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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Mullan's (Seamus James Francis) Application (Judicial Review)

IN THE MATTER OF AN APLICATION BY SEAMUS JAMES FRANCIS MULLAN FOR JUDICIAL REVIEW

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BETWEEN

SEAMUS MULLAN

Applicant

and

SECRETARY OF STATE FOR NORTHERN IRELAND

First Respondent

and

SENTENCE REVIEW COMMISSIONERS

Second Respondent

_____

TREACY J

Introduction

[1] This is an application by the second named respondent to have leave for judicial review set aside.

Factual Background

[2] The applicant is a life sentence prisoner who was released on licence on 4 December 1998 pursuant to the Northern Ireland (Sentences) Act 1998.

[3] On 12 December 2006, the applicant was arrested and questioned in relation to the possession and sale of contraband/counterfeit cigarettes. The applicant was subsequently charged with a number of offences in relation to same.

[4] On 20 December 2006, the Secretary of State for Northern Ireland suspended the applicant's licence in accordance with section 9 of the 1998 Act and recalled him to prison. The applicant was advised by letter of the same date that:

> 'The Secretary of state, believes, on the basis of information available to him about the offences with which you have been charged and about other criminal and paramilitary activity in which you are alleged to have been involved, that you have breached the terms of your licence.
>
> In particular the Secretary of State believes that you have become involved with a specified organisation, the Real IRA, and become re-involved in terrorist and criminal activity and become a danger to the public. Accordingly he has decided to suspend your licence. You will therefore now be detained in pursuance of your life sentence and resume the status of a life sentence prisoner.'

[5] In addition, and on the same date, the Secretary of State signed a certificate of damaging information pursuant to Rule 22(1) of the Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 ("the 1998 Rules") in respect of information withheld from the applicant. A special advocate was appointed.

[6] In accordance with section 9(3) of the 1998 Act the applicant's case fell to be considered by the Sentence Review Commissioners.

[7] The course to be taken by the SRC on such consideration is provided for, in mandatory terms by section 9(4):

> "On consideration of a person's case –
>
> (a) if the Commissioners think 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."

[8] The 1998 rules provide for a two stage process of consideration, involving a preliminary indication (Rule 14) and a substantive determination (Rule 15).

[9] On 2 January 2007, the applicant's solicitor wrote to the Secretary of State stating that in their view the decision to revoke the applicant's licence was unlawful. The applicant's solicitors further advised that if no response was received,

proceedings would be issued to have the decision quashed. The Secretary of State replied on 4 January 2008 and advised that the applicant's licence had been suspended for the reasons set out in the letter of 20 December 2006.

[10] On 11 January 2007, an application was lodged with the Sentence Review Commissioners by the applicant's solicitors to have the revocation of the applicant's licence re-considered. Thereafter judicial review proceedings were issued on 19 January 2007 in respect of the Secretary of State's decision to revoke the applicant's licence.

[11] In considering the revocation of the applicant's licence the Single Commissioner issued a ruling admitting the damaging information on 31 January 2007. On 15 February 2007 the Single Commissioner provided his preliminary indication. It stated that:

> "On the basis of the information provided, the Commissioners could not be satisfied that Mr Mullan had not broken the licence conditions specified in section 9(1)(a) and (b) and hereby indicate that they are minded to made a substantive determination to the effect that his licence should be revoked."

[12] On 16 February 2007, the applicant gave notice that the preliminary indication was to be challenged. Accordingly, the preliminary indication was disregarded, and a substantive determination was to be made pursuant to a substantive hearing (Rule 15(3) of the 1998 Rules).

[13] Thereafter, on 19 February 2007 the Sentence Review Commissioners wrote to the applicant's solicitors outlining a number of procedural matters and requesting confirmation as to whether the applicant wished to proceed before the conclusion of the outstanding criminal proceedings. By letter dated 2 March 2007 the applicant's solicitor confirmed that the applicant wished to have an oral hearing as soon as possible.

[14] By letter dated 29 March 2007, the applicant's solicitor sought confirmation from the Sentence Review Commissioner as to whether the guilt or innocence of the criminal charges could form a basis for the revocation of the applicant's licence. The applicant's solicitors once again sought confirmation on 4 April 2007 as to whether the applicant's guilt or innocence in relation to the offences charged, on the factual basis set out in the affidavit supplied, could form the basis for the revocation of his licence.

