Life sentence prisoner – recall by Secretary of State – Art 9(2) of Life Sentences (NI) Order 2001 – Whether impracticable to obtain recommendation of Life Sentence Review Commissioners – powers of Commissioners under Art 9 of 2001 Order – referral of case under Art 9(4) – duty of Commissioners under Art 5.4 of ECHR – whether breach of that duty.

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Judgment: approved by the Court for handing down | *Delivered:* **31/03/2006**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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

and

IN THE MATTER OF A DECISION BY THE SECRETARY OF STATE TO REVOKE THE LICENCE OF WILLIAN JOHN MULLAN TAKEN ON 6TH DECEMBER 2004

and

IN THE MATTER OF DECISIONS OF THE LIFE SENTENCE REVIEW COMMISSIONERS TAKEN ON 17TH FEBRUARY 2005, 6TH MAY 2005 AND 8TH SEPTEMBER 2005

GIRVAN J

Factual background

[1] The applicant having been convicted of murder and a number of other serious offences in May 1980 was sentenced to life imprisonment. The conviction for murder related a sectarian murder of a man in North Belfast. On 24 April 1979, the applicant and another man called at the victim's house, remained there for two hours awaiting the victim's return. When the victim returned they shot him dead in front of his wife and daughter. At the time of his conviction he had a significant prison record. He served a period of over 15 years in prison on foot of the life

sentence. On 15 August 1994, the Secretary of State decided that he should be released on licence. This followed the consideration of his case by the Life Sentence Review Board which gave a positive recommendation for his release on licence. As a prisoner released on licence he was subject to recall and to the possibility of revocation of the licence in the event of him being involved in criminal activity.

[2] The applicant was arrested on 25 November 2004 on suspicion of involvement in a conspiracy to imprison an employee of a First Trust Bank and to carry out a robbery. At the time of his arrest the Police Service believed that the applicant, along with a number of others, had planned to falsely imprison the employee with a view to procuring his assistance in the carrying out of a robbery of the bank. He was charged on 29 November 2004 and remanded in custody on 30 November 2004.

[3] In view of his arrest and detention the Prison Service sought information from the police and advice on the question whether his licence should be revoked. On 3 December 2004 a report was forwarded by the Police Service to the Life Sentence Unit. The police document set out a summary of facts regarding the incident. This included details of a sighting of the applicant near the home of the relevant bank employee in the company of one of the three males who, according to the police evidence, later entered the employee's house with a firearm. The evidence included a sighting a week before the incident of the applicant in a vehicle driven by him behind a bus in which the employee was travelling, one of the co-accused being on the same bus. The co-accused followed the employee to his house and was picked up by the applicant. There was a further sighting the next day in a car following another bus in which the employee was travelling. Later that same day the applicant was seen walking behind the employee and following him to his home area, the applicant being seen to observe at the employee's house and being seen shortly afterwards to get into the car in which he had been previously seen. The applicant was seen to drive past the employee's house twice. The police view was that there was a well organised conspiracy to rob the First Trust Bank, that the applicant played an integral part in that conspiracy, and that the applicant represented "a serious risk to the public which may warrant direct action in respect of his licensee status."

[4] On 3 December consideration was given by the Prison Service to the question whether he licence should be revoked. The question arose as to whether, if a revocation was appropriate, it should be effected under Article 9(1) of the Life Sentences (Northern Ireland) Order 2001 ("the 2001 Order") which is by obtaining a recommendation from the Life Sentence Review Commissioners ("the Commissioners") or under Article 9(2) which authorises the Secretary of Sate to revoke a licence if he considers it expedient to recall a prisoner before a recommendation of the Commissioners is practicable. In the early afternoon of 3 December, the Prison Service received information that the applicant had sought bail before the High Court and his bail application was listed for hearing on the morning of Monday 6 December 2004. According to Mr Mayes of the Life Sentence Unit, the view was formed that it would not have been practicable in the circumstances to

have referred the case to the Commissioners for their recommendation. Such a step was not viewed as appropriate due to the urgency of the matter as it was the intention to seek to obtain a decision on the question whether or not the applicant's licence should be revoked, before any decision was made in the High Court whether or not he should be granted bail. The experience of the Prison Service was that the process of obtaining the recommendation of the Commissioners under Article 9(1) was a lengthy one, involved the establishment of a panel for the purpose and involved necessary time consuming deliberations by that panel in respect of the matter. The judgment reached was that it would not be practicable for the Commissioners to have dealt with the issue of recommending a recall the applicant between the Friday afternoon and the following Monday morning when the bail application was to be heard.

