SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT FALKIRK

[2019] SC FAL 51

FAL-A72-17

JUDGMENT OF SHERIFF J K MUNDY

in the cause

THOMAS SCOTT

Pursuer

against

THE SCOTTISH MINISTERS

Defenders

Act: Leighton, Advocate
Alt: McKinlay, Advocate

Falkirk, 5 June 2019

The sheriff, having resumed consideration of the cause, sustains the first, third, fourth and fifth pleas in law for the defenders; dismisses the cause; repels the pursuer's pleas in law; finds the pursuer liable, as an assisted person, to the defenders in the expenses of the cause; grants sanction for the employment of junior counsel; allows an account of said expenses to be given in and remits same, when lodged, to the auditor of court to tax and report.

NOTE

Introduction

[1] This is an action by the pursuer, formerly prisoner within HMP Addiewell, against the defenders for (1) declarator that his imprisonment from 10 May 2016 to 16 June 2016 was unlawful (2) for declarator that the said imprisonment was in breach of his convention rights

in terms of Article 5 of the European Convention and Human Rights ("ECHR") and (3) for damages of £10,000.

[2] After sundry procedure the matter came before me for debate on the parties' preliminary pleas. Both parties were represented by counsel: Mr Leighton for the pursuer and Mr McKinlay for the defenders. Mr McKinlay moved the court to dismiss the action. Mr Leighton sought decree of declarator *de plano*, restricting a proof to damages. It was ultimately agreed that the essential facts were not in dispute so that the cause could be disposed of at debate and without a proof, except for the question of damages in the event that I was with the pursuer.

Background

[3] The pursuer was convicted of the offence of carrying a knife in contravention of the Criminal Law (Consolidation) (Scotland) Act 1995 section 49(1). On 5 February 2016 the pursuer was sentenced to 16 months imprisonment. He was accordingly a short-term prisoner in terms of section 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act"). The sentence was backdated to 16 October 2015 being the date from which the pursuer was detained at HMP Addiewell. By virtue of section 1 of the 1993 Act, as soon as he had served one half of his sentence he would be released by the Secretary of State unconditionally. That date, or his earliest date of liberation ("EDL") was 16 June 2016 when he was in fact ultimately released.

[4] In terms of section 3AA of the 1993 Act certain prisoners may be released before their EDL at the discretion of the defenders in furtherance of a Home Detention Curfew Licence ("HDCL"). The pursuer was released on such a licence of 7 March 2016 in terms of section 3AA(1)(a) as a short-term prisoner having served 3 months or more. The duration of

the licence was from 7 March 2016, expiring on 16 June 2016 being the same date as his EDL. The licence was subject to specific conditions including a curfew and electronic monitoring. Subsequently the HDCL was revoked and the pursuer recalled to prison on 20 March 2016 in terms of the powers contained in section 17A of the 1993 Act which power can be exercised if it appears to the defenders *inter alia* that he has failed to comply with any condition included in his licence. Thereafter the pursuer made representations to the defenders in relation to that revocation and the defenders referred the case to the Parole Board on 24 March 2016. This was done in terms of section 17A(3) of the 1993 Act. The case was considered by the Parole Board for Scotland on 10 May 2016 whose decision reads as follows:

> "Mr Scott has claimed as part of his appeal he has committed no offence though acknowledges he acted incompetently by putting himself in a vulnerable situation. A letter from head of case management at HMP Addiewell on 13 April 2016 confirms there are no outstanding warrants for Mr Scott and he has not been charged with any offence. Mr Scott's partner and young family are a protective factor. Given all the circumstances Mr Scott should be re-released on HDC licence."

[5] Thereafter the defenders considered again whether the pursuer should be released under the HDCL scheme. This was refused on the basis of *inter alia* information in a community assessment report by criminal justice social work of 31 May 2016 which disclosed breaches of community payback orders not evident when release was first considered. The pursuer appealed that decision but before the appeal was determined he was released at his EDL.

Contentions of the parties

[6] The pursuer's position on averment is that following the decision of the Parole Board of 10 May 2016 the defenders were required to release the pursuer on that day having regard

to the terms of section 17A of the 1993 Act and in particular section 17A(4) which provides that the Parole Board may direct the Scottish Ministers to cancel the revocation. As a consequence, it was maintained that the defenders' failure to release the pursuer at that time resulted in unlawful imprisonment and separately a breach of the pursuer's rights in terms of Article 5 of the ECHR.

