

## FOCUS ON ARTICLE 5 ECHR

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1. Article 5 of the ECHR protects the liberty and security of the person. The underlying aim of Article 5 is to ensure that no one is deprived of this liberty arbitrarily. There are three aspects to the rights under Article 5. First, there is an exhaustive list of circumstances in which a person can be lawfully deprived of his liberty (paragraphs (1)(a) to (f)). Second, there is a list of procedural safeguards to be met accompanying those permissible grounds on which a person can be deprived of his liberty. Third, a person who is unlawfully deprived of his liberty has an enforceable right to compensation for that deprivation. An exhaustive examination of all those issues is beyond the scope of this article; it concentrates on some of the areas which the English Courts have focused since the enactment of the Human Rights Act 1998.
2. Before doing so, a prior question arises: what amounts to a *deprivation* of liberty to attract the protection of Article 5?
3. The starting point is the EctHR's decision in Guzzardi v. Italy (1980) 3 EHRR 333 at para. 93 where it was held that the distinction between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance. Deprivation of liberty has to be contrasted with a restriction on freedom of movement<sup>1</sup>. The distinction has been considered in the mental health context. In R. (Secretary of State for the Home Department) v. Mental Health Review Tribunal, PH intervening [2002] EWCA Civ. 1868. PH was a restricted patient, who on a proposed discharge from compulsory detention from Broadmoor hospital was made subject to conditions. Those conditions stipulated, *inter alia*, that he must reside at specialist accommodation (with suitable nursing care and security) and that he must not leave his accommodation without an escort. It was contended that those conditions were so restrictive as to amount to a deprivation of liberty. The Court of Appeal set

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<sup>1</sup> Lesser restrictions on freedom of movement are governed by Article 2 of the fourth protocol (to which the United Kingdom is not a party and is therefore not part of the HRA)

out the relevant factors to take into account when making the distinction between a deprivation of liberty and restriction of movement:

- a) The court must start with the concrete or actual situation of the individual concerned and take account of a range of criteria, such as the type, duration, effects and manner of implementation of the measure in question;
  - b) Account must be taken of the cumulative effect of the various restrictions;
  - c) The purpose of any measures of restriction is a relevant consideration. If the measures are taken principally in the interests of the individual who is being restricted, they may well be regarded as not amounting to a deprivation of liberty<sup>2</sup>.
4. The Court of Appeal held that the cumulative effects of the conditions which were sought to be imposed on PH were not so restrictive as to amount to a deprivation of liberty. The conditions were sufficiently broadly phrased and were imposed to protect PH<sup>3</sup>.

#### **A. Permissible grounds upon which one can be deprived of liberty**

5. Article 5(1)(a) – (f) provides an exhaustive list of circumstances in which a person can be lawfully deprived of his liberty. The definition of those circumstances is to be narrowly drawn<sup>4</sup>. This article does not discuss those grounds in any detail<sup>5</sup> but examines a theme which runs through all those grounds.

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<sup>2</sup> See the EctHR's judgment in Neilsen v. Denmark [1988] EHRR 175 and HM v. Switzerland (26<sup>th</sup> February 2002, application no 39187/98)

<sup>3</sup> In R.(G) v. MHRT [2004] EWHC 2193 and R. (SSHD) v. MHRT [2004] EWHC 2194, Collins J affirmed the principles in PH supra. However, he held that a condition which stipulated that a patient could not be allowed out of his accommodation without an escort amounted to a deprivation of liberty. In this case, the condition was imposed to protect others from the patient and not the patient himself. See also in the Criminal Justice context, the Divisional Court's decision in Davies (Owen) (aka Nicholas Slocombe) v. Secretary of State for the Home Department [2004] EWHC 3113 (Admin). The claimant served the whole of a sentence of 30 months in a Young Offender Institution. He was released on licence. The licence stipulated that he had to permanently reside at a nominated probation hostel and that he was not to leave the hostel unescorted without prior approval of his supervising officers. The Divisional Court held that the cumulative effects of those conditions did not amount to a deprivation of liberty. The conditions were designed to provide the claimant with a fixed address and the support of the probation service so as to prevent him re-offending. This was to protect the public and to attempt to achieve the claimant's successful re-integration into the community.

