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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Duffy (Colin) and Others' Application (No 2) [2011] NIQB 16

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY COLIN DUFFY and OTHERS (No 2)

Before Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LCJ

[1] This is an application for a declaration of incompatibility in respect of paragraphs 29 (3) and 36(3) (b) of Schedule 8 of the Terrorism Act 2000 (the Act) which deal with the circumstances in which a person arrested under section 41 of the Act on reasonable suspicion of being a terrorist may have their period of detention extended for a period of up to 28 days. Mr MacDonald QC appeared with Ms Doherty for D, D2, C and G, Mr Mulholland appeared for Colin Duffy, Mr Moriarty appeared for T and Mr Perry QC appeared with Mr McMillen for the Secretary of State. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] The background to this application arises from the arrest of each of the applicants under section 41 of the Act on 14 March 2009. The applicants challenged their continued detention in proceedings commenced on 23 March 2009 and on 25 March 2009 a Divisional Court quashed the decisions to continue their detention by reason of the failure of the review judge to consider the lawfulness of the arrest of each of them. The applicants also included a claim for a declaration of incompatibility in respect of the impugned provisions but this was deferred so that notice could be served in accordance with the Rules. This judgment relates to that issue of incompatibility.

[3] The history of the detention of the applicants was set out in the earlier judgment reported at [2009] NIQB 31. For convenience we repeat it here.

> "**[1]** These applications for judicial review challenge the decision of Her Honour Judge Philpott QC to grant warrants of further detention of the applicants pursuant to paragraph 32 of Schedule 8 to the Terrorism Act 2000. Each of the applicants had been arrested on 14 March 2009 under section 41 of that Act. Colin Duffy and three other applicants (who shall be referred to as C, D and D2) were arrested on suspicion of involvement in the murders of two soldiers and the attempted murders of three soldiers and two civilians at Massereene Barracks, Antrim, and the wounding in the same incident of a number of civilians on 7 March 2009. The two remaining applicants (T and G) were arrested on suspicion of having been involved in the murder of a police officer in Craigavon on 9 March 2009…."

History of the detention of the applicants

[4] On 15 March 2009 Detective Superintendent Farrar of the Police Service of Northern Ireland (who is the senior investigating officer in the Massereene incident) decided to seek a warrant of detention from a judge to allow the detention of Colin Duffy, C, D and D2 to continue beyond the period of forty-eight hours from the date of their arrest. (By virtue of section 41 (3) of the Terrorism Act, a person detained under that section must be released within forty-eight hours unless an extension of detention is obtained.)

[5] The application began in the evening of 15 March and continued until the early hours of the following morning. It was resumed at 9.30 am on 16 March and continued until approximately 4.30 pm on the same day. It was heard by His Honour Judge Smyth QC and at the conclusion of the hearing he made extension orders of five days in respect of each of the applicants, Colin Duffy, C, D and D2.

[6] At the hearing evidence was given about seven phases of an interview strategy which had been developed; the process of review of each arrestee's detention; and the nature of the forensic tests that had been undertaken and the dates on which it was anticipated the results of those tests would be known. Some of the evidence was given in the presence of the detained persons and their legal representatives and some was given when they were not present. (Under paragraph 33 (3) of Schedule 8 a judge who hears an application for an extension may exclude from any part of the hearing the person to whom the application relates or anyone representing him.) The

judge was informed that the arrests of D, Colin Duffy and D2 were based on intelligence information whereas the arrest of C was based both on evidence and information.

[7] The interviews of these applicants were completed within the five day extensions granted by the judge. The results of many of the forensic examinations and analyses were provided within that time also. None of these provided evidence linking any of the detainees to involvement in the incident. At the expiry of the period of extension, however, examination and analysis of some 100 swabs which had been sent to a laboratory in Great Britain was still to take place. Detective Superintendent Farrar therefore decided to seek further warrants of detention for 7 days in respect of each of the detainees. He explained the reasons for this in paragraph 19 of an affidavit filed on behalf of the respondent: -

> "The principal reason for [applying for the further extension] was that I was conscious that results of a wide range of further forensic examinations and analyses would become available within the next 7 days and that in an investigation of the importance of the Massereene investigation it was necessary to detain the arrestees in custody until results were known so that:
>
> (i) in the event of there being evidence to support the charging of one or more or all of the arrestees charging could be effected; and
>
> (ii) in the event of positive results one or more or all of the arrestees could be further interviewed in connection with the results as a means of obtaining further evidence."