[7] It is averred by the defenders that they were not required to release the pursuer by virtue of the statutory provisions. Rather the effect of the Parole Board's decision was that the defenders were not prevented from considering the pursuer again for release on HDCL (which they did). The meaning of those statutory provisions was central to the discussion.

Statutory Provisions

[8] As indicated, section 3AA is the relevant statutory provision concerning the release of prisoners under the HDCL. This was inserted into the 1993 Act by the Management of Offenders etc (Scotland) Act 2005 and provided at the relevant time (and up to 13 December 2016) *inter alia* as follows:

> "3AA Further powers to release prisoners
>
> (1) Subject to subsections (2) to (5) below, the Scottish Ministers may release on licence under this section—
>
> (a) a short-term prisoner serving a sentence of imprisonment for a term of three months or more; or
>
> (b) a long-term prisoner whose release on having served one-half of his sentence has been recommended by the Parole Board.
>
> (2) The power in subsection (1) above is not to be exercised before the prisoner has served whichever is the greater of-
>
> (a) one quarter of his sentence; and
>
> (b) four weeks of his sentence...
>
> (4) In exercising the power conferred by subsection (1) above, the Scottish Ministers must have regard to considerations of—
>
> (a) protecting the public at large;
>
> (b) preventing re-offending by the prisoner; and
>
> (c) securing the successful re-integration of the prisoner into the community.

(5) Subsection (1) above does not apply where—

… (f) the prisoner has been released on licence under this Part of this Act or under the 1989 Act but-

... (i) has been recalled to prison other than by virtue of section 17A(1)(b) of this Act.".

[9] Sections 12AA and 12AB make provision that any licence granted under section 3AA must include "the standard conditions" prescribed by the defenders and a curfew condition. The conditions in this case, effective from 7 March 2016, are contained in the licence lodged as number 6/3/3 of process and include the use of electronic monitoring equipment (in terms of The Home Detention Curfew Licence (Prescribed Conditions)(Scotland) (No. 2) Order 2008).

[10] Section 17A of the 1993 Act provides for the recall of prisoners released under section 3AA and is in the following terms:

"17A Recall of prisoners released under section 3AA

(1) If it appears to the Scottish Ministers as regards a prisoner released on licence under section 3AA of this Act that—

(a) he has failed to comply with any condition included in his licence; or

(b) his whereabouts can no longer be monitored remotely at the place for the time being specified in the curfew condition included in the licence,

they may revoke the licence and recall the person to prison under this section.

(2) A person whose licence is revoked under subsection (1) above—

(a) must, on his return to prison, be informed of the reasons for the revocation and of his right under paragraph (b) below; and

(b) may make representations in writing with respect to the revocation to the Scottish Ministers.

(3) The Scottish Ministers are to refer to the Parole Board the case of any person who makes such representations.

(4) After considering the case the Parole Board may direct, or decline to direct, the Scottish Ministers to cancel the revocation.

(5) Where the revocation of a person's licence is cancelled by virtue of subsection (4) above, the person is to be treated for the purposes of section 3AA of this Act as if he had not been recalled to prison under this section.

> (6) On the revocation under this section of a person's licence, he shall be liable to be detained in pursuance of his sentence and, if at large, shall be deemed to be unlawfully at large."

Submissions for the defenders

[11] Counsel for the defenders submitted that in terms of section 3AA it was clear that the defenders had a discretion to release a prisoner on HDCL and the section set out the considerations to which the defenders required to have regard. The provisions of subsection (5) dis-applied the provisions for release where *inter alia* the prisoner has been released on licence but has been recalled to prison (other than by virtue of section 17A(1)(b) of the Act which did not apply in this case). Accordingly, once recalled, the pursuer could not, subject to section 17A, apply for early release.