[15] A response was received from the Sentence Review Commissioners on 6 April 2007. In that letter they indicated that, following a meeting on 14 February 2007 at which the Commissioners considered all of the evidence, they:

> "Could not positively conclude that Mr Mullan had not broken and was not likely to break the conditions set out in section 9(1)(a) and 9(1)(b) of the Northern Ireland (Sentences) Act 1998"

[16] The letter also stated that:

> 'The matter raised in your letter is one which can only be properly determined by a panel following its consideration of all of the evidence and submissions in any particular case at a substantive hearing.
>
> The Commissioners note however that they have not yet received any response from you to their letter of 1 March 2007 requesting clarification as to whether or not you wish to proceed to oral hearing before the conclusion of the outstanding criminal proceedings."

[17] By letter dated 12 April 2007 the applicant's solicitor indicated that the matter raised was one that could be properly dealt with prior to any substantive hearing. The applicant's solicitors confirmed that the applicant did wish to proceed to a substantive hearing prior to the outcome of the criminal proceedings. Nevertheless, the applicant's solicitors sought clarification as a matter of urgency in respect of whether innocence or guilt of the criminal charge would impact upon the applicant's position. That letter also indicated that the special advocate appointed in the applicant's case was to consult with the applicant, and that it was hoped that a finalised list of witnesses would be available before the end of the week.

[18] On 25 April 2007 the SRC responded and indicated that they were not in a position to make any further statement concerning the alleged breach of the licence conditions until they had considered all the evidence and once all the evidence was tested at an oral hearing. However, the SRC further advised that they were:

> "Not concerned with the guilt or innocence of a prisoner in relation to any criminal charges which he may face arising from the alleged behaviour which resulted in his recall. The fact of a conviction in relation to such charges does not in itself mean that a licence will be revoked nor does an acquittal mean that a licence will necessarily be confirmed."

[19] The SRC letter of 25 April 2007 emphasised that in order to avoid undue delay, the applicant should as soon as possible make an application in respect of any additional evidence that he sought to introduce, and indicate (if any) witnesses he wished to call. It was indicated that the SRC were mindful that the applicant remained in custody and anxious to arrange a hearing date as soon as possible.

[20] By letter dated 15 May 2007, the SRC noted that a substantive hearing could not be listed until all ancillary applications or appeals had been determined, and the time to bring any appeal against an ancillary decision had passed (Rule 16(4) of the 1998 Rules). It was noted that the parties were understood to be giving consideration to the evidence they wished to introduce at hearing and/or the witnesses they wished to call, and that applications were therefore anticipated. The letter indicated that, in order to minimise delay in bringing the matter to substantive hearing, the SRC intended to hold a pre-hearing meeting with the parties and special advocate on 8 June 2008, in relation to the damaging information in the case.

[21] On 17 May 2007 the applicant's solicitor responded and indicated that it was impossible for them to finalise a witness list if they could not be sure in advance as to whether the Commissioners would have regard to the criminal charges the applicant faced.

[22] The letter further advised that the applicant may have needed to call witnesses to deal with the charges which he faced and that to address the allegations as part of the SRC hearing may well prejudice the applicant in the criminal proceedings. In addition the applicant's solicitor advised that to await the outcome of criminal proceedings would constitute inordinate delay. As such the applicant's solicitor invited proposals as to how the matter could be dealt with without delay. The letter indicated that the applicant's solicitors were also in correspondence with the Secretary of State in order to ascertain whether the allegations reflected in the criminal charge were to be relied upon in respect of the suspension/revocation of the applicant's licence.

[23] By letter dated 18 May 2007 the SRC advised that they were aware of the applicant's concerns and anticipated that the pre-hearing scheduled for 8 June 2007 would assist in addressing the matter.

[24] The pre-hearing meeting was thus held. Following the review the SRC wrote to the applicant's solicitors and advised how in their view the meeting had addressed the applicant's concerns and outlined how they were 'minded to proceed'. The letter also included a proposal by the SRC as to how the matter might be advanced in a way that sought to avoid prejudice to the applicant.

Associated Judicial Review Proceedings

[25] Judicial review proceedings were issued against the Secretary of State on 19 January 2007 in respect of his decision to revoke the applicant's licence. On 20 April 2007 leave was granted to amend the applicant's Order 53 statement and to allow the SRC to be added as a respondent to proceedings.