[8] The applicants, G and T, were also the subject of applications for extension on 16 March. Five day extensions were granted in both cases. It was decided to make applications for further warrants of detention for seven days. The reasons for this were given in affidavits of Temporary Superintendent Ernest Ian McCoy: -

> "7. The basis for the said application was that there were reasonable grounds for believing that the further detention of the Applicant was necessary to obtain relevant evidence by questioning and pending the result of an examination or analysis of any relevant evidence, or with anything the examination or

analysis of which is to be carried out with a view to obtaining relevant evidence.

8. In essence the PSNI's application with respect to the Applicant for the further extension of [his/her] detention related to the requirement to put to [him/her] the results of various forensic examinations, which were pending at the time of the application."

The hearings before Judge Philpott

[9] The evidence given to Judge Philpott in the cases of Colin Duffy, C, D and D2 was described by Detective Superintendent Farrar in the following paragraphs of his affidavit: -

> "20. In the course of the hearing before the Judge - Her Honour Judge Philpott QC myself and Paul Wilson, Crime Scene management, gave evidence for the police in support of the seeking of the further warrants. I told the Judge of the matters referred to above [this was a reference to the evidence given to Judge Smyth] and provided the Court with a schedule of the material sent for forensic examinations or analyses in respect of which results were expected within the 7 day period. I explained the schedule in detail to the Judge and was extensively cross examined about it. I stressed to the Judge that the results of forensic examinations would assist in confirming or dispelling the suspicion upon which the arrestees had been arrested. Paul Wilson also gave evidence in relation to matters of forensic detail which Counsel for the detained persons and the Judge required clarification.
>
> 21. I recall, in particular, being challenged by D2's solicitor about whether D2 represented a flight risk. I indicated that given the importance and seriousness of the investigation and the awareness that D2 would have of the material sent for forensic analysis and the potential seriousness of the matter for him this would be a factor.
>
> 22. My recall is that Counsel for the Police Service of Northern Ireland in the course of the hearings

> emphasised as matters relevant to the Court's assessment the following:
>
> (i) The importance of the investigation.
>
> (ii) The potential seriousness of any charge.
>
> (iii) The need to have the arrestee available for interview and/or charging in the event of any positive test results."

[10] In his affidavit Superintendent McCoy described the evidence that he gave in support of the application for an extension in the case of G. He outlined the ongoing forensic examinations in some detail. He stated his conclusions on this in the following paragraphs: -

> "11. It was my view as expressed to the Court during the course of my evidence in the application that it was necessary to secure the further detention of the Applicant for a further 7 days in order to obtain relevant evidence from him by questioning in relation to the results of the aforementioned forensic examinations or the analysis of same pursuant to paragraph 32 of Schedule 8 to the 2000 Act.
>
> 12. It is the PSNI's contention that the further detention of the Applicant was necessary pending the availability of the results of the said forensic examinations and to question him accordingly following same and this process would have been disrupted severely if the Applicant was released and took flight.
>
> 13. This is self evidently an investigation into the most serious of matters and it is the Respondent's view that it is vital that it is able to interview the Applicant in respect of the results of those forensic investigations."

[11] In relation to the case of T, Superintendent McCoy described in a second affidavit the evidence that he had given on the hearing before Judge Philpott. Again he outlined in detail the ongoing forensic examinations including the examination of a mobile phone. He then said: -

> "It was my view as expressed to the Court during the course of my evidence in the application that it

> was necessary to secure the further detention of the Applicant for a further 7 days in order to question [T] in relation to the mobile phone traffic with a view to obtaining relevant evidence, and also for the purpose of obtaining relevant evidence from [T] by questioning in relation to the results of the aforementioned forensic examinations or the analysis of same pursuant to paragraph 32 of Schedule 8 to the 2000 Act.""

Statutory scheme

[12] Section 40 of the Act provides that a terrorist means a person who has committed an offence under various sections of the Act or who is or has been concerned in the commission, preparation or instigation of acts of terrorism. Such a concept is well in keeping with the European Court's analysis of what constitutes an offence (see Brogan v UK (1988) 11 EHRR 117 and Steel and others v UK (1998) 28 EHRR 603). Section 41(1) of the Act provides that a constable may arrest without warrant a person whom he reasonably suspects to be a terrorist. Where a person has been so arrested section 41(2) provides that the provisions of Schedule 8 in relation to detention, treatment, review and extension should apply. Part II (paragraphs 21-28) deals with detention by police during the first 48 hours. Section 41 (3) provides that a person detained must be released not later than the end of the period of 48 hours beginning with the time of the arrest subject to subsections (4) to (7) set out below.

