature, such a remedy would fall foul of both such requirements of article 5 (3) of the Convention."

[16] Mr Larkin argued that these passages from the decision of ECmHR indicate its view that all the guarantees in article 5 (3) should be provided automatically by the State. We do not accept this argument. It is clear that ECmHR recognised that article 5 (3) had a series of component guarantees. It is also clear that it recognised that each of these guarantees called for separate consideration and treatment. Thus, the availability of a habeas corpus procedure did not satisfy the requirement that the review of the legality of arrest be automatic; the preparation required for an abuse of process application offended the need for promptness; and the exclusion of the magistrate from considering bail meant that there was no opportunity for a judicial officer to examine the facts that would be relevant to the question whether the applicant should be detained.

[17] It is important to note, however, that the availability of habeas corpus and an abuse of process application were advanced in *Caballero* as satisfactory substitutes for the non-availability of bail. But it was precisely because article 5 (3) guarantees separate rights which call for separate approaches that this argument could not succeed.

[18] In the *S.B.C.* case ECtHR adopted the reasoning of the Commission in *Caballero* and expressed agreement with its conclusion that "section 25 of the 1994 Act … removed the judicial control of [the] pre-trial detention which is required by Article 5 § 3 of the Convention". But that decision does not, in our opinion, support the claim that the form of judicial control should have the same attributes in relation to each of the rights guaranteed by the

provision. Mr Larkin fastened on a passage in the judgment which, he suggested, clearly implied that the same judge who conducted the review of the legality of detention should also deal with the question of bail. The passage appears at paragraph 22 and is as follows: -

> "Certain procedural and substantive guarantees ensure … judicial control: the judge (or other officer) before whom the accused is "brought promptly" must be seen to be independent of the executive and of the parties to the proceedings; that judge, having heard the accused himself, must examine all the facts arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the presumption of innocence, a departure from the rule of respect for the accused's liberty, and that judge must have the power to order an accused's release."

We do not consider, however, that the Commission was here doing other than signifying that the judge who deals with the question of bail should be, as in the case of the judge before whom the detained person must be promptly brought, independent.

[19] In *TW v Malta; Aquilina v Malta* (1999) EHRR 185, ECtHR said that "the review required under Article 5 § 3, being intended to establish whether the deprivation of the individual's liberty is justified, must be sufficiently wide to encompass the various circumstances militating for or against detention" (paragraph 46). Referring to this statement, Girvan J, in an extra judicial context, suggested that magistrates are precluded from considering all the circumstances militating for and against detention and questioned whether the restriction on their powers to grant bail was not in breach of article 5 (3). It is important to note, however, that in that case the court had expressly confined its conclusions to matters other than bail. This much is, we think, clear from paragraphs 48 and 49: -

> "48. In the light of the above, the Court considers that the applicant's appearance before the magistrate on 7 October 1994 was not capable of ensuring compliance with Article 5 § 3 of the Convention since the magistrate had no power to order his release. It follows that there has been a breach of that provision.
>
> 49. In reaching this conclusion, the Court would nevertheless agree with the Government that the

> question of bail is a distinct and separate issue, which only comes into play when the arrest and detention are lawful. In consequence, the Court does not have to address this issue for the purposes of its finding of a violation of Article 5 § 3."

The need to be able to review the 'various circumstances militating for and against detention' was not a reference to the extent of the powers that the magistrate should have in the matter of bail.

[20] In the same context Girvan J referred to the case of *Huber v Switzerland* (1990) Series A-188 which, he suggested, was authority for the proposition that "the tribunal must be empowered to make a legally binding decision ordering release". But the only issue arising in that case, as the court itself notes (in paragraph 40 of the judgment), was the impartiality of the Zurich District Attorney who had ordered the detention of the applicant. In our view, this case makes no contribution to the debate as to whether the judge before whom a detained person is first brought must be empowered to grant bail.