<sup>4</sup> See Wintwerp v. Netherlands (1979) 2 EHRR 387 at para. 37

6. An issue which has arisen repeatedly is whether or not there is any separate proportionality requirement in Article 5. Dyson LJ in Nadarajah v. Secretary of State for the Home Department [2003] EWCA Civ 1768 at paragraph 54 found that there was no separate proportionality requirement in Article 5. This obviously reflects the clear words of Article 5. Moreover, in Hutchison Reid v. UK (2003) 37 EHRR 211 at paras. 47-48, where the ECtHR set out the requirements of Article 5(1)(e), there was no suggestion of any proportionality requirement in Article 5. This reflects the requirements as set out in Winterwerp v. Netherlands (1979) 2 EHRR 387 at para. 39 and Ashingdane v. UK (1985) 7 EHRR 528 at para. 44, which focus upon the requirement to avoid arbitrary detention.
7. However, contrast those conclusions with Lord Slynn's analysis in R. (Saadi) v Home Secretary [2002] 1 WLR 3131 at para. 43 and R. v. Governor of Brockhill Prison ex parte Evans (No2) [2001] 2 AC 19 at 32 where Lord Hope held that in Article 5(1) there was a requirement that the domestic law authorising detention not be arbitrary (in the sense that it was resorted to in bad faith or was disproportionate).
8. Also, in the mental health context, there is clear authority that, in applying the statutory tests to determine whether or not detention should take place or continue, it is necessary to balance the interests involved and to reach a proportionate decision: see R(H) v. MHRT [2001] EWCA Civ 415 at para. 33, as interpreted by Elias J. in R(SSHD) v. MHRT [2002] EWHC Admin 1128 at para. 24: "*in determining whether it is appropriate to detain a patient in hospital, the interests*

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<sup>5</sup> The most common grounds are: (i) Article 5(1)(a), detention following conviction by a competent court. The detention must result from, follow and depend upon, or occur by virtue of the conviction (Weeks v. United Kingdom (1987) 10 EHRR 293, at para. 42); (ii) Article 5(1)(c), lawful arrest or detention for the purpose of bringing a person before the competent legal authority on reasonable suspicion of having committed, or about to commit, an offence. In R. (Hirst) v. Secretary of State for the Home Department [2005] EWHC 1480 (Admin.), Crane J rejected the contention that Article 5(1)(c) applied to the recall of persons on parole licence. The claimant also failed to have the procedural safeguards in Article 5(3) applied to him; (iii) Article 5(1)(e), detention by lawful order of persons of unsound mind. It is necessary to satisfy three requirements (Winterwerp v. Netherlands supra): first, that the individual concerned must be reliably shown by objective medical expertise to be of unsound mind; second, that the individual's mental disorder is of a kind or degree which warrants compulsory confinement; and third, that the disorder persists throughout the period of detention (i.e. that the detention continues to be justified); and (iv) Article 5(1)(f), the lawful arrest or detention of a person to prevent his unauthorised entry into the country or to effect his deportation or extradition (see Saadi supra for the relevant principles).

of the patient have to be weighed against those of the public, and the tribunal has to determine whether the detention is proportional to the risks involved". This was recently approved by Munby J. in R(DJ and AN) v. MHRT [2005] EWHC Admin 587 at para. 84 as neatly encapsulating the balance which is inherent in the Tribunal's task under the Mental Health Act 1983. In R(SC) v. MHRT [2005] EWHC Admin 17 Munby J. at para. 19 stated that where (unspecified) rights under the Convention are engaged, decisions must satisfy the twin Convention requirements of necessity and proportionality. He then clarified what he meant by this in para. 66 where he held, as the Mental Health Review Tribunal was bound to act in accordance with Article 8, its decisions must be informed by the Convention principles of necessity and proportionality – although that was in a case concerning a decision whether or not to grant an absolute discharge to a patient already subject to a conditional discharge, i.e. where the subject matter of the decision was not detention as such. If, however, any decision involving detention had to satisfy Article 8, then there would implicitly be a proportionality requirement in all Article 5 decisions.

