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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY THOMAS McCABE FOR JUDICIAL REVIEW

Before: Kerr LCJ, Campbell LJ and Sir Michael Nicholson

Sir Michael Nicholson

Introduction

[1] This is an appeal from the decision of Higgins J dismissing the appellant's application for judicial review of the decisions of the Northern Ireland Prison Service and the Secretary of State for Northern Ireland in relation to his detention on foot of a sentence of life imprisonment imposed on the appellant on 29 October 1990 at the Central Criminal Court, London.

Factual background

[2] On 1 February 1990 the appellant, then 26 years of age, was arrested and charged with the murder of his girlfriend's cousin, a young man of 18 years. On 29 October 1990 he pleaded guilty to the offence of murder and was sentenced by the Common Serjeant, Judge Lymbery QC, to a mandatory sentence of imprisonment for life. The judge, when passing sentence, stated:-

> "…. You killed him by a series of most brutal blows to the head with a metal bar. It appears that at the time you had had a substantial amount to drink, a feature which marks and mars much of your past years ….."

[3] As the appellant pleaded guilty, there are only witness statements as to the nature of the killing which occurred in his girlfriend's flat. His girlfriend's statements tell a story that he was violent towards her when

drunk. At the time of the killing she became alarmed because he had the metal bar and she went out onto a balcony of the flat. He spoke to her, saying:

> "You'd better go and see your cousin. I think he's unconscious."

[4] She stated that he smiled at her and then walked into the bathroom. She found her cousin lying in an armchair covered in blood. She touched his hand but he did not move. She met the appellant who said: "Have you got a towel for my hands?" She called to a friend to phone the police. The appellant kept walking in and out of the living room. He was just laughing. She told him that she was going to have him arrested. He said "It only takes a letter to come out of the prison and you'll be blown away. You and your baby …." She made a more detailed statement later.

[5] The report of the forensic pathologist speaks for itself. The cause of death was multiple head injuries. There appear to have been at least eight blows from a heavy blunt instrument. A forensic scientist estimated that there were approximately 270 milligrams of alcohol per 100 millilitres of blood in the appellant's system at the time of the murder. Blood alcohol concentrations of this order were normally associated with a state of extreme drunkenness although these effects might be less pronounced in a person accustomed to drinking large quantities of alcohol.

[6] When the appellant was told by police that he was under arrest for murder and cautioned, he replied: "When I came home and he was in the house with my old woman so I just whacked him." This reply was noted in the custody record and signed as correct by the appellant.

[7] In the course of interviews with the police he said that he thought the young man was having an affair with his girlfriend. It is apparent that he had no grounds for thinking this. He said that his mind went blank. He stated that he was an alcoholic. He denied beating his girlfriend previously.

The fixing of the tariff

[8] The judge's remarks about tariff were:-

> "This appears to have been a sudden unpremeditated attack in a moment of drunkenness and unreasoned (or intuitive) jealousy upon a complete stranger …. I have no reason to suppose that he will be a danger to the public provided he is not in drink. If he reverts to drink he may well constitute a danger to his alcoholic peers."

These remarks were made in the context of section 1(2) of the Murder (Abolition of Death Penalty) Act 1965.

[9] The judge expressed the view that the length of detention necessary to meet the requirements of retribution and deterrence was ten years. On 4 November 1990 the Lord Chief Justice of England and Wales, Lord Lane, recommended that eleven years would be more appropriate. The Home Secretary fixed the period of eleven years as the tariff and the appellant was informed of this while he was in custody in England. From the time of the murder until the passing of the Criminal Justice Act 2003 there was no statutory duty or power enabling the trial judge or the Lord Chief Justice to "fix a tariff".

[10] The death penalty for murder had been effectively abolished in 1965. The Home Secretary looked to the judiciary for advice on the time to be served to satisfy the requirements of retribution and deterrence and from 1967, when the Parole Board was set up, looked to the Parole Board for advice on risk.

[11] The role of the trial judge and the Lord Chief Justice was of advisers or makers of recommendations and the power of decision rested with the Home Secretary (or a junior Home Office Minister). In *R v Secretary of State for the Home Department, Ex parte Doody* [1994] 1 AC 531 the House of Lords accepted that mandatory life sentences were very different from discretionary life sentences and regarded the fixing of a convicted murderer's tariff as appropriately carried out by the Home Secretary and his junior ministers as it was an anomalous task of fixing a "tariff" penal element for an offence in respect of which the true tariff sentence was life imprisonment. Tariff-fixing was regarded as an administrative procedure governing the implementation, not the determination of the sentence. The European Court of Human Rights in *Wynne v UK* (1994) 19 EHRR 333 accepted that in relation to persons serving a mandatory sentence of life imprisonment the Home Secretary decided the length of the tariff. The guarantee of Article 5(4) was satisfied by the original trial and appeal proceedings.

[12] The appellant was informed of the fixing of the tariff at eleven years while he was in custody in England in 1990. This was to include the time he had spent in custody before sentence. That period of eleven years expired on 3 February 2001.

The transfer to Northern Ireland

[13] Under Section 27 of the Criminal Justice Act 1961, on the application of the appellant, he was temporarily transferred on a restricted basis to HM Prison, Maghaberry in Northern Ireland on 19 September 1991 and subsequently under Section 26(1) of the 1961 Act on his application he was transferred permanently on an unrestricted basis to Northern Ireland on 21 January 1992.

[14] Section 26(4) of the 1961 Act provided that a person transferred under Section 26 to serve …. the remainder of his sentence should be treated for purposes of detention, release, supervision, recall and otherwise as if that sentence (and any other sentence to which he might be subject) had been an equivalent sentence passed by a court in that part of the United Kingdom and, where it was not a sentence which could be so passed, as if it could be so passed.

[15] On 23 January 1992 the appellant signed a document stating that he had had the differences between the English and Northern Ireland prison systems explained to him. He stated that he understood that on transfer to Northern Ireland a review of his life sentence would be conducted after he had completed ten years of his sentence and that a release date might then be set. He further stated that he understood the terms of his transfer … and agreed to his permanent transfer to Northern Ireland. He was thereafter to be treated as a prisoner serving a life sentence in Northern Ireland: see *Re Kavanagh's Application* [1997] NI 368.

[16] On 17 October 1991 the Prison Service in Northern Ireland was informed by their English counterparts that a tariff had been set and that a first review should taken place in approximately February 1998. But when the appellant was transferred permanently in January 1992 he was governed by the procedures applicable in Northern Ireland, and, as he had been informed would happen, the Board conducted a review of his life sentence after he had completed ten years.