> "(4) If on a review of a person's detention under Part II of Schedule 8 the review officer does not authorise continued detention, the person shall (unless detained in accordance with subsection (5) or (6) or under any other power) be released.
>
> (5) Where a police officer intends to make an application for a warrant under paragraph 29 of Schedule 8 extending a person's detention, the person may be detained pending the making of the application.
>
> (6) here an application has been made under paragraph 29 or 36 of Schedule 8 in respect of a person's detention, he may be detained pending the conclusion of proceedings on the application.

> (7) here an application under paragraph 29 or 36 of Schedule 8 is granted in respect of a person's detention, he may be detained, subject to paragraph 37 of that Schedule, during the period specified in the warrant."

Section 41 (8) provides that the refusal of an application in respect of a person's detention under paragraphs 29 or 36 of Schedule 8 shall not prevent his continued detention in accordance with the section.

[13] Paragraph 29 of Schedule 8 of the Act provides that the DPP for Northern Ireland (DPP) may apply to a judicial authority for the issue of a warrant of further detention. Paragraph 29(3) provides that the period of further detention shall be 7 days from the time of his arrest under section 41 of the Act unless the application is for a shorter period or the judicial authority is satisfied that there are circumstances that would make it inappropriate for the specified period to be as long as the period of 7 days. In Northern Ireland the judicial authority under the Act is a County Court Judge or a District Judge (Magistrates' Court) who has been designated for the purposes of the Act. Paragraph 30 of Schedule 8 requires the application for the warrant to be made during the period of the initial detention or within 6 hours of the end of that period.

[14] Paragraph 31 ensures that a warrant cannot be heard until the person to whom it relates has been given a notice stating that the application has been made, the time at which it was made, the time at which it is to be heard and the grounds upon which further detention is sought. Paragraph 32 (1) provides that a judicial authority may only issue a warrant of further detention if satisfied that there are reasonable grounds for believing that the further detention of the person is necessary and that the investigation in connection with which the person is detained is being conducted diligently and expeditiously. Paragraph 32(1A) provides that the further detention of a person is required if it is necessary:-

> "(a) to obtain relevant evidence whether by questioning him or otherwise;
>
> (b) to preserve relevant evidence; or
>
> (c) pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence."

Relevant evidence is evidence which relates to the commission of an offence under section 40 or an indication that the person detained is a person falling within that section.

[15] Paragraph 33 requires that a person to whom an application relates be given an opportunity to make oral or written representations to the judicial authority and be legally represented at the hearing. Paragraph 33 (3) provides that the judicial authority may exclude the person to whom the application relates or anyone representing him from the hearing.

[16] Paragraph 34 enables the DPP to apply to the judicial authority for an order that specified information upon which he intends to rely be withheld from the person to whom the application relates and anyone representing him. The judicial authority may make such an order only if satisfied that there are reasonable grounds for believing that if the information were disclosed:-

> "(a) evidence of an offence under any of the provisions mentioned in section 40(1)(a) would be interfered with or harmed,
>
> (b) the recovery of property obtained as a result of an offence under any of those provisions would be hindered,
>
> (c) the recovery of property in respect of which a forfeiture order could be made under section 23 or 23A would be hindered,
>
> (d) the apprehension, prosecution or conviction of a person who is suspected of falling within section 40(1)(a) or (b) would be made more difficult as a result of his being alerted,
>
> (e) the prevention of an act of terrorism would be made more difficult as a result of a person being alerted,
>
> (f) the gathering of information about the commission, preparation or instigation of an act of terrorism would be interfered with, or
>
> (g) a person would be interfered with or physically injured."

[17] Paragraph 36 deals with further extensions up to a maximum of 28 days. Each such application may extend the period of detention for up to seven days. Any application which would extend the then total period beyond 14 days must be made to a judge of the High Court.