9. In the immigration detention context, the Court of Appeal in ID & ors. v. Home Office [2005] EWCA Civ 1554 held, relying upon Evans supra., that Article 5 required that domestic law which authorised detention be proportionate (at para. 100). However, in the next paragraph, Brooke LJ quoted from Nadarajah supra. where Dyson LJ expressly rejected the submission that there was any proportionality requirement in Article 5. Whilst Brooke LJ did not appear in any way to disagree with what Dyson LJ had said, he referred, at para. 130, to immigration officers having to justify their decisions as proportionate, thereby implying that there was such a requirement in Article 5.
10. An interesting (though no more helpful) perspective on the relevant test to be applied in Article 5 cases comes from the case of Al-Fayed v. Commissioner of Police of the Metropolis [2004] EWCA Civ 1579 where, having considered an argument that proportionality should be imported into the test for the lawful exercise of a power of arrest, Auld LJ (implicitly rejecting any separate proportionality requirement) stated that:

"The requirement of Wednesbury reasonableness, given the burden on the claimant to establish that the arresting officer's exercise or non-exercise of discretion to arrest him was unlawful, may, depending on the circumstances of each case, be modified where

appropriate by the human rights jurisprudence to some of which I have referred, so as to narrow, where appropriate, the traditionally generous ambit of *Wednesbury* discretion - *Cumming*, per Latham LJ at para. 26. It is not, as a norm, to be equated with necessity; neither Article 5 nor section 24(6) so provide. The extent, if at all, of that narrowing of the ambit or lightening of the burden on the claimant will depend on the nature of the human right in play - in this context one of the most fundamental, the Article 5 right to liberty. In my view, it will also depend on how substantial an interference with that right, in all or any of the senses mentioned in paragraph 82 above, an arrest in any particular circumstances constitutes. The more substantial the interference, the narrower the otherwise generous *Wednesbury* ambit of reasonableness becomes.”

## **B. The procedural safeguards**

11. The right to be informed of the ground for detention: Article 5(2) requires that anyone arrested or detained should be informed promptly in a language which he understands, of the reasons for his arrest or detention. The requirement is not confined to an arrest for a criminal offence. It extends to compulsory detention of a person of unsound mind<sup>6</sup> and to a person on parole licence who is being recalled to prison<sup>7</sup>.
12. The person must be told, in simple and non-technical language, the essential legal and factual grounds for his arrest or detention so that he could apply to a court to challenge its lawfulness under Article 5(4). This obligation remains even if the person is broadly aware of the reasons: see *Hirst supra.* at paras. 31-33.
13. Habeus Corpus: Article 5(4) 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 his detention is not lawful*”. The burden of proving the lawfulness of detention rests with the State<sup>8</sup>.

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<sup>6</sup> *Van Der Leer v. Netherlands* (1990) 12 EHRR 567

<sup>7</sup> *Hirst supra.*

<sup>8</sup> See *R. (H) v. London North and East Region MHRT (Secretary of State for Health) intervening* [2002] QB 1, the Court of Appeal granted a declaration of incompatibility insofar as sections 72 and 73 of the Mental Health Act 1983 imposed the burden on a patient to establish that at least one of the criteria for his continued detention is no longer satisfied, i.e. it put the burden on the patient. The Mental Health Act 1983 (Remedial) Order 2001, IS 2001/3712 amended sections 72 and 73 to omit the word “*not*” with the consequence that the MHRT is now required to be satisfied that the criteria for detention are met. Similarly, in *R. (Sim) v Parole Board* [2003] 2 WLR 1374, Elias J granted a declaration of incompatibility in respect of section 44A(4) of the Criminal Justice Act 1991 which provided that the Parole Board shall direct the prisoner’s release is satisfied that it is no longer necessary for the protection of the public that he should be confined (but not otherwise). Elias J held that section 44A(4) must be construed so that the Parole Board is obliged to conclude that it is no