Life Sentences in Northern Ireland

[17] The procedures under which persons served a sentence of imprisonment for life in Northern Ireland were governed by section 23 of the Prison Act (Northern Ireland) 1953. The Secretary of State for Northern Ireland established a Life Sentence Review Board (the Board) to advise him as to when he should release on licence under Section 23 prisoners serving terms of imprisonment for life. A memorandum issued by the Northern Ireland Office explained the composition of the Board and its functions as follows:-

> "Within the Northern Ireland Office life sentence cases are the responsibility at working level of the Life Sentence Unit (LSU) in the Prison Regimes

> Division …. At the review after that, which in the majority of cases is after ten years but may be sooner, the case is considered by the Life Sentence Review Board (the Board) which is chaired by the Permanent Under-Secretary of the Northern Ireland Office, and includes among its members senior Northern Ireland Office officials, a Principal Medical officer of the Department of Health and Social Services, a consultant psychiatrist and the Chief Probation Officer. Further reviews are carried out at intervals determined by the Board until a stage is reached when the Board is prepared to recommend to the Secretary of State that a release date should be set; or cases may for particular reasons be brought to Ministers' attention before the Board feels able to recommend the fixing of a release date."

[18] The normal practice of the Board was to carry out reviews after the prisoner had completed three years and six years in custody. In the majority of cases the next review took place after the completion of ten years in custody. Further reviews were carried out at intervals determined by the Board until a stage was reached when it was prepared to recommend to the Secretary of State that a release date should be set.

[19] In considering the appellant's case the Board took into account the nature of the prisoner's offence, his age and background, his response in prison and all other relevant factors, including the comments made by the trial judge when passing sentence. It was the practice to inform prisoners when their cases were to be considered by the Board, and on these occasions prisoners were invited to make any written representations on points which they wished the Board to take into account. When the Board thought that the time had come, it recommended that a provisional release date be fixed and if Ministers agreed a date was fixed about a year ahead. The Lord Chief Justice and trial judge were consulted before such a date was fixed. The prisoner was informed of the provisional release date, and steps were taken to prepare for his release. Shortly before the provisional release date the Secretary of State considered the case, in order to determine whether he should give final approval to the prisoner's release: see *Re Whelan's Application* [1990] NI 348, especially at pp 350, 351.

The conduct of the appellant before and after the expiry of the period of 11 years

[20] The Board considered the appellant's case on 11 April 2000. The result of that review was communicated to the appellant by letter dated 21 April 2000. This stated:

> "The Board carefully considered all available information about your case and decided that it should be referred to the judiciary for consultation with a view to your possible release on life licence in about a year's time ...
>
> The Board observed from tariff documentation available to it that your offence was described by the trial judge as a 'sudden unpremeditated attack in a moment of drunken and unreasoned jealousy upon a complete stranger'. It is noted that your case attracted a tariff of 11 years from the Home Secretary on the recommendation of the Lord Chief Justice, although the trial judge had considered that a period of 10 years would be sufficient. The Board noted, however, that the tariff was not binding upon them …
>
> From careful consideration of all the factors applying in your case the Board took the view that the appropriate retributive period in this instance would fall at around 11 years in line with the tariff set by the Home Office …
>
> Turning to the question of risk ... Whilst it was felt that you *were* not likely to become violent in most situations, concerns remained with regard to alcohol abuse, drug abuse, relationships with adult females and your abuse of temporary release …
>
> … there was a general view that alcohol was a significant risk factor in your case. It was felt that a well-controlled and carefully structured pre-release programme and subsequent arrangement when on supervision in the community would be called for in your case and that particular monitoring of your drug and alcohol intake would be required.
>
> It was the view also that a carefully structured and monitored programme would be required in your case the conditions relating to which you would be expected to comply (sic). On that basis the Board recommended that your case be referred for consultation with the judiciary with a view to your

> release on life licence after having served a period of around 11 years. In doing so it was of the view that the combined consultation and anticipated pre-release phase of around a year would be sufficient to test whether or not you were a suitable candidate for release on licence …
>
> Exceptionally in your case the Board determined that in referring your case at this time you should be permitted the normal alternate weekend consultation home leave. I can confirm that this privilege is being granted to you. It is granted in the form of temporary release in accordance with Prison Rule 27. It may be suspended or withdrawn if the privilege is in any way abused or if your behaviour at any time indicated that you present a risk to the public. You should also be aware that you are subject to recall to prison at any time under Prison Rules whether or not you have breached the terms and conditions of temporary release."

[21] On 7 July 2000 the appellant was informed by letter that on 17 July 2000 he would join the pre-release scheme (PRS). He was reminded that the setting of a provisional release date did not mean that release on licence would follow automatically. He was also told that his release was subject to his continued good behaviour and to suitable resettlement arrangements being made. The appellant completed the first phase of the scheme and on 31 July 2000 he started the second phase. This involved working at approved jobs, staying in the pre-release unit (PRU), Crumlin Road (Belfast) at nights and having extended paroles at weekends.

[22] On 30 October 2000 the appellant was due to begin the third phase. On that date he failed to attend an alcohol management programme or to report for work. As a result he was posted as unlawfully at large. He remained unlawfully at large until he was returned to the prison on 12 November 2000. He was then formally suspended from PRS.

[23] A case conference on the appellant's situation was held on 10 January 2001 and areas of further work that he needed to undertake were identified. At a case conference in June 2001 it was agreed that he had completed satisfactorily the work that had been identified in January. It was considered, however, that further work on his alcohol addiction required to be carried out and it was recommended that he should complete an intensive alcohol management programme as part of a special pre-release programme.

[24] On 6 September 2001 it was decided that the appellant should be restored to PRS on a specially devised programme. This was discussed with

him at a meeting on 7 September 2001, when he agreed to participate in an eight week residential course at Carlisle House to address his alcohol addiction. By letter dated 12 September 2001 he was informed that he would begin the special pre-release programme at Carlisle House on 19 September 2001. He was told that if he completed this successfully he would be permitted to return to PRS in Belfast and to complete phase two (over 13 weeks) and then phase three (over approximately 6 months). The letter informed him that for good reasons he would not be permitted to return to Newry during periods of temporary release at this time and concluded by stating that any failure to complete the special pre-release programme at Carlisle House would probably result in his return to prison. It was also pointed out that any further breaches of PRS, particularly in relation to temporary release and alcohol, would result in a review of his suitability to retain a provisional release date.

