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Judgment: approved by the Court for handing down (subject to editorial corrections)* | Delivered: 07/07/03

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY THOMAS McCABE

AND IN THE MATTER OF DECISIONS BY THE SECRETARY OF STATE FOR NORTHERN IRELAND

AND THE NORTHERN IRELAND PRISON SERVICE TAKEN ON THE 23 APRIL 2002

AND IN THE MATTER OF THE CONTINUING DETENTION OF THOMAS McCABE AT HER MAJESTY'S PRISON MAGHABERRY

HIGGINS J

[1] This is an application by Thomas McCabe for judicial review of several decisions of the Northern Ireland Prison Service and a decision of he Secretary of State for Northern Ireland. The applicant seeks the following relief –

> "(a) A declaration that the decision of the 23 April 2002 to return the Applicant to custody was unreasonable, unlawful and void.
>
> (b) An order of certiorari removing into this Honourable Court and quashing the decision of 23 April 2002.
>
> (c) A declaration that the continued detention of the Applicant in custody, since 23 April 2002 is unreasonable, unlawful and void.
>
> (d) A declaration that the detention of the Applicant in custody after April 2001, without an opportunity to challenge the lawfulness of his

continued detention was unreasonable, unlawful and void.

(e) A declaration that the detention of the Applicant in custody after February 2001 without an opportunity to challenge the lawfulness of his continued detention was unreasonable, unlawful and void.

(f) A declaration that the failure of the Secretary of State, failing to refer the Applicant's case to the Life Sentence Review Commissioners was unreasonable, unlawful and void.

(g) Such further or other relief as may be deemed just.

(h) Interim relief.

(i) Costs.

(j) All necessary and consequential directions."

[2] The applicant is 41 years of age and was born in Northern Ireland. On 1 February 1990 he was arrested and charged with the murder of an 18 year old youth, his partner's cousin. On 29 October 1990 at the Central Criminal Court in London he pleaded guilty to the offence of murder and was sentenced by the Common Serjeant, Judge Lymbery QC to imprisonment for life. On the same date the learned trial judge expressed the view that the length of detention necessary to meet the requirements of retribution and general deterrence was 10 years. On 4 November 1990 the Lord Chief Justice of England and Wales expressed the view that he took a slightly more severe view of the case and recommended 'that 11 years would be the appropriate minimum'. (hereafter referred to as the 'minimum term' or 'tariff').

[3] On 21 January 1992 an order pursuant to section 26(1) of the Criminal Justice Act 1961 was made, whereby the permanent transfer of the applicant to Northern Ireland, there to serve the remainder of his sentence, was effected. After unrestricted transfer to Northern Ireland, a life sentence prisoner falls to be considered for release in accordance with the law and practice of Northern Ireland relating to life sentence prisoners. This was set out in an explanatory memorandum entitled 'Life Sentence prisoners in Northern Ireland'. On 23 January 1992 the applicant signed a transfer document agreeing to the transfer to Northern Ireland and acknowledging that the differences between the England and Northern Ireland Prison Systems had been explained to him and that a review of his life sentence

would be conducted after he had completed 10 years of his sentence and that a release date may then be set.

[4] On 17 October 1991 the Northern Ireland Prison Authorities were informed by their English counterparts that a 'tariff of 11 years had been set and that a first review should take place in approximately February 1998'. The review of life sentences in Northern Ireland was at that time different from the process in operation in England and Wales. In accordance with the life sentence prisoner's memorandum, the Life Sentence Review Board considered the applicant's case on 11 April 2000. The result of that review was communicated to the applicant by letter dated 21 April 2000. This stated, inter alia, -

> "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 have served a period of around 11 years (sic). 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. "

[5] On 7 July 2000 the applicant 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 automatically mean that release on licence would follow. He was further informed that his release was subject to his continued good behaviour and to suitable resettlement arrangements being made. Phase One of the PRS began immediately. On 31 July 2000 the applicant commenced Phase Two. This involved working at approved jobs and staying in the Pre-Release Unit (PRU), Crumlin Road, at nights and having extended paroles at weekends.

