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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY WILLIAM JOHN MULLAN FOR JUDICIAL REVIEW

Before Kerr LCJ, Campbell LJ and Higgins LJ

KERR LCJ

Introduction

[1] On 31 March 2006 Girvan J delivered judgment on an application for judicial review by William Mullan of decisions taken by the Secretary of State and the Life Sentence Review Commissioners in relation to his recall to prison and the revocation of the licence on which he had been released from prison on 15 August 1994. He had been serving a life sentence for murder. This and other sentences for firearm offences had been imposed at Belfast Crown Court on 23 May 1980.

[2] Girvan J dismissed Mr Mullan's claim that his recall to prison and the revocation of his licence had been unlawful but he held that the commissioners were in breach of article 5 (4) of the European Convention on Human Rights and Fundamental Freedoms in failing to ensure that the lawfulness of his detention was decided speedily after the matter had been referred to them by the Secretary of State for Northern Ireland under article 9 (4) of the Life Sentences (Northern Ireland) Order 2001.

[3] Following delivery of this judgment Mr Mullan applied for compensation on foot of the finding that there had been a breach of his rights under article 5 (4) of ECHR. A further hearing took place before Girvan J and on 12 October 2007 this application was refused, the learned judge observing that Mr

Mullan's detention during the period of remand in custody could not be attributed to the revocation of his licence since he had been remanded in custody on criminal charges that had been preferred on 29 November 2004.

[4] The commissioners have appealed against the finding that their failure to deal with the review of the legality of Mr Mullan's detention amounted to a breach of article 5 (4). Mr Mullan (whom we will refer to as 'the respondent') has appealed against the decision that the original revocation of the licence and his recall to prison was lawful. He has also appealed against the refusal of compensation.

Background

[5] The respondent remained at liberty following his release on licence until 25 November 2004. On that date he was arrested on suspicion of conspiracy to imprison an employee of First Trust Bank and to carry out a robbery. The respondent and two others were detained at an address in north Belfast where they had apparently attempted to force entry at gunpoint of a dwelling house. It was suspected that he and the others had been planning to imprison the bank employee who lived there in order to carry out the robbery of the branch where he worked. On 29 November 2004 the respondent was charged with two offences of conspiracy - to falsely imprison the bank employee and to rob him. The charge of conspiracy to rob alleged that a firearm was to be used. He appeared before a magistrates' court the next day and was remanded in custody.

[6] On the respondent being remanded in custody, the Prison Service sought information from the police about the circumstances of the respondent's arrest and advice on whether his licence should be revoked. On 3 December 2004, a report was received from the police in which the circumstances of the respondent's arrest were outlined. The report also contained information about police surveillance of his movements in the days before his arrest. The Police Service expressed the view that the respondent represented a serious risk to the public.

[7] Having received this advice from the police, the Prison Service then considered whether to apply for a revocation of the respondent's licence. Since this is a matter of some significance in relation to the claim that the revocation of the licence was unlawful, we will quote from the affidavit of Harold James Mayes as to how it was dealt with by the Prison Service. Mr Mayes is employed in the Life Sentence Unit (LSU) and he said this at paragraph 2 (vii) – (ix): -

> "(vii) On the same day, Friday 3 December 2004, consideration was given by the Prison Service as to whether the [respondent's] licence should be

revoked. A particular issue which was [adverted] to was that of whether, if a revocation was appropriate, it should be [effected] under the route provided by article 9 (1) of the Life Sentences (Northern Ireland) Order 2001, or that provided by article 9 (2). The former involved first obtaining a recommendation from the Life Sentence Review Commissioners while the latter did not.

(viii) While consideration of the issue was under way at a time in the early afternoon of 3 December Prison Service officials received information that the [respondent] had sought bail before the High Court and that his bail application was listed for hearing on the morning of 6 December 2004.

(ix) In these circumstances it was decided that the route to revocation found at article 9 (2) of the Order should be used as the view was formed that it would not have been a practical proposition in these circumstances to have referred the case to the Life Sentence Review Commissioners for their recommendation. Such a step was not viewed as appropriate due to the urgency of the issue as it was the intention to seek to obtain a decision on the question of whether or not the [respondent's] licence should be revoked before any decision was made in the High Court whether or not in respect of the offences which the [respondent] faced he should be granted bail. In the past the Prison Service has referred other cases to the Life Sentence Review Commissioners for a decision as to whether or not the commissioners recommended revocation of a life sentence prisoner's licence but in these cases the process of obtaining a recommendation had been lengthy and involved the establishment of a panel for this purpose and necessarily deliberations by that panel in respect of the matter. Consequently, the judgment was arrived at that it would not have been practical for the commissioners to have dealt with the issue of a recommendation in the applicant's case between a Friday afternoon and the following Monday morning."