The conduct of the appellant after the coming into operation of the Life Sentences (Northern Ireland) Order 2001 on 8 October 2001

[25] The appellant completed the residential course at Carlisle House, Belfast and on 19 November 2001 he was moved to the second phase of PRS. He later started work at Bryson House, Belfast. On 7 February 2002 the probation officer supported his transition to the next phase and on 18 February 2002 he moved to phase three. On 15 April 2002 he failed to report for work and on 17 April 2002 he was posted unlawfully at large. On 23 April 2002 he was arrested by the police in Newry in an intoxicated state and returned to the prison. On the following day the appellant was interviewed by a prison governor. He admitted being in Newry and said that this had happened because he had relapsed from his abstinence from alcohol.

[26] On 24 April 2002 the Life Management Unit (LMU) wrote to the appellant informing him that he was suspended from PRS and that a case conference would be held to consider his absence from his employment without permission and his intoxicated condition when arrested. He was asked to supply an explanation for his behaviour at PRU and he responded with a handwritten submission which, the learned judge decided, revealed that he was well aware of why he had been returned to prison.

[27] A multi-disciplinary meeting took place on 4 May 2002 at which the appellant's case was discussed and a full case conference was arranged for 31 May 2002. The appellant sent a further submission to Governor Caulfield on 14 May 2002. The case conference on 31 May 2002 considered his recent history on the PRS and decided to undertake further assessments relating to the risk he posed to the community. A further conference was arranged for 4 July. In the meantime the appellant's solicitors wrote to LMU on 7 June 2002 asserting that the appellant had completed the punishment element of his sentence and stating:-

"Our client was therefore clearly serving that part of his sentence which relates to the prevention of risk and his perceived dangerousness to society. To our knowledge it has not been alleged that our client has committed any crime whatsoever. We are instructed that the sole reason for his arrest on 23 April was the request by the prison service. This is further supported by the fact that our client has not been charged with any criminal offence and has not been questioned by police in relation to any offence whatsoever.

Furthermore we would contend that for any decision to be taken to revoke our client's status on the Pre-Release Scheme that any such allegations or offences would have to create a belief that our client was at risk of committing a further violent offence. We contend that any such belief is simply untenable in these circumstances.

We would contend that to recall our client to HMP Maghaberry without recourse to a judicial authority is therefore unlawful and in breach of our client's Article 5 and 6 rights as protected under the European Convention of Human Rights."

[28] LMU replied on 11 July 2002 as follows: -

"Mr McCabe's continued suspension from the pre-release scheme is primarily because of his risk of violent offending. The key factors in this assessment are:

1. Alcohol was a significant factor in Mr McCabe's index offence. In spite of the best efforts of the staff at Carlisle House, Mr McCabe admits to drinking alcohol and to being drunk since his completion of the alcohol programme. Indeed, Mr McCabe now admits to drinking alcohol prior to his suspension from the pre-release scheme on 30 October 2000, during his subsequent period unlawfully at large, prior to his second suspension from the pre-release scheme on 23 April 2002 and during his most recent period unlawfully at large.

2. Mr McCabe had been posted unlawfully at large by the NI Prison Service on 23 April 2002. However, Mr McCabe came to the attention of Newry PSNI because of the disturbance he was causing in the street.

3. Mr McCabe was in an intoxicated state when arrested by police in Newry on 23 April 2002. Upon his return to HMP Maghaberry he became abusive to Prison Staff during a cell search and was later found guilty of assaulting a prison officer. He was awarded two days cellular confinement for this incident, which involved him in pushing his fist into an officer's face.

4. Mr McCabe's behaviour during periods of temporary release clearly shows a pattern where he can not be trusted to comply with the terms and conditions of his release. He has now been found guilty of being unlawfully at large on four occasions as set out below.

   10 September 1997 - 20 September 1997
   18 March 1998 -25 May 1998
   30 October 2000 -12 November 2000
   17 April 2002 -23 April 2002

These failures, coupled with his alcohol problem, not reporting for work and not attending alcohol management sessions in October 2000, raise serious questions about Mr McCabe's ability to comply with the elements of risk management designed to prevent further violent offences.

In relation to the handling of Mr McCabe's suspension from the pre-release scheme, it may be helpful to note that Mr McCabe was given written notification of his suspension on 24 April 2002. He was invited to make written representations to the multi-disciplinary team and did so on two separate occasions. His case was considered at a specially convened case conference on 31 May 2002 and again at the multi-disciplinary meeting on 4 July 2002. Mr McCabe co-operated with assessment by David Cuthbert, Carlisle House, and Siobhan Keating, Forensic Psychologist.

> Further consideration is required regarding how best to address the risk factors in this case and the investigation into the circumstances surrounding Mr McCabe's suspension from the pre-release scheme is also still ongoing. In these circumstances, and for all the concerns listed above regarding Mr McCabe's potential for relapse and violence, Mr McCabe will remain suspended from the pre-release scheme."

The fixing of the appellant's tariff in Northern Ireland

[29] On 8 October 2001, the Life Sentences (Northern Ireland) Order 2001 (the 2001 Order) came into operation. This Order introduced a statutory scheme for the fixing of minimum terms (commonly referred to as 'tariffs') to be served by life sentence prisoners and provided for the determination of the date of release after the minimum term had elapsed. When the prisoner has served the minimum term the Life Sentence Review Commissioners (a new body created by the Order referred to hereafter as "the Commissioners") consider whether it is necessary that the prisoner should continue to be detained in order to protect the public from serious harm. Articles 10 and 11 seek to apply the release provisions of the Order to life prisoners transferred to Northern Ireland.

[30] On 22 November 2001, the appellant asked that documentation relevant to the fixing of the tariff in his case be supplied to his solicitors. On 5 June 2002 he and his solicitors were informed of the procedure that would be adopted in the tariff fixing process and he was invited to submit representations in writing. By letter of 17 June 2002, the solicitors then acting for him intimated that he would probably wish "... to make representations in respect of the tariff setting." On 26 June 2002 the appellant informed the Prison Service of a change in his legal representation and stated that his present solicitors would be acting for him in relation to his "forthcoming tariff setting".