14. The review should be wide enough to bear on those conditions to determine whether the detention is lawful by reference to Article 5(1) (E. v. Norway (1990) 17 EHRR 30 at para. 90). Thus, judicial review has been held to be insufficient in respect of detention following recall of a life-sentence prisoner or detention with a view to deportation since the domestic courts are not in a position to review the merits of the decision to detain (Weeks supra. at para. 69 and Chahal v. United Kingdom (1996) 23 EHRR 413 at para. 130).
15. The application of Article 5(4) in cases of preventative detention: Prior to the introduction of the Human Rights Act, the ECtHR had already determined the scope of Article 5(4) in respect of discretionary lifers<sup>9</sup> and persons detained during Her Majesty's Pleasure<sup>10</sup>. In Weeks supra. the ECtHR held that it was not for the court to review the appropriateness of the imposition of the life sentence in the first place. Further, there was a sufficient causal connection between the conviction (following which the life sentence was imposed) and the recall to prison from life licence to satisfy the requirements of Article 5(1)(a)<sup>11</sup>. However, the court inferred that, if a decision not to release a discretionary lifer or re-detain him was based on grounds which were inconsistent with the objectives of the sentencing court, the causal link might be broken and a detention which was lawful at conviction would become unlawful as being an arbitrary deprivation of liberty incompatible with Article 5<sup>12</sup>. The ECtHR rejected the government's argument that the supervision of lawfulness guaranteed by Article 5(4) was

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longer necessary to detain the recalled prisoner unless the Board are positively satisfied that the interests of the public require that he should be confined.

<sup>9</sup> Thynne, Wilson and Gunnell v. United Kingdom (1991) 13 EHRR 666.

<sup>10</sup> Hussain and Singh v. United Kingdom (1991) 13 EHRR 666

<sup>11</sup> This issue was considered by the Court of Appeal in R.(Noorkoiv) v. Secretary of State for the Home Department [2002] 1 WLR 3284 in the context of automatic life sentence (though that distinction is not material). Simon Brown LJ was of the view that, whilst the causal connection might eventually be broken, it would be so only in "very exceptional cases". Mere delay in Article 5(4) proceedings, even after tariff expiry date would not break the causal connection. Lord Woolf put it more succinctly at paragraph 61, "Article 5(1) is not relevant because the justification for the detention of a prisoner sentenced to life imprisonment is that sentence and not the fixing of the tariff period".

<sup>12</sup> The Court of Appeal considered in R (Cawser v. Secretary of State for the Home Department [2003] EWCA Civ. 1522 whether the delay in providing lifers with Sex Offender Treatment Programmes broke the casual connection between the lawful conviction and the subsequent detention. The majority (Simon Brown and Laws LJ) held that it did not. Arden LJ dissented and held that, in exceptional circumstances, such a delay might break the causal connection so as to make the detention arbitrary within the meaning of Article 5(1)(a)).

incorporated at the outset in the original judicial process. It held that the original judicial process does not deal with an ensuing period of detention in which new issues affecting the lawfulness of detention might arise. The grounds relied upon in that original judicial process for deciding that the length of deprivation of liberty should be subject to the discretion of the executive for the rest of his life are by their nature susceptible of change with the passage of time. Article 5(4) therefore required a supervision of the lawfulness of the continued detention. The Parole Board's jurisdiction did not satisfy the requirements of Article 5(4) as the Board did not have the competence to direct release if the detention had become unlawful.

16. The ECtHR had approached mandatory life sentences differently<sup>13</sup>. However, the ECtHR in *Stafford v. United Kingdom*<sup>14</sup> held that a distinction between mandatory and other categories of life sentences could not be maintained. The mandatory life sentence did not impose imprisonment for life as a punishment. The ECtHR held that once the punishment element of the sentence had been satisfied (i.e. the tariff), the grounds for continued detention, as in other life sentence cases, must be based upon considerations of risk and dangerousness. Thus, as these elements may change with the course of time and new issues of lawfulness might arise, Article 5(4) required a periodic review of the lawfulness of the detention post-tariff.
17. Until recently, determinate sentence prisoners did not enjoy the protection of Article 5(4) in relation to release decisions. The ECtHR consistently held that the requirements of Article 5(4) are satisfied at the outset of the determinate sentence by the original judicial process for the whole period of the determinate sentence. The most succinct statement of principle is provided by the ECtHR<sup>15</sup> in *De Wilde v. Belgium (No. 1)* (1971) 1 EHRR 373 at para. 76,

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<sup>13</sup> *Wynne v. United Kingdom* (1995) 19 EHRR 333, "However the fact remains that the mandatory life sentence belongs to a different category from the discretionary life sentence in the sense that it is imposed automatically as punishment for the offence of murder irrespective of considerations pertaining to the dangerousness of the offender."