[12] In accordance with section 17A if it appears to the defenders that a prisoner has failed to comply with conditions they may revoke the licence. It was not disputed in this case that the defenders did revoke the licence in accordance with this provision and that in accordance with section 17A(1)(a) (rather than section 17A(1)(b)). He was thereafter liable to be detained in terms of his sentence until his EDL otherwise he would be deemed to be "unlawfully at large" (section 17A(6)). In terms of subsection (3) the defenders are to refer to the Parole Board in a case of any person who makes representations and this is what occurred, their powers being provided in subsection (4). They "may direct, or decline to direct, the Scottish Ministers to cancel the revocation". The effect of cancellation of the revocation is provided for in subsection (5) and the person is to be "treated for the purposes of section 3AA of this Act as if he had not been recalled to prison under this section". Accordingly, the cancellation of the revocation excluded the operation of that prohibition, rendering the prisoner eligible for consideration of early release under these provisions.

[13] Counsel noted that the power of the Parole Board was specifically limited to directing or declining to direct the defenders to cancel the revocation, the effect of cancellation being in terms of subsection (5) that the person is treated as if he had not been recalled to prison. It was submitted that what the Parole Board could not do was to direct the release of the prisoner on a HDCL, in contrast to their powers under section 17, which is concerned with the revocation of licences under different provisions of the Act. Under section 17 there is provision for referring to the Parole Board in the case of a person whose licence is revoked and in terms of subsection (4) specific provision that where the Board "directs a prisoner's immediate release on licence, the Secretary of State shall under the section, give effect to that direction". Had Parliament intended that the Parole Board could direct release under the HDCL then they could easily have done so by enacting identical provisions. They did not. The provisions were different and must have been intended to be so.

[14] Accordingly, it was submitted, the effect of the decision of the Parole Board was that the defenders were not prevented from reconsidering the release of the pursuer under an HDCL and in fact did so, deciding, following consideration of a community assessment report, that he was not suitable. The Parole Board had no statutory power to order the pursuer's release in spite of the wording adopted by them in their decision of 11 May 2016. In those circumstances, there was no basis for the case of unlawful detention. Firstly, the pursuer had been lawfully detained by warrant dated 5 February 2016. Secondly, he was not entitled to release as of right in light of the discretionary nature of the decision of the powers of the defenders under section 3AA. Thirdly, the statutory provisions did not require the defenders to release the pursuer following the decision of the Parole Board.

[15] At this point, counsel also made some reference to the pursuer's averments relating to the Guidance issued by the defenders in Circular JD 7/2008 "Home Detention Curfew-

Guidance for Agencies" founded upon by the pursuer in support of his contention as to the effect of the Parole Board's decision. It was submitted that those averments were irrelevant. Paragraph 8.1 at page 9 under the section "Part 1 – Role of the Scottish Prison Service" provides:

> "Prisoners whose HDC licence has been revoked have the right of appeal against the decision to return them to custody. The prisoner must make written representation to Scottish Ministers (in practice, the SPS) who must refer all appeals to the Parole Board for Scotland…. It should be noted that SPS has no authority over appeals and SPS is legally required to carry out the directions of the Parole Board in the case of all appeals."

[16] In the course of discussion it was noted that further guidance updated to February 2016 had been issued and at page 11 paragraph 72 the provision was replicated in the same terms. It was submitted that the guidance did no more than state the statutory position in that the defenders were bound to give effect to the decision of the Parole Board as required by section 17A(5) i.e. cancel the revocation of the licence. There were also averments critical of the defenders for not making the updated guidance freely available. That was disputed but in any event the relevant passage was in the same terms and so those averments were irrelevant. A further contention of the pursuer on record as regards the guidance was that, *esto* the defenders had a discretion in the release of prisoners in circumstances such as the present, the guidance indicated the way in which the defenders ought to exercise their discretion where the Parole Board revoke a licence i.e. the release of the prisoner. Any deviation from the stated position would mean the law lacked the requisite qualities of certainty and foreseeability. It was submitted firstly that the guidance did not say that the defenders will release the prisoner in such circumstances. Further, certainty and foreseeability in the law arose from consistent application of section 17A, having regard to the statutory considerations in section 3AA.

[17] Finally, counsel for the defender addressed the pursuer's averments that his convention rights under Article 5 of the European Convention of Human Rights (ECHR) had been breached on the basis that the pursuer had been imprisoned without lawful authorisation and further, that the failure to release following the Parole Board's decision was a breach of Article 5.4 The article provides *inter alia*:

> "**Right to liberty and security**
>
> 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; …
>
> 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."