[31] The issue of the material to be considered by those responsible for fixing the minimum period of imprisonment in cases such as the appellant's was the subject of a judicial review challenge at about this time in the case of *Re King's application*. Judgment was given at first instance in that case on 5 July 2002 and by the Court of Appeal on 15 November 2002. After the Court of Appeal had delivered judgment the appellant, in a petition to the Secretary of State dated 19 December 2002, stated that he did not wish to submit any written representations or to have any legal representation in the tariff fixing process. The matter was then referred to the Lord Chief Justice who on 5 March 2003 made a recommendation to the Secretary of State under Article 10 of the 2001 Act. In it he referred to the report by the trial judge to the Home Secretary:

> "The defendant, an alcoholic, was released from his last prison sentence (15 months for robbery of alcoholic vagrant) in October 1989. He soon formed a relationship with a 19 year old woman who had two children. The relationship was stormy and ended on 1 February 1990. On that day when she said she wished to go out to see a friend he replied that if she went he would not see or speak to her again. She did go out; and by the time she returned to the flat that evening he had disappeared. In fact she returned with a cousin (Richard Hunt aged 18) who had offered to do some reduction for her. Later in the evening at about 10.30, she was preparing supper and went to open the front door to let the steam out. The defendant was standing there. He had been drinking (then about 270 mgs). He entered. Hunt was now sitting in front of the TV awaiting for his supper. The witness said 'my cousin is in the sitting room, he has come down to see me' to which the defendant replied 'He should not be in this flat'. He then went and picked up a piece of scaffold pole (2 feet long and weighing about 2¾ lbs), used for propping open the front door. Without more ado he went to Hunt and struck about eight vicious blows to the face and head, from which he soon died. The defendant replaced the pole, washed his hands and left grinning. The police had already been called by a neighbour and the defendant was arrested downstairs. In interview he repeatedly said that he could not recall anything, that he never intended to kill and that all that was going through his head was 'seeing this geezer coming between me and her'."

He went on to discuss the appellant's lengthy criminal record, the trial judge's sentencing remarks and recommendation of a minimum term and the recommendation of the Lord Chief Justice of England and Wales that eleven years would be an appropriate minimum. Having had regard to the Practice Statement as to life sentences dated 31 May 2002 made by Lord Woolf CJ, he concluded that a court in Northern Ireland, applying the criterion contained in Article 5(2) of the 2001 Order, would have fixed the minimum term which the prisoner must serve at eleven years including the time spent in custody on remand.

The reference to the Life Sentence Review Commissioners

[32] After the appellant's tariff was fixed, the Commissioners became responsible for considering whether he should be released under Article 6 of

the Life Sentences (Northern Ireland) Order 2001. By virtue of Article 6 (4)(b) the Commissioners must not give a direction about the release of a life sentence prisoner unless they are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined. Counsel for the appellant expressly stated to this court that the decision in *Re Colin King* [2003] NI 4.8 (referred to above at paragraph [31]) was not being challenged. It related to the validity of Article 11 of the 2001 Order whereas the case made throughout on behalf of the appellant related to a period before the "fixing of the tariff" in March or April 2003.

[33] The appellant's case was referred to the Commissioners on 3 April 2003. The first hearing before the Commissioners took place on 18 August 2003. The panel who considered his case at that time were not satisfied that he met the conditions for release. They formed the view that he remained a risk to the public because of his tendency to react to stress by abusing alcohol. This had prevented him from successfully completing working-out programmes. It was recommended that his case should be reviewed in six months and that in the interim he should continue with one-to-one focused therapeutic work with a clinical psychologist.

[34] The appellant engaged in individual work with Dr Pollock, psychologist, between May and December 2003. He began a special pre-release programme on 2 September 2003 but unfortunately, he was unlawfully at large again between the 27 December 2003 and 18 February 2004. A number of exchanges between the LMU and the Commissioners ensued. Hearings before the Commissioners had to be adjourned for various reasons, including the fact that the appellant had failed to attend legal visits arranged at the prison by his solicitors. Eventually a hearing took place on 25 November 2004. This was adjourned and the Commissioners directed that before the next hearing a report should be obtained from a psychologist providing an assessment of the steps that needed to be taken in order to prepare the appellant for eventual release. A further hearing was due to take place in March 2005. Following the hearing before this court the Commissioners recommended that he complete a cognitive self-change programme which was completed in June 2006. At a further review in October 2006 they adjourned the case for 12 months so that he could be tested on a pre-release scheme which started on 7 November 2006.

The Salem issue

[35] Mr McCloskey QC, who appeared for the respondents, submitted that the appellant's challenge to the validity of his detention after February 2001 should not be permitted to proceed. He referred to the chronology of key dates supplied on 28 February 2005 by the appellant's solicitors at the request of the court. The Home Secretary fixed a tariff of eleven years. It would have expired at the beginning of February 2001.

[37] Mr McCloskey argued that the application for judicial review of the decisions of the Northern Ireland Prison Service and of the decision of the Secretary of State for Northern Ireland made on 23 April 2002 was a futile application as was the appeal to the Court of Appeal. It had become necessary for the Lord Chief Justice of Northern Ireland to recommend a minimum term which would then be certified by the Secretary of State. The term which he recommended was eleven years (as fixed in 1991 by the Home Secretary). The appellant was then treated as if he had been sentenced in Northern Ireland and the Secretary of State certified the minimum term as eleven years. He was dealt with by the Commissioners under the 2001 Order. The Prison Service and the Board which had previously been concerned with his release ceased to be concerned with his release. Judicial review of their decisions then became academic and the principles set out in *ex parte Salem* [1999] 2 All ER 42 applied. This was the only case of its kind in Northern Ireland.

[38] In response Mr Barry Macdonald QC for the appellant pointed out that the burden lay with the respondent to establish that the appeal was academic. He did not concede that there had been no violation of the appellant's Article 5 rights since the hearing of the Commissioners in August 2003. But the respondents were inviting the court to determine issues arising after August 2003. The original challenge by the appellant was to the decisions of the Prison Service in 2002 to take the appellant back into custody. These decisions had been based on incorrect factors. The Order 53 statement related to issues which arose before July 2002 when the application for judicial review commenced and these issues were relevant to the appellant's detention as at February 2005. In February 2001 the eleven year tariff imposed by the Home Secretary expired. The eleven year tariff imposed by the Lord Chief Justice of Northern Ireland also expired in February 2001.

[39] If the appellant was wrongfully returned to custody by the Prison Service after February 2001 the judgment of the Court of Appeal would give rise to a right to damages, Mr Macdonald said. There was an issue as to whether the appellant was returned to prison because of serious risk to harm to the public or for different reasons. This required a study of the correspondence. A further issue arose in relation to the burden of proof in respect of a risk to the public. The appellant had been returned to prison not because he was a serious risk to the public but for breach of conditions imposed by the prison authorities. He had, therefore, been unlawfully arrested and imprisoned. It was only after the institution of proceedings for judicial review that the prison authorities raised the issue of violence as a ground for returning the appellant to prison.