[6] On 30 October 2000 the applicant was due to commence Phase Three. On that date he failed to attend at an alcohol management programme or to report to work. As a result he was posted as unlawfully at large and remained so for thirteen days. He was returned to the prison on 12 November 2000 and formally suspended from the Pre-Release Scheme. On 29 December 2000 the

Lifer Management Unit (LMU) wrote to the applicant confirming that he had been suspended from the Pre-release Scheme.

[7] A Case conference was held on 10 January 2001 and areas of further work were identified. These areas of work were undertaken by the applicant. The applicant's case was considered further at a case conference in May 2001. At a case conference in June 2001 it was agreed that he had completed satisfactorily the work identified in January. However it was considered that further work on his alcohol addiction required to be completed, and it was recommended, that the applicant complete an intensive alcohol management programme as part of a special pre-release programme.

[8] On 6 September 2001 a decision was taken to restore the applicant to the Pre-Release Scheme on the specially devised programme. This was discussed with the applicant at a meeting on 7 September 2001, when he agreed to participate in an 8 - week residential course at Carlisle House to address his alcohol addiction. By letter dated 12 September 2001 the LMU confirmed to him that he would commence the special pre-release programme at Carlisle House on 19 September 2001 following successful completion of which he would be permitted to return to the Pre-release Scheme in Belfast and to complete Phase Two (over 13 weeks) and then Phase Three (over approximately 6 months). The letter informed him that it was not considered appropriate that he 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 to the applicant that any further breaches of the Pre-release Scheme, particularly in relation to temporary release and alcohol, would result in his suitability to retain a provisional release date being reviewed The applicant completed the residential course at Carlisle House, Belfast.

[9] On 19 November 2001 he was moved to Phase Two of the Pre-Release Scheme and later commenced work at Bryson House. 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 2001 he was posted unlawfully at large. He was arrested by the police in Newry in an intoxicated state and returned to the prison on 23 April 2002.

[10] On the following day 24 April 2002 the applicant was interviewed by a prison Governor. He admitted being in Newry and that it was as a result of a relapse into alcohol. He asked what would happen to him now and was informed that a case conference would have to be arranged to decide his future and that he would be interviewed again.

[11] The skeleton argument prepared on behalf of the applicant recounts that the applicant encountered a number of difficulties and stresses during Phase Three as a result of which he breached several conditions of the PRS. These were identified as – drinking alcohol, not going to work on 15/16 April 2002 and being unlawfully at large.

[12] On 24 April 2002 the LMU wrote to him informing him that he was formally suspended from the Pre-release Scheme. This letter stated –

> "On 17th April 2002 you failed to attend your place of work at Bryson House. You were subsequently posted unlawfully at large. You were arrested by the police and returned to Maghaberry on 23 April 2002. You also failed to inform the Pre-release Unit about your absence from work on 15th and 16th April 2002.
>
> You are considered now to be formally suspended from the Pre-release Scheme and you will remain in HM Prison, Maghaberry pending full investigation of your recent behaviour.
>
> You will remain suspended from the Pre-release Scheme until such times as full consideration can be given to your suitability for possessing a provisional release date. You are reminded that the word provisional in this context means that your release date is subject to continued good behaviour and to satisfactory arrangements being made for your resettlement into the community.
>
> A case conference will be arranged to consider your period of being unlawfully at large (17.02.02 – 23.04.02), your absence without permission from your place of work at Bryson House during the period 15-16 April 2002 and your intoxicated state when arrested by the police. You are invited to submit in writing your own explanation for your behaviour whilst at the PRU so that the Multi-disciplinary Group can take into account all relevant information in deciding how best your case can be progressed. Please make any submission to Lifer Management Unit via Governor Caulfield by 17 May 2002.
>
> During your suspension you are not entitled to any periods of temporary release previously granted to you as part of the Scheme."