<sup>14</sup> (2002) 35 EHRR 1211

<sup>15</sup> This principle has been confirmed by the ECtHR and the Commission in subsequent cases: see *Van Droogenbroeck v. Belgium* (1982) 4 EHRR 433 at paras. 45 and 47; *Perez v. France* (1995) 22 EHRR 153 at paras. 30-31; *Mansell v. United Kingdom* (application 32072/96 (1997)); *Rocha v Portugal* (2001) 32 EHRR 333 at paras. 28-30.

“At first sight, the wording of Article 5(4) might make one think that it guarantees the right of the detainee always to have supervised by a court the lawfulness of a previous decision which has deprived him of liberty... it is clear that the purpose of Article 5(4) is to assure persons who are arrested and detained the right to a judicial supervision of the lawfulness of the measure to they are subjected: the word ‘court’ is there found in the singular and not in the plural. Where the decision depriving a person of his liberty is one taken by an administrative body, there is no doubt that Article 5(4) obliges the Contracting States to make available to the person detained a right to recourse to a court; but there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the later case, the supervision required by Article 5 (incorporated in the decision; this is so, for example, where a sentence of imprisonment is pronounced after ‘conviction by a competent court’.”

18. The House of Lords rejected an argument that Article 5(4) applied to a “*longer than commensurate*” determinate sentence in *R. (Giles) v Parole Board* [2003] 3 WLR 736. Their Lordships held that the period of detention which the Claimant was required to serve by virtue of section 2(2)(b), i.e. to protect the public from harm, was not analogous with the post-tariff period of a life sentence<sup>16</sup>. A person to whom this type of sentence applies was entitled to the same rights as any other determinate sentence prisoner but no other or greater rights.

19. Lord Hope summarised the position at paragraphs 41, 51 and 52,

“The critical distinction is that which the European Court has made between cases where the length of the detention is fixed by the court and those whose decisions about its length are left to the executive. It is in the latter case only that new issues of lawfulness arise in the course of detention which were not incorporated in the original decision of the court.

...

It is plain ... that the basic rule which the European court laid down in *De Wilde* continues to apply. Where a prisoner has been lawfully detained within the meaning of Article 5(1)(a) following the imposition of a determinate sentence after his conviction by a competent court, the review which Article 5(4) requires is incorporated in the original sentence passed by the sentencing court. Once the appeal process has been exhausted there is no right to have the lawfulness of the detention under that sentence reviewed by another court. The principle which underlies these propositions is that detention in accordance with a lawful sentence passed after conviction by a competent court cannot be described as arbitrary. The cases where the basic rule has been departed from are cases where decision as to the length of the detention have passed from the court to the executive and there is a risk that the factors which informed the original decision will change with the passage of time. In those cases the review which Article 5(4) requires cannot be said to be incorporated in the original decision by the court. A further review in judicial proceedings is needed at reasonable intervals if the detention is not to be at risk of becoming arbitrary.

I would hold that the present case falls within the basic rule. The review which Article 5(4) requires was incorporated in the sentence which the judge passed under subsection (2)(b). This is because he fixed the period of the sentence which was

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<sup>16</sup> See, in particular, Lord Bingham at paragraphs 7 and 11

needed to protect the public from serious harm. He was able to take this decision in the light of information before him and, in the exercise of his ordinary powers of sentencing, to decide on the total length of sentence which in all the circumstances was appropriate. As he was able to take this decision at the outset there is no risk that detention for the minimum period fixed by the sentence will become arbitrary. The appellant has no further right under article 5(4) to have his detention for the minimum period fixed by that sentence reviewed judicially.”