[40] He further argued that Higgins J wrongly approached the decisions of the prison authorities on the basis of domestic law, not European case law. The

appellant was not inviting the court to consider the compatibility of the 2001 Order with Article 5 of the Convention. But the appellant should have been released when the penal term expired. The prison authorities had applied the wrong test to the issues. The test should have been whether the appellant was a risk to the public in the context of violent behaviour, not whether there was a breach of conditions. The appellant was entitled to a Declaration that there had been a breach of his Convention rights. He was not unlawfully at large when arrested on 23 April 2002.

[41] In reply Mr McCloskey stated that there was no issue between the parties about matters since the Spring of 2003. The appellant had asserted his rights under Article 5 before the Life Sentence Review Commissioners in August 2003. There was no collateral or indirect challenge to the Commissioners' decision. No judgment of this court could bring about the relief claimed. Whilst the appellant might get a declaration, it was inappropriate to make one. There was no issue of importance before the court. The word "academic" in *Re Salem* should be given a broad meaning.

[42] After considering this matter for a short time this court decided to proceed with the substantive appeal while allowing the *Salem* issue to remain open.

The arguments on the appeal

[43] Mr McDonald argued that the appellant should have been given at the least the right to make representations about whether he was a risk to the public before the impugned decision to return him to custody was made on 23 April 2002. The appellant had been suspended from the PRS for failing to comply with its terms and conditions: (see letter from Prison Service to Human Rights Commission of 28 June 2002). The penal element of his sentence had expired. There was no risk of violence or serious harm to a member of the public. He should have been released. It was only after judicial review proceedings were issued that the Prison Service stated that his "continued suspension from the pre-release scheme was primarily because of his risk of violent offending": see letter of 11 July 2002. Reference was made to unanswered letters from the applicant's solicitors on 7 June and 14 June 2002 set out in the judgment of Higgins J.

[44] It was contended that:

(a) the appellant had a tariff fixed and communicated to him in early 1990;
(b) this tariff, at the time, was lawfully fixed by the Home Secretary at 11 years;
(c) this tariff represented the penal element of his life sentence;
(d) the Northern Ireland authorities were aware of this fact;

(e) by operation of the rule of law the Northern Ireland authorities could not act so as to aggravate the penal element of 11 years once lawfully fixed and communicated to the appellant;
(f) once that period expired the appellant's detention could no longer be justified in terms of punishment and had to be justified in terms of risk – a factor capable of change over time;
(g) once that period expired the appellant was entitled to a determination by a court as to the lawfulness of his detention thereafter.

It was incumbent on the Northern Ireland authorities to realise that the issue of 'punishment' had been determined in the appellant's case by the Secretary of State for the Home Department, and that the determination had been communicated to the appellant. Reliance was place on *ex parte Pierson* [1997] 3 All ER 577 and subsequent authorities cited to the court.

[45] Mr Macdonald submitted that there had been a violation of the appellant's Convention Rights because he had served the penal element in his sentence by February 2001. The consequences were illustrated in *Stafford v UK,* Appl No 46295/99 (28 May 2002) confirmed in *ex parte Anderson* [2002] 4 All ER 1089. There must be a sufficient causal connection between the conviction and the deprivation of liberty. This had not been established.

[46] An ECHR compliant tribunal would have required, Mr Macdonald argued: -

(a) a court exercising the necessary judicial procedures and safeguards;

(b) which was independent of the parties and the executive;

(c) which was able to review and decided on the unlawfulness of the detention;

(d) which was in place, and which was provided to the appellant without his having to institute separate legal proceedings;

(e) and which provided a periodic review.

See *Benjamin and Wilson v UK* [2003] 36 EHRR 1 and *R v Home Secretary ex parte Noorkoiv* [2002] 4 All ER 515.

[47] The Article 5(4) review must be provided speedily. Delaying referrals until the end or near the end of the tariff was Wednesbury unreasonable. See also *T v UK* (Appl No 24724)/94 (16 December 1999). Reference was made to paragraph 23 of the judgment of Higgins J and criticism was made of his statement that the appellant "was not yet a person who had served what might be adjudged to be the penal element of his sentence [until a tariff was

fixed by the Lord Chief Justice of Northern Ireland]. Paragraph 29 of the judgment was criticised on the basis that it ignored the effect of the decision in *ex parte Pierson* or indicated that the judge did not appreciate the significance of the decision.

[48] In the absence of an Article 5(4) review during the period between February 2001 and August 2003 the 'causal link' between detention and original conviction was broken, Mr Macdonald submitted. The respondents failed to appreciate the significance of the English tariff and the implications of *Pierson* and failed to put adequate procedures in place in respect of risk assessment to allow for an effective Article 5(4) review. Relying on the observations of Buxton LJ in *Noorkoiv* at para. 18, Mr Macdonald contended that there had been a breach of Article 5(1). The judge, he said, had failed to deal with these issues adequately at paragraphs 30-36 of his judgment. He should not have accepted that the case of *ex parte Colin King* justified the delay in the appellant's case.

[49] Habeas corpus was not an appropriate remedy as it did not permit the court to examine whether the detention of the appellant was justified: see *X v UK*, 24 October 1981, *HL v UK*, 5 October 2004 and Valentine's Criminal Law, Ch 19 para 100: see also *Linnett v Coles* [1987] 1 QB 555 at 561.

[50] Mr McCloskey, replying to the arguments advanced by Mr McDonald, referred to the order of the Home Secretary made on 1 January 1992 transferring the appellant permanently to Northern Ireland and to the terms of section 26(1) of the 1961 Act. The appellant's acknowledgment of the effect of the transfer was unqualified. Mr McCloskey contended that the appellant did not have a legitimate expectation that he would serve eleven years imprisonment only or that a release date would be fixed after eleven years. Any "legitimate expectation" was extinguished by Section 26. The life sentence explanatory memorandum was referred to and he relied on the decision in *Re Wright's Application* [1997] NI 318. He also referred to *In re Whelan's Application* [1990] NI 348 in which the then Lord Chief Justice set out the functions of the Board and the practice of the LMU in the Prison Regimes Division of the Northern Ireland Office and of the Board.