[13] The applicant responded with a 5 page handwritten submission addressed to Governor Caulfield and dated 29 April 2002. It appears from this document that he was aware of why he had been returned to prison. A local Multi-disciplinary Meeting took place on 4 May 2002 at which the applicant's case was discussed and a full case conference arranged for 31 May 2002. The applicant forwarded to Governor Caulfield a further handwritten submission dated 14 May 2002. The case conference on 31 May 2002 considered the applicant's recent history on the Pre-release Scheme and decided to action further assessments relating to the risk he posed to the community and a further conference was arranged for July. One of the main problems to be addressed was the applicant's addiction to alcohol and an addiction assessment report was compiled dated 28 June 2002. A further Multi-disciplinary Meeting took place on 4 July 2002.

[14] Meanwhile the applicant's solicitors wrote to the LMU on 7 June 2002. This letter stated, inter alia, -

> "Our client was admitted to the Pre-Release Scheme by the Secretary of State acting through a lawfully constituted body, namely the Life Sentence Review Board. While our client has not yet received a tariff under the provisions of the Life Sentence Order it is clear that the punishment element of our client's sentence has been served. To suggest otherwise would be contrary to the findings of the LSRB who found him suitable for the scheme in both June 2000 and September 2001.
>
> 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."

[15] A reply to this letter from the Lifer Unit of the Prison Service dated 11 July 2002 stated –

"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."

Meanwhile on 3 July 2002 the applicant commenced the present proceedings seeking the relief referred to earlier.

[16] During this process Parliament considered and passed the Life Sentences (Northern Ireland) Order 2001 (the Life Sentences Order), which

came into effect on 8 October 2001. This Order introduced a statutory scheme for the incarceration and subsequent release of life sentence prisoners. This requires the trial judge in the case of a prisoner sentenced to imprisonment for life to fix the minimum term (often referred to as the 'tariff') which the prisoner must serve before the release provisions of the Life Sentences Order apply. The minimum term is such period as the court considers satisfies the requirements of retribution and deterrence, having regard to the seriousness of the offence. When the prisoner has served the minimum term the Life Sentence Commissioners (a new body created under the Order) consider whether it is necessary that the prisoner should be confined further for the protection of the public from serious harm. Articles 10 and 11 of the Life Sentences Order apply the release provisions of that Order to life prisoners transferred to Northern Ireland. Article 11 requires the Secretary of State, after consultation with the Lord Chief Justice of Northern Ireland, to certify his opinion that the release provisions should apply after he has served that part of his sentence certified by the Secretary of State. The opinion of the Lord Chief Justice of Northern Ireland as to the minimum term to be specified in the certificate is decisive – see Colin King's Application 2002 NICA 48.

[17] On 20 November 2001, in accordance with the provisions of the Life Sentences Order, the applicant was informed that his case would soon be referred to the Lord Chief Justice for his recommendation on the setting of his minimum term. The applicant requested that the relevant documentation be provided to his solicitors. Thus began what was described as an information gathering process relating to the applicant and his offence and those affected by it. On 5 June 2002 he was invited to make representations and on 17 June 2002 his former solicitors indicated that he would probably wish to make representations.

[18] The application of Colin King, supra, challenged the provisions of the Life Sentences Order. The judgment at first instance was given on 5 July 2002 and by the Court of Appeal on 15 November 2002. This delayed the processing of many life prisoners' cases under the Life Sentences Order. Further affidavits were submitted in relation to the case of King and its effect on the processing of cases of life sentence prisoners sentenced before the Life Sentences order came into operation. The applicant's solicitor does not accept the contention on behalf of the respondent that the case of King caused any period of uncertainty or instability either for the process generally or in relation to this applicant's case. It is clear that the application in King's case required a fundamental consideration of the Life Sentence Order and its operation in practice. It would be surprising if it did not create the type of uncertainty referred to in the Respondent's affidavits.

