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Judgment: approved by the Court for handing down

(subject to editorial corrections)

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY STEPHEN McCLEAN FOR JUDICIAL REVIEW OF THE SECRETARY OF STATE FOR NORTHERN IRELAND

Before: Nicholson LJ, McCollum LJ & Higgins J

NICHOLSON LJ

Introduction

[1] This is an appeal from the decision of Coghlin J made on 15 May 2003 whereby he dismissed an application by Stephen James McClean for judicial review of a decision by the Secretary of State for Northern Ireland. It had been argued on behalf of the appellant that the Order in Council made by the Secretary of State on 25 July 2000 was outside the powers of the Secretary of State under the Northern Ireland (Sentences) Act 1998 (the 1998 Act) and that, therefore, the appellant was entitled to a declaration that it was ultra vires, as it was primary legislation. It was further contended that the appellant was entitled to a declaration that the Order was incompatible with Article 5 of the European Convention on Human Rights. A notice in accordance with Rules of Court was served on the Crown under Section 5 (1) of the Human Rights Act 1998. The Sentence Review Commission was joined as a notice party to the proceedings. Mr Tracey, QC and Ms Quinlivan appeared for the appellant. Mr Morgan, QC and Mr Piers Grant appeared for the Secretary of State and Mr Larkin, QC and Mr Torrens appeared for the notice party.

THE FACTUAL BACKGROUND

[2] On 3 March 1998 the appellant, together with another man, murdered or aided and abetted the murder of Damien Trainor and Philip Allen at the Railway Bar at Poyntzpass, County Down. Two other men sustained gunshot wounds as a result of the attempted murder of them. On 2 February 2000 the appellant, together with the other man, was convicted of the double murder, two counts of attempted murder and possession of firearms and ammunition

with intent to endanger life arising out of the incident. He was sentenced to life imprisonment on both counts of murder, 20 years imprisonment in respect of each count of attempted murder and 15 years imprisonment in respect of the count of possession of firearms and ammunition with intent. He appealed to the Court of Appeal against the convictions and his appeal was dismissed on 28 June 2001.

[3] The appellant applied to the Sentence Review Commissioners for a declaration that he was eligible for release under the provisions of Section 3 of the 1998 Act and on 2 May 2000 the Commissioners made a determination granting the application and specifying that 12 November 2008 was a date which, they believed, would mark the completion of about two-thirds of the period which the appellant would have been likely to spend in prison under the sentence: see Section 6(1) of the 1998 Act.

[4] On 5 July 2000 the appellant was released from prison on pre-release home leave and on 6 July he was arrested and charged with attempted murder and causing grievous bodily harm with intent following a violent disturbance in Banbridge, Co.Down. The appellant was remanded in custody and refused bail on 21 July 2000. He was ultimately acquitted of these charges on 27 November 2001.

[5] On 10 July 2000 the respondent wrote to the Sentence Review Commissioners applying under Section 8 of the 1998 Act for a revocation of the Commissioners' declaration. This application was based upon the allegation by the respondent that, as a consequence of the appellant's involvement in the incident at Banbridge, one of the relevant conditions under Section 3 of the 1998 Act was no longer satisfied, namely that the appellant would not be a danger to the public, if released immediately. On 26 July 2000 the Commissioners issued a preliminary indication that they were minded to grant the Secretary of State's application for a revocation of the declaration of eligibility for release. On the same day as the Commissioners issued the preliminary indication, 26 July 2000, the respondent laid before Parliament an Order in Council providing for amendment of the 1998 Act, namely Statutory Instrument 2000 No. 2024.

[6] The Belfast Agreement which was entered into on 10 April 1998 provided that the British and Irish Governments would put in place mechanisms to provide for an accelerated programme for the release of prisoners convicted of scheduled offences in Northern Ireland in the case of qualified prisoners. It was further agreed that both Governments would complete a review process within a fixed time frame and set prospective release dates for all qualifying prisoners. This process would provide "for the advance of the release date of qualifying prisoners while "allowing account to be taken of the seriousness of the offences for which the person was convicted and the need to protect the community". In addition, the intention would be

that, "should the circumstances allow it," any qualifying prisoners who remained in custody two years after the commencement of the scheme for accelerated release would be released at that point.