[51] Mr McCloskey pointed out that the Board had reviewed the appellant's case on 11 April 2000, ten years after the crime was committed. It was not bound by the English authorities. It was concerned about the appellant's abuse of alcohol and relationship with females and considered that it was necessary to address his problem with alcohol in order to assuage the risk to the public. The concerns about alcohol thereafter could be found in documents such as those of 7 July 2000 and 12 July 2002.

[52] Mr McCloskey drew the court's attention to the detailed consideration of the appellant's case and issues which had to be resolved. Work was

considered to be required on his relationships, his alcohol management and drug awareness, suitability for participation in a resident alcohol programme, psychology work, attendance at AA sessions and feedback to the appellant. A programme of work was being prepared and advice as to the consequence of non-co-operation. The court's attention was directed to paragraphs 34 of Governor Hazley's affidavit sworn on 23 October 2002 in which he referred to a log kept in respect of the appellant at the PRS unit, showing a relapse into alcohol consumption and consequent loss of control prior to the application for judicial review. The appellant had signed a document on 3 April 2002 under which he undertook not to consume alcohol. It contained a warning that any contravention of any of the conditions contained in the undertaking would result in his immediate recall to custody.

[53] In a letter to the Northern Ireland Human Rights Commission, Governor Hazley stated that the appellant's eventual release on licence would require a direction from the Independent Life Sentence Review Commissioners. They would require up to date reports from the Northern Ireland Prison Service, including a psychology risk assessment. His return to a pre-release scheme, however, was a matter for the Northern Ireland Prison Service and was unlikely in the short term given his past failures and breaches of trust. This letter was written on 28 June 2002.

[54] The Order 53 statement was dated 3 July 2002 and leave to apply for judicial review was granted ex parte on 23 September 2002. Mr McCloskey referred the court to a vast quantity of material in the form of affidavits and exhibits to affidavits extending over hundreds of pages. In particular he referred to the letter from Governor Hazley dated 11 July 2002 in which he stated that the appellant's continued suspension from the PRS was primarily because of his risk of violent offending. This letter is set out at paragraph 11 of this judgment. It was written without legal advice. It preceded the leave hearing in September 2002. The Order 53 statement was not then served on the Prison Service. There was no foundation for the contention that there was no nexus between the imposition of the life sentence and the continued incarceration from 2002 onwards.

[55] Mr McCloskey submitted that the cases relied on by the appellant did not address a case where two differing legal systems applied and did not address the effect of Section 26(1) of the 1961 Act. On the facts there was no increase in the tariff. On the authorities he relied on paragraphs 80-82 and 87 of *Stafford*. The English Court of Appeal in *Noorkoiv* had an exceptional state of affairs in mind. He suggested that the judicial review application in *King* created a great deal of uncertainty and considerable delay in the processing of cases to which Articles 10 and 11 applied. During the period in which the judicial review proceedings in *King* were in existence the basic administrative steps, including the assembly of all relevant information and reports, were taken in respect of all other life sentence prisoners so that they could be

forwarded to the Lord Chief Justice to perform his function under Articles 10 and 11. A further complication was that one of the issues in *King* referred to the precise scope of the function of the Lord Chief Justice under the legislation.

[56] Mr McCloskey further argued that the appellant had been given access to an Article 5(4) compliant tribunal since March 2003. He had made his case for release on licence and was still incarcerated. A declaration in his favour would be "beating the air" in respect of a finite past period. Habeas corpus or judicial review satisfies Article 5(4). He submitted that Higgins J had committed no error in the findings which he made. The appellant had at all times been a lawfully convicted and sentenced life prisoner. He had not been released on licence. He was the beneficiary on two occasions of a discretionary privilege which did not alter his status. When apprehended by the police he was clearly "at large without some lawful excuse" within Section 25 of the Prison Act (NI) 1953. He had not challenged the legality of the actions of the police in apprehending him and committing him to the custody of the prison governor. For these reasons complaint of a breach of Article 5.1 was without substance.

[57] Counsel pointed out that it was at all times open to the appellant to challenge his continuing detention by the swift, effective and potent remedies of habeas corpus and judicial review: see Lewis, Judicial Remedies in Public Law at paragraph 12.001, *Cullen v Chief Constable* [2002] NI 375, paras 36 and 39. Since the enactment of the 2001 Act the Commissioners had constituted the Article 5.4 'court'. The appellant's case was referred to them and they could have directed his release under Article 6(3): see *Benjamin and Wilson v UK* and *Stafford v UK.* The appellant's affidavits failed to discharge the onus which rested on him. Finally, it would be inappropriate for the court to exercise its discretion to grant any relief to the appellant.

[58] Mr Macdonald in response argued that the loss of tariff would have had to be spelt out to him. This was not done. Section 26 of the 1961 Act did not extinguish his legitimate expectation and there was nothing in the document which justified the assertion that he was waiving his right to an 11 year tariff. Section 26(4) was no more than a technical saving provision. There was a fiction that he had been sentenced in Northern Ireland. There was nothing in the subsection to suggest that the notion of substantive fairness was overridden.

[59] He claimed that the documents exhibited to Governor Hazley's affidavits had been taken out of context and that the Minutes of Case Conferences and the like did not support the Respondents' case. Until April 2002 when he was returned to prison, the appellant had never been assessed for release as required under Article 5(4) of the Convention. He relied on the decision in *R (Sim) v Parole Board* [2003] EWCA Civ 1845 and, in particular, on para 49 of the

judgment of Keene LJ. The material on which the respondents relied had to be viewed in the context of Article 5(4) of the Convention.

Conclusions

[60] When the tariff of 11 years was fixed for the appellant in 1991 it was regarded by Parliament, the executive and the courts as an administrative act and not as part of his sentence. In *R v Home Secretary, Ex p. Doody* [1994] 1 AC 531 Lord Mustill did say at p 557A:-

> "Even if the Home Secretary still retains his controlling discretion as regards the assessment of culpability, the fixing of the penal element begins to look much more like an orthodox sentencing exercise, and less like a general power exercised completely at large".

But he went on to say at p 588 F:-

> "But the position as to mandatory sentences is very different. Until Mr Brittan [then Home Secretary] completely changed the rules in 1983 the idea of a separate determinate penal element co-existing with the life sentence would have been meaningless . . . it is the Home Secretary who decided and who has developed (with his predecessors) his own ministerial ideas on what the public interest demands. I can see no reason why the anomalous task of fixing a "tariff" penal element for an offence in respect of which the true tariff sentence is life imprisonment is one for which the Home Secretary and his junior ministers, informed by his officials about the existing departmental practice, are any less experienced and capable than are the judges . . . Parliament has not by statute conferred on the judges any role, even as advisers, as to the time when the penal element of a mandatory sentence is fixed . . . The discretionary and mandatory life sentences, having in the past grown apart, may now be converging. Nevertheless, on the statutory framework, the underlying theory and the current practice, there remains a substantial gap between them . . ."