[19] On 19 December 2002 the applicant indicated that he did not wish to submit any written representations in the fixing of his minimum term nor did he wish to have legal representation. It appears that he was blaming his then

legal representation for the delay. Later he changed his mind about representation and applied for legal aid. The applications for legal aid brought about further delay. However his case was referred to the Lord Chief Justice without his representations and he was so informed.

[20] On 5 March 2003 the Lord Chief Justice determined that the applicant's minimum term should be eleven years including time spent on remand. (The learned trial judge and the Lord Chief Justice of England and Wales did not specify that the 'tariff' which they fixed, would date from the applicant's first remand). On 3 April 2003 the applicant's case was referred to the Life Sentence commissioners who fixed a hearing date of 4 August 2003.

[21] The applicant's case is that the decision to return him to prison on 23 April 2002 was unlawful, arbitrary and in breach of his rights under Article 5 (1) of the European Convention on Human Rights (ECHR). He relied on the case of Stafford v United Kingdom Application No. 46295/99 in which judgment was delivered by the European Court of Human Rights (EctHR) on 28 May 2002. In that case the applicant was convicted of murder in January 1967. He was released on licence in April 1979. Soon after his release he left the UK in breach of his licence. In September 1980 his licence was revoked. In April 1989 he was arrested in the UK in possession of a false passport for which offence he was fined. He remained in custody as his licence had been revoked. He was released again on life licence in March 1991. In July 1994 he was convicted of forgery offences and sentenced to 6 years imprisonment and his licence revoked. In 1996 the Parole Board recommended his release on licence, but the Secretary of State rejected that recommendation. He regarded the previous breaches of his licence as a serious and grave breach of trust, but acknowledged that there was not a significant risk that he would commit further violent offences in the future. He asserted that he could 'lawfully detain a post-tariff mandatory lifer solely because there was a risk that he might commit further non-violent imprisonable offences'. The Court observed –

> "80. The Government maintained that the mandatory life sentence was nonetheless an indeterminate sentence which was not based on any individual characteristic of the offender, such as youth and dangerousness and therefore there was no question of any change in the relevant circumstances of the offender that might raise lawfulness issues concerning the basis for his continued detention. However, the Court is not convinced by this argument. One the punishment element of the sentence (as reflected in the tariff) has been satisfied, the grounds for the continued detention, as in discretionary life and juvenile murderer case, must be consideration of risk

and dangerousness. Reference has been made by Secretaries of State to a third element, - public acceptability of release – yet this has never in fact been relied upon. As Lord Justice Simon Brown forcefully commented in the case of Anderson and Taylor (see paragraph 46), it is not apparent how public confidence in the system of criminal justice could legitimately require the continued incarceration of a prisoner who had served the term required for punishment for the offence and was no longer a risk to the public. It may also be noticed that recent reforms in Scotland and Northern Ireland equate the position of mandatory life prisoners in those jurisdictions to that of discretionary life prisoners in England and Wales in respect of whom continued detention after expiry of tariff is solely based on assessment of risk of harm to the public from future violent or sexual offending.

81. In the Court's view, the applicant in the present case must be regarded as having exhausted the punishment element for his offence of murder – if this were not the case, it is hard to understand why the Secretary of State allowed his release in 1979. When his sentence for the later fraud offence expired on 1 July 1997, his continued detention under the mandatory life sentence cannot be regarded as justified by his punishment for the original murder. Nor, in contrast to the recall of the applicant in Weeks, was the continued detention of the present applicant justified by the Secretary of State on grounds of mental instability and dangerousness to the public from the risk of further violence. The Secretary of State expressly relied on the risk of non-violent offending by the applicant. The Court finds no sufficient causal connection, as required by the notion of lawfulness in Article 5(1)(a) of the Convention (see paragraph 64), between the possible commission of other non-violent offences and the original sentence for murder in 1967.