[26] Leave to apply for judicial review was subsequently granted by Mr Justice Weatherup on 26 June 2007. The applicant was granted bail in respect of the criminal proceedings by Lord Justice Girvan on 29 June 2007.

[27] On 2 July 2007 bail was granted by way of interim relief in respect of the judicial review proceedings by Mr Justice Weatherup against the Secretary of State.

[28] On 4 September 2007, a substantive hearing in the applicant's case was adjourned on the application of the applicant, to be relisted on the application of the parties.

[29] The prosecution of the applicant was in due course stayed on 9 June 2009.

[30] On 7 December 2007 the SRC moved a *Salem* application to have the application for judicial review dismissed. In holding that there was a good reason in the public interest for the matter to proceed to a full hearing, Mr Justice Weatherup rejected the application on 14 December 2007. In so holding he granted leave to proceed against the SRC on the ground that there had been a breach of Article 5(4) of the ECHR.

[31] On 10 January 2008 the judicial review proceedings were adjourned generally to await the outcome of the associated criminal and civil proceedings.

[32] Following exchanges with the SRC indicating an altered view in relation to the applicant, the Secretary of State withdrew the damaging information from the consideration of the SRC. The substantive decision of the SRC was that the applicant's licence should be confirmed: on 20 January 2011 a licence was issued to the applicant. Section 9(7) of the 1998 Act provides that:

> "Detention during suspension of a licence shall not be made unlawful by the subsequent confirmation of the licence".

Associated Criminal and Civil Recovery Proceedings

[33] The applicant was arraigned on 25 April 2008 at Dungannon Courthouse on five counts on a bill of indictment relating to the possession and sale of contraband cigarettes, breach of a trademark and social security fraud.

[34] On 9 June 2009, following a hearing before his Honour Judge McFarland, the criminal proceedings against Mr Mullan were stayed as a result of a finding by the court that Mr Mullan was unfit to plead.

[35] On 8 July 2009 a referral of Mr Mullan's case was made to the Serious Organised Crime Agency. On 21 July a property freezing order was placed upon Mr Mullan's property.

[36] On 24 September 2010 an application for a recovery order pursuant to section 243 of the Proceeds of Crime Act 2002 was served on the applicant's solicitors. A notice of appearance was entered on behalf of the applicant on 5 October 2010.

[37] A hearing then took place between 27 and 29 February 2012. During the course of the hearing a number of legal issues arose and the matter was adjourned. The matter was finally concluded by way of a consent order of 10 April 2013.

Further Developments

[38] It is stated in the SRC's written submissions that, following exchanges with the SRC indicating an altered view in relation to the applicant, the Secretary of State withdrew the damaging information from the consideration of the SRC.

[39] The written submissions then indicated that the substantive decision of the SRC was that the applicant's licence should be confirmed and as such on 20 January 2011 a licence was issued to the applicant.

Remaining Issues

[40] Following the conclusion of the criminal and civil recovery proceedings, the application for judicial review was listed for review on the 13 September 2013. The Court directed the applicant to write to the respondents setting out the current position in respect of the judicial review proceedings.

[41] By letters of 21 May 2014, the applicant's legal representative wrote to both respondents setting out the applicant's position in respect of the proceedings and the outstanding issues that remained to be addressed. In those letters it was noted that:

> "… that the SRC refused to hold a substantive hearing on the issue until such times as all outstanding ancillary applications or appeals have been determined and the time for bringing an ancillary appeal against an ancillary decision has expired. Our client was placed in an impossible position by the Commissioners by being forced to decide between addressing the criminal allegations as part of the substantive hearing or adjourning the substantive hearing until such time as the criminal proceedings had been dealt with.
>
> The failure by the commissioners to hold a substantive hearing as a matter of urgency and/or to create a mechanism whereby a hearing could be held without the applicant having to make his choice was unlawful and in breach of Article 5(4) ECHR"

[42] It was contended that the practical effect of these matters was to subject the applicant to three days' detention following his admission to bail in the criminal proceedings. Compensation for that detention was sought, together with the SRC's consent to the quashing of 'the decision and a declaration that the decision was unlawful'.