[5] On the afternoon of 3 December 2004 a submission was made to the Secretary of State recommending that the licence be revoked. The submission averted to the need for the Secretary of State to take a decision immediately due to the possibility of the applicant being successful in his bail application and recommended that the Secretary of State revoke the licence without the matter being referred to the Commissioners at that stage. The Secretary of State did not receive the submission in time to be able to deal with it over the weekend. On 6 December 2004 another Minister, Mr Gardiner MP, was nominated to deal with the matter on behalf of the Secretary of State. He decided to accept the recommendation and on 6 December 2004 at 10.30 he revoked the licence signing the appropriate revocation order. The applicant was informed of the revocation by letter of 6 December 2004 which stated under the heading of "Reasons for Revocation":

> "Mr Gardiner has taken this decision on behalf of the Secretary of State following careful consideration of all available information about your case. Due account was taken of the charges which you are currently facing; of police advice that they believe you now represent a serious risk to the public; and of your index offence for which you received a life sentence. Mr Gardiner has decided that with regard to all of the circumstances of your case your licence should be revoked. You will now be detained in pursuance of your life sentence and resume the status of a life sentence prisoner."

The applicant was informed that his case would be referred to the Commissioners in accordance with Article 9(4) of the Order to review the decision by the Minister and that a dossier of material about the case would be prepared in accordance with Schedule 2 of that Order and served both on the applicant and the Commissioners. He was also informed that he was entitled to make representations about the revocation of the licence to the Secretary of State and/or the Commissioners.

[6] It is unclear precisely what happened in the bail court on 6 December 2004. According to Mr Mayes information supplied by the investing police officer showed that the bail application was abandoned (see paragraph 2(xvi) of Mr Mayes' affidavit). According to the affidavit of the applicant's solicitor, Mr McCallion, Morgan J refused the applicant for bail. Whatever the true position may be, the fact is that the applicant was remanded in custody in relation to the pending charge and continued to remain in such custody, being remanded from time to time, until the charges were subsequently dropped.

[7] On 14 December the Life Sentence Unit referred the applicant's case to the Commissioners under Article 9(4) in a letter which explained the reasons for the revocation. This letter stated:

> "Mr Gardiner considered that it was expedient in the public interest for him to act immediately under Article 9(2) of the Order to revoke Mr Mullan's licence without prior reference to the Commissioners under Article 9(1), this was with regard to the possibility of Mr Mullan being granted bail on the offences with which he is charged …"

By letter of 21 December 2001 the Commissioners set a timetable for various steps to be taken by the Life Sentence Unit in connection with the hearing before the Commissioners. The Secretary of State was asked to provide any further information or reports he wished to rely on before the Commissioners by 15 February 2005. On 15 February Mr Mayes wrote to the Commissioners seeking directions deferring the nominated date for provision of further materials for the Secretary of State. The police had informed the Life Sentence Unit that they were not in a position to provide further material about the applicant's case at that stage. The unavailability of such further police material inhibited the ability of the Probation Service and the Northern Ireland Prison Service Psychology Service to provide reports on the applicant. On 17 February 2005 the Commissioners gave a direction in which they set a new date of 22 March by which the Secretary of State should submit further information. A further application to seek a direction deferring the date for the provision of further materials by the Secretary of State was made on 22 March. By that date the police had told the Life Sentence unit that they were not in a position to provide any further information about the applicant's case at that stage. By direction give on 18 May 2005, the Commissioners agreed to extend time for the provision by the Secretary of State to further material. This direction stated:

> "A further indication of the expected availability of the materials in question should be provided by 25 July 2005."

It also stated that all future proceedings of the case should be stayed pending the outcome of current criminal proceedings against the applicant. The applicant sought to appeal the direction of 18 May 2005 and sought an extension of time which was granted on 18 July 2005. On 8 September 2005 the Commissioners affirmed the direction of 18 May 2005. They concluded that it would be inappropriate to determine the matter in advance of criminal proceedings.

[8] On 30 September 2005 the Public Prosecution Service withdrew all charges against the applicant. Following that the police informed the Life Sentence Unit that they could not release relevant materials and information as criminal proceedings were continuing against the accused and the same solicitor was representing the co-accused and the applicant. The police expressed the view that once preliminary enquiry papers had been served on the former co-accused, the papers could be released to the Secretary of State. A delay of some 3-4 weeks was expected. The Commissioners indicated that a preliminary meeting to discuss the case would be convened by the Commissioners on 3 November. However, they decided to cancel that meeting after the judicial review papers were filed on 25 October 2005. On 29 November 2005, the Life Sentence Unit received a bundle of documents from the police comprising a series of police statements and transcripts of interviews. These were provided to the Commission on 14 December 2005.