[7] One of the qualifications for early release was that the crime was a scheduled (or terrorist) offence and had been committed before 10 April 1998. Accordingly, the appellant qualified for early release on this ground as the double murder and other crimes of which he was guilty occurred on 3 March 1998 and were scheduled (or terrorist) offences.

STATUTORY FRAMEWORK

[8] The statutory framework for accelerated release was provided by the Northern Ireland (Sentences) Act 1998 which was passed on 28 July 1998. The relevant sections included section 1, setting up Sentence Review Commissioners appointed by the Secretary of State of whom one, at least, was to be a lawyer. Section 3 provided:

> (1) a prisoner may apply to Commissioners for a declaration that he is eligible for release in accordance with the provisions of this Act.
>
> (2) the Commissioners shall grant the application if (and only if) -
>
> (a) the prisoner is serving a sentence of imprisonment for a fixed term in Northern Ireland and the first three of the following four conditions are satisfied, or
>
> (b) the prisoner is serving a sentence of imprisonment for life in Northern Ireland and the following four conditions are satisfied.
>
> (3) the first condition is that the sentence -
>
> (a) was passed in Northern Ireland for a qualifying offence, and
>
> (b) is one of imprisonment for life or for a term of at least 5 years.
>
> (4) the second condition is that the prisoner is not a supporter of a specified organisation.
>
> (5) the third condition is that if the prisoner were released immediately, he would not be likely -
>
> (a) to become a supporter of a specified organisation or

(b) to become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland.

(6) the fourth condition is that if the prisoner were released immediately, he would not be a danger to the public.

(7) a qualifying offence is an offence which -

(a) was committed before 10 April 1998,

(b) was, when committed, a scheduled offence…

(c) …

Section 4 provided:-

(1) if a fixed term prisoner is granted a declaration in relation to a sentence he has a right to be released on licence so far as that sentence is concerned on the day which he has served –

(a) one third of his sentence, plus

(b) one day for every day of remission which he has lost and, not had restored, in accordance with prison rules.

(2) if the day arrived…

(3) …

(4) if a prisoner is released on licence under this section his sentence shall expire (and the licence shall lapse) at the time when he could have been discharged on the grounds of good conduct under prison rules.

Section 5 provided:-

(1) if the length of a sentence is treated as reduced by a period of custody in accordance with Section 26 of the Treatment of Offenders Act (NI) 1968 (duration of sentence) for the purposes of section 4 (1) above the period of custody must be treated as having been served as part of the sentence.

Section 6 provided:-

(1) When Commissioners grant a declaration to a life prisoner in relation to a sentence they must specify a date which they believe marks the completion of about two thirds of the period which the prisoner would have been likely to spend in prison under the sentence.

(2) the prisoner has a right to be released on licence (so far as that sentence is concerned) –

(a) on the day specified under sub-section 1, or

(b) if that day falls on or before the day of the declaration, by the end of the day after the day of the declaration.

(3) …

Section 8 provided:-

(1) the Secretary of State shall apply to Commissioners to revoke a declaration under Section 3 (1) if, at any time before the prisoner is released under Section 4 or 6, the Secretary of State believes –

(a) that as a result of … or a change in the prisoner's circumstances, an applicable condition in Section 3 is not satisfied or

(b) that evidence or information which was not available to the Commissioners when they granted a declaration suggests that an applicable condition in Section 3 is not satisfied.

(2) the Commissioners shall grant an application under this Section if (and only if) the prisoner has not been released under Section 4 or 6 and they believe –

(a) that as a result of a change in the prisoner's circumstances, an applicable condition in Section 3 is not satisfied, or

(b) that evidence or information which was not available to them when they granted a declaration suggests that an applicable condition in Section 3 is not satisfied.