[43] The SRC replied in the following terms by letter dated 12 September 2014:

> "Thank you for your letter dated 21 May in relation to the above matter, which follows the direction of Mr Justice Treacy on 15 October 2014[1] that the applicant should serve written submissions on the parties:
>
> - Identifying any issues that remain to be determined; and
>
> - Indicating why those issues should be considered on judicial review.
>
> We note that your letter has not engaged with the court's direction that the applicant address the propriety of continuing these proceedings, which are now over seven years old, in the Judicial Review court.
>
> Your letter appears to suggest that the applicant's detention became a matter attracting compensation on 29 June 2007, when he was admitted to bail in respect of criminal charges but remained in custody as his licence under the Northern Ireland (Sentences) Act 1998 was suspended.
>
> This is not so. Section 9(7) of the 1998 Act provides that 'Detention during suspension of a licence shall not be made unlawful by the subsequent confirmation of the licence': accordingly, the recalled prisoner remains lawfully detained in pursuance of his sentence pending a substantive determination of the Sentence Review Commissioners.
>
> Consideration of the correspondence in this case makes clear that the SRC were anxious to arrange a date for substantive hearing as soon as possible, but that (in accordance with Rule 16(4) of the Northern Ireland

[1] **The order was in fact from 2013.**

(Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998) such a date would not be fixed until all ancillary applications were determined. The applicant's solicitors had indicated an intention to apply to call witnesses but declined to make such an application in the absence of a confirmation not envisaged by the statutory scheme and which the SRC considered it inappropriate to provide: that the allegations upon which criminal charges against the applicant were based would not constitute a basis for revocation of the applicant's licence.

This was plainly a submission for consideration at substantive hearing, at which the SRC could have considered the issue (which was disputed by the Secretary of State) in light of all evidence (both open and 'damaging information') and submissions. Rule 15(3) of the 1998 Rules makes clear that a substantive determination is to be made 'pursuant to a substantive hearing'.

The position of the SRC remains that set out clearly by letter dated 6 April 2007.

The fairness of criminal proceedings is not the responsibility of the SRC but of the criminal court. It is nonetheless clear that the SRC sought to advance the matter in a manner that would not prejudice the position of the applicant…

The progress of this matter discloses no culpable delay on the part of the SRC. Efforts were made to address the applicant's concerns: the most significant impediment to the expeditious determination of the matter was however the applicant's refusal to progress the case in the absence of an unwarranted assurance.

The applicant remained lawfully detained until 2 July 2007 and no proposals as to compensation are made.'

[44] In light of the fact that no agreement could be reached between the parties, the applicant's solicitors, in a letter dated 20 October 2014, advised that it was their intention to have the matter referred to the Judicial Review Office in order to have the matter listed for review. In advance of the matter being referred back both respondents were invited to lodge updated affidavit evidence.

Relevant Law

[45] Article 5(4) ECHR provides:

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

Relief Sought against the Second Named Respondent

[46] The applicant seeks the following relief against the second named respondent:

(a) a declaration that the decision of the Sentence Review Commissioners failing to timeously hold an oral hearing is unlawful;

(b) an order of Certiorari quashing the said decision;

(c) an order of Mandamus compelling the Sentence Review Commissioners to hold an oral hearing forthwith;

(d) such further or other relief as the Court deems equitable or just;

(e) damages;

(f) costs;

(g) a declaration that this Respondent has acted in breach of the Applicant's rights pursuant to Article 5.4 of the European Convention on Human Rights;

(h) a declaration that this Respondent has acted in breach of the applicant's rights pursuant to Article 6 of the ECHR.

Grounds upon which relief is sought against the Second named Respondent

[47] The grounds upon which the said relief against the second named respondent is sought are as follows:

(a) the decision was made in breach of the Applicant's rights pursuant to Article 6 of the European Convention on Human Rights;

(b) there was an unreasonable delay between the suspension of the Applicant's licence and a date for hearing on the question of revocation of the Licence;

(c) the Applicant has been forced to opt for a further delay in the said hearing to avoid prejudicing himself in criminal proceedings; and

(d) the Respondents have failed to devise, institute or propose a scheme whereby the Applicant in such circumstances can have the matter of the suspension and revocation of his licence determined expeditiously without prejudicing himself in the ongoing criminal proceedings.

Arguments

Respondent's Arguments

[48] The applicant's solicitors identify the issue remaining in the case as the lawfulness of the applicant's detention between:

(a) The grant of bail in criminal proceedings on 29 June 2007; and

(b) The purported grant of bail as a form of interim relief in judicial review proceedings on 2 July 2007.

[49] It is submitted on behalf of the SRC that it is now clear that the applicant was not unlawfully detained at any time during the suspension of his licence and further that a purported grant of bail to the applicant should not in fact have been ordered.