[9] On 9 January 2006, the Secretary of State, having reviewed the matter in the light of developments, confirmed his decision to revoke the licence. On 11 January the Commissioners were provided with a certificate of the Secretary of State's opinion under rule 15 with associated security information and a gist of the information withheld. On 11 January 2006 the Secretary of State indicated to the Commissioners his strong preference for as early a date as possible for the hearing of the applicant's case.

The Judicial Review Challenge

[10] The applicant challenges the legal validity of the Secretary of State's decision of 6 December 2004 revoking his licence and he contends that the Secretary of State did not have the legal right to make such a revocation order, having regard to the statutory requirements of Article 9(2). If the applicant makes good the argument that the applicant's detention on foot of the revocation would be unlawful, he would be entitled to be released. The applicant further challenged the decision of the Commissioners' taken on 17 February, 20 May and 8 September 2005 effectively as being in breach of the Commissioners' obligation to comply with the requirements of Article 5(4) of the Convention which requires that proceedings determining the lawfulness of his detention should be decided "speedily" by a court and his release ordered if the detention is not lawful.

The Statutory Context of the Application

[11] The Commissioners were established by the Life Sentences (Northern Ireland) Order 2001 ("the 2001 Order"). Their functions are set out in Article 2 to advise the Secretary of State with respect to any matter referred to them which is connected with the release or recall of life prisoners and they have the further functions conferred by Part III. The 2001 Order was the State's response to the findings of the European Court of Human Rights in relation to shortcomings in the domestic law relating to life sentence requirements under Convention law (see cases such as V v United Kingdom [1999] EHRR 121, Stafford v The United Kingdom [2002] 35 EHRR 112 and Weeks v United Kingdom [1998] 10 EHRR 293). In discharging their functions the Commissioners must have "due regard to the need to protect the public from serious harm from life prisoners" and have "regard to the desirability of (i) preventing the commission by life prisoners of further offences and (ii) securing the rehabilitation of life prisoners" (see Article 3(4)). Under Schedule 2 the Secretary of State is empowered to make rules prescribing the procedure to be followed in relation to the proceedings of the Commissioners. These rules may provide for the allocation of proceedings to panels of Commissioners or for the taking of specified decisions by a single Commissioner. Under the 2001 Order it is duty of the Secretary of State to release life sentence prisoners if the Commissioners have directed the release following completion of the tariff imposed by the court. Before the Commissioners may direct the release, the Commissioners must be satisfied, following referral of the prisoner's case to them by the Secretary of State, that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined. Generally speaking the Secretary of State may be required by the prisoner to refer his case to the Commissioners after he has served his tariff. When a prisoner is released on licence, the licence still remains in force until his death. Article 9 sets out the provisions relating to the recall of the life sentence prisoner released on licence. It applies to life sentence prisoners sentenced before and after the 2001 Order and accordingly applies in respect of the applicant (see Articles 2(2) and 12). As Lord Hutton made clear in R v Lichniak [2002] UKHL 47 the equivalent provisions in the English legislation relating to the recall of a life sentence prisoner are designed to give protection against the arbitrary exercise of the power by providing that a prisoner who is recalled can made representations which are considered by the Parole Board in England and Wales (and in this jurisdiction by the Commissioners.) If the relevant body recommend a release to the Secretary of State, the Secretary of State is bound to give effect to the recommendation. This power vested in the Commissioners to make a binding recommendation ensure that effectively the decision is made by an independent and impartial court satisfying the requirements of Article 5(4) (see the criticism of the pre-existing system in Weeks v United Kingdom) (1988) 10 EHRR 293.)

[12] Article 9 of the 2001 Order so far as material provides,

> "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.

(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.

(3) A life prisoner recalled to prison under this Article –

(a) on his return to prison, shall be informed of the reasons for his recall and of his right to make representations; an

(b) may make representations in writing to the Secretary of State with respect to his recall.

(4) The Secretary of State shall refer the case of a life prisoner recalled under this Article to the Commissioners.

(5) Where on a reference under paragraph (4) the Commissioners direct the immediate release of a life prisoner on licence under this Article, the Secretary of State shall give effect to the direction."