[18] It was submitted that there could be no breach in the present case where the pursuer had been lawfully detained by a competent court following conviction and there had been no challenge to the validity of that. Further, he had been detained as consequence of the lawful warrant dated 5 February 2016 following sentence by order of a competent court, that ending at his EDL on 16 June 2016. Accordingly Article 5.1 was not engaged. Further, the requirements of Article 5.4 were satisfied by the original sentence. Reference was made to the decision of the Supreme Court in *Regina (Whiston)* v *Secretary of State for Justice* [2015] AC 176 which decided that when a prisoner serving a determinate sentence was released on licence and is later recalled, Article 5.4 did not apply.

[19] It was accordingly submitted that there was no entitlement to damages in the absence of unlawful imprisonment or a breach of convention rights. However, *esto* there was any entitlement to damages these should be nominal given the pursuer would in any event have been deprived of his liberty by being released on HDCL given the conditions attached to that.

Submissions for the pursuer

[20] Counsel for the pursuer, in support of his contention as to the meaning of section 17A(4) and (5), submitted that the provisions were ambiguous and relied on the approach of the Parole Board in the expression of their decision and also to the general presumption in favour of liberty referred to by Lord Dyson in the case of *R(Lumba)* v *Secretary of State for the Home Department* [2012] 1 AC 245 at para. 53. No assistance could be gleaned from section 17 as the provisions there were different and performed a quite different role. Notwithstanding the provisions of section 3AA(5)(f) restricting the power to release under licence, the terms of the decision of the Parole Board reflected the correct view of how section 17A(4) and (5) should be interpreted with the effect that the prisoner should be released. In short, cancellation of the revocation of licence required the defenders to release the pursuer following that decision.

[21] Counsel for the pursuer further submitted in the event he was wrong about his construction of the statute and that the defenders had a discretion in circumstances such as the present, the guidance issued by the defenders indicated the manner in which that discretion ought to be exercised. It was submitted that the defenders were legally required to carry out the directions of the Parole Board and any other approach would be inconsistent with the defenders' stated position in the guidance. Any deviation from that stated position would mean that the relevant law lacked the requisite qualities of certainty and foreseeability (*Lumba,* per Lord Dyson at paragraph 26).

[22] Separately counsel for the pursuer argued that the pursuer's rights under Article 5 of ECHR had been breached. Counsel argued that Article 5 was engaged in this case and more particularly 5.4. He referred in support of his submission to the case of *Mooren* v *Germany* [2010] 50 EHRR 23. Counsel explained that the pursuer was not founding on Article 5 as an

independent breach but that Crave 2 which sought a declarator of breach was in truth ancillary to the declarator sought in Crave 1, the point being that the relevant domestic provisions should be interpreted in line with the Convention. Reference was made to paragraph 76 of the decision in *Mooren* which referred to the necessity of legal certainty where deprivation of liberty is concerned.

[23] In relation to damages, counsel founded on the case of *Thompson* v *Commissioner of Police* [1998] QB 498 where the Court of Appeal, at page 515, gave some guidance as to the quantum of damages in a case of wrongful arrest and imprisonment. I was informed that there were no reported cases in Scotland in relation to this aspect that counsel had discovered. In *Thompson* the court stated:

> "In a straightforward case of wrongful arrest and imprisonment the starting point is likely to be about £500 for the first hour during which the plaintiff has been deprived of his or her liberty. After the first hour an additional sum is to be awarded, but that sum should be on a reducing scale so as to keep the damages proportionate with those payable in personal injury cases and because the plaintiff is entitled to have a higher rate of compensation for the initial shock of being arrested. As a guideline we consider, for example, that a plaintiff who has been wrongly kept in custody for 24 hours should for this alone normally be regarded as entitled to an award of about £3000. For subsequent days the daily rate will be on a progressively reducing scale."

[24] Counsel submitted that this approach could be adopted as a basis for calculation damages and that the pursuer's averments were sufficient for proof.