[18] The arrest and pre-charge detention of non-terrorist suspects is governed by the provisions of the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE). By virtue of article 26 of PACE a constable can

arrest without warrant any person whom he has reasonable grounds for suspecting is about to commit an offence, is committing an offence or has committed an offence if it is necessary to do so. The constable must inform the suspect that he is under arrest and of the grounds for the arrest and take the suspect to a police station as soon as is practicable. Upon arrival at the police station the suspect is placed in the charge of the custody officer who decides whether there is sufficient evidence to charge the suspect. If there is not sufficient evidence to charge the suspect he must be released unless the custody officer has reasonable grounds for believing that his detention without being charged is necessary to secure or preserve evidence relating to the offence for which he is under arrest or to obtain such evidence by questioning him. The continued detention of the suspect is reviewed and he must be released after 24 hours unless a Superintendent determines that the detention of the person without charge is necessary, the offence is an indictable offence and the investigation is being conducted diligently and expeditiously. If the suspect is still in custody after 36 hours article 44 of PACE provides for an application to the magistrates' court for a warrant of further detention for a further period of up to 36 hours. The police can apply for an extension of the warrant for further detention for a total period of up to 96 hours after his arrival at the police station. If not charged by the end of that period the suspect must be released and if charged must be brought before a magistrates' court not later than the day following the day after he was charged. The court may then remand the suspect in custody or on bail.

The arguments for incompatibility

[19] Article 5 of the ECHR deals with the circumstances in which the state may deprive the citizen of his liberty.

> "**1** Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or

when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3 `Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

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

[20] There is no dispute that the competent legal authority referred to in article 5(1)(c) is the authority which has the competence to deal with any criminal charges. In this jurisdiction once the alleged offender is charged that authority is the magistrates' court. There is a clear relationship between article 5(1)(c) and article 5 (3) as a result of which the applicants submitted that the judge or other officer authorised by law to exercise judicial power referred to in article 5 (3) must also be the magistrates' court exercising its full competence. That was consistent with the imperative in article 5 (2) that

everyone arrested should be informed promptly of the reasons for his arrest and of any charge against him. The applicants further contended that this interpretation was supported by a review of the Travaux Preparatoires which indicated that until a very late stage the draft of article 5 (3) read:-

> "Everyone arrested or detained on the charge of having committed a crime in accordance with the provisions of paragraph 1(c)…."

There is nothing in the Travaux to suggest that the omission of the underlying words was intended to change the effect of the article. The appellants argued that this supported their contention that article 5 (3) dealt with post charge review. It was submitted, therefore, that the combination of article 5 and the domestic provisions requiring charge or release within four days to reflect the decision in Brogan v UK (1989) 11 EHRR 117 made the provisions in Schedule 8 incompatible with the ECHR.

[21] We acknowledge that it is permissible for the court to look at preparatory work in construing the terms of the ECHR but it is clear that caution should be used in any such examination. To be of assistance the preparatory work must indisputably point to a definite legislative intention (see Fothergill v Monarch Airlines [1981] AC 251 at 278 per Lord Wilberforce). The omission of the term under consideration does not have that character. It might just as easily be argued that the omission of the relevant phrase was a point against the appellants' argument. In light of such ambiguity we do not consider, therefore, that the preparatory work is of any assistance in construing the obligations to which article 5 gives rise.

[22] The starting point in this construction exercise must be the words themselves. As indicated in paragraph 12 above there is no doubt that the competent legal authority referred to in article 5(1)(c) is the authority having the competence to deal with a criminal charge. It is striking that the same term is not used in article 5 (3). That requires, therefore, an examination of the judicial power which the judge or other officer authorised by law must have in order to carry out the functions of article 5 (3). Such an exercise requires an examination of the relevant case law of the ECtHR.

[23] In Schiesser v Switzerland (1979-1980) 2 EHRR 417 the applicant was arrested on suspicion of having committed several offences of aggravated theft. He was brought before the District Attorney who remanded him in custody. The District Attorney's powers included the conducting of investigations in criminal cases and the issue of warrants for arrest. He then had an obligation to conduct an interview of the person arrested within a specified time limit. The issue was whether the District Attorney was an officer authorised by law to exercise judicial power. The court concluded that the same person might hold investigative and judicial functions. The officer

was not identical with the judge but had to satisfy conditions which constituted a guarantee for the person arrested. The first of those was independence of the executive and of the parties. The court then examined the procedural and substantive requirements of article 5 (3) at paragraph 31.