An additional Article 9(5A) was inserted into the 2001 Order by the Criminal Justice (Northern Ireland) Order 2002 and 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 applicant's Art 9(2) argument

[13] Mr Treacy QC contended that reading the provisions of the 2001 Order in context the primary purpose of Article 9 is to allow prisoners to be recalled if necessary but the power conferred on the Secretary of State falls to be exercised in a way which reflects the modern approach to the rule of law and separation of powers. He referred to various European Court of Human Rights decisions

including Stafford v UK [2002], Benjamin v UK and Kurt v Turkey [1998] which made clear, he argued, that under Convention law, the role of the Secretary of State as a member of the executive in fixing the tariff and in deciding on prisoners' release and recall did not sit easily with the proper separation of powers between executive and the judiciary. The primary intent of Article 9 is that decisions in respect of recall will be taken and reviewed by an independent and impartial body equating to a court within the meaning of Article 5 of the Convention. The recall of a life sentence prisoner is subject to a full review of the case following a reference under Article 9(4). The prisoner is entitled to a "speedy" determination of the lawfulness of his detention before a court. Counsel argued that it was for the Secretary of State to discharge the burden of showing that the statutory conditions precedent for the exercise of the Article 9(2) jurisdiction was properly met in all respects. Counsel argued that he had not done so in this case. The Secretary of State had failed to appreciate that a single Commissioner could have urgently considered the matter under Article 9(1). The Secretary of State was accordingly wrong to consider that it was necessary to convene a panel of Commissioners to determine an Article 9(1) issue. The last minute nature of the submission to the Minister was an abuse of power. The revocation decision was designed to pre-empt the applicant's bail application and was an improper exercise of power. The Minister had never properly considered Article 5 of the Convention and the decision was not properly reached.

Determination of the issues under Art. 9(2)

[14] Article 9(1) and (2) must be seen in their proper context and read in the light of the principles emerging from Convention case law. As pointed out, the 2001 Order as a whole was the state's response to the Convention's requirement to create a properly balanced statutory mechanism that reflected the proper separation of powers between the executive and the courts in relation to dealing with life sentence prisoners. The Commissioners were intended to fulfil the purpose of providing an independent and impartial court or tribunal to oversee the exercise of power relating to the recall of the life sentence prisoner. The element of procedural guarantees in relation to the Commissioners' oversight of a recall of a prisoner negatives any element of inhuman or degrading treatment or punishment (see Lord Hutton in Lichniak at paragraph 37). The propriety of recall must be subject to independent assessment (per Lord Bingham at paragraph 16 in Lichniak). The recall of a prisoner released on licence deprives that individual of his actual liberty, even if in theory he remains a sentenced prisoner (see Weeks v United Kingdom (1988) EHRR 293). Accordingly, the lawfulness of his detention must be decided speedily by a court under Article 5(4). Mr Maguire correctly argued that the prisoner's Article 5(4) rights were intended to be catered for by the referral of his case to the Commissioners after revocation under Article 9. The revocation of his licence under Article 9(2) (which triggered the right to have the legality of his recall investigated) constitutes a detention falling within Article 5(1), since the recall is in consequence of the alleged breach by the prisoner of the licence obligations fixed by the terms of his licence and release. Article 9(2) provides a procedure fixed by law for the recall of

the prisoner. 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.

[15] If it were or should rationally have been considered to be practicable to seek a recommendation from the Commissioners the power to revoke would not have been within the power of the Minister since the impracticability of a recommendation from the Commissioners was a condition precedent to the exercise of the power even if the Secretary of State might otherwise have consider it expedite to revoke the licence. The question of the public interest and the degree of impracticability are, however, inter-related for the more pressing in the public interest to recall the prisoner the more urgent the making and effectuation of a decision will be. If the public interest in favour of revocation is legitimately considered by the Minister to be very urgent the more difficult it may be to obtain a decision by the Commissioners under Article 9(1) within the urgent timeframe called for. A given situation may demand a very rapid response to the situation making it more unlikely that the recommendation could be timeously obtained from the Commissioners. The fact that the revocation decision will be subject to the legal oversight of the Commissioners under Article 9(4) is a factor to which the Secretary of State will have regard under Article 9(2).

[16] The parties' submissions reveal a shortcoming in the Rules of Procedure of the Commissioners for no rules appear to have been made to cater for the Article 9(1) revocation situation. The Life Sentence Review Commissioners Rules 2001 expressly apply to referrals of prisoners' cases under Article 6 and Article 9 (4) of the Order.