[8] A submission was prepared for the Secretary of State recommending that the licence be revoked. The imminent bail application was referred to and the Secretary of State was advised that he should take a decision immediately because it was possible that the respondent might be released on bail. It was drawn to his attention that the matter had not been referred to the commissioners and, according to Mr Mayes, "the submission gave due attention to the language of article 9 (1) and (2) of the 2001 Order".

[9] The submission to the Secretary of State was sent by e-mail to his private office at 4.34pm on 3 December 2004. In the event, he was not able to deal with it over the weekend and on the morning that the bail application was due to be heard, 6 December, it became clear that the Secretary of State would not be available for this matter. Another minister, Mr Barry Gardiner MP, was nominated to consider the submission. Mr Mayes sent an e-mail to the minister, explaining why it was necessary to deal with the application immediately and at about 10.30am he signed the revocation order.

[10] In the meantime, the respondent's bail application duly appeared in the list before Morgan J on the morning of 6 December 2004. In an affidavit filed on behalf of the respondent, his solicitor, Martin McCallion, stated that the application was refused. He was not present at the bail court. Another solicitor from his office attended. Mr McCallion said this about the application: -

> "It … appeared … to counsel in the bail court and to the solicitor from our offices who attended him that [the respondent] had a reasonable prospect of being granted bail at that time. In the course of the bail application for Mr Mullan, however, Crown counsel stood up and advised the court that bail could not be granted as the authorities were seeking leave to have the [respondent's] licence revoked. It is believed that bail was refused then at that stage, largely due to the import of the impending licence revocation."

[11] Mr Mayes had also dealt with the matter of bail in his affidavit. He stated that he had informed the police officer who was present at the bail court that the respondent's licence had been revoked. He was later told by the officer that this information had been "communicated to the High Court" and the bail application was abandoned.

[12] This court raised the conflict in these two accounts with Mr Barry Macdonald QC, who appeared with Mr Hutton for the respondent. After seeking instructions, Mr Macdonald informed us that the bail application had indeed been withdrawn. We intimated to Mr Macdonald that this court

would require an explanation from Mr McCallion as to how the averments in his affidavit about the matter of bail came to be made. That explanation is still awaited. Although it was assumed that Morgan J would not have been able to grant bail if revocation of the licence was made, it is clear that this was not correct. It is now accepted that there was no inhibition on the power of the court to grant bail.

[13] On 14 December 2004 LSU referred the respondent's case to the commissioners. In the referring letter they explained the reasons for the revocation of the licence. A dossier of documents was enclosed with the letter. These included the police report that had been received by the Prison Service on 3 December, the charge sheet, a case summary in relation to the original offences in 1980, the respondent's criminal record and documents generated by the respondent's application to be placed in separated accommodation conditions in the prison. He had applied to be housed in a loyalist section of the prison.

[14] On 21 December 2004 the commissioners wrote to LSU asking that the Secretary of State provide any further material or reports that he intended to rely on by 15 February 2005. This prompted Mr Mayes to write to the Police Service to ask for more information. In particular, he wanted to have more detailed material about the charges preferred against the respondent and any other offences that the respondent was suspected of having committed. The police replied that they were not in a position to provide this information. Mr Mayes then asked the commissioners to postpone the date for a reply to their letter and they agreed to defer this until 22 March 2005. That date could not be met, however, because the police were again unable to supply the material that was needed to make the necessary response. A further application to extend the time for the supply of information was granted on 18 May 2005. The direction made was that "all future proceedings in this case be stayed pending the outcome of the current criminal proceedings against Mr Mullan". The reason for the direction was stated to be that "the criminal proceedings are highly relevant to the disposal of the reference and it would therefore be inappropriate to proceed with it until the criminal proceedings are complete". Having obtained an extension of time in order to do so, the respondent appealed this direction but on 8 September 2005, a panel of commissioners affirmed the decision.

[15] On 30 September 2005 the Public Prosecution Service withdrew all charges against the respondent. Mr Mayes then contacted the police to ask for the further materials that had previously been sought. They replied that since criminal proceedings against the respondent's co-accused were continuing, they could not supply the papers until after preliminary inquiry papers had been served. It was expected that this would occur within three to four weeks. Mr Hayes relayed this information to the commissioners and they indicated that a preliminary meeting to discuss the case should be held

on 3 November 2005. Before that could take place, the respondent was granted leave to apply for judicial review and the meeting was therefore cancelled.

[16] Following Girvan J's first judgment, the respondent applied for and was granted bail. On 14 June 2007 the commissioners completed their review of the legality of the decision to detain him and issued a decision that his licence should remain revoked. The respondent has been returned to prison. He had spent a total of 489 days in detention after his arrest in November 2004 before bail was granted. During 304 of those days he was remanded in custody on the charges on which he had been arrested.

Article 9 of the 2001 Order

[17] Article 9 (1) is the primary provision in relation to recall to prison and revocation of a life sentence licence. It provides: -

> "**Recall of life prisoners while on licence**
>
> **9.** - (1) If recommended to do so by the Commissioners, in the case of a life prisoner who has been released on licence, the Secretary of State may revoke his licence and recall him to prison."