[25] In reply counsel for the defender submitted that the case of *Lumba* fell to be distinguished as it involved the scrutiny of the application of the policy of the Secretary of State. The case of *Mooren* could also be distinguished on the facts, the applicant there having been held on remand. As for damages, the case of *Thompson* should be treated with caution involving as it did different forms of damages and further on the basis that the pursuer in this case would, if the defenders had released the pursuer following the decision of the Parole Board, have been released on curfew with the restrictions on liberty which that entailed.

Discussion

[26] The starting point appears to me to try and ascertain the meaning of the relevant provisions of sections 3AA and 17A from their terms. If there is ambiguity, it is then necessary to cast the net wider to see if the meaning can be construed. In my view, on a proper construction of the statute, the effect of the decision of the Parole Board was to cancel the revocation of the licence rendering the pursuer eligible once again for early release. In the absence of that decision there would have been a bar by virtue of section 3AA(5)(f). Section 3AA(5)(f) provided that the power to release under that section did not apply where *inter alia* "the prisoner has been released on licence under this Part of this Act …but (i) has been recalled to prison…" 17A(4) provides *inter alia* that the "…Parole Board may direct, or decline to direct, the Scottish Ministers to **cancel** the revocation" (my emphasis) and when that occurs section 17A(5) provides that "…the person is to be treated **for the purposes of section 3AA**…as if he had not been recalled to prison under this section" (my emphasis). There is no direction to release the prisoner. Further, the reference "for the purposes of section 3AA" must be taken to be a direct reference section 3AA(5)(f) it being the only provision barring consideration of release following recall. So the cancellation of the revocation is for the purpose of allowing consideration of an early release under section 3AA and, in the absence of express provision, cannot in my view go beyond that to direct release. Had it been the intention of Parliament to give the Parole Board power to order release under this provision, they could have done so, as they have done under section 17. The basic rule of law as to the presumption of liberty does not in my view assist the pursuer's contention as to the meaning of the provisions given my conclusion that the provisions are capable of a clear meaning. Further, I am not persuaded that the observation by Lord Dyson in *Lumba* (at para.

53) that "the right to liberty is of fundamental importance and that the courts should strictly and narrowly construe general statutory powers whose exercise restricts fundamental common law rights…" is apposite. It is difficult to imagine that such a consideration can be applied to decisions relating to discretionary early release.

[27] The decision of the Parole Board in relation to the pursuer of 10 May 2016 has to be looked at in that light and in particular the way the decision was expressed. The wording of the decision was that the pursuer "should be re-released on HDC licence". In the first place, it was not expressed as a direction to release. In the second place, even if it might be so construed, it could not be regarded as a direction to which the defenders required to give effect. The height of the Board's competence was to direct cancellation of the revocation. It might also be regarded as a recommendation as to what should happen in the event that the matter was placed before the defenders for their consideration. As we know, they did consider it again but decided not to re-release the pursuer on the information they had before them and which they did not have at the time of the earlier decision to release.

[28] Accordingly, as a matter of statutory interpretation, I have come to the view that the arguments advanced on behalf of the defenders are sound and that there is no legal basis for the pursuer's argument that the defenders required, as a matter of statutory obligation, to release the pursuer following the decision of the Parole Board. It is I think not difficult to understand the rationale for the difference between the provisions regarding the Parole Board's powers under section 17 and those under section 17A. The release provisions under section 3AA are discretionary. The defenders are under no legal obligation to release a prisoner under an HDCL. It is not a matter of right, in contrast to the situation where, for example, a short-term prisoner is released under section 1(1) having served one half of his sentence and is then recalled under section 17. The latter is entitled to release unconditionally

in the first instance. This principled distinction was recognised by Lady Hale in *Whiston* at para 59 in the context of Article 5 of ECHR (*infra*). I am unable to agree that there is ambiguity in the statute. It seems to me that the provisions are unambiguous and that the plain meaning is that which I have described.