They do not apply to Article 9(1) cases. Rule 24 does not save the situation for that rule applies the rules to Article 9(4) cases, subject to the modifications set out in rule 24. It does not apply to Article 9(1) cases. The question arises as to how the Commissioners would be permitted to go about the Article 9(1) functions in the absence of rules of procedure. Mr Treacy argued that since under the Interpretation Act (Northern Ireland) 1954 the plural includes the singular a single Commissioner could exercise the powers of the Commissioners. Mr Maguire on behalf of the Secretary of State and Mr Larkin QC on behalf of the Commissioners recognising the problem arising from the absence of proper rules, argued that in the absence of special rules the Commissioners as a body would have to determine the Article 9(1) matter or as masters of their own procedure would be entitled to appoint a panel. Routinely they do appoint panels for the purposes of Article 9(1). The Order and the Rules make no provision for a quorum in relation to a decision to be made by the Commissioners nor is provision made for a majority view except in relation to matters which are governed by the Rules. Rules may provide for the allocation of proceedings to panels and for the taking of specified decisions by single commissioners. So rules could empower a panel to be convened to deal with Article 9(1) cases or could enable a decision to be taken by a single commissioner but the Rules did not cater for that. In practice it appears that panels were convened to deal with Article 9(1) cases, a procedure which may be of questionable legality in view of the shortcomings in the procedural rules. It would appear that appropriate rules should be made as a matter of urgency and such rules could make provision for urgent cases. As matters stand when the Minister had to make his decision there was a de facto practice of appointing a panel. I consider that it is doubtful whether a single commissioner could under Article 9(1) make a decision, the wording of the 2001 Order pointing to the Commissioners acting as a body except to the extent that rules empowered them to act through a panel or individually. Against the background of the belief that a panel would have to be convened and the past experience in relation to the time involved in the procedures involved in establishing a panel and obtaining a decision from the panel the view that it was expedient in the public interest to revoke the licence before the Commissioners could make a recommendation under Article 9(1) was one that a reasonable decision maker could in the circumstances have made. The Minister's belief was based on the view taken by civil servants advising him and he was entitled to rely on such advice. Had the Minister been aware that it was in fact doubtful whether even a panel could have made such a decision and that it was highly questionable whether an individual commissioner could make such a decision then the Minister's decision was a fortiori soundly based in relation to the impracticability of obtaining the Commissioner's recommendation in time. The fact that there was pending a bail application which theoretically could lead to the release of the applicant and thus expose the public to the Minister's rationally based conclusion of risk to the public was one which the Minister could permissibly take into account. There was the possibility of a different conclusion being reached by the court on the advisability of release though it must be said that in practice at the time in view of the state of the Crown evidence, the record of the accused and the fact that he was a convicted murderer released on licence all make it highly unlikely that bail would in fact have been granted.

[17] In the result the decision of the Minister to recall the applicant to prison taken on 6 December 2004 was lawful and accordingly I reject the applicant's challenge to the legality of the decision.

The Commissioners decisions

[18] Once the decision was made the Secretary of State properly and timeously referred the matter to the Commissioners under Article 9(4). The Commissioners accordingly were bound to review the legality of his detention and to do so within the terms of Article 5.4 that is to say speedily. The automatically required referral of the case to the Commissioners by the Secretary of State satisfies the requirements of Article 5.4 in relation to the right of the detained person to refer the question of the legality of the detention to a court (see Weeks v United Kingdom [1988] EHRR 293 at para. 65). The burden of proof lies on the state to show that the detention to lawful. For the purposes of Article 5.4 the court must be independent of the executive and the parties and be competent to take a legally binding decision leading to the person's release. It is not disputed in this case that the Commissioners in this instance constitute a valid and effective court for the purposes of Article 5 and that they can make a recommendation to the Secretary of State to which the Secretary of State must give effect. The Commissioners must conduct a review which is wide enough to bear on all the conditions which are essential to the lawfulness of the continuing detention of the prisoner. The obligation on the court is to do so "speedily". This is a lesser degree of urgency than "promptly" as used in Article 5(3). (See E v Norway [1990] 17 EHRR at para. 64). Convention jurisprudence indicates that there are two distinct requirements as to the speediness of the remedy: firstly, the remedy must be exercised immediately or speedily after the detention and secondly once exercised it must proceed "speedily" to conclusion (see Clayton "The Law of Human Rights" at para. 10.155). There must be a consideration of the circumstances of the individual case including the diligence of the national authorities.

[19] The Strasbourg authorities do not claim to define with any degree of precision what is involved in the concept of "speediness" in Article 5.4 cases. What is required of the relevant court is a need to recognise that the legality of the deprivation of liberty of someone such as the applicant is something which requires review with a relatively high degree of urgency and requires to be justified by the state. In urgent matters, and in particular when the individual's liberty is at stake, it is incumbent on the judicial authorities to ensure that appropriate provision is made for speedy and public determination of applications, for example, regardless of vacation periods (E v Norway [1994] 17 EHRR 30). In E v Norway the applicant, an untreatable psychopath, was repeatedly sentenced either to periods of detention in mental hospitals or to judicial observation. On 3 August 1988 he successfully challenged by way of judicial review before the Oslo County Court a decree of the Minister of Justice to replace his supervision with detention in a secure institution for a short but indefinite period. The review proceedings lasted eight weeks partly because they

were begun on vacation and partly because the judge took three weeks to deliver his judgment. In that case the court stated:

> "A period of eight weeks from filing of summons to judgment does appear prima facie difficult to reconcile with the notion of 'speedily'".