Section 9 provided:-

(1) a person's licence under Section 4 or 6 is subject only to the conditions –

(a) that he does not support a specified organisation (within the meaning of Section 3)

(b) that he does not become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland, and

(c) in the case of a life prisoner, that he does not become a danger to the public.

(2) the Secretary of State may suspend a licence under Section 4 or 6 if he believes a person concerned has broken or is likely to break a condition imposed by this section.

(3) Where a person's licence is suspended –

(a) he shall be detained in pursuant of his sentence… and

(b) Commissioners shall consider his case.

(4) On consideration of a person's case –

(a) If the Commissioner thinks he has not broken and is not likely to break a condition imposed by this section, they shall confirm his licence, and

(b) otherwise, they shall revoke his licence.

(5) Where a person's licence is confirmed –

(a) he has a right to be released (so far as the relevant sentence is concerned) by the end of the day after the day of confirmation , or …

(b) …

(7) Detention during suspension of a licence shall not be made unlawful by the subsequent confirmation of the licence.

Section 10 provided:-

(1) This section applies if –

(a) a prisoner is granted a declaration in relation to a sentence, and

(b) the day on which he has a right to be released under Section 4 or 6 (so far as that sentence is concerned) falls after the accelerated release day.

(2) He has a right to be released under the section concerned (so far as that sentence is concerned) on the accelerated release day.

(3) …

(4) In the case of a sentence passed before the day on which this Act comes into force, the accelerated release day is the second anniversary of that day.

(5) In the case of a sentence –

(a) passed after the day on which the Act comes into force and

(b) treated in accordance with Section 26 of the Treatment of Offenders Act (NI) 1968 as reduced by a period of custody beginning before the day on which this Act comes into force the accelerated release day is the second anniversary of that day.

(6) In the case of any other sentence passed after the day on which this Act comes into force the accelerated release day is the second anniversary of the start of the sentence (or the start of any period of custody by which the sentence is treated as reduced in accordance with Section 26 of the 1968 Act).

(7) Nothing in this section shall permit the release of a prisoners following a declaration under Section 3 (1) before he has served two years of a sentence to which the declaration relates; and for that purpose any period of custody by which a sentence is treated as reduced in accordance with Section 26 of the 1968 Act shall be treated as served as part of the sentence.

(8) The Secretary of State may by Order amend sub-sections (4) (7).

THE AMENDMENT

[9] The Northern Ireland (Sentences) Act 1998 (Amendment of Section 10) Order 2000 made on 25 July 2000 and coming into force on 27 July 2000 and purporting to be made under the powers conferred by Section 10 (8) of the Northern Ireland (Sentences) Act 1998 provided by Article 2 as follows:-

(1) …

(2) For Section 10 (7) of the Act there shall be substituted –

> (7) Nothing in this section shall prevent the release of a prisoner following a declaration under Section 3 (1) –
>
> (a) before he has served two years of the sentence to which the declaration relates; or
>
> (b) at any time when an application under Section 8 (1) for revocation of the declaration has yet to be finally determined; and for the purposes of paragraph (a) any period of custody by which the sentence is treated as reduced in accordance with Section 26 of the 1968 Act shall be treated as served as part of the sentence.

JUDGMENT OF COGHLIN J

[10] Coghlin J held that the amendment effected by Article 2 of the 2000 Order simply specified a further circumstance according to which the accelerated release date of a prisoner following a declaration under Section 3 (1) was to be calculated and did not specifically alter the circumstances or conditions under which the Secretary of State could apply to the Commissioners to revoke a declaration in accordance with Section 8. By amending Section 10 (7) of the Act as it did the Amendment Order of 2000 simply ensured that the accelerated date of release was fixed in such a way as to enable any revocation application, properly instigated by the Secretary of State under Article 8 of the 1998 Act, to be effectively completed prior to release.