In *Wynne v United Kingdom* (1994) 19 EHRR 333 the headnote reads, inter alia:-

> "Despite judicial comments to the effect that the mandatory life sentence should be seen as containing both a punitive and a preventive element, the mandatory sentence belongs to a different category from the discretionary sentence in that it is imposed automatically as the punishment for murder irrespective of considerations pertaining to the dangerousness of the offender. That mandatory life prisoners do not actually spend the rest of their lives in prison and that a notional tariff period is also established in such cases does not alter this essential distinction between the two types of life sentence. While the two types of life sentence may be converging, there remains a substantial gap between them . . . [35]
>
> As regards mandatory life sentences, the guarantee of Article 5(4) was satisfied by the original trial and appeal proceedings and confers no additional right to challenge the lawfulness of continuing detention or re-dentention following revocation of the life licence. There were no new issues of lawfulness which entitled the applicant to a review of his continued detention under the original mandatory life sentence [36]."

[61] Following the decision of the European Court in *Stafford v United Kingdom* (2002) 35 EHRR 666 the House of Lords examined the exercise of the power of the Secretary of State for the Home Department to fix the tariff in *R v Secretary of State for the Home Department Ex parte Anderson* [2003] 1 AC 837. The head note reads in part:-

> "Held, allowing the appeal in part,
>
> (1) that the nature of the procedure adopted by the Secretary of State for fixing the tariff, judged as a matter of reality rather than of form, involved his assessing the term of imprisonment a mandatory life sentence prisoner should serve as punishment for his offence and thereby defining the period to be served before licensed release would be considered; that, accordingly, the Secretary of State was performing a sentencing function closely resembling that regularly undertaken by the judiciary in imposing custodial sentences for other crimes: that the domestic court was obliged

to take into account, although was not bound by, any decision of the European Court, but since that court's changed opinion [in *Stafford v UK*] rested on an accurate understanding of the tariff-fixing process and the Secretary of State's role, the House would give effect to its decision in ruling on the claimants rights under article 6(1) . . .

(2) That, since the imposition of sentence was part of a trial for the purposes of the right to a fair hearing by an independent and impartial tribunal guaranteed by article 6(1), and since tariff fixing was legally indistinguishable from the imposition of a sentence, the tariff was required to be set by an independent and impartial tribunal, and that, since, as a member of the executive, the Secretary of State was neither independent of the executive nor a tribunal, it following that he should play no part in fixing the claimant's tariff . . .

(3) That, since section 29 of the 1997 Act expressed the deliberate legislative intent of entrusting decisions relating to the length of imprisonment and the release of prisoners serving mandatory life sentences to the Secretary of State, that provision could not be read and given effect, under section 3(1) of the 1998 Act, in a way which was compatible with the Convention; and that, accordingly, a declaration of incompatibility under section 4 of the Act was the only appropriate relief which was available to the claimant.

Accordingly a declaration of incompatibility was made in the following terms:-

"Section 29 of the Crime (Sentences) Act 1997 is incompatible with a Convention right (that is the right under article 6 of the European Convention on Human Rights to have a sentence imposed by an independent and impartial tribunal) in that the Secretary of State for the Home Department is acting so as to give effect to section 29 when he himself decides on the minimum period which must be served by a mandatory life sentence prisoner before he is considered for release on life licence".

[62] Lord Bingham set out the history of the sentencing, punishment and detention of adults convicted of murder in England and Wales at paragraphs 1 to 12 of his opinion. It was clear, he stated, that the role of the Home Secretary in 1990 was the same role as he played until the decision in *Stafford* and *ex parte Anderson* and that role was not removed by Parliament until the Criminal Justice Act 2003 came into force. At para 13 he stated that the true nature of that procedure must be judged as one of substance, not of form or description. "It is what happens in practice that matter . . . what happens in practice is that . . . the Home Secretary assesses the term of imprisonment which the convicted murderer should serve as punishment for his crime or crimes . . . This is a classical sentencing function." At paras 16 and 17 he dealt with *Doody* and *Wynne* pointing out that there was material in the judgments to support the view of the Home Secretary that his role involved not the imposition of a sentence but the administrative implementation of a sentence already passed. But he added that these views were inconsistent with the steadily growing recognition of the tariff-fixing exercise as involving the imposition of a sentence.

[63] Lord Steyn at para 39 of his opinion said:-

> "In a series of decisions since *Doody* in 1993 . . . the House of Lords has described the Home Secretary's role to determine the tariff period to be served by a convicted murderer as punishment akin to a sentencing exercise . . . Parliament had the power to entrust this particular role to the Home Secretary. It did so unambiguously by enacting section 29 of the 1997 Act and its precursors."

He referred at para 44 to the decision in *Stafford v UK*. He pointed out that the Grand Chamber stated with reference to the decision in *Wynne*:-

> "The court considers that it may now be regarded as established by domestic law that there is no distinction between mandatory life prisoners, discretionary life prisoners and juvenile murderers as regards the nature of tariff fixing. It is a sentencing exercise ..."

He further referred to *Benjamin and Wilson v United Kingdom* (2002) 36 EHRR 1 in which the applicants were discretionary life sentence prisoners who were detained in a mental hospital. He pointed out that the court ruled that:-

> "although both parties appear to agree that the Secretary of State, following entry into force of the

> Human Rights Act 1998, would not be able lawfully to depart from the [mental health review] tribunal's recommendation, this does not alter the fact that the decision to release would be taken by a member of the executive and not by the tribunal ..."

[64] Lord Hutton at para 74 of *ex parte Anderson* stated:

> "I consider that the European Court was right to hold in *Stafford* that the mandatory life sentence pronounced by a judge when a defendant is convicted of murder does not impose imprisonment for life as a punishment and that the fixing of the tariff for punishment and deterrence is a sentencing exercise."

[65] Lord Nicholls, Lord Hobhouse, Lord Scott and Lord Rodger agreed with the speeches of Lord Bingham, Lord Steyn and Lord Hutton.