The court went on to say that in order to reach a firm conclusion that special circumstances of the case had to be taken into account. It concluded that the delays were caused by administrative problems due to the lodging of the application for judicial review during vacation. The court required the contracting states to organise their legal system so as to enable the court to comply with its various requirements.

> "It is incumbent on the judicial authorities to make the necessary administrative arrangements even during a vacation period to ensure that urgent matters are dealt with speedily and this is particularly necessary when the individual's personal liberty is at stake. Appropriate provisions for this purpose do not appear to have been made in the circumstances of the present case."

The court was (perhaps somewhat surprisingly) somewhat critical of the period of three weeks which it took the judge to formulate his decision.

[20] It is necessary to examine with some care the sequence of events before the Commissioners. The police provided their report to the Life Sentence Unit on 3 December 2004 and it was on the police assessment that the applicant posed a serious risk to the public combined with his past history, that led to the decision to recall him to prison. The matter was referred to the Commission on 14 December 2004. It was not argued that there was undue delay in the referral of the case to the Commissioners. Within one week the Commissioners set a timetable for various steps to be taken by the Life Sentence Unit in connection with the hearing before the Commissioners. The Secretary of State was asked to provide any further information or reports he wished to rely on before the Commissioner on 15 January. The Commission acted promptly in giving such directions. The Life Sentence Unit wrote to the police requesting police assistance in respect of the provision of information and of witnesses in connection with the hearing on 23 December 2004. By letter dated 23 December 2004 the Life Sentence Unit wrote to the police requesting police assistance in respect of the provision of information and of witnesses in connection with their proposed Life Sentence Review Commissioners' hearing. In particular more detailed information was sought about the circumstances relating to the applicant being charged with offences in November 2004 and in relation to any other criminal activity in which he was suspected of involvement. Prior to 15 February 2005 the police informed the Life Sentence Unit that they were not in a position to provide further materials about the applicant's case. The unavailability of such

further police material inhibited the ability of the Probation Service and the Northern Ireland Prison Service Psychology Service to provide reports on the applicant. Bearing in mind that it was the result of initial police advice that the decision to revoke the applicant's licence was made it is difficult to understand why the police were not in a position to provide to the Life Sentence Unit all the evidence and information which they currently had at that stage relating to the applicant and relevant to the view that they had formed that he should continue to be detained on the grounds that he was a danger to the public. The only explanation given by the Life Sentence Unit in their letter of 15 February 2005 in respect of the police delay was because "the file in what is a complex investigation is in the course of preparation." The Life Sentence Unit had been advised that work on the case had been hampered by the demand of investigations into other much more significant recent crime. The file therefore was not expected to be passed to the office of the DPP for several weeks. The letter then went on to state:

> "The police advised that as matters stand they are unable to release any further material they may have in relation to this case. They believe nonetheless that they have a prima case against which to connect Mr Mullan to the charge he faces currently. As such they consider that he constitutes a danger to the public. .."

It was following receipt of the letter of 15 February 2005 that the panel chairman gave the direction of 17 February 2005. He accepted the reason for the delay in providing the Secretary of State's view and considered that it should be provided on or before 22 March 2005. The reason for the decision given was "all relevant evidence and information will then be available to the Commissioners."

[21] On 22 March 2005 the Life Sentence Unit wrote to the Commissioners again stating that it was still unable to provide anything further about the case beyond that submitted previously. This is because the police were not in a position to provide any further material about the case at that stage. The letter went onto state:

> "The police advised that their file in this complex case is in the process of being passed to the office of the DPP for consideration. As matters stand they are unable to release any further material they have relating to this case at this time. They envisage that it may be at least two – three months before they may be in a position to provide any further material pending developments in the prosecution of this case. It is noted that Mr Mullan is to appear in court again by video link on 12 April in respect of the charges he faces."

The letter concluded:

> "At this point in time it is uncertain precisely when we might be in a position to provide the materials in question but it would appear that we would not be able to do so for at least three-four months."