[11] He also rejected the submission that there was a breach of Article 5 of the Convention. He stated that he did not consider that such a breach had been established since in his view, at all material times the applicant was legitimately deprived of his liberty as a result of the original conviction by a court of competent jurisdiction which took place less than six months before his pre-release home leave. If he was wrong about this conclusion and Article 5 (1) was engaged by the passing of the Amendment Order 2000, he was satisfied that the passing of this amending Order was neither arbitrary nor irrational and, if the applicant was deprived of his liberty, such deprivation was a reasonable and lawful response to circumstances disclosing a risk of danger to the public with a sufficient connection with the circumstances of his original offence to justify his detention.

[12] He also rejected a submission on behalf of the appellant that detention of the applicant was in breach of Article 5 (4) of the Convention. He was not persuaded that the time which elapsed before the Commissioners' final determination of the Secretary of State's application to revoke the declaration was such as to give rise to a breach of Article 5 (4).

THE GROUNDS OF APPEAL

[13] We need not set out the grounds of appeal as these were covered in greater detail in the course of written skeleton and oral arguments.

THE FIRST ARGUMENT ON BEHALF OF THE APPELLANT

[14] It was submitted on behalf of the appellant that had the Order not been passed the appellant would have been released under Section 6 of the Northern Ireland (Sentences) Act 1998. Once released the Sentence Review Commissioners could not have determined the Secretary of State's application for a revocation by virtue of Section 8 (2) of the Act. While the appellant would have been detained in custody by virtue of the refusal of bail he would have been free to apply for bail at any time and in any event would have been released from custody once acquitted in November 2001.

[15] It was self-evident that the limited and exceptional power of the Secretary of State by Order to amend sub-sections (4) to (7) of Section 10 did not authorise him to use that power to amend another section of the Act or other sub-sections of the same section. Section 10 dealt with "accelerated release"; sub-section 10 (2) conferred a statutory right to be released on the accelerated release date which in the case of the appellant was defined by reference to Section 10 (4) which had not been amended. The effect of a declaration from the Commissioners was that the appellant was by statute entitled to be released from 28 July 2000. Sub-sections (4) to (7) of Section 10 dealt with the method by which release dates were calculated with the objective of ensuring that every prisoner, no matter when convicted, would serve a minimum sentence of two years. Section 8 of the legislation dealt with the issue of applications by the Secretary of State for revocation of a declaration under Section 3 (1) of the Act. The Secretary of State was not empowered to make amendments to Section 8 by Order and any amendment, where necessary, would go before the Houses of Parliament. The appellant had acquired a right to be released on 28 July 2000 but for the amendment of the legislation which was ultra vires. The Secretary of State had exercised his power under Section 10 (8) in order to cure a perceived lacuna in the legislation. There was no statutory provision for revocation under Section 8 (2). Indeed under Section 8(2) the Commissioners were expressly prohibited from doing so. The appellant had a right which was already acquired and taken away by the amendment. The amendment was a breach of the provisions of the Good Friday (or Belfast) Agreement. The Secretary of State

might have suspended the licence under Section 9 but by using his ultra vires powers the appellant was detained from July 2000 until April 2002.

ARGUMENT ON BEHALF OF THE RESPONDENT

[16] Mr Morgan QC dealt with the provisions of the 1998 Act and referred in particular to Section 3 (6). He said that Section 8 was designed to deal with the situation before a person was released from prison and Section 9 was designed to deal with a prisoner after release. There could be no breach of a licence if not released on licence and therefore Section 9 might not be applicable if the person had committed an offence prior to release which made him a danger to the public. He referred to the correspondence in relation to the incident of 5 July 2000, the application to revoke on 10 July 2000, the ancillary application of 19 July 2000 which sought to persuade the Commissioners to deal with the appellant before the date for his release, namely 28 July 2000 and he referred to the preliminary determination of the Commissioners on 26 July 2000. Section 10 dealt with the accelerated release day and enabled one to find out what the accelerated release day was. The amendment identified a new accelerated release day where a release day had not been finalised under Section 8. The amendment was intended to remedy a lacuna in Section 10 (7) and if the Secretary of State had identified, as he had, that legislation had failed to deal with issues of dangerousness and had power to alter the date for release, a failure to exercise that power where a prisoner on release would be a danger to the public would be irrational and perverse. Section 8 did not deal with accelerated release days and was not intended to affect the accelerated release day.