[50] Any remaining contention that a substantive hearing was not convened sufficiently promptly should, it is submitted, be determined otherwise than on judicial review (being a matter of dispute relating to a damages claim likely – if successful – to attract a modest reward).

[51] It is submitted that leave to apply for judicial review, granted over seven years ago, should be set aside, and that the applicant should be required to pursue any remaining contention in a more appropriate forum.

[52] The extraordinary release scheme includes a mechanism whereby it may be determined whether a prisoner, released on licence and recalled to prison, may again be released. That decision – in issue in the present case – is placed by the legislature in the hands of a panel of experts. Release ordered by the High Court by reason only of a failure to conduct an article 5(4) ECHR complaint review would run counter to the operation of the applicable statutory scheme.

[53] In In Re Corey [2013] UKSC 76, Lord Kerr – having noted the requirement of the Life Sentences (Northern Ireland) Order 2001 that 'a miscellany of experts drawn from a variety of fields be appointed to be life sentence review commissioners' – observed at paragraph 33 that:

> 'It would be inconsistent with the protection of the public (which is such a central feature of the legislation) that a judge should order the release of a life sentence prisoner by reason only of a failure to conduct an article 5.4 compliant review, where the intense examination, contemplated by article 6(4)(b) [of the Life Sentence (NI) Order 2001], of whether his detention is no longer necessary has not taken place. Put simply, the legislature has placed in the hands of a panel of experts the difficult decision as to when a life sentence prisoner should be released. Their role should not be supplanted by a judge who does not have access to the range of information and skills available to the commissioners.'

[54] The respondent submits that this focus on the applicable statutory scheme chimes with that of Lord Reed, by whom it was confirmed in R (Faulkner) v Secretary of State for Justice, R (Sturnham) v The Parole Board [2013] UKSC 23 at paragraph 16 of that judgement that:

> 'The argument that the detention of a life prisoner constitutes false imprisonment, if it continues beyond the point in time when article 5(4) required a hearing to be held, must be rejected. As was explained in R(James) v Secretary of State for Justice [2010] 1 AC 553, the continued detention is authorised by statute… By virtue of the relevant legislation, the prisoner's detention is therefore lawful until the Board gives a direction for his release. That conclusion is not affected by section 6(1) of the 1998 Act, which makes an act of a public authority unlawful if it is incompatible with Convention rights. That provision does not apply to an act if, as a result of one or more provisions of primary legislation, the public authority could not have acted differently: see section 6(2)(a). In a case where there has been a failure to review the lawfulness of detention speedily, as required by Article 5(4), there may well be some respects in which a public authority could have acted differently: but, as I have explained, the absence of a speedy decision does not affect the question whether the prisoner can be released under the relevant provisions.'

[55] The respondents submit that the above authorities and others referred to make clear that it does not follow from a breach of article 5(4) – should such a breach be established – that a recalled prisoner is entitled to release.

[56] In particular, it was not open to the High Court to admit a recalled prisoner to bail on a determination only that no article 5(4) ECHR compliant review has been provided (and not on a conclusion that the prisoner's detention was unlawful). It is therefore now apparent that the purported grant of bail to the applicant by Weatherup J was not lawful.

[57] The applicant's detention during the suspension of his licence was lawful – see section 9(7) of the 1998 Act – and breach of article 5(4) ECHR, which has not been established in the present case, would not deprive that detention of its lawfulness.

[58] Rather than involving three days' unlawful detention, the present case can now be understood as having seen the applicant obtain the benefit of a purported grant of bail that should not have been ordered.

[59] Any contention that the holding of a substantive hearing was delayed by the SRC is a matter of dispute.

[60] In the circumstances, it is respectfully submitted that any such contention should not be advanced by way of continuing judicial review proceedings, and that the grant of leave to apply for judicial review should be set aside in the applicant's case.

[61] Any contention of an article 5(4) ECHR breach may be advanced in the context of the applicant's claim for damages, in a forum appropriate to the quantum in issue and in which oral evidence is routinely taken, where the respective claims of the parties as to the manner in which this case was progressed can be properly tested.

Applicant's Arguments

[62] It is submitted that this is not a case in which leave should be set aside.

[63] Existing case law in respect of such applications makes it clear that such a power is exceptional in nature and should only be used sparingly, primarily when an applicant's case can no longer stand. It is submitted that this is not the case in respect of the current proceedings.