[29] As regards the *esto* submission on behalf of the pursuer, that if the defenders had a discretion, then the guidance indicated the manner in which it would be exercised, I have come to the view that it is unsound. The particular passage relied upon which occurs in both the 2008 and 2016 guidance states "It should be noted that SPS has no authority over appeals and SPS is legally required to carry out the directions of the Parole Board in the case of all appeals." In my view there is nothing in that statement which is inconsistent with the terms of section 17A as properly construed. Properly construed the legal requirement upon SPS is to cancel the revocation of the decision to recall the prisoner. The terms of the circular do not go beyond that and do not state that the prisoner will be released in the event of a decision in the prisoner's favour. The defenders are then in a position to consider early release under an HDCL of new. It seems to me that this result provides the necessary certainty and foreseeability that the law requires when considering deprivation of liberty. To suggest on the other hand that a decision which is discretionary requires to be exercised in a particular way necessarily implies that it is not a discretion at all but something which is mandatory. In this case, for the reasons explained, it is not a result that the statute provides for. Provided that there is a consistent application of the statutory provisions, and there is no suggestion that that is the case, then I do not see the difficulty.

[30] The separate argument founded on Article 5 of ECHR was not presented as an independent ground upon which the claim in the present action could succeed. In the event, it was an argument used to bolster the principal argument on the construction of the

domestic statutory provisions. Section 3 of the Human Rights Act 1998 requires legislation to be read and given effect in a way which is compatible with Convention rights, so far as it is possible to do so. However, the court first needs to consider the ordinary construction of the statute before resorting to section 3 and only resorts to it where that construction gives rise to an incompatibility with and a breach of convention rights (*R (Wardle)* v *Crown Court at Leeds* [2002] 1AC 754, per Lord Hope at para. 79; *S* v *L* 2013 SC (SC) 20, per Lord Reed at paras. 15-17; and *Reed and Murdoch: Human Rights Law in Scotland (4th Ed.)* at para. 1.45).

[31] The terms of section 17A(4) and (5) of the 1993 have already been noted and I have indicated my conclusions as to their meaning. The question then arises – does this construction give rise to incompatibility with or breach of the Convention? In this context, it is relevant to consider the case of *Whiston*, founded on by the defenders, a decision of the Supreme Court under the provisions of the Criminal Justice Act 2003, applying to England and Wales, the claimant was serving a sentence of 18 months' imprisonment. Since his sentence was for a period of more than 12 months, he was entitled to be released on licence after serving half of it, known as the "custodial period". After he had served some four and a half months of his sentence the Secretary of State released him on licence pursuant to the home detention curfew scheme, under which a prisoner could be released during the custodial period. Just over six weeks later the Secretary of State recalled the claimant to prison on the ground that his whereabouts could no longer be electronically monitored at the place specified in the curfew condition in his licence. The claimant sought judicial review of that decision on the grounds that, since the exercise by the Secretary of State of the power to recall a prisoner could not be reviewed by the Parole Board or any other judicial body, the decision to do so had breached his right to liberty under article 5.4 of the Convention. The

court dismissed the appeal and Lord Neuberger, in delivering the judgment of the majority of the court said (at paras 38-40):

> "38 …Where a person is lawfully sentenced to a determinate term of imprisonment by a competent court, there is (at least in the absence of unusual circumstances) no question of his being able to challenge his loss of liberty during that term on the ground that it infringes article 5.4 . This is because, for the duration of the sentence period, "the lawfulness of his detention" has been "decided … by a court", namely the court which sentenced him to the term of imprisonment.
>
> 39 That does not appear to me to be a surprising result. Once a person has been lawfully sentenced by a competent court for a determinate term, he has been "deprived of his liberty" in a way permitted by article 5.1(a) for the sentence term, and one can see how it follows that there can be no need for "the lawfulness of his detention" during the sentence period to be "decided speedily by a court", as it has already been decided by the sentencing court. If that is the law, it would follow that Mr Whiston's appeal in this case must fail.
>
> 40 On this approach, article 5.4 could not normally be invoked in a case where domestic discretionary early release provisions are operated by the executive in relation to those serving determinative terms. I accept that, in the absence of the clear Strasbourg jurisprudence, there would be an argument for saying that article 5.4 should apply in such cases. However, as already observed, the notion that the article is not engaged because of the original sentence appears entirely principled, and the consequence that a person under such a regime has to rely on his domestic remedies, at least unless other Convention rights are engaged, seems to me to be not unreasonable in practice."