[21] That there are distinct and separate guarantees under article 5 (3) which may be catered for at separate stages appears most clearly, perhaps, from the case of *Sabeur Ben Ali v. Malta* (2000) EHRR (Application no. 35892/97). In that case ECtHR expressly acknowledged the distinction to be drawn between, on the one hand, the guarantee against arbitrary arrest and, on the other, the right to a prompt trial and release pending trial. At paragraphs 28 and 29 the court said: -

> "28. The Court recalls that Article 5 § 3 of the Convention provides persons arrested or detained on suspicion of having committed a criminal offence with a guarantee against any arbitrary or unjustified deprivation of liberty (see the *Aquilina v. Malta* judgment of 29 April 1999, *op. cit.*, § 47). What is described in the case-law as "the opening part of Article 5 § 3" guarantees the right to be brought promptly before a judge or "other officer"; the second part of the provision guarantees the right to trial within a reasonable time or release pending trial (see the *Assenov and Others v. Bulgaria* judgment of 28 October 1998, *Reports 1998-VIII*, p. 3264).
>
> 29. According to the Court's case-law, the opening part of Article 5 § 3 requires prompt automatic

> review by a judicial officer of the merits of the detention (see the above-mentioned Aquilina judgment, *loc. cit.*)."

[22] The clear implication from this passage of the court's judgment is that the right to be brought promptly before a judge relates to the review of the lawfulness of the decision but that it is not indispensable that the question of release on bail pending trial be dealt with immediately or that it should occur automatically. Of course a person who wishes to apply for bail should be able to do so promptly and that is ensured by the present arrangements. And if a detained person is unrepresented it would be appropriate for the judicial officer before whom he appears to explain to him his rights relating to bail.

[23] But it is unsurprising that bail should not be automatically considered and should arise only where an arrested person wishes to apply for it. It is our general experience that bail is not applied for in every case. Some defendants choose not to seek it. Moreover, some preparation time is required before the issues that arise on a normal bail application can be properly presented to the court. It is not inappropriate, therefore, that the decision whether bail should be applied for be left to the election of the detained person and that it should not occur as a matter of course.

[24] We are satisfied that the objective of the opening part of article 5 (3) is fulfilled by the requirement that a detained person be brought promptly before a court that is able to examine the lawfulness of his arrest and detention. The magistrates' court is competent to fulfil that requirement. In *Re Valente's application* [1998] NI 341, 345 the Divisional Court said this about the power of the magistrates' court in this area: -

> "The purpose of requiring an arrested person to be brought before a court within a specified time is to prevent his being detained arbitrarily and otherwise than in accordance with the due process of law. It is to determine the legality of his arrest and his continued detention pending further investigation and trial. It is for the court which is asked to remand him to determine whether there is sufficient reason to do so."

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. Since 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 and since an

application for bail pending trial may be made at any time and will be dealt with promptly, we do not consider that there has been any breach of article 5 (3) of ECHR.

The differences between Northern Ireland and Great Britain

[25] The restriction on the power of magistrates to grant bail applies only to Northern Ireland. Bail on offences such as are specified in Schedule 9 to the Terrorism Act may be granted by magistrates in England and Wales. The restriction was introduced in 1973 by the Northern Ireland (Emergency Provisions) Act of that year and was based on the recommendations of the Report of the Commission to consider legal procedures to deal with the terrorist activities in Northern Ireland (the Diplock report). The position has been reviewed from time to time but it has been concluded that the restriction should not be removed yet.

[26] The review of the restriction on bail in magistrates' courts has taken a number of forms. The original provision in the 1973 Act has been re-enacted in 1978, 1991, 1996 and finally in section 67 of the 2000 Act. On the occasion of each enactment parliamentary scrutiny of the bail provisions for scheduled cases has been possible. In May 2000 a specially established review group comprising representatives of the Northern Ireland Office, the Northern Ireland Court Service, the Director of Public Prosecutions Office, the Attorney General's office and the police reported on the subject of the Diplock court system including the hearing of bail applications in scheduled cases. Almost all who were consulted by the group suggested that all bail applications should be heard in the magistrates' court. The review group nevertheless recommended that bail applications in these cases should remain in the High Court, while acknowledging that a continuing improvement in the security situation might permit the resumption of such hearings in the magistrates' court in due course. It recommended that the government keep the matter under review.