82. The Government have argued that it would be absurd if a Secretary of State was bound to release a mandatory life prisoner who was likely to commit serious non-violent offences. With reference to the present case however, the Court would note that the applicant was sentenced for the fraud which he

> committed while on release and he served the sentence found appropriate as punishment by the trial court. There was no power under domestic law to impose indefinite detention on him to prevent future non-violent offending. If there was evidence that the applicant was conspiring to commit any such offences, a further criminal prosecution could have been brought against him. The Court cannot accept that a decision-making power by the executive to detain the applicant on the basis of perceived fears of future non-violent criminal conduct unrelated to his original murder conviction accords with the spirit of the Convention, with its emphasis on the rule of law and protection from arbitrariness.
>
> 83. The Court concludes that the applicant's detention after 1 July 1997 was not justified in terms of Article 5(1)(a) and that there has accordingly been a violation of Article 5(1) of the Convention."

[22] The applicant submitted that by analogy with the case of Stafford, the return of the applicant to prison on 23 April 2002 was unlawful and arbitrary. It was submitted that it was clear that the return of the applicant to prison was prompted by breaches of the conditions upon which he was released. Where he had served the penal element of his sentence he could only be returned, if there was a risk of further offences of a violent nature, which was not demonstrated in his case. It was submitted that the applicant had served the penal element of his sentence and that this was evidenced by the recommendation of the trial judge and the Lord Chief Justice in England and Wales, the findings of the Life Sentence Review Board, the provisional release date, the applicant's release into the community and the recent opinion of the Lord Chief Justice on the minimum term he should serve before the release provisions of the Life Sentences Order would apply.

[23] It was contended by the respondent that the applicant had not been released on licence either under section 23 of the Prison (Northern Ireland) 1953 nor under the provisions of the Life Sentences Order 2001. Therefore his status remained, as it had been since October 1990, as a lawfully convicted and sentenced life prisoner, who was temporarily released subject to conditions under Rule 27(1) of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995. The applicant submitted that there was no distinction between prisoners released on licence and those granted temporary release on conditions. Reference was made to the decision of Kerr J in Re McDonnell's Application 2001 NIJB 106 where at page 113A he stated –

> "I do not consider that any distinction should be drawn between the case of a prisoner whose licence ahs been revoked and one who has been suspended from a pre-release/working out scheme".

[24] These remarks were made in the context of an entitlement to information about the reasons for suspension from a pre-release scheme and about being afforded the opportunity to make representations about the reasons and the requirement of fairness in that process. I do not consider that they provide any support for the contention that for all purposes there is no distinction to be drawn between release on licence and temporary release under Rules 27. There is a world of difference between the two situations. In the former the prisoner has been released generally on licence after completion of a formal process for that purpose, in circumstances in which a major element of his sentence has been served. In the latter he is released temporarily for a particular purpose subject to such conditions as the situation requires.

[25] The applicant was aware that his release was temporary and if the conditions were breached his release was liable to be suspended. Suspension of the release was not subject, as was argued, to any link between the reason for the breach and the nature of the original offence.

[26] Once the applicant was transferred to Northern Ireland under Section 26 of the Criminal Justice Act 1961, he became subject to the release provisions for mandatory life prisoners that then applied in this jurisdiction. The effect of Section 26(4) of the Criminal Justice Act 1961 was considered in Re Kavanagh's and Others Application 1997 NI 368. In that case it was submitted on behalf of the appellants that Section 26(4) did not require a prisoner, permanently transferred Northern Ireland, to be released on the same basis as one who had been sentenced in a court in Northern Ireland. Giving the judgment of the court the Lord Chief Justice said at page 379F –

> "The learned judge rejected this argument, we think rightly. We agree with his conclusion that the effect of s 26(4) is that a permanently transferred prisoner must be treated in determining his release in a way which is comparable with that in which he would be treated if sentenced in Northern Ireland. It follows that a prisoner serving a determinate sentence would be entitled to the same rate of remission for good conduct, as was held in this jurisdiction in Re Grogan's Application [1993] 10 NIJB 18 and in England in R v Secretary of State for the Home Dept, ex p McComb (1991) Times, 15 April and R v Secretary of State for the Home Dept, ex p