[18] Mr Macdonald submitted that this was the normal route for revocation of licences and reflected the move away from the situation where decisions such as this were taken by the Executive. The commissioners were a quasi judicial body, he said, and, in exercising their powers under article 9 (1), were performing an adjudicative function in deciding whether loss of liberty was warranted. Recourse to the powers in article 9 (2) should, therefore, be had only in exceptional circumstances. Article 9 (2) provides: -

> "(2) The Secretary of State may revoke the licence of any life prisoner and recall him to prison without a recommendation by the Commissioners, where it appears to him that it is expedient in the public interest to recall that person before such a recommendation is practicable."

[19] The requirement of non-practicability in article 9 (2) could only be satisfied, Mr Macdonald argued, by the commissioners deciding that it was not feasible to make the necessary recommendation. At the very least, he suggested, they must participate in that exercise. It was impossible for the Secretary of State to conclude that it was not practicable for the commissioners to make the recommendation without consulting them as to the feasibility of doing so.

[20] Article 9 (4) requires the Secretary of State to refer the case of a recalled prisoner to the commissioners and by article 9 (5) where, on such a reference, the commissioners direct the immediate release of a life prisoner, the Secretary of State must give effect to the direction. Article 9(5A) was inserted in the 2001 Order by the Criminal Justice (Northern Ireland) Order 2002. It provides: -

> "5A. The Commissioners shall not give a direction under paragraph (5) 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."

The commissioners' duties

[21] Article 3 (3) (a) of the 2001 Order makes provision for the duties to be performed by the commissioners in dealing with cases referred to them by the Secretary of State. It provides: -

> "(3) The Commissioners shall –
>
> (a) advise the Secretary of State with respect to any matter referred to them by him which is connected with the release or recall of life prisoners;"

[22] In carrying out the review of cases referred to them by the Secretary of State, the commissioners are given specific statutory duties in article 3 (4) as follows: -

> "(4) In discharging any functions under this Order the Commissioners shall –
>
> (a) have due regard to the need to protect the public from serious harm from life prisoners; and
>
> (b) have regard to the desirability of –
>
> (i) preventing the commission by life prisoners of further offences; and
> (ii) securing the rehabilitation of life prisoners."

The practicability point

[23] The structure of article 9 clearly contemplates that normally the decision to revoke a licence and recall a released prisoner to jail will be taken by the commissioners. The Secretary of State is empowered to bypass the commissioners only where it is considered impracticable for them to take the decision and it is expedient in the public interest to recall the prisoner. The question of practicability must, of course, be considered in light of the arrangements that the commissioners put in place for this type of decision. Girvan J dealt with this issue in the following passage from paragraph [14] of judgment: -

> "From the wording of the 2001 Order, Article 9(2) is intended to be an exceptional power, exercisable only when an Article 9(1) recommendation is considered to be impracticable and it is considered by the Secretary of State to be expedient in the public interest to recall the prisoner before an Article 9(1) recommendation is practicable. It is for the Secretary of State to satisfy the requirement of showing that it appeared to him to be expedient to recall in the public interest before an Article 9(1) recommendation was practicable. Nevertheless in considering the question, the court is not deciding the question whether in fact it was expedient or whether in fact it was impracticable to obtain an Article 9(1) recommendation, but whether the Secretary of State was acting so outwith the area of judgment called for in Article 9(2) that his decision can be categorised as irrational, arbitrary or otherwise unlawful. Applying the anxious scrutiny test (which I shall assume in favour of the applicant) I have not been persuaded that the Minister erred in law in making his decision to revoke the licence and recall the prisoner. The question as to what is expedient in the public interest before an Article 9(1) recommendation is practicable calls for a balanced judgment. What is required in the public interest requires an assessment based and a view taken as to the risk to the public that would arise from the continued liberty of the prisoner. That view is one that by the statute must be taken by the Secretary of State albeit subject to the judicial review powers of the court. In this case, faced with the police advice and the evidence against the applicant, the decision

> that it was expedient in the public interest to recall the prisoner is not one that could be regarded as an unlawful one in public law provided that the conclusion by the Minister was impracticable to seek a recommendation of the Commissioners under Article 9(1) was tenably reached."

[24] The reasons that, as Mr Mayes deposed, decisions taken by the commissioners under article 9 (1) involved a lengthy process and the establishment of a panel were explained by Mr Peter Smith QC, the chairman of the commissioners, in a different case, *Re Fergal Toal's application* [2006] NIQB 44. Mr Smith's affidavit in the *Toal* case was quoted by Girvan J (who delivered the judgment in that case also): -

> "2. Shortly after our appointment the Commissioners resolved at a plenary meeting that all references of cases of individual prisoners other than those referred under article 6 or 9(4) of the Order which would fall to be dealt with by panels appointed by me under rule 3 of the LSRC Rules 2001 would be processed by panels of three Commissioners again to be appointed by me. Those panels would consist of a legally qualified Commissioner, one who was a psychiatrist or a psychologist and one draw from the group of Commissioners having a variety of other qualifications and backgrounds.
>
> 3. The only practicable alternative was the processing of such references by a single Commissioner. However, the Commissioners were concerned to ensure that in order to safeguard the rights of the prisoner the quality of the decision making would be at the highest possible standard and consistent with that which applied in cases referred under article 6 and 9(4). In relation to article 9(1) references, this was felt to be particularly important as a recommendation to recall would almost certainly mean that the prisoner would be returned to custody for at least a number of months while the consequence reference under article 9(4) of the Order was being processed."