> "In addition, under Article 5 para. 3 (art. 5-3), there is both a procedural and a substantive requirement. The procedural requirement places the "officer" under the obligation of hearing himself the individual brought before him; the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons."

Having examined the circumstances of that particular case the court concluded that there had been no breach of article 5 (3).

[24] De Yong and others v The Netherlands [1984] 8 EHRR 20 was a case in which the applicants were military conscripts who refused on conscientious grounds to obey orders given to them. They were arrested and subsequently referred to the Auditeur-Militair who had the function of prosecuting cases before the military courts. He had the power to recommend release but could not order release. The court concluded that there had been a breach of article 5 (3). The Auditeur-Militair could be called upon to perform the function of prosecuting authority and therefore could become a party to the proceedings. He did not, therefore, have the kind of independence demanded by article 5 (3). In addition he did not have the power to order release which is a substantive requirement of this article.

[25] Both of these cases indicate that the object and purpose of article 5 (3) is to guard against arbitrary detention and to ensure prompt, independent judicial supervision. Each of them supports the proposition that such a function can be carried out by an officer authorised by law who need not necessarily be a person with power to conduct the trial of any eventual charge. These cases, therefore, point directly against the contention for which the appellants argue. Although the appellants placed weight on the passage in paragraph 29 of Scheisser where the court stated that "competent legal authority" is a synonym for "judge or other officer authorised by law to exercise judicial power" it is clear from the context of that comment that it was not intended to undermine the court's finding on the attributes necessary for the "other officer" and that the reference arose in a discussion about the vagueness of these descriptions as compared to the precision of the terms "court" and "judge" in other provisions of the article.

[26] The requirement to ensure that the judge or other officer has the power to order release was also specifically addressed by the court in Aquilana v Malta (2000) 29 EHRR 185 at paragraph 47.

> "As the Court has pointed out on many occasions, Article 5 § 3 of the Convention provides persons arrested or detained on suspicion of having committed a criminal offence with a guarantee against any arbitrary or unjustified deprivation of liberty. It is essentially the object of Article 5 § 3, which forms a whole with paragraph 1 (c), to require provisional release once detention ceases to be reasonable. The fact that an arrested person had access to a judicial authority is not sufficient to constitute compliance with the opening part of Article 5 § 3. This provision enjoins the judicial officer before whom the arrested person appears to review the circumstances militating for or against detention, to decide by reference to legal criteria whether there are reasons to justify detention, and to order release if there are no such reasons."

[27] The precise requirements of this article were again extensively reviewed by the court in McKay v UK (2007) 44 EHRR 41. The key purpose of article 5 was again identified as the prevention of arbitrary or unjustified deprivation of liberty. Article 5 (3) achieved this by virtue of the automatic nature of the review and the requirement of promptness. The attributes of the judicial officer identified in Schiesser were again approved. At the initial automatic review of arrest and detention the judicial officer must be capable of examining lawfulness issues and whether or not there is a reasonable suspicion that the arrested person had committed an offence. The judicial officer must also have the power to order release. The obligations on the judicial officer thereafter are summarised in paragraphs 44 and 45.

> "44. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but with the lapse of time this no longer suffices and the Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also be satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings.

> 45. In sum, domestic courts are under an obligation to review the continued detention of persons pending trial with a view to ensuring release when circumstances no longer justify continued deprivation of liberty. For at least an initial period, the existence of reasonable suspicion may justify detention but there comes a time when this is no longer enough. As the question whether or not a period of detention is reasonable cannot be assessed in the abstract but must be assessed in each case according to its special features, there is no fixed time frame applicable to each case."

[28] Although there is no express power to order release in the 2000 Act the earlier Divisional Court judgment in this case recognised at paragraph 28 that the provisions of the 2000 Act must be read in conformity with the requirements of article 5 (3) of the ECHR as they have been explained in the jurisprudence of the European Court. The specific issue to which the court's attention was drawn in the earlier hearing was whether the review of detention could examine the lawfulness of the arrest. Having concluded that it could do so it follows that where the arrest was unlawful the court must have power to order release. Similarly if the existence of reasonable suspicion is not established or has been dispelled the judicial authority has both the power and the obligation to order release.