OUR CONCLUSIONS ON THE FIRST ARGUMENT

[17] We are satisfied that the Northern Ireland (Sentences) Act 1998 (Amendment of Section 10) Order 2000 is within the powers of the Secretary of State under Section 10 (8) of the 1998 Act. Section 3 of the 1998 Act deals with eligibility for release and provides that a prisoner serving a sentence of imprisonment for a fixed term must satisfy three conditions, namely that his sentence was passed in Northern Ireland, that he is not a supporter of a specified organisation and that, if he were released immediately, he would not be likely to become a supporter of a specified organisation or become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland. A prisoner serving a sentence of imprisonment for life has also to satisfy a fourth condition that, if he were released immediately, he would not be a danger to the public. "Qualifying offence" is defined by sub-section (7).

[18] Section 4 (1) deals with fixed term prisoners and with the right to be released on licence on the day on which the prisoner has served one third of

his sentence plus one day for every day of remission which he has lost and not had restored in accordance with prison rules.

[19] It is to be noted that prisoners are treated under sub-section (4) as prisoners sentenced by the Court which dealt with them and the sentence is regarded as operative. Sub-section (4) provides that, if a prisoner is released on licence under this section, his sentence shall expire (and the licence shall lapse) at the time when he could have been discharged on the ground of good conduct under prison rules. Section 6 (1) provides for life sentence prisoners and requires the Commissioners to specify a day which they believe, marks completion of about two thirds of the period which the prisoner would have been likely to spend in prison under the sentence and by sub-section (2) provides that he has a right to be released on licence (so far as that sentence is concerned) on the day specified under sub-section (1) or if that day falls on or before the day of the declaration by the end of the day after the day of the declaration. Again, this section recognises the validity of the sentence which has been imposed on the prisoner.

[20] Section 8 (1) deals with applications to revoke a declaration by the Commissioners granted under Section 3(1) in circumstances where the prisoner has not been released under Section 4 or Section 6 and sub-section (2) provides that the Commissioners shall grant an application under the section if (and only if) the prisoner has not been released under Section 4 or 6 and they believe the matters set out at (a) or (b) of sub-section (2).

[21] Section 9 deals with licensed prisoners, that is say, prisoners who have been discharged from prison and provides by sub-section 1 (c) that in the case of a life sentence prisoner a condition shall be imposed that he does not become a danger to the public. Sub-section (2) provides that the Secretary of State may suspend a licence under Section 4 or 6 if he believes that the person concerned has broken or is likely to break a condition imposed by the section. In order that Section 9 comes into play a prisoner must have been released from prison under licence and have broken that licence or been considered likely to break a condition of the licence. In our view this means that the prisoner must have aroused belief in the Secretary of State after discharge from prison that he has broken or is likely to break a condition imposed by this section and it does not apply to a person who has not yet been released from prison and, therefore, has not yet been released under licence.

[22] Section 10 is intended to honour the Good Friday (or Belfast) Agreement in relation to prisoners to whom Section 3 applies and provides a formula for an accelerated release date which is not provided by Section 4 or Section 6. Section 10 applies if a prisoner is granted a declaration under Section 3 in relation to a sentence and the day on which he has a right to be released under Section 4 or 6 (so far as that sentence is concerned) falls after "the accelerated release day". We note that Section 10 (1) (b) refers to "the

day on which he has a right to be released under Section 4 or 6." Sub-section (2) provides that he has a right to be released under the section concerned, i.e. Section 4 or Section 6 (so far as that sentence is concerned) on "the accelerated release day". We consider that this right arises on the day on which he has a right to be released and not before that day. Section 10(5) applied to the appellant as he was sentenced after the 1998 Act came into force. It provides:

> (5) In the case of a sentence -
>
> (a) passed after the day on which this Act comes into force, and
>
> (b) treated in accordance with Section 26 of the Treatment of Offenders Act (Northern Ireland) 1968 as reduced by a period of custody beginning before the day on which this Act comes into force,
>
> the accelerated release day is the second anniversary of that day.