[66] In my opinion before the appellant left England he was sentenced not merely to life imprisonment but to a tariff of 11 years including the period spent in custody before trial and was so informed. I do not consider that section 26 of the Criminal Justice Act 1961 meant that he left behind the tariff in England, unless it could be said that the tariff was an administrative act. Since the decision in *ex parte Anderson*, this argument is not open to the respondents.

[67] I consider, therefore, that Higgins J was wrong in holding that no penal term had been set until March 2003. But it was wholly understandable that he should so hold, as *ex parte Anderson* was not cited to him. It had been decided in November 2002 and he gave judgment in July 2003. He was presented with the decision of the Court of Appeal in Northern Ireland in *Re Kavanagh* [1997] NI 368 as binding authority in the absence of any argument that the House of Lords had effectively overruled it.

[68] The appellant did not have an Article 5(4) compliant tribunal to consider whether he was a serious risk to the public until April 2003. But the Board which considered his case from April 2000 until the coming into force of the 2001 Order examined it with exemplary care, as is shown at paras [9], [10], [11], [12], [13], [14] and [15] of the Factual Background set out in this judgment. The prison authorities showed equal concern as is shown at paras [16], [17] and [20]. After the passing of the 2001 Order the prison authorities and the newly appointed Life Sentence Commissioners (who were a body compliant with Article 5(4) of the Convention) showed equal concern as can be seen from paras [25] to [27] .

[69] The argument that the Board was concerned to ensure that the appellant complied with the conditions of the PRS and not with the serious risk which he presented to the public appears to me to be devoid of merit. The appellant is a man who at the age of 26 was an alcoholic and murdered a young man aged 19 in a violent attack motivated by jealousy which was without foundation. Despite all the efforts made to date to keep him off alcohol and to provide him with a release date he had been unable to control his alcoholism. Inevitably the Board and subsequently the Life Sentence Review Commissioners have been unable to release him on licence. He remains a serious risk to the public.

[70] I accept that he should have had an independent tribunal to review his case after February 2001 and that the Board was not such a tribunal. In so far as he was treated in Northern Ireland as though no tariff had been fixed until March 2003 there was a breach of Article 6(1). In so far as he did not have an independent tribunal to review his case and decide whether he presented a serious risk to the public, there was a breach of Article 5(4) until April 2003 or, at latest, August 2003. But if an independent tribunal had examined his case in February 2001 it would have been bound to reach the same conclusions as were reached by the Board in April 2000. It would have been bound to involve the appellant in the pre-release schemes which he has been unable to comply with to date of judgment. Although I do not consider that the case of *Colin King* justified the delay in referring the appellant's case to the Lord Chief Justice of Northern Ireland, this delay is irrelevant.

[71] I do not consider that *ex parte Salem* applies to this case. The exercise which I have conducted has not been an academic exercise but, rather, a fresh investigation into the conduct of the prison authorities, the Board and the Commissioners in order to satisfy myself that everything has been done to enable the appellant to be released on licence, having regard to the serious risk to the public. The progress which he has made recently is promising. But he has fallen so often at the last fence that one cannot be confident of the future.

[72] I am satisfied that he was unlawfully at large at the relevant times when he was brought back to prison in breach of the conditions of the pre-release schemes. He was lawfully sentenced to imprisonment for life. He was and is lawfully imprisoned at HM Prison, Maghaberry on transfer from England to Northern Ireland. He is lawfully subject to prison rules and discipline under the Prison Act (Northern Ireland) 1953. He was in breach of a fundamental condition of his PRS on 23 April 2002; he had consumed alcohol. He was a danger to the public. He was validly arrested by the police and brought back to the prison. If he had been wrongfully arrested or had claimed that he was wrongfully arrested, he could have brought proceedings to challenge same. He did not do so. He admitted that he was in breach of

the conditions of release. He was disciplined by the prison governor. He did not challenge the right of the prison governor to discipline him.

[73] We are asked to make various declarations set out in the Order 53 statement. I would exercise my discretion against making any such declarations because they would be valueless, for the reasons which I have sought to set out. He has suffered no damage as a result of breaches of Article 6(1) and 5(4) of the Convention.

By oversight the point raised in relation to Article 5(1) was not addressed in the judgment of the court and as the application for leave to appeal to the House of Lords was not drawn to his attention, he was not in a position to rectify the oversight until after the application had been refused.

This court has held that there was a breach of Article 5(4). Burton LJ stated in *Noorkow* that he found "it very difficult to see how continued detention after the expiry of the tariff stage without the justification required for the protective stage could be justified under Article 5(1)." However he appeared to accept that the deprivation of liberty under Article 5(1) must be arbitrary.

Simon Brown LJ disagreed holding that there was no breach of Article 5(1). It seemed to him impossible to suggest that at the tariff expiry date there ceased to be "a sufficient causal connection between the conviction and the deprivation of liberty. Mere delay in Art. 5(4) proceedings, even after the tariff expiry date, would not … break the causal link.

Lord Wolff CJ also disagreed holding that Article 5(1) was not relevant because the justification for the detention of a prisoner sentenced to life imprisonment (whether discretionary or automatic or mandatory) is that sentence and not the fixing of the tariff period.

The appellant was sentenced to life imprisonment because it was mandatory. The authorities did not believe that the fixing of the tariff was part of the sentence. That became clear only after the decision in *ex parte Anderson* in November 2001. Meantime the Board had examined the appellant's case before the expiry of the tariff period and had taken steps to determine whether he was a danger to the public. They concluded that he was unless and until he could control his alcoholism. In November 2001 the order providing for the setting by the Lord Chief Justice of Northern Ireland of a tariff for prisoners sentenced to life imprisonment in England but transferred to Northern Ireland, as the appellant was, came into force. There was a delay in fixing his tariff under the order because the validity of the order was challenged in the case of Colin King. There was nothing arbitrary about the delay in having a hearing before the appropriate body set up under the order. As soon as the tariff was set, there was a hearing within a month, adjourned for good reason for a further few months. That body shared the same view as the Board that the appellant remained and remains a danger to the public unless and until he can control his alcoholism.

For these reasons we did not and do not consider that there has been a breach of Article 5(1). Even if Buxton LJ's approach to Article 5(1) is correct, we found no basis for holding that the continued detention was arbitrary and,

therefore, did not and do not consider that there was a breach of Article 5(1). If we are wrong in so holding and there was a breach of Article 5(1), we would have exercised our discretion against the appellant in regard to a declaration on the same grounds as we have exercised it in relation to Article 6(1) and 5(4). Such a declaration would be worthless and not in the interests of justice.