[27] There have also been regular reviews by persons appointed for the purpose such as Lord Carlile of Berriew QC who has been responsible for reporting to the government on the operation of Part VII of the 2000 Act. In his report for the year 2002, Lord Carlile recorded a complaint from some practising solicitors that the requirement that all bail applications in scheduled cases must be heard in the High Court leads to some defendants spending longer in custody than those who may apply for bail in the magistrates' court. He recommended that permanent resident magistrates should be permitted, after suitable training, to deal with bail applications in scheduled cases.

[28] The government has not acted on Lord Carlile's recommendation although the matter remains under review. In an affidavit filed on behalf of

the respondent, David Watkins, the director of policing and security in the Northern Ireland Office, explained why. Paramilitary organisations in Northern Ireland remain active. They are considered to be capable of intimidating sections of the community that uphold the framework of government. Paramilitary groups regularly target prison officers and members of the District Police Partnerships. Intimidation of witnesses has increased markedly from the year 2001/02 to the year 2002/03. Likewise, intimidation of people based on their residence has risen sharply in the same period. The government considers that resident magistrates should not be exposed to the risks that requiring them to deal with bail applications in scheduled cases would involve.

[29] Mr Larkin suggested that the claim that resident magistrates would be at risk if required to deal with bail applications in scheduled cases did not rest easily with the notification of a proposed derogation by the United Kingdom from article 5 (1) of ECHR contained in the Schedule to the Human Rights Act 1998 (Designated Derogation) Order 2001. In this the following statement appears: -

> "There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom"

[30] Mr Larkin submitted that this revealed a far more serious risk to magistrates in England and Wales who might have to deal with such terrorists than that currently presented by paramilitary groups in Northern Ireland. We do not accept this submission. Resident magistrates live in the community that they serve in Northern Ireland. Their courts are accessible to members of the public and it is a commonplace that persons charged with scheduled offences attract substantial numbers of supporters in public galleries during court appearances. Given the background of continuing paramilitary activity and increasing intimidation of those such as prison officers we cannot dismiss as ill founded the apprehension that magistrates would be subject to similar pressures if required to deal with bail applications in scheduled cases.

Article 14

[31] The respondent resisted the applicant's claim founded on article 14 on the ground that the difference in treatment arose because of the applicant's location within Northern Ireland rather than by reason of any personal characteristic; it was not, Mr Maguire argued, discrimination directed personally at the applicant but a difference in treatment that reflected the different conditions that obtained in the two jurisdictions.

[32] ECtHR dealt with a claim relating to difference in treatment between terrorist suspects in Northern Ireland and those in Great Britain in *Magee v United Kingdom* [2001] 31 EHRR 822. In that case the applicant had complained that suspects arrested and detained in England and Wales under Prevention of Terrorism legislation could have access to a lawyer immediately and were entitled to his presence during interview whereas in Northern Ireland access to a solicitor could be deferred and the suspect was not entitled to legal advice during interview. It was claimed that these differences amounted to a violation of article 14.

[33] This claim was rejected. At paragraph 50 of its judgment ECtHR said: -

> "50. The Court recalls that Article 14 of the Convention protects against a discriminatory difference in treatment of persons in analogous positions in the exercise of the rights and freedoms recognised by the Convention and its Protocols. It observes in this connection that in the constituent parts of the United Kingdom there is not always a uniform approach to legislation in particular areas. Whether or not an individual can assert a right derived from legislation may accordingly depend on the geographical reach of the legislation at issue and the individual's location at the time. For the Court, in so far as there exists a difference in treatment of detained suspects under the 1988 Order and the legislation of England and Wales on the matters referred to by the applicant, that difference is not to be explained in terms of personal characteristics, such as national origin or association with a national minority, but on the geographical location where the individual is arrested and detained. This permits legislation to take account of regional differences and characteristics of an objective and reasonable nature. In the present case, such a difference does

not amount to discriminatory treatment within the meaning of Article 14 of the Convention."