20. Although it is not expressly stated, it is apparent from their Lordships’ opinions that Article 5 has no application to the discretionary release of determinate sentence prisoners. Its’ requirements are satisfied by the original trial (and appeal) proceedings for the whole of the term of a determinate sentence. Their Lordships’ reasoning was applied by the Outer House, Court of Session, in Re Stephen Dempsey [2003] ScotCS 275<sup>17</sup> in relation to a recall case. The issue appeared to be put beyond doubt by the Court of Appeal in R. (Trevor Smith)(No.2) v. Parole Board [2004] 1 WLR 421. The claimant contended that the process of recall was subject to Article 5(4). This was emphatically rejected by the Court of Appeal<sup>18</sup>. Kennedy LJ held (at para. 23),

“In my judgment the decision to recall is not an infringement of the right to liberty in the case of a prisoner serving a determinate sentence who has been released on licence because his right to liberty for the period up to the end of his sentence was lost when he was sentenced. There being no right to liberty which has been infringed there can be no right to take proceedings to decide whether the detention is lawful.”

21. Holman J rejected the argument in these terms (para. 52),

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<sup>17</sup> Lord Brodie concluded at paragraph 62, “... when a prisoner is released on licence that is the implementation of the sentence which the court has pronounced. Clearly the same can be said of his being kept in custody prior to such release. In my opinion, the same can be said of the revocation of the licence and the recall of the prisoner to custody on his breaching a licence condition: that is something done in the implementation of the original sentence. Consistent with that, a prisoner cannot be detained simply by virtue of a recall to custody beyond the expiry date of the period pronounced by the court as being his sentence. In my opinion, the deprivation of liberty ... was not only authorised by the sentence of five years imprisonment ... but it resulted from, followed and depended upon and occurred by virtue of that sentence.”

<sup>18</sup> Relying upon the jurisprudence of the EctHR, the majority Court of Appeal in Hindawi & Headley v Secretary of State for the Home Department [2005] 1 WLR 1102 held that release decisions did not fall within the ambit of Article 5 for Article 14 to apply. Neuberger LJ dissented (see para. 60). The majority’s reasoning differed. Kennedy LJ relied upon the House of Lords’ opinions in Giles supra, which he stated, had concluded that the determinate sentence “that had been imposed satisfied the [claimant]’s rights under Article 5 until the end of its term” (para. 17). Sedley LJ’s reasoning was more technical. He did not think that it was logically impossible to bring early release during the currency of a lawful sentence within the ambit of Article 5 but that what is sought to be brought within the ambit of Article 5 is not “even potentially” a right to be released, but “at most an obligation upon the Home Secretary to take the advice of the Parole Board before forming his own view on early release”(see para. 37). Lord Woolf had considered (without any analysis) that it was arguable, notwithstanding Giles and Smith (No.2) supra, that early release came within the ambit of Article 5 (see Clift v. Secretary of State for the Home Department [2004] EWCA Civ. 514 at para. 18).

“When Mr. Scrivener speaks of ‘*a right to be released*’, what he is really contending for is a right to be released and thereafter to remain at liberty in the community with all the same rights as a person who is not still subject to a sentence of imprisonment. In my view, it is plain from sections 33(2) and 39(6) and the scheme of the legislation generally that a long-term prisoner who is released on licence during a determinate sentence is not in that position and does not enjoy that right until the expiry of the licence.”

22. However, on appeal (along with the case of Justin West), the House of Lords<sup>19</sup> held that Article 5(4) applied to recall proceedings in respect of determinate sentence prisoner. There is, however, a surprising lack of analysis. Only Lords Bingham, Hope and Slynn refer to the issue<sup>20</sup>. Lord Bingham (with whom Lord Hope agreed) accepted<sup>21</sup> that the sentence of the original trial court satisfied Article 5(1)(a) “*not only in relation to the initial term served by the prisoner but also in relation to revocation and recall, since conditional release subject to the possibility of recall formed an integral component of the composite sentence passed by the court*”. Having concluded that detention following recall satisfied Article 5(1)(a), Lord Bingham appeared to assume that Article 5(4) applied. His main focus was upon whether the Parole Board hearing satisfied the requirements of Article 5(4)<sup>22</sup>.
23. On the other hand, Lord Slynn did provide some reasoning<sup>23</sup>. He concluded that the recall to prison from licence was “*a new deprivation of liberty*” which was not empowered by the initial sentence of the court. Therefore the prisoner was entitled to take “*proceedings by which the lawfulness of that detention can be decided speedily by a court under article 5(4)*”. He also concluded that the hearing before the Parole Board, provided it was conducted in accordance with the common law principles of fairness, satisfied the requirements of Article 5(4).
24. With respect to their Lordships, their conclusions are inconsistent with the jurisprudence of the ECtHR<sup>24</sup> and their own reasoning in Giles supra.<sup>25</sup> Their