The Life Sentence Unit asked for the deferral of the nominated date for the provision of further materials at that point in time it was uncertain precisely when the Life Sentence Unit would be in a position to provide the materials in question but it would appear that they would not be able to do so for at least three to four months. The Chairman's direction of 18 May 2005 granted the extension of time for the provision of further material. A further indication of the expected availability of the materials in question should be provided by 25 July 2005. The criminal proceedings were highly relevant to the disposal of the reference and it would therefore be inappropriate to proceed with it until criminal proceedings were completed. On 7 July the applicant sought an extension of time to appeal the Chairman's direction. This was granted on 18 July. The Life Sentence Unit in their letter of 15 August 2005 to the Commission stated:

> "With regard to the appeal the Secretary of State would respectfully submit that it would be inappropriate for the Commissioner's to seek to determine this matter in advance to the conclusion of the criminal proceedings…. We have conferred again with PSNI about the ability of that service to make available at this time any further materials about this case. They advise that, relevant to continuing consideration being given by the PPS to taking criminal proceedings against the applicant they are unable still to provide any further material about this case. We understand that this is likely to be the position for some little while yet. They are not able at the moment to be more precise on this point."

The appeal panel on 8 September 2005 rejected the appeal and decided that it would be inappropriate to seek to determine a matter in advance of the outcome of the criminal proceedings.

The applicant's argument

[22] The thrust of Mr Treacy's argument was that taking the decision making processes of the Commission as a whole (the individual's decisions of 17 February, 6 May and 8 September being part and parcel of that process) the Commissioners had breached the Article 5.4 rights of the applicant to a speedy determination of the legality of his detention. Mr Larkin on behalf of the Commissioners pointed to the

procedural rules and argued that the impugned decisions were individually validly and properly reached under the Rules. The decision of 17 February 2005 was not appealed although there was a right of appeal in relation to it. The decision of 18 May was appealed and that decision was upheld on 8 September. The earlier decisions could not be challenged by judicial review having regard to the delay in the bringing of the judicial review challenge and having regard to the fact that in one case the appeal mechanism was not pursued and in the latter case was the subject of the appeal. The decision to stay the proceedings pending the outcome of the criminal proceedings was, counsel argued, entirely appropriate. The materials that might have emerged at any trial of the applicant were vital to any assessment and weighing of risks that might arise from the applicant's release. It would have been a grave dereliction of duty imposed on the Commissioners' by Article 3(4) of the 2001 Order to have proceeded to deal with the applicant's case on a less than informed basis.

Determination of the question

[23] The 2001 Order and any rules made thereunder fall to be construed so far as possible in a manner that is consistent with the Convention and enable the Convention rights of individuals to be upheld and fulfilled. The deprivation of the applicant's liberty had to be justified by the State authorities and shown to be legally justified and necessary. The applicant is entitled to meaningful safeguards designed to prevent the untrammelled arbitrary exercise of executive powers in respect of his detention. The state authorities which include the Commissioners within the ambit of their jurisdiction, the Secretary of State as the party seeking to justify the deprivation of liberty and the Police Service of Northern Ireland were, within their respective fields, bound to ensure the protection of the applicant's Convention rights. In the case of the Commissioners as the relevant court for the purposes of Article 5.4 their obligation was to ensure the speedy determination of the legality of the applicant's imprisonment. They would not be properly discharging that obligation if they simply left it to the executive and the Police Service to determine when information would be supplied to the Commissioners and when the matter could effectively be brought to final determination. It is true that under Article 9(5A) of the 2001 Order the Commissioners may not recommend the release of the prisoner unless they are satisfied it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined. So long as the state authorities have failed to lodge all relevant material it might be suggested that the Commissioners could not conclude that it would be safe to release the prisoner. If that were the proper approach to Article 9(5A) it would effectively mean that the state authorities could dictate the speed at which a determination might be reached and could arbitrarily delay the determination. Such an approach would not be compatible with Article 5.4 of the Convention. Lord Bingham in R v Lichniak [2002] 3 WLR 1834 at 1841 para. 16 doubted whether there is in truth a burden on the prisoner to persuade the Parole Board that it is safe to recommend release since it is an administrative process requiring the Board to consider all the available material and form a judgment. A balance must be struck and in the case of doubt the

interests of society prevail over the interests of the individual in the case of someone who has taken life with the necessary murderous intent.