[64] It is submitted that there is a live public law matter to be determined, namely whether the Sentence Review Commissioners discharged their obligations pursuant to Article 5(4) Of the European Convention of Human Rights.

[65] As to the assertion that the claim in respect of Article 5(4) should be determined otherwise than by way of judicial review, it is noted that in reality the only issue in dispute is whether Article 5(4) has been breached. In that regard, it is further submitted that this matter does not call for any oral evidence and conversely the relevant evidence is for the most part already before the Court. As such it is

submitted that these proceedings are quite properly categorised as a matter of public law and thus fall squarely within the ambit of the Judicial Review court.

[66] It is also submitted that the granting of bail represents an ancillary issue. Rather it is clear that the primary issue revolves around Article 5(4) of the ECHR. It is therefore submitted that the issue of bail only arises once the Court has determined whether there has been a breach of Article 5(4). In addition it is further submitted that the issue of bail is not, in and of itself, determinative of the issue of damages.

[67] It is accepted that In Re Corey's Application [2014] AC 516 does, *prima facie* indicate that the release of recalled prisoners should primarily be left to specialist bodies set up under various statutory schemes. Nevertheless, it is noted that Corey did not inhibit the powers of the High Court *per se.* Rather it is clear from the judgment of the Supreme Court that the inherent jurisdiction of the High Court can be exercised in those contexts subject to the restrictions outlined in that judgment.

[68] It is submitted that it is clear from the judgment that Corey was primarily concerned with the remedies available in respect of violations of Article 5(4) of the ECHR. In contrast, in the instant case it is noted that Article 5(4) was not the sole issue when Mr Justice Weatherup was asked to consider granting the applicant bail. In that regard it is clear that the current proceedings, and the associated grant of bail, can be distinguished from the decision of the Supreme Court in Corey. Nevertheless, notwithstanding this assertion, it is again noted that the issue of bail is now ancillary to the main issue of the Sentence Review Commissioners' obligations under Article 5(4) of the ECHR.

[69] In any event, the applicant submitted that all of the foregoing issues are matters to be considered at a full judicial review hearing. In that regard it is noted that the issues do not touch upon the setting aside of leave as outlined by the existing case law. As such it is argued that the matter should proceed to a full substantive hearing where all the matters can be fully canvassed, thus circumventing the need for two separate hearings.

[70] It is submitted that such an approach is consonant with the observations of Bingham LJ (as he was then) in R v Secretary of State for the Home Department, ex parte Chinoy (1991) 4 Admin LR 457. The observations have received the express approval of the Northern Ireland Court of Appeal in Re DPP's application [2000] NIQB 2. Whilst those observations were made in respect of ex-parte leave hearings, it is submitted that they carry more weight in circumstances, such as this case, where leave was granted following an inter partes hearing.

[71] Where leave has been granted, a respondent or notice party may apply to have the grant of leave set aside because the case in their view is not arguable. Such applications may be brought pursuant to Order 32 rule 8 or with reference to the inherent jurisdiction of the High Court.

[72] The principles to be applied in respect of such an application are set out in Re DPP's application [2000] NIQB 2 in which Carswell LCJ (as he was then) stated at paragraph 3 of that judgment:

> 'It has been clearly established in a series of cases that the court has power, either under RSC (NI) Order 32, rule 8 or its inherent jurisdiction, to set aside a grant of leave to apply for judicial review… It has consistently been held, however, that it requires a very clear case and that the power should be exercised very sparingly.'

[73] Carswell LCJ agreed with the observations of Bingham LJ in R v Secretary of State for the Home Department, ex parte Chinoy (1991) 4 Admin LR 457 at 462:

> 'I would, however, wish to emphasize that the procedure to set aside is one that should be invoked very sparingly. It would be an entirely unfortunate development if the grant of leave ex parte were to be followed by applications to set aside inter partes which would then be followed, if the leave were not set aside, by a full hearing. The only purpose of such a procedure would be to increase costs and lengthen delays, both of which would be regrettable results. I stress therefore that the procedure is one to be invoked very sparingly and it is an order which the court will only grant in a very plain case.'

[74] The Lord Chief Justice also referred to R v Secretary of State for the Home Department, ex parte Sholola [1992] Imm AR136:

> 'It is not sufficient to show merely that the judicial review application is distinctly unpromising and most likely to fail. It is not sufficient merely to persuade the judge hearing the setting aside application that he personally would not have been disposed to grant leave and certainly would not have been disposed to do so had he heard the respondent's argument and perhaps had the advantage of seeing their evidence. Rather it is necessary to deliver some clean knockout blow to justify invoking this procedure'.