[34] Mr Larkin suggested that this decision should not be followed or alternatively that it could be distinguished on the basis that the Terrorism Act was a UK wide statute and ought therefore to be applied equally to all UK citizens. We do not accept either submission. It appears to us that the reasoning of the court should be accepted and should be applied to this case. The fact that the statute (in its provisions other than Part VII) applies throughout the UK is neither here nor there in approaching the question whether this amounts to discrimination within article 14. The applicant is not being treated differently because of some characteristic personal to him. The different treatment has nothing to do with his particular position or attribute. It arises because of the conditions that apply where he lives, not because of who he is or what he does.

[35] In *Michalak v London Borough of Wandsworth* [2002] EWCA Civ 271 the Court of Appeal suggested that article 14 should be approached in a 'structured way'. At paragraph 20 of the judgment Brooke LJ said: -

"It appears to me that it will usually be convenient for a court, when invited to consider an Article 14 issue, to approach its task in a structured way. For this purpose I adopt the structure suggested by Stephen Grosz, Jack Beatson QC and the late Peter Duffy QC in their book *Human Rights: The 1998 Act and the European Convention* (2000). If a court follows this model it should ask itself the four questions I set out below. If the answer to any of the four questions is "no", then the claim is likely to fail, and it is in general unnecessary to proceed to the next question. These questions are:

(i) Do the facts fall within the ambit of one or more of the substantive Convention provisions (for the relevant Convention rights see Human Rights Act 1998, section 1(1))?

(ii) If so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward for comparison ("the chosen comparators") on the other?

(iii) Were the chosen comparators in an

> analogous situation to the complainant's situation?
>
> (iv) If so, did the difference in treatment have an objective and reasonable justification: in other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved?"

[36] Approaching the matter in this way, we are satisfied that the applicant's claim comes within the ambit of article 5; and that there is a difference of treatment between the applicant and those charged with similar offences in England and Wales. We do not accept, however, that detained persons in Great Britain charged with scheduled offences are in an analogous position to the applicant. Their situation is different, not because of any personal characteristic but because they live in an area where conditions are different. Finally, we consider that the difference in treatment pursues a legitimate aim viz the protection of the magistrates from unnecessary risk and has an objective and reasonable justification.

[37] In relation to the final conclusion, that there is in any event a reasonable justification for the difference in treatment, we observe that weight must be given to the consideration that it was obviously the will of Parliament that the position in relation to bail applications in the magistrates' court should continue. Mr Larkin suggested that, since this was a matter on which the courts were well qualified to make a judgment, the level of deference to be accorded to this factor was commensurately small. But although this court is, of course, familiar with the transaction of bail applications and all that they entail, it does not follow that we are in a position to make a confident judgment about the level of risk that might arise if magistrates were once more required to deal with bail in scheduled cases. For that reason we find the well-known passage from the opinion of Lord Bingham of Cornhill in *Brown v Stott (Procurator Fiscal, Dunfermline)* [2003] 1 AC 681, 703 apt for the present context: -

> "Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them. While a national court does not accord the margin of appreciation recognised by the European court as a supra-national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of

> judgment accorded to those bodies: see *Lester & Pannick, Human Rights Law and Practice* (1999), pp 73-76. The Convention is concerned with rights and freedoms which are of real importance in a modern democracy governed by the rule of law. It does not, as is sometimes mistakenly thought, offer relief from "The heart-ache and the thousand natural shocks That flesh is heir to."

Conclusions

[38] None of the grounds on which the applicant has sought judicial review has been made out. The application must be dismissed.