> McLaughlin (27 November 1996, unreported). It also follows in our opinion that a prisoner serving a life sentence would be entitled to have the same criteria applied to his release as are applied to prisoners sentenced in Northern Ireland courts. The Secretary of State could in our view consult the trial judge and the Lord Chief Justice of England if she thought fit, although in some of the cases at least their views on the tariff element have already been given. She would also be entitled to take note of the Home Secretary's decision on the tariff. We do not think that the learned judge meant any more than this when he stated in his judgment that the Secretary of State 'may (and indeed, should)' take these matters into account. At the end of her consideration she is still bound to treat permanently transferred prisoners as if they had been sentenced in Northern Ireland, and in our view it is an inescapable conclusion that she must apply to them the same release policy as is applied to locally sentenced prisoners, whether or not it appears that the Home Secretary would have required them to serve an appreciably longer period if they had remained in England. It follows that she could not properly allow a material difference to exist between the release dates of prisoners serving life sentences imposed in England and those of prisoners sentenced in Northern Ireland. It is accordingly highly probable that if the appellants were permanently transferred they would each benefit from a substantial reduction in time left to serve. We therefore consider that the basis has been established for the Home Secretary's decision.

[27] The applicant had not been released on licence under Section 23 of the Prison (Northern Ireland) Act 1953 nor was he scheduled for such release based on the recommendations made by the trial judge or the Lord Chief Justice of England and Wales. While their opinions would probably be taken into account, the applicant's case had to proceed in the same manner as if he had been sentenced in Northern Ireland. Therefore he was not yet a prisoner who had served what might be adjudged to be the penal element of his sentence.

[28] I do not find the analogy with the case of Stafford, as submitted, to be borne out. The authority and reasoning in Stafford's case provides no basis upon which to conclude that the return of the applicant to prison on 23 April 2002 was unlawful , unreasonable, arbitrary or void. Equally, it provides no

basis for holding that his continued detention since that date is unlawful, unreasonable, arbitrary or void. The applicant also relied on Benjamin & Wilson v UK Applic. No 28212/95 and R (on the application of Noorkoiv) v Secretary of State for the Home Department, and another 2002 EWCA Civ 770. In both cases a tariff had been set and exceeded and they are thereby distinguishable from the applicant's case in which until March 2003 no penal term had been set.

[29] It was submitted on behalf of the applicant that the reason for the applicant's return to detention was his breach of the conditions upon which he was released on the latest pre-release scheme – see the correspondence dated 24 April and 28 June 2002. On the authority of Stafford's case it was submitted that return to prison or continued detention could only be effected where there was evidence of risk and dangerousness to the public. The letter dated 11 July 2002 was, it was submitted, an attempt by the authorities to suggest that the applicant represented a risk to the public through violent offending. It was submitted that this was ex post facto rationalisation which should be rejected or at least treated with caution. The applicant relied on the judgment of Kerr J in Re Trevor Hinton's Application (unreported 20 January 2003) and Ex Parte Lilleycrop 1996 EWHC Admin 281. The applicant also submitted that the letter dated 11 July 2002 does not, in fact, allege that the applicant represents a risk to the public, but was an attempt to explain or expand on the earlier reasons given for his return to detention. Any attempt to elucidate correct or add to reasons already given and communicated to a prisoner or his legal representatives for the prisoner's detention or continued detention require to be treated with caution. However, whether the letter dated 11 July 2002 is such does not require decision because, on the authority of Stafford's case, the issue of risk of violent re-offending only arises after the prisoner has been released, having served the penal element of the sentence which grounded his detention. A public authority should not be permitted to resile from reasons first given and permitted to substitute different reasons, but that does not mean to say that it may not, in appropriate circumstances, explain its earlier reasoning. It is clear in this case that the prison authorities were concerned about the applicant's drinking and rightly so. That it might lead to further offences of a violent nature is also evident and, in that regard it is to be observed, that the applicant's drinking was highlighted by the trial judge in the context of a very violent attack on a complete stranger. When the matters which the prison authorities were concerned about both before, during and after the applicant's release on the various pre-release schemes are compared with the letter dated 11 July 2002 I do not think it can be maintained that the authorities were changing their reasons for the return of the applicant to prison and for further detaining him. Indeed the applicant was well aware of what led to his return as his written submission to the governor revealed.