[75] He referred finally to R v Environment Agency, ex parte Leam (1997, unreported):

> 'Such an application is not to be brought merely on the footing that a respondent has a very powerful, even an overwhelming case.'

[76] In Regina v Secretary of State for the Home Department, Ex Parte Salem [1999] 1 AC 450 the House of Lords indicated that, notwithstanding that a matter may be academic, if there is a good reason in the public interest for doing so, the Court has the discretion to hear and determine the matter.

[77] The applicants submit that the operative part of the Salem test is set out in the judgment of Lord Slynn as follows at page 457:

> 'The discretion to hear disputes, even in the area of public law, must however be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.'

[78] In relation to when a Court may engage with an academic matter the applicant cites Re Nicholson's Application [2003] NIQB 30 in which Kerr J stated:

> 'The present legal position would therefore appear to be that a court asked to give a decision on an academic issue should normally decline to do so unless there is good reason to rule on the matter. Generally it will be necessary to demonstrate that such a ruling would not require a detailed consideration of facts; it should also be shown that a large number of cases are likely to arise (or already exist) on which guidance can be given; that there is at least a substantial possibility that the decision maker had acted unlawfully and that such guidance as the court can give is likely to prevent the decision maker from acting in an unlawful manner.'

[79] In relation to the respondent's reliance on the Corey judgment the applicant recalls that the applicant in the Corey case challenged the Commissioners' decision to uphold the revocation of his licence on the grounds that inadequate material had been disclosed and that the refusal to direct his release had been based solely or to a decisive degree on that material. In addition the applicant argued that a hearing on the lawfulness of a detention could not be compliant with article 5(4).

[80] In Corey the Supreme Court held that the Northern Ireland High Court had an inherent jurisdiction to grant bail provided certain conditions were met, namely whether it was necessary for the effective disposal of the applicant's claim and whether it was contrary to the purpose or spirit of the legislation to grant bail. In Corey, Lord Kerr noted that:

> '[25] It is important to recall that in the present case, the lawfulness of the appellant's detention on foot of his recall to prison was not directly in issue in the judicial review proceedings before Treacy J. The focus of the appellant's challenge was to the commissioners' failure to direct his immediate release and the manner in which their determination was made. The appellant had not made a substantive challenge to the lawfulness of his detention under article 5.1 of the Convention. As the judge said in his judgement "this court is concerned only with the *fairness of the determination and the process used to come to it*..." (emphasis added).
>
> [26] The decision to grant bail in the present case was not founded, therefore, on the conclusion that the appellant's detention was unlawful. The judge did not address that issue. He based his decision on the manner in which the commissioners' review of the appellant's case had been conducted. The claim that the court had inherent jurisdiction to order his release must be viewed against that backdrop. The same applies to the claim that the finding of a breach of article 5.4, to be practical and effective, required that the court should be able to order the appellant's release. Put shortly, the critical question is whether it was necessary that, in order to give meaningful and realistic effect to the finding that the review into the appellant's detention had not been conducted lawfully, the court should have power to order the appellant's release.
>
> [27] In my view it is clear that the judge's decision did not require that underpinning. His order that the review of the appellant's detention had not been conducted lawfully and that it should be reconsidered was, on its own terms, a full vindication of the right which the appellant had asserted. On that ground alone, I consider that the judge did not have power to order the appellant's release.'

[81] The applicant relies on the below summary of the cases R (Faulkner) v Secretary of State for Justice and another [2013] UKSC 23 and R(Sturnham) v Parole Board and another (Nos 1 and 2) [2013] UKSC 47:

(a) A prisoner whose detention was prolonged as a result of delay in the consideration of his case by the Parole Board could bring a challenge in respect of Article 5(4) of the ECHR. This is the case notwithstanding that the prisoner's continued detention may be authorised by statute.

(b) Where it was established that on a balance of probabilities that a violation of article 5(4) had resulted in the detention of a prisoner beyond the date when he would otherwise have been released, damages should ordinarily be awarded as compensation for the resultant detention; that the appropriate amount to be awarded in such circumstances would be a matter of judgment, reflecting the facts of the individual case and taking into account such guidance as was available from the awards made by the European Court, or by domestic courts under section 8 of the Human Rights Act in comparable cases.