Lady Hale, while agreeing that the appeal be dismissed, said (at paras 58 and 59):

> "58 In this case, Mr Whiston was still serving the period of imprisonment which resulted from the sentence imposed on him by the court: it is called "the requisite custodial period". He was not yet entitled to release. Discretionary release subject to a home detention curfew enforced by electronic monitoring may or may not be regarded as a continued deprivation of liberty, depending on the length of the curfew, but it is very close to it. The prisoner may be recalled for the purely practical reason that it is not possible to monitor him at his address, which is nothing to do with whether he still constitutes a risk. It is the original sentence which means that he is still a prisoner.
>
> 59 Hence it seems to me that our domestic law, which gives the Parole Board the power to decide on the continued detention of a prisoner recalled after mandatory release on licence, but not after release on home detention curfew, draws a principled distinction. It is a distinction which is certainly consistent with the principles contained in article 5.1 and 5.4 of the European Convention. It is for that reason that,

> although agreeing with the ratio of the decision in this case, I would prefer it not to be taken further than the situation with which this case is concerned."

[32] The result of the foregoing seems to be that neither Article 5.1 nor 5.4 is engaged in the instant case. The pursuer was lawfully sentenced by a competent court to a determinate term of imprisonment and could not, in the absence of unusual circumstances (which are not averred) challenge his loss of liberty during that term on the ground that it infringed Article 5.4, because for the duration of the sentence period, the lawfulness of his detention had been decided by the sentencing court so that he had been deprived of his liberty in a way permitted by Article 5.1(a). In other words Article 5.4 was satisfied by the original sentence. The distinction drawn by Lady Hale as between prisoners recalled following mandatory release and those recalled following discretionary release did not affect the decision in that case nor does it in this, but highlights the important principled distinction mentioned above at paragraph [28].

[33] The passages in *Mooren* founded upon by counsel for the pursuer simply stress the importance that legal certainty be satisfied where deprivation of liberty is at stake and that it is accordingly essential that conditions for deprivation of liberty under domestic law be clearly defined. It seems to me that those requirements do little more than to state the position at common law already noted under reference to the *dicta* of Lord Dyson in *Lumba* noted above. In any event, those conditions are clearly defined in the statute and there is in my view no incompatibility there.

[34] Accordingly, it seems to me that there is no question of the relevant statutory provisions coming into conflict with Article 5 of the Convention and I have concluded that reference to it does not assist the pursuer in this case.

[35] As regards the damages and the reference to the case of *Thompson*, the observations of the court at page 515 were made over 20 years ago. Further, there is the difference that in a case such as this the pursuer while not being in prison would, in the event of his release, have been deprived of his liberty to a significant extent given the curfew and electronic monitoring. Accordingly, it seems to me that the guidance set forth in *Thompson* should be treated with a degree of caution for present purposes and cannot translate easily into any assessment of damages in the instant case. It seems to me that damages would require to be assessed broadly having regard to the circumstances of this case and taking account of the restriction in liberty that a release on a HDCL would involve.

[36] In view of my conclusions on the merits of the action, the issue of damages does not arise. However, had I been driven to do so I think the averments are sufficient to have allowed a proof thereon.

[37] Counsel were both agreed that the case was suitable for the employment of counsel and moved for sanction. It was further agreed that expenses should follow success. The pursuer submitted that if I found in favour of the defenders any award of expenses against the pursuer should be against him as an assisted person.

[38] In light of my conclusions, I have found in favour of the defenders and dealt with expenses accordingly. It further seems to me that in light of the novelty and difficulty of the issues in this particular case that sanction for counsel is reasonable.

Postscript

[39] The provisions of section 3AA(5)(f) were repealed with effect from 14 December 2006, but section 17A(3), (4) and (5) remained in place. The effect of that is that prisoners who have been recalled under section 17A are eligible for consideration of release under an HDCL, and

therefore presumably do not require the decision of the Parole Board cancelling the revocation to apply for release although the Board continues to have a role in that regard. I was not addressed on the change and express no view of the effect of it. I can only construe the statute as it stood at the relevant time. I would only observe that if my construction of the statute is correct, it might be thought that the provisions of section 17A(3), (4) and (5) serve no practical purpose. Whatever the position, the power of the Board as expressed in section 17A(4) remains unaltered.