[30] It was submitted on behalf of the applicant that once it was established that the penal of element of his sentence had been exhausted the applicant was entitled to a 'court' in accordance with Article 5(4) ECHR in order to challenge the lawfulness of his detention. In the skeleton argument the applicant submitted that the refusal of the respondents to refer the applicant's case to the Life Sentence Review Commissioners was highly irregular. The applicant's case has now been referred to the Review Commissioners following the delay occasioned both by the judicial review proceedings in the case of Colin King and by the applicant himself. As was submitted by the respondent and envisaged by Article 5(4), the applicant would have been entitled to challenge his detention by judicial review proceedings or by an application for habeas corpus. There has always been a court available to review the lawfulness of detention though the circumstances in which resort would be made to it in the case of prisoners lawfully detained following conviction are probably few. In the case of prisoners sentenced to an indeterminate life sentence the Life Sentences Order has introduced a determinate element into their sentence during which they are lawfully detained and after which they are lawfully detained only if their detention is necessary to protect the public from serious harm. Since the enactment of the Life Sentences Order, the Review Commissioners are empowered to direct the release of life sentence prisoners where their continued detention is no longer required to protect the public from serious harm, but only after they have completed the determinate element that represents retribution and deterrence. In the case of a transferred life sentence prisoner the Life Sentence Commissioners are empowered to direct his release where he has served that part of the sentence specified to represent retribution and deterrence and certified after consultation with the Lord Chief Justice (the minimum or penal term) and where they are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined.

[31] In March 2003 the Lord Chief Justice gave his opinion that the minimum term should be eleven years including the period spent on remand. The hearing before the Commissioners is scheduled for August 2003 and for the purposes of Article 5(4) this is the court by which 'the lawfulness of the applicant's detention' shall be determined. It was submitted by the respondent that the decision to refer the applicant's case to the Commissioners was taken before the applicant had served the minimum or penal term, which was certified subsequently.

[32] The case made on behalf of the applicant is that his penal or minimum term was set by the Lord Chief Justice of England and Wales in 1990 as eleven years and that either he should have been released at the expiration of that period or his case referred to a court or tribunal earlier than April 2003. As a result his rights under Article 5(4) have been breached in a manner that

represents a 'lost opportunity' to be considered for release and accordingly he is entitled to damages for the period during which he has been confined.

[33] Once the applicant was transferred to Northern Ireland, he was treated in a way comparable with that in which he would have been treated if he had been sentenced in Northern Ireland for the purposes of determining his date of release on licence under Section 23 of the Prison (Northern Ireland) Act 1953. Thus his case fell to be considered by the Life Sentences Review Board. On 11 April 2000 the Board decided that the applicant's case should be referred to the judiciary. This was required under section 1(3) of the Northern Ireland (Emergency provisions) Act 1973. The Board's decision was made with a view to the possible release of the applicant in about a year's time, that is about April 2001, which would have been within the period recommended by the Lord Chief Justice of England and Wales. After the Board's decision the various Pre-release Schemes began. The applicant was unable to take advantage of these schemes and eventually became unlawfully at large on a number of occasions, which is a criminal offence under the Prison (NI) Act 1953, resulting in his return to prison. Thus the applicant had not completed that pre-licence part of his sentence, successful completion of which would have concluded the penal element of his sentence and led to consideration of his release. The procedure in England and Wales whereby, at the time of sentence, the judiciary set 'the tariff' to be served before which consideration for release does not arise, did not operate in Northern Ireland.