[23] Again, this sub-section reflects the fact that the sentence is in force and that Section 26 of the Treatment of Offenders Act comes into effect, thereby reducing the period of custody which the prisoner has to serve. The accelerated release day is fixed as the second anniversary of the day on which sentence is passed less the period in custody which the prisoner has served in accordance with Section 26 of the 1968 Act. Prior to its amendment sub-section (7) provided that nothing in Section 10 should permit the release of a prisoner following a declaration under Section 3 before he had served two years of the sentence to which the declaration related. It also provided that any period of custody by which the sentence was treated as reduced in accordance with Section 26 of the 1968 Act should be treated as served as part of the sentence. This sub-section ensured that a prisoner would serve at least two years in custody for any crime which came within Section 3 of the 1998 Act. Sub-section (8) provided that the Secretary of State might by Order amend sub-sections (4) to (7) which were the sub-sections that fixed the accelerated release day. Neither Section 10 (1) nor (2) nor (3) fixed the accelerated release day.

[24] The amendment to the Act brought about by the Order of 2000 added to the provisions for fixing the accelerated release day and accordingly was intra vires. Section 10 (8) amended sub-section (7) and did not amend any other sections of the Act either directly or indirectly. It is clear from the correspondence that the Secretary of State realised that there was a lacuna in Section 10 in that a prisoner who had obtained a declaration under Section 3 but prior to his release in accordance with Section 4 or 6 was believed to have broken or was likely to break a condition with which he was required to comply before he was entitled to be released, was not covered by sub-section (7). That is to say if a prisoner committed a serious criminal offence in prison

or outside on a pre-release scheme after obtaining a declaration from the Commissioners under Section 3 and showed that he was a danger to the public or, as in the case of this appellant, had been involved in an incident involving violence and the Secretary of State believed that he would be a danger to the public if released, then by making this amendment the prisoner could not be discharged from prison until the application by the Secretary of State had been determined. If the application was determined by the Commissioners against the appellant then he would not be released and the danger to the public would be averted.

[25] We see good reason for this amendment of the sub-section. The appellant had been charged with an attempted murder outside the prison whilst on a pre-release scheme and prima facie was a danger to the public. He had not served the period of imprisonment which he would normally have served as a punitive and deterrent element of his sentence or sentences and had not served the minimum period under the accelerated release scheme. He was allowed out of prison and was involved in an incident which, the Secretary of State believed, required investigation by the Commissioners in order to satisfy them that he was not a danger to the public. The amendment was made because the Secretary of State realised that there was a lacuna in sub-section (7) following the incident which involved this appellant and another man convicted of the double murder. Nonetheless, this amendment will or could affect any prisoners in the future who are convicted of terrorist crimes (as these were) committed before April 1998 and who are subsequently prosecuted and sentenced for those crimes. There are thousands of unsolved violent crimes of terrorism committed prior to 10 April 1998 and it is to be hoped that some of those guilty of these offences will be brought to justice sooner or later. Therefore, although the Secretary of State had the appellant and one other prisoner specifically in mind when the amendment was made, the amendment will cater for other prisoners who, after obtaining a declaration, but before release, are believed to have broken or to be likely to break one of the conditions which they had established to the Commissioners' satisfaction. In any event there would have been nothing wrong in passing the legislation solely to deal with these two persons provided that the Secretary of State believed that they were liable to be a danger to the public if released immediately. We consider that the Secretary of State would have been failing in his duty to protect the public if the amendment to sub-section (7) had not been made.

<u>THE SECOND ARGUMENT ADVANCED ON BEHALF OF THE APPELLANT</u>

[26] It was submitted on behalf of the appellant that Article 5 of the Convention of Human Rights, read with Article 6, applied. The underlying

aim of Article 5 was, "to ensure that no one should be deprived of their liberty in an arbitrary fashion."