[25] Mr Macdonald pointed out that Mr Smith had acknowledged that a "practicable alternative" to the processing by a panel of recommendations

under article 9 (1) was that a single commissioner should deal with them. He suggested, therefore, that the pre-condition on the exercise of the power in article 9 (2) (that a recommendation of the commissioners could not practicably be obtained) was not satisfied. He also argued that there was a "disconnect" in Mr Smith's reasoning in that the claim that the prisoner's rights would be better safeguarded by recommendations being made under article 9 (1) failed to take account of the fact that this would lead to the Secretary of State taking these decisions rather than the commissioners. This would dilute rather than enhance the protection of prisoners' rights.

[26] It was not in issue in this appeal that it is legally permissible for a single commissioner to make a recommendation under article 9 (1). In the present case, in an *obiter* passage, Girvan J had expressed some doubt as to whether it was possible for a single commissioner to make such a decision because the wording of the 2001 Order pointed to the commissioners acting as a body. But he disavowed that preliminary view firmly in the later case of *Toal.* At paragraph [13] of his judgment in that case, the judge said: -

> "… what the Secretary of State requires under article 9(1) is assistance from the Commissioners in arriving at the decision which the Secretary of State must take whether to recall the prisoner to prison. That assistance could be in the form of a recommendation based on an assessment carried out by one or more Commissioners. The force of the recommendation comes from the analysis carried out by the Commissioners who looked at the question. The context of the legislation does not point to a need to construe the plural "Commissioners" as solely a plural term. The Commissioners under article 9(1) are not governed by specific procedural rules. In the absence of specific rules there is no logical reason why a recommendation reached by the Commissioners could not include one reached by a Commissioner or a limited number of Commissioners since the plural term Commissioners includes the singular."

[27] Girvan J was disposed to accept at face value Mr Smith's claim that the decision of the commissioners to establish panels for article 9 (1) decisions was intended to enhance the decision making process. We do not doubt that this was what was intended but we are concerned that this approach might have the opposite, unplanned effect. Certainly, if it led to decisions on recall being regularly made by the Secretary of State rather than the commissioners this would appear to us to subvert the intention of the legislature. That intention we consider to be plain. It is that, ordinarily, the decision to revoke

a licence and recall a released prisoner to jail will be taken by the commissioners. The importance of ensuring that this structure be preserved is reflected in the consideration that if the commissioners decide *not* to make a recommendation, the Secretary of State may not order the recall of a prisoner. The opportunity to have the matter considered by a commissioner rather than the Secretary of State is not a merely formal entitlement, therefore.

[28] Mr Maguire QC, who appeared with Mr Coll for the Secretary of State, suggested that it was wrong to portray the exercise of the power under article 9 (1) as some kind of judicialised process. It was merely a power of recommendation. Ultimately, the decision was one for the Secretary of State. The principal motivating force underlying the decision to recall was the protection of the public. A hearing to investigate the material on which the recall order was based was neither required nor appropriate. The nature of the decision, whether it was made by the commissioners or the Secretary of State, was essentially the same.

[29] In advancing this argument Mr Maguire relied on *R (on the application of Hirst) v Secretary of State for the Home Department* [2006] EWCA Civ 945 where a prisoner who was subject to a discretionary life sentence was recalled on the recommendation of a discretionary lifer panel. It had been argued that an immediate hearing to investigate the material on which the recall order was based, and to examine whether any further and fuller investigation into it was necessary, should take place before the recall order was confirmed. The Court of Appeal rejected that suggestion, stating that to convene such a hearing in the context of a perceived risk of danger to public safety was unrealistic.

[30] Mr Macdonald pointed out that since the basis on which the discretionary life sentence had been imposed in the *Hirst* case was that the prisoner constituted a danger to the community, it should not be regarded as authority for the proposition that the decision to recall was essentially an executive or administrative one. The need to protect the community in that instance was self evidently greater than in the case of a prisoner subject to a mandatory life sentence.