[34] The cornerstone of the applicant's case is the assertion that the applicant has served the penal element of his sentence and on the authority of Stafford's case supra and the other cases referred to earlier, the only grounds for continued detention thereafter are considerations of risk and dangerousness. No penal element or 'tariff' was ever set in Northern Ireland prior to the review of the Board in April 2000. The questions of risk, dangerousness and suitability for release were under consideration from April 2000 and throughout the Pre-release Schemes, which the applicant did not successfully complete. In Stafford's case the prisoner had been released on licence in 1979 and the European court stated that he must be regarded as having exhausted the punishment element for his offence of murder – see paragraph 81. That position cannot be said to have been reached in the case of the applicant prior to the decision of the Lord Chief Justice in March 2003.

[35] Counsel on behalf of the applicant urged the court to look at the reality of the applicant's position rather than the formalities. The reality was, he submitted, that the applicant had served the penal element of his sentence and should not have been detained after February 2001, the eleventh anniversary of his remand in custody. At first sight that submission appeared to be unassailable. However, Mr McCloskey on behalf of the respondent demonstrated very comprehensively that the reality was very different. The applicant was transferred to Northern Ireland to serve his sentence and

became subject to the procedures applicable to life sentence prisoners in this jurisdiction. No penal term was established here. Once the Board made its decision in April 2000 the applicant knew what was required to secure his release. It was not dependent on the mere passage of time. He relapsed twice. The first occasion was before the tariff set by the Lord Chief Justice of England and Wales had expired. The applicant was aware he was under assessment. The prison authorities arranged further assessments and another pre-release scheme, with the same result. No penal term was set until March 2003 and the applicant's release will be considered on 4 August 2003. Time has passed since the Life Sentence Order came into operation. It was essential that information be collated for the reference of the case to the Lord Chief Justice and ultimately to the Life Sentence Commissioners, as well as allowing the applicant and other to make representations. The judicial review proceedings in the case of Colin King further delayed the process. The applicant contended that the authorities should have established a process which would have enabled his case to be dealt with before the expiry of the penal term set by the Lord Chief Justice of England and Wales. There would be much force in that argument were that term operative. As it is not operative the only period of time which requires consideration is from the date of the decision by the Lord Chief Justice to the hearing fixed for 4 August 2003. That period is justified under the provisions of the Life Sentences Order. Thus since October 1990 the applicant has been and remains a lawfully detained person following conviction by a competent court.

[36] My conclusion is that the applicant has not established that his detention from February 2001, October 2001 or April 2002 has been unlawful, arbitrary or void. There are no grounds upon which to make a declaration that he has been without opportunity to challenge the lawfulness of his continued detention since February 2001 nor to declare that the Secretary of State acted unreasonably or unlawfully in not referring the applicant's case to the Life Sentence Review Commissioners before April 2003.

[37] The application of judicial review is dismissed.

[38] At the commencement of the hearing Mr McCloskey on behalf of the respondent informed the court that the main affidavit filed on behalf of the applicant was not in his name, but in the name of his solicitor and that a further affidavit in the name of the applicant was in draft form and unsworn. I ruled that the application could proceed on the basis that these matters would be rectified. To their credit the applicant's solicitors produced proper sworn affidavits before the court rose on the first day of the hearing. However, it should be remembered that judicial review proceedings invariably proceed on affidavit sworn personally by and in the name of the applicant. It is important that the court has sworn testimony upon which to proceed. It is not appropriate that solicitors swear affidavits deposing to facts on their client's behalf and in fact setting out their client's case. Fortunately on

this occasions that matter was resolved in time. However, a court would be justified in declining to hear a judicial review or in dismissing such an application without adjudication, where the grounding affidavit, setting out factual matters crucial to the application, was not sworn by the applicant personally.