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<sup>19</sup> [2005] 1 WLR 350

<sup>20</sup> The *ratio descendit* in the case (whether the Parole Board was obliged to afford an oral hearing to prisoners who are recalled) was decided on the basis of the common law principles of fairness: see Lord Bingham at paras. 27-35.

<sup>21</sup> See para. 36

<sup>22</sup> He concluded that the requirements of Article 5(4) would be met provided the hearing was conducted in a manner that meets the requirements of common law procedural fairness: see paragraph 37. Lord Hope agreed with Lord Bingham’s (lack of) reasoning at paras. 72 *et seq.*

<sup>23</sup> paras. 53-55

<sup>24</sup> See also the Commission decision of Brown v. United Kingdom (Application No. 968/04) in which, relying upon the ECtHR’s jurisprudence, the Commission held the complaint based on Article 5 to be inadmissible. See also Ganusauskas v. Lithuania (Application No. 47922/99) which also held Article 5 to be inadmissible.

Lordships' omission to deal with Giles supra. is disappointing. Further, Lord Slynn's reasoning is erroneous. Insofar as the detention following recall is not ordered by the original trial court, Article 5(1)(a) fails to be satisfied and the detention is consequently unlawful. In which case, no issue arises under Article 5(4).

### C. Compensation under Article 5

25. In R. (KB and others v. South London and South and West Region Mental Health Review Tribunal and another [2004] QB 936, Stanley Burnton J gave guidance as to damages to be recovered under Article 5:

- a) damages were only be made where the court was satisfied that such an award was necessary to afford just satisfaction. Article 5(5) does not compel the award of damages in every case in which Article 5 is breached (paras. 26, 28-30);
- b) damages for frustration and distress were recoverable where the "*frustration and distress*" was significant and of such intensity that it would in itself justify an award of compensation for non-pecuniary damage (paras. 41-42 and 73);
- c) damages for loss of liberty could only be awarded where a claimant could establish, on the balance of probabilities, that he would have been discharged at an earlier hearing (para. 64).

26. These principles can equally apply to delays in other contexts. Stanley Burnton J held that no special considerations applied to mental health patients.

27. The amount of damages ranged from nothing to £4,000 for delays of between two weeks and four months. This provides a useful indication of the likely damages<sup>26</sup>.

28. The courts will not award damages for loss of a chance of a favourable hearing: see R. (Greenfield) v. Secretary of State for the Home Department [2005] UKHL 14 at para. 28. Further, it is for the Claimant to prove his case by adducing the appropriate evidence: see Greenfield supra. at para. 30.

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<sup>25</sup> And (i) the analysis of Elias J and the Court of Appeal in Sim supra. and at [2003] EWCA Civ. 1845 in relation to extended sentence prisoners and (ii) the Court of Appeal's analysis in Hindawi supra.

<sup>26</sup> see also EctHR's judgment in Lloyd v. United Kingdom 1<sup>st</sup> March 2005

## Conclusion

29. By simply looking at the wording of Article 5, it would seem that the structure of the protection seems straightforward. If one comes within the list of circumstances defined, the deprivation of liberty is lawful. If the procedural safeguards are met, the deprivation remains lawful. However, further analysis reveals an added complexity, in particular, whether the deprivation has to be proportionate. The case-law has hitherto been inconsistent – it is hoped that the higher courts will address this issue soon. In addition, until the House of Lords’ decision in Smith & West *supra*, the scope of Article 5(4) was settled. It is hoped that their Lordships will address the uncertainty in the forthcoming appeals of Hindawi & Headley and Clift (due to be heard sometime next year).

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