[31] We do not consider that there is any distinction of significance to be drawn between a discretionary life sentence and a mandatory life sentence in this context. *Hirst* was primarily concerned with the question whether the scheme of recall was compatible with article 5 (1) of ECHR. As the court observed, the jurisprudence of the European Court of Human Rights, as exemplified in such cases as *Weeks v United Kingdom* (1987) 10 EHRR 293, *Stafford v United Kingdom* (2002) 35 EHRR 32 and *Waite v United Kingdom* App No 5323 6/99 (10 December 2002) established that the circumstances under which the original sentence was imposed must be sufficiently connected to those which prompt the recall order. The need to protect the community

(which is the essential catalyst for the exercise of the recall power) obtains in both instances.

[32] We agree with Mr Maguire's contention that the decision whether to recommend a recall should not be regarded as one that requires the deployment of the full adjudicative panoply but we do not consider that this derogates from the importance of the decision being customarily taken by the commissioners. While the decision process may not greatly differ if it is carried out by the commissioners or the Secretary of State, it is, we believe, important that the independent element that the recommendation route provides should not be dispensed with in any but exceptional cases.

[33] While we can understand the commissioners' anxiety to achieve a high quality of decision under article 9 (1) as well as under article 9 (4), we think that there is a real danger that the approach they have adopted may lead to many decisions that should rightfully be taken by them being taken by the Secretary of State. It seems to us that the commissioners may wish to take the opportunity that this case presents to re-evaluate that approach. As Mr Macdonald pointed out, the concern that their decision to recommend might result in a prisoner being returned to custody for a number of months before an article 9 (4) review can take place is unlikely to be alleviated if the Secretary of State is routinely required to have recourse to his powers under article 9 (2). There is, of course, no evidence that this is currently the position. But if the commissioners continue with their present stance that decisions under article 9 (1) can only be taken by a panel of commissioners, one can readily anticipate that the Secretary of State will feel it necessary to have resort to the powers under article 9 (2) in those cases where there is a need for a prompt revocation of the licence.

[34] The nature of the decision under article 9 (1) is quite different from that to be taken under article 9 (4). The latter involves a careful sifting of the evidence, with relevant material being provided to the prisoner so that informed representations can be made about it. A review decision under article 9 (4) will often be based on expert opinion obtained after the prisoner's recall to prison and which deals with the risk that the prisoner presents at that time. By contrast, the decision whether to recall is directed to the question whether there is sufficient immediate cause to revoke the licence and recall the prisoner. That decision is taken in the knowledge that there will thereafter be a review of his continued detention. Of its nature it is a more peremptory decision than that involved in the later review. While one should naturally aspire to a high standard of decision making, the need to ensure that there is an exhaustive and conclusive appraisal of the facts is self evidently not as great at the recall stage as it will be at the review stage. The need for a full panel to take the decision on recommendation is not obvious, therefore.

[35] In the present case the minister was presented with a submission that stressed the need for urgency because a bail application by the prisoner was about to be heard. If that application had succeeded and LSU proved to be correct in its prediction of how long it would take to obtain a recommendation from the commissioners, the appellant might well have been at liberty before the commissioners' decision on the issue was known. On the basis of the material available to him and the advice that he had been given, we find it impossible to say that the minister's decision to exercise his powers under article 9 (2) fell outside the range of reasonable conclusions that might be reached. We do not accept that the commissioners had to participate in the assessment whether it was practicable for them to make a recommendation. The language of the subsection reserves that evaluation to the Secretary of State. Nor do we accept that the minister should have deferred his decision in order to allow time for the commissioners to convene a panel meeting. The circumstances in which the respondent was arrested were such that the view that the public would be put at immediate risk if the respondent was released was a perfectly tenable one.

Article 5 (1) of ECHR

[36] Article 5 (1) (a) of ECHR provides: -

> "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:
>
> (a) the lawful detention of a person after conviction by a competent court"

[37] As the Court of Appeal in *Hirst* held, "provided the circumstances under which the original sentence was imposed are sufficiently reflected in those which pertain at the time when the recall order is made, the recall of a prisoner subject to a discretionary life sentence does not contravene art 5(1)(a). The recall and consequent detention follow a 'conviction by a competent court'".

[38] The recall of the respondent in the present case is consequent on his conviction on the original charge of murder. There was a clear connection between the circumstances of the original offence and those which prompted the revocation of his licence. The respondent has not suggested otherwise. The violence associated with the attempt to force entry and the use of a weapon are sufficient to make that link. We have concluded, therefore, that there is no basis for the claim that the revocation of the respondent's licence and his recall to prison constitutes a breach of article 5 (1) (a) of ECHR.