[29] The applicants argued that this interpretation was inconsistent with the terms of section 41(8) of the 2000 Act which states that the refusal of an application in respect of a person's detention under paragraph 29 or 36 of Schedule 8 shall not prevent his continued detention in accordance with the section. We do not agree. Applications under paragraphs 29 and 36 are concerned with extensions to the permitted period of detention. A judicial authority may well conclude that it is not necessary within the meaning of the 2000 Act to extend the period of detention but that would not, of course, call into question the appropriateness of any extension in force. Section 41 (8) expressly recognises that position. It does not prevent the judicial authority from exercising its independent duty to ensure compliance with article 5 (3).

[30] It was submitted on behalf of the applicants that under Schedule 8 a person could be detained for up to 28 days without any consideration of the proportionality or justification for such detention. Paragraph 32 of Schedule 8 provides that there must be reasonable grounds for believing that the further detention of the person to whom the application relates is necessary and therefore imports the requirement of proportionality as explained in McKay. There is, of course, a continuing need to demonstrate reasonable suspicion. Issues of proportionality and justification are, therefore, fundamental aspects of the review process. These inevitably come into play in circumstances such

as arose in this case where the application for an extension was based on the need to ascertain the outcome of forensic analysis.

[31] There is no provision for conditional release on bail within the statutory scheme. The respondent submitted that persons arrested under this legislation would be likely to interfere with evidence or witnesses, fail to attend trial, obstruct the course of justice or commit offences while on bail. We do not consider that such generalisations are appropriate. Persons arrested under this legislation may be peripheral to any alleged serious terrorist activity or may be vulnerable. For a variety of reasons the continuation of questioning or the pending results of an examination or analysis of relevant evidence may not make it necessary to continue the detention of a person arrested. In some cases the imposition of conditions might deal with any relevant and sufficient reasons which would otherwise justify detention. We have set out the background to the applications in this case and this issue did not arise but if a person detained could be released on conditions which would deal with any relevant and sufficient reasons for his detention it may well be that his continued detention would not be judged necessary. This is, therefore, a fact specific issue which will need to be addressed in any case in which it arises but does not lead to any risk of incompatibility.

[32] The applicants further contend that the provisions of Paragraph 33(3) of Schedule 8 enabling a judicial authority to exclude the applicant or anyone representing him from any part of the hearing and Paragraph 34 of the Schedule making provision for information to be withheld from the applicant or anyone representing him on the grounds set out in paragraph 8 above are incompatible with the requirement for an adversarial hearing as required by article 5. These provisions have been considered by the House of Lords in Ward v PSNI [2007] UKHL 50. That was a case in which the police sought an extension to a warrant of further detention to enable them to continue questioning the suspect. They did not wish to disclose the topics which they intended to pursue. The learned county court judge wished to be satisfied that these were in fact new topics and not simply aspects of topics previously covered. In order to explore that issue he agreed at the request of the police to exclude the applicant and his representative for 10 minutes so that he could establish the topics intended to be covered.

[33] Lord Bingham gave the opinion of the Committee and in paragraph 11 said that the length of the detention that may follow an arrest under section 41 is the subject of a carefully constructed timetable and a series of carefully constructed procedural safeguards. He noted that paragraph 33 of Schedule 8 provided that the person be given an opportunity to make oral and written representations about the application to the judicial authority and be legally represented at the hearing. He held, however, that a suspect was not entitled to be told the questions the police wished to put to him when interviewing

him nor were the police required to reveal in advance the topics that they wished to cover. The context, however, was that the judicial authority may want to know what those topics were in order to be satisfied that the warrant or an extension of it should be granted. Lord Bingham set out the object and purpose of the exclusion provisions at paragraph 27.

> "…the procedure before the judicial authority which para 33 contemplates has been conceived in the interests of the detained person and not those of the police. It gives the person to whom the application relates the right to make representations and to be represented at the hearing. But it recognises too the sensitive nature of the inquiries that the judicial authority may wish to make to be satisfied, in that person's best interests, that there are reasonable grounds for believing that the further detention that is being sought is necessary. The more penetrating the examination of this issue becomes, the more sensitive it is likely to be. The longer the period during which an extension is permitted, the more important it is that the grounds for the application are carefully and diligently scrutinised."

[34] At paragraph 23 of his opinion he dealt with paragraph 34 of Schedule 8 dealing with the withholding of information.