(c) That where it was not established that an earlier hearing would have resulted in earlier release, there was nevertheless a strong but not irrebutable, presumption that delay in violation of article 5(4) had caused the prisoner to suffer feelings of frustration and anxiety, that where such feelings could be presumed or were shown to have been suffered, the findings of a violation would not ordinarily constitute sufficient just satisfaction and a modest award of damage should be made.

(d) That no such award should be made where the delay was such that any resultant frustration and anxiety were insufficiently severe to warrant it, although that was unlikely to be the position where the delay was of an order of three months or more.

[82] The applicant repeats that this is not a case in which leave should be set aside. The Court's power to do so should be exercised sparingly. Such applications should only succeed where a respondent can deliver a 'clean knockout blow' to the applicant's case. The applicant submits that this is not the case in respect of the instant proceedings. Rather, it is submitted that there is a live issue to be determined in respect of whether the SRC discharged their obligations pursuant to Article 5(4) of the ECHR.

[83] The applicant notes that Mr Justice Weatherup granted leave to proceed against the SRC on the ground that there had been a breach of Article 5(4). It is evident therefore that Mr Justice Weatherup made a finding that in relation to Article 5(4) there was a good reason in the public interest for the matter to proceed to hearing.

[84] It is also submitted that the reality that there is a matter to be determined, is expressly recognised by the SRC in their written submissions, albeit that they argue that it should be dealt with in a different forum.

[85] As to the assertion that any claim in respect of Article 5(4) should be determined otherwise than by way of judicial review as there are matters in dispute relating to a damages claim, it is noted that in reality the only issue in dispute is as to whether Article 5(4) has been breached. It is further submitted that this matter does not call for any oral evidence and conversely the relevant evidence is for the most part, save for updated affidavit from the respondents, already before the Court. It is submitted therefore that this issue in these proceedings is a public law matter and thus falls squarely within the remit of the judicial Review Court.

[86] R(Faulkner) v Secretary of State for Justice and another [2013] UKSC 23 and R(Sturnham) v Parole Board and another (Nos 1 and 2) [2013] UKSC 47 were judicial review applications. It is of note that in neither case was an issue raised as to the suitability of those proceedings for the assessment of damages for violations of Article 5(4) ECHR.

[87] The applicant submits that the assessment of damages by the judicial review Court is expressly provided for by statute and regularly carried out by the Court pursuant to section 8 of the Human Rights Act 1998.

[88] The applicant notes that any issue in respect of bail and damages is ancillary to the main issue in the proceedings. In this regard the applicant submits that the primary issue is whether the SRC discharged their obligations pursuant to Article 5(4) ECHR. It is therefore submitted that the issue of the grant of bail only arises once the Court has determined if there has been a breach of Article 5(4). Furthermore, it is contended that the issue of bail only ever speaks to the potential award of damages in this case. In addition it is submitted that the granting of bail or the asserted lack of power to grant bail is not determinative of the issue of damages.

Discussion

[89] The sole issue for determination in this application is whether leave for judicial review should be set aside. In order to decide in the respondent's favour the Court must be satisfied that the tests established by the authorities relied on by the applicant, and reproduced in this judgment at paragraphs 72 through 78 have been met. The principles to be derived from those authorities can be summarised as follows:
(i) the Court has power under RSC Order 32(8) or its inherent jurisdiction to set aside the grant of leave;
(ii) the procedure to set aside should be exercised very sparingly;
(iii) it is necessary to deliver some clear "knockout blow" to justify invoking the procedure;

(iv) "such an application is not to be brought on the footing that a respondent has a very powerful, even an overwhelming case.

[90] Many of the arguments advanced by the respondent centre upon whether the detention of the applicant was lawful, and not on the separate and discrete issue as to whether there has been a breach of the applicant's Article 5(4) rights.

[91] In relation to that separate issue the respondent merely submits that it is a matter which should more properly be advanced in another forum. However, this alleged breach of a party's ECHR rights by a public body is a public law issue and the applicant is entitled, in the circumstances of this case, to assert that right in a public law court.

[92] Additionally, the bald assertion that another forum might be more appropriate clearly is not capable of surmounting the very high threshold required by the relevant authorities.

[93] Finally, and as an ancillary point, but one which weighs in the applicant's favour, if the applicant was required to re-institute his proceedings in another court, even if it were more suitable, all parties would be put to additional expense and delay, which would be a regrettable result.