[39] Mr Macdonald advanced an alternative basis for the claim that there was a breach of article 5 (1). He submitted that where detention on foot of a recall to prison continues for a significant period without judicial authorisation a breach of article 5 (1) is established. He relied on the decision of ECtHR in *Erkalo v Netherlands*, Application No. 23807/04, 2nd September 1998. In that case the applicant was convicted and placed at the government's disposal in a psychiatric institution. It was held that his detention fell under Article 5 § 1 (a) and (e) of the Convention. Domestic case-law recognised that in certain circumstances the state was obliged to terminate the placement order after expiry of statutory period and without a decision on extension having been taken. ECtHR held that since for eighty-two days the applicant's placement was not based on any judicial decision there was a breach of article 5 (1). At paragraph 57 of its judgment, the court said: -

> "In its *Winterwerp v. the Netherlands* judgment (of 24 October 1979, Series A no. 33, p. 21, § 49), the Court held that a delay of two weeks in the renewal of a detention order could not be regarded as unreasonable or excessive, and, as a result, did not involve an arbitrary deprivation of liberty. However, in the instant case the request of the public prosecutor for the extension of the placement order was not received by the Groningen Regional Court until two months after the expiry of the statutory period, and, as a result, for eighty-two days the placement of the applicant was not based on any judicial decision."

[40] In *Baranowski v Poland* Appl No. 28358/95, 28th March 2000 at paragraph 57 of its judgment, ECtHR said: -

> "… the Court also stresses that, for the purposes of Article 5 § 1 of the Convention, detention which extends over a period of several months and which has not been ordered by a court or by a judge or any other person "authorised ... to exercise judicial power" cannot be considered "lawful" in the sense of that provision. While this requirement is not explicitly stipulated in Article 5 § 1, it can be inferred from Article 5 read as a whole, in particular the wording in paragraph 1 (c) ("for the purpose of bringing him before the competent legal authority") and paragraph 3 ("shall be brought promptly before a judge or other officer authorised by law to exercise judicial power"). In

> addition, the habeas corpus guarantee contained in Article 5 § 4 further supports the view that detention which is prolonged beyond the initial period foreseen in paragraph 3 necessitates "judicial" intervention as a safeguard against arbitrariness. In the Court's opinion, the protection afforded by Article 5 § 1 against arbitrary deprivations of liberty would be seriously undermined if a person could be detained by executive order alone following a mere appearance before the judicial authorities referred to in paragraph 3 of Article 5."

[41] In *Rutten v Netherlands* [2001] MHLR 155, it might appear, at first sight, that a somewhat different view appears to have been taken. In that case the applicant was the subject of a detention order that was due to expire on 4 September 1995. The public prosecutor applied for a continuance of the detention. That application was not heard until 22 September 1995, and a decision to prolong the order was not made until 6 October 1995. The applicant remained in detention between 4 September and 6 October. In his complaint to ECtHR he claimed the state authorities had breached his rights under article 5 (1) and (4) of the Convention. The court found a breach of article 5 (4) but not of article 5 (1). It held that the detention during that period had not been 'arbitrary', and that this was required before a breach of article 5(1) could be established.

[42] The *Rutten* decision was considered by the Court of Appeal in England in the case of *R (on the application of Noorkoiv) v Secretary of State for the Home Department and another* [2002] 4 All ER 515. In that case the claimant had been sentenced to an automatic life sentence. The Parole Board did not hold a hearing to determine whether he should be released on licence until two months after the expiry of his tariff. Although he expressed some reservations about the correctness of the decision in *Rutten*, Buxton LJ felt constrained to follow it. At paragraph [21] of his judgment, he said: -

> "… the underlying legal structure in *Rutten*'s case seems to me to be sufficiently similar to that applying in the case of the automatic life sentence to render it impossible for a national court to say that any period at all of detention between the expiry of the tariff period and the decision of the Board must be struck down under art 5(1)."

[43] The apparent divergence between the approach in cases such as *Erkalo* and *Baranowski* and that in *Rutten* can possibly be explained on the basis that in the former two cases the applicants were not detained in right of an

original conviction, whereas in *Rutten* (and, incidentally, *Noorkoiv*) they were. In any event, we agree that, if a requirement for the applicability of article 5 (1) in this context is that it be shown that the detention is arbitrary, it is impossible to say that a recalled prisoner, who is held on foot of his originally conviction, is arbitrarily detained. The interplay between articles 5 (1) and 5 (4) in the area of recall to prison of released persons who have received automatic life sentences was succinctly described by Buxton LJ in *Noorkoiv* at paragraph [22] in a way that summarises neatly our reasons for rejecting the respondent's arguments on this aspect of the article 5 (1) issue -

> "… the reference to article 5(1) in the context of the present case has served the valuable purpose of concentrating our minds on two fundamental considerations. First, detention between the expiry of the tariff period and the determination of the Board does indeed need justification, and control in convention terms. Second, the European Court of Human Rights has seen article 5(4) as the vehicle through which that control should be operated."