> "Details of evidence that he wishes to obtain otherwise than by questioning that person or of evidence that he wishes to preserve, and of the reasons why the continued detention of the person to whom the application relates is necessary for that purpose, is information that will fall within the ambit of this paragraph. The grounds for withholding it that are listed in para 34(2) are exactly those that one would expect to find in that context. They include such risks to the public interest as interfering with or harming evidence, making more difficult the apprehension, prosecution or conviction of a person suspected of terrorism and making prevention of an act of terrorism more difficult as a result of a person being alerted. The person to whom the application relates has the right under para 33(1)(a) to be given the opportunity to make oral or written representations to the judicial authority about the application. It follows that an application under para 34 should ordinarily be made before the hearing

> begins, so that the amount of the information that the detained person is to receive is settled before it starts."

[35] The extent to which there may be a requirement for disclosure of information or the gist of it will vary from case to case. This was specifically acknowledged by the Divisional Court in this case at paragraph 30 of its judgment. It also reflects the changing nature of the scrutiny which the judicial authority has to exercise over the detention as the length of detention increases. This is specifically referred to in the passage from McKay set out that paragraph 19 above. There are a range of tools available to the court to ensure that it preserves to the necessary extent an adversarial procedure and equality of arms. Some of this can be achieved by the supervision of the process by the court in the detained person's interest as occurred in Ward. Sometimes it may be possible to ensure that the gist of information is disclosed so as to ensure the necessary procedural protection. In exceptional cases the appointment of a special advocate may be appropriate (see Roberts v Parole Board [2005] 2 AC 738). All of this emphasises that it is for the court in each case to make a judgment about the extent of procedural protection required having regard to the issues in the case and the stage which it has reached. In each case where there is an application under paragraph 34 of Schedule 8 the court will only be able to accede to the application in circumstances where it is satisfied that appropriate procedural protection is in place. In those circumstances no question of incompatibility arises.

[36] At the heart of the challenge made by the applicants is the proposition that article 5 requires that a person detained should be charged well before the expiry of the 28 day period contemplated by the 2000 Act. There is no authority which expressly supports such a proposition and Wemhoff v Germany (1968) 1 EHRR 55 is expressly against the proposition. That was a case in which the applicant was arrested on 9 November 1961 and detained until the completion of the investigation in February 1964. His trial opened in November 1964 and lasted until April 1965. The pre-charge period was in excess of two years but no breach of article 5 was found by the court. That case supports the proposition that there is a distinction between liberty rights and trial rights and that the charging of the detainee is not relevant to the permitted duration of the person's detention (See article in NILQ 60(2) entitled "Article 5 of the ECHR and 28 day pre-charge detention of terrorist suspects" by Professor Brice Dickson). We accept that this distinction is well founded. The applicants placed reliance on the Liberty Report for the House of Lords in November 2007 which examined pre-charge periods of detention in other jurisdictions. Although the overall view of the authors was that detention periods in the UK exceeded those in other democratic jurisdictions it was acknowledged that comparisons with other legal systems was difficult and in any event we consider that little weight can be placed on this material in determining the issue of incompatibility.

[37] The appellant criticised the Divisional Court's assessment in this case that a review of the lawfulness of the arrest need not involve a detailed analysis of the basis for the decision to arrest. This could not be an incompatibility issue since the complaint could be cured by a more detailed review but in our view the statement in any event correctly sets out the manner in which such applications should be dealt with. It has to be remembered that these reviews take place in the context of an ongoing investigation and that the measure of procedural review is that appropriate to the investigatory stage rather than the trial stage. The appellants also criticise the acceptance by the Divisional Court of the reasoning provided by the judicial authority but this again cannot go to incompatibility.

[38] The final point made on behalf of the applicants is that there is no right of appeal from a judicial authority and no opportunity to judicially review the decision of the judicial authority where made by a High Court judge. These issues were the subject of a leave application in R (Hussain) v Mr Justice Collins [2006] EWHC 2467 Admin. Lord Justice Richards concluded that article 5 (4) did not require a right of appeal or of review of a decision authorising an extension of the period of detention. The applicants rely on this case as authority for the proposition that the decision of a High Court judge cannot be subject to judicial review. We agree with the reasoning of the Divisional Court in Hussain.

Conclusion

[39] For the reasons set out we do not consider that the appellants have established any basis for contending that paragraphs 29 or 36 of Schedule 8 to the 2000 Act are incompatible with article 5 of the ECHR.