[24] Reading as a whole the actions and the impugned decisions of the Commissioners the conclusion to be reached is that the Commissioners were not effecting a speedy determination of the legality of the applicant's detention. The reasons given by the police for failing to provide information were not in Convention law terms justifiable reasons for delaying the provision of information which the Commissioners' needed in order to carry out their function of speedily determining the issue. Faced with the delays flowing from the inability or refusal of the police to furnish further information the Commissioners obligation remained to speedily determine the case. If the state authorities refused or were unable to furnish further information the Commissioners in furtherance of their duty for requisite speed must decide how that speediness can be achieved. This could be done by enforcing a peremptory timetable on the state authorities to produce any further materials that they wished to rely on and by proceeding to determine the matter on the basis of the information and evidence supplied within the peremptory timetable fixed. There will be an area of judgment to be exercised as to what reasonable timetable should be fixed with peremptory consequences but the timetable must be in the context of ensuring speed. Open ended timetables revealing no determination to hold the state authorities to a timetable designed to achieve a speedy conclusion and ready acceptance of arguments based on the competing needs of other police cases and police and prosecution resources are not consistent with the duty to ensure a speedy determination of the subject reference.

[25] In Weeks v United Kingdom the prisoner was recalled to prison in 1977. The Home Secretary, in the view of the court was ordering his removal from an actual state of liberty albeit one enjoyed in law as a privilege and not as a right to a state of custody. The court went on to state:

> "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 order of the court following his arrest on 23 June on various criminal charges … "

[26] It follows from that passage in Weeks that the duty of the Commissioners remains to review the legality of the Secretary of State's detention of the prisoner. As the European Court went on to state the applicant's entitlement to a speedy decision should have been excersable at the moment of any return to custody after being at liberty and also at reasonable intervals during the course of his imprisonment (see paragraph 58).

[27] By staying the Article 9(4) proceedings pending the outcome of the then current criminal proceedings, the Commissioners were, in effect, declining to

consider the legality of his detention by the Secretary of State under Article 9(2) in the meantime no matter how long those criminal proceedings might take. Since the Commissioners' obligation was to speedily decide the legality of the detention, brought about by the Secretary of State's recall of the applicant to prison, they were in effect failing to fulfil the obligation by simply staying the proceedings pending the outcome of the criminal proceedings. In the context of the Minister's decision, Mr Maguire stressed the different functions of the Minister exercising powers under Article 9(2) and the court exercising its bail powers in respect of an accused person. The functions of the criminal court and of the Commissioners differ, not least because in the criminal court the prosecution must prove the case beyond reasonable doubt. In determining questions of fact relative to a detention under Article 9 of the 2001 Order, the Commissioners must decide on the balance of probabilities and in the context of weighing the public interest over that of the a convicted murderer. The outcome of the criminal case would not be determinative of the issues before the Commissioners but it would no doubt turn up material of relevance to the Commissioners in relation to their ongoing duty to keep under review the applicant's case. The true and proper question for the Commissioners was whether there was currently before them material justifying the detention of the applicant, the onus being on the state to produce that material relied on to justify the detention of the prisoner and the duty being on the Commissioners to determine speedily the question whether the Secretary of State had made good the state's claim to be able to detain the prisoner. It may well have been (and it seems likely) that on the evidence which was then currently before the Commission there was adequate material to lead them to the conclusion that the detention was lawful. Rather than delay addressing the question indefinitely pending the obtaining of other materials, the Commissioners should have proceeded to determine, in the light of the evidence adduced whether the detention was lawful. In postponing its determination of the issue in the way in which it did, the Commissioners were not satisfying the Convention law duty to decide the question speedily. If the evidence was insufficient to justify the detention the prisoners would be entitled to be released. If subsequently further evidence came to light justifying his recall to prison he could be recalled.

[28] The judicial review application related to events up to the date on which the judicial review application was brought. This application thus does not relate to events subsequent to the applicant for leave and the applicant is not seeking specified relief in relation to subsequent delays by the Commissioners in progressing the case to a decision. It appears from the affidavits before the court that the Commissioners apparently decided to cancel a preliminary meeting which had been scheduled for 3 November 2005 following the granting of leave to apply for judicial review. The judicial review challenge could not have the effect of staying the Article 9(4) reference and the Commissioners' duty was to get on with the case to reach to a decision on legality of the detention. That duty has still to be carried out. It is incumbent on the Commissioners for the reasons given in this ruling to progress the reference as a matter of urgency.

[29] In view of the conclusions which I have reached it is not necessary to consider further the point made by the applicant that the Commissioner's approach was procedurally flawed because they had not specifically adverted to the Art. 5.4 obligations. The very recent decision of the House of Lords in R (Begum) v Denbigh High School [2006] UKHL 15 makes clear that what falls to be examined is whether the relevant impugned decision or course of conduct in fact infringes the Convention duty not the quality of the decision making process that led to it (see Lord Bingham at paras 30 and 31 in particular). For the reasons given I have come to the conclusion that the Commissioners were in breach of the Art. 5.6 obligations.

[30] I shall hear counsel on the appropriate relief to be granted in the light of the ruling in this judgment.