Article 5 (4) of ECHR

[44] Article 5 (4) of ECHR provides: -

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

[45] The lawfulness of the prisoner's continued detention must be determined speedily. In *Sanchez-Reisse v Switzerland* (1986) 9 EHRR 71, paragraph 55, ECtHR emphasised that the term 'speedily' cannot be defined in the abstract. What is required in terms of speed of determination must depend on the circumstances of the individual case. Thus, in *R (Spence) v Secretary of State for the Home Department* [2003] EWCA Civ 732 (2003 147 Sol Jo LB 660) the Court of Appeal held that it was not possible to determine prospectively whether the Secretary of State's decision as to the period between reviews by the Parole Board violated article 5(4), as each case would turn on its individual circumstances. Relevant considerations include the diligence shown by the authorities, any delay caused by the detained person, and any other factors causing delay that do not engage the state's responsibility – paragraph 56 of *Sanchez-Reisse*. If the length of time before a decision is taken is *prima facie* less than expeditious, it will be for the public authority responsible for making the determination to justify the delay - *Koendjbiharie v Netherlands* (1990) 13 EHRR

820, paragraph 29. (See generally on this subject *Lester & Pannick, Human Rights Law and Practice* paragraph 4.5.57)

[46] The delay in determining the lawfulness of the respondent's detention obviously raises the issue of a lack of expedition. One must then examine the reasons proffered for the delay. It is suggested that the trial of the respondent in the Crown Court would unquestionably generate material directly relevant to the assessment that the commissioners had to undertake. This can be accepted without demur. But the mere fact that such material will not be released by the police to the commissioners until the end of the trial process will not, of itself, justify the delay.

[47] In *Noorkoiv* the court, in considering the claim that there had been a breach of article 5 (4), observed that the state was required to organise its legal system to enable it to comply with convention requirements. The Parole Board's delay in holding a hearing was not unusual. The gap between the end of the tariff period and the hearing date could be up to three months, because *inter alia* a shortage of judicially qualified chairmen and psychiatrists had prompted a policy on the part of the Board of hearing all cases pending at a particular prison at the same time by the same panel. At paragraph [30] Buxton LJ said: -

> "Mr Noorkoiv was detained by the Secretary of State, who was implementing arrangements made by the state, including the slowness of consideration by the Board forced on it by the limited resources made available to it by the state. The Secretary of State cannot therefore excuse any failing under article 5(4) by pointing to policies adopted by other departments; nor, I am constrained to say, should he seek to do so."

[48] A distinction can be drawn between the situation that obtained in *Noorkoiv* and the present case since it lay within the power of the state to address the lack of resources of the Parole Board whereas, arguably, here the state could not compel the release of the materials that the police were withholding. The least that was required, however, was that a scrupulous examination of the reasons for withholding the materials be undertaken. It does not follow that simply because a criminal trial was due to take place, material sufficient to allow the commissioners to proceed could not be released. The panel appears to have concluded that because a trial was pending, this automatically required the hearing of the review to be postponed. There was no investigation of whether the review could proceed without the material that had been requested of the police. No representation was made to the police that the material (or, at least, enough of it to allow the review to progress) should be released. There was no inquiry into the reasons

that the police were reluctant to disclose the requested information or whether such objections as they had could be accommodated or overcome. To borrow the language of Buxton LJ, the commissioners cannot excuse their failure to discharge their duty under article 5 (4) by pointing to the stance of the Police Service. We have concluded, therefore, that the decision of the commissioners not to hold a review hearing until June 2007 violated the respondent's rights under article 5 (4) of ECHR.

[49] As Girvan J observed, the fact that article 9 (5A) of the 2001 Order requires the commissioners not to recommend the release of the prisoner unless they are satisfied that his detention is no longer necessary for the protection of the public does not alter this position. It could be argued that if the commissioners do not have the information that would allow them to reach that conclusion they cannot be faulted for waiting for it to be supplied. We could not accept such a proposition. The commissioners must be pro-active in their quest for the material that would allow them to conduct a speedy review of the lawfulness of the prisoner's detention. It is not open to them to wait passively for the police to supply the information and to defer the review until they decide to do so.

[50] The fact that the respondent was in custody on foot of his arrest and subsequent remand in custody does not relieve the commissioners of their duty to review the lawfulness of the respondent's detention. That duty is not abrogated because the respondent was in custody for other reasons. The issue was considered, albeit somewhat obliquely, by ECtHR in *Weeks v UK.* At paragraph 40 of its judgment the court said: -

> "40. … All persons, whether at liberty or in detention, are entitled to the protection of Article 5, that is to say, not to be deprived, or to continue to be deprived, of their liberty save in accordance with the conditions specified in paragraph 1 and, when arrested or detained, to receive the benefit of the various safeguards provided by paragraphs 2 to 5 so far as applicable.
>
> …
>
> The freedom enjoyed by a life prisoner, such as Mr. Weeks, released on licence is … more circumscribed in law and more precarious than the freedom enjoyed by the ordinary citizen. Nevertheless, the restrictions to which Mr. Weeks' freedom outside prison was subject under the law are not sufficient to prevent its being qualified as a state of 'liberty' for the purposes of Article 5.