The European Court of Human Rights has consistently emphasised that it is one of the fundamental principles of a democratic society that the State must strictly adhere to the rule of law when interfering with the right to personal liberty. Reference was made to Lester & Pannick - Human Rights, Law and Practice, paragraph 4.5.1. Article 5 (1) provides an exhaustive definition of the circumstances in which a person might be lawfully deprived of his liberty and is to be given a narrow construction: see Lester & Pannick at paragraph 4.5.7. For detention to comply with Article 5 the procedure followed must be in conformity with the applicable domestic law and with the Convention, including the general principles contained in the Convention. The European Court has held that an "arrested or detained" person was entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law, but also of the text of the Convention, of the general principles embodied therein and the aim of the restrictions permitted by Article 5 (1): see Lester & Pannick paragraph 4.5.8. Article 5 has been held to prohibit the deprivation of liberty which was "arbitrary" in its motivation or effect. A detention would be arbitrary if it was not in keeping with the purpose of the restrictions permissible under Article 5 (1) or with Article 5 generally. Even if properly motivated, detention might be arbitrary if it was disproportionate to the attainment of its purpose. Although there was no mechanism for applying for bail until the decision of the Commissioners was made, Coghlin J's judgment did not deal with the absence of a power to apply for bail. The Secretary of State had made an Order, namely the Amendment Order, securing indefinite detention without any judicial process to determine its lawfulness. Judicial review was not an adequate remedy and there should, therefore, be a declaration of incompatibility. A number of authorities were cited included Clayton's Law of Human Rights, Chapter 10.156 and <u>*R (on the application of Sim) v The Parole Board and Another*</u>.

<u>ARGUMENT ON BEHALF OF THE RESPONDENT</u>

[26] Mr Morgan, QC contended that the sentences which the appellant was serving were still extant. He was serving two life sentences for the double murder for which a tariff would, in due course, be fixed; he was serving sentences of 20 years' imprisonment for attempted murder on two counts and 15 years imprisonment for possession of firearms and ammunition with intent to endanger life. These sentences were imposed by a court of competent jurisdiction. The appellant was lawfully held in custody in HM Prison Maghaberry under these sentences which had been affirmed on appeal and, therefore, Article 5 (4) did not apply and the lawfulness of his detention could not be challenged under the Convention.

<u>OUR CONCLUSION</u>

[27] We accept the argument on behalf of the respondent that the sentences imposed on the appellant are in force. We have already pointed out that the whole of the 1998 Act is designed to take into account that these sentences are in force and we have referred to some of the relevant parts of the Act which indicate this. Accordingly, there is no substance in the argument that Article 5 (4) applies to these sentences. The appellant could, of course apply, as he did, for bail in respect of the offence of attempted murder alleged to have been committed whilst he was on the pre-release scheme; but after he had been acquitted of that offence he was being held in custody at HM Prison Maghaberry under the sentences passed by Kerr J (as he then was) which were upheld by the Court of Appeal and there was no breach, therefore, of Article 5 (4) of the Convention. Article 5 (1) expressly provides that "no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court". Therefore Article 5 (4) is not applicable to this Judicial Review: see Waite v UK (Appl No 53236/99) at para 56; De Wilde, Ooms and Versyn v Belgium (No 1) (1971) 1 EHRR 373, 407 at para 76; Weeks v UK (1987) 10 EHRR 293; R (Giles) v Parole Board [2003] UKHL 42. Nor does Article 6 apply: see A v Austria (Appl No 16626/90). No argument was advanced under Article 7.

[28] Accordingly, we dismiss this appeal. We hold that the legislation amended by the 2000 Order is within the powers of the Secretary of State given to him by Section 10 (8) of the 1998 Act and that the appellant could not be released on 28 July 2000 or thereafter, because there was a valid application for revocation of the determination by the Commissioners to grant him a declaration under Section 3 of the 1998 Act.