> Hence, when recalling Mr. Weeks to prison in 1977, the Home Secretary was ordering his removal from an actual state of liberty, albeit one enjoyed in law as a privilege and not as of right, to a state of custody … *This conclusion is not altered by the fact that on the day the Home Secretary revoked his licence (30 June 1977) Mr. Weeks was already in detention on another ground, having been remanded in custody by an order of Court following his arrest on 23 June on various criminal charges.*" [Emphasis added]

The claim for compensation

[51] In light of our conclusions on the article 5 (1) argument, it is unnecessary to say anything about the circumstances in which compensation is recoverable where a violation of that provision has been established. In relation to article 5 (4) claims for compensation, ECtHR has said this in *Nikolova v Bulgaria* [2001] EHRR 3 at paragraph 76: -

> "76. The Court recalls that in certain cases which concerned violations of Article 5(3) and (4) it has granted claims for relatively small amounts in respect of non-pecuniary damage. However, in more recent cases concerning violations of either or both paragraphs 3 and 4 of Article 5, the Court has declined to accept such claims. In some of these judgments the Court noted that just satisfaction can be awarded only in respect of damage resulting from a deprivation of liberty that the applicant would not have suffered if he or she had had the benefit of the guarantees of Article 5(3) and concluded, according to the circumstances, that the finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage suffered."

[52] This general approach was followed in *Migon v Poland* (App. no. 24244/94), as can be seen from the judgment at paragraph 91: -

> "As regards the claim for the alleged damage suffered as a result of the violation of art 5(4) of the Convention, the Court recalls that in certain cases which concerned violations of art 5(3) and (4) it has made modest awards in respect of non-pecuniary damage (see *Van Droogenbroeck v Belgium* (art 50) [1983] ECHR 7906/77 at para 13,

> and *De Jong, Baljet and Van den Brink v Netherlands* [1984] ECHR 8805/79 at para 65). However, in more recent cases, it has declined to make any such award (see *Pauwels v Belgium* [1988] ECHR 10208/82 at para 46; *Brogan and Others v UK* (art 50) [1989] ECHR 11209/84 at para 9; *Huber v Switzerland* [1990] ECHR 12794/87 at para 46; *Toth v Austria* [1991] ECHR 11894/85 at para 91; *Kampanis v Greece* at [1995] ECHR 17977/91 at para 66; *Hood v UK* [1999] ECHR 27267/95 at paras 84-87; and *Nikolova v Bulgaria* [1999] ECHR 31195/96 at para 76; *Niedbala v Poland* [2000] ECHR 27915/95 at para 89). In certain of these judgments, for instance in the cases of *Hood*, *Huber*, *Niedbala v Poland* [2000] ECHR 27915/95 and *Nikolova v Bulgaria* [1999] ECHR 31195/96 the Court stated that just satisfaction can be awarded only in respect of damage resulting from a deprivation of liberty that the applicant would not have suffered if he or she had had the benefit of the procedural guarantees of art 5 of the Convention and concluded, according to the circumstances, that the finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage suffered."

[53] These cases were reviewed by Stanley Burnton J in *KB and others v Mental Health Review Tribunal* [2003] EWHC 193 (Admin.). At paragraph 151 the learned judge said that he read them as holding that damages for distress cannot be recovered in the absence of a finding of unlawful detention but in the next paragraph of his judgment observed that "in other recent decisions the Court has awarded damages where the only claim relates to frustration and distress: see *Delbec v France* (18 June 2002, App no. 43125/98), *LR v France* (27 June 2002, App no 33395/96), *DM v France* (27 June 2002, 00041376/98) and *Laidin v France* (5 November 2002, 43191/98) (all Article 5.4 mental health cases)."

[54] At paragraph 54 of his judgment, while recognising that the jurisprudence of ECtHR did not suggest that any special legal principles applied to mental health cases as opposed to other article 5 cases, Stanley Burnton J said that they involved special factual considerations, in particular the generally vulnerable condition and circumstances of mental patients who are compulsorily detained. As he later observed, however, even in the case of mentally ill claimants, not every feeling of frustration and distress will justify an award of damages. The frustration and distress must be significant: "of

such intensity that it would in itself justify an award of compensation for non-pecuniary damage" (paragraph 188).

[55] We agree with the reasoning and the statements of principles contained in the various passages that we have referred to or quoted. In the present case the respondent did not suffer "a deprivation of liberty that [he] would not have suffered if he … had had the benefit of the procedural guarantees of article 5 of the Convention". The commissioners decided that the revocation of his licence was justified and that decision has not been challenged. Quite apart from this, we are entirely satisfied that the reaction of the respondent to his recall could not remotely be described as of significant intensity. This is not a case for the award of compensation.

Conclusions

[56] We have concluded that the revocation of the respondent's licence and his recall to prison was not unlawful. In particular, we do not consider that it constituted a violation of his rights under article 5 (1) of ECHR. We have concluded, however, that the failure of the commissioners to conduct the review of the legality of his detention until June 2007 was in breach of the respondent's rights under article 5 (4) and we will make a declaration to that effect. The respondent is not, in our judgment, entitled to recover compensation for that breach. Both the appeal and the cross appeal are dismissed and the decision of Girvan J is affirmed.