

APPELLANT'S REPLY NOTE II: THE ARTICLE 5 ISSUES

Deprivation of liberty?

1. Applying the principles laid down in the *Gillan* case [Vol 2 tab 18, paras 23-25] the Appellant submits that the passengers were deprived of their liberty whilst they were confined in the coaches en route to London, as surely as if they had been locked in the back of a police van for the duration of the journey. They were, as the CA pointed out, 'virtual prisoners'. The passengers were not detained in the sense of being kept from proceeding or kept waiting (as in *Gillan*). This was confinement and removal to a different place. As to detention in a moving vehicle, see *Bozano v France* [Vol 6 tab 51].
2. The arguments advanced by the Respondent and the interested parties are most conveniently gathered together in the printed case for the Second Interested Party (the Commissioner of the Metropolitan Police) at p. 7 para. 14. Addressing those points in order:
 - (1) *The length of time is relevant but not determinative.* That may be so, but 2 and a half hours *confinement* is undoubtedly sufficient to amount to a deprivation of liberty for the purposes of Article 5.
 - (2) Three points are made at 2:
 - (a) *The claimant was able to move around the coach.* That again is true – but she was not able to leave the coach. Confinement in an enclosed space does not cease to be confinement merely because the person concerned has the residual liberty to move around within it. Deprivation of liberty does not depend on the size of a locked hospital ward or prison exercise yard.
 - (b) *The claimant would, in any event, have returned to London on the coach later in the day.* There is, in fact, no evidence that this is the case. She – and others on the coach – may well have wished to go somewhere else. The point is – as the CA rightly held – they were not free to make that choice.

(c) *The moving train analogy.* This is a bad point. The passenger on the train voluntarily enters it on terms which restrict his ability to get off between stations. That is not a deprivation of liberty.

(3) *The motive was not to detain the appellant, but to prevent her from travelling to RAF Fairford.* This confuses motive and intention. The *motive or goal* may have been to prevent the appellant reaching the airfield but the *intention* was to achieve this goal by means of confinement on the coach until it arrived in London. If the argument were sound it would mean that CS Lambert could have locked the appellant in a police cell for the afternoon but this would not be a deprivation of liberty if its motive was to prevent her from reaching Fairford.

(4) *If the confinement was proportionate, then it should not be classified as detention.* There is no authority to suggest that proportionality is the test to be applied for determining whether there has been a deprivation of liberty for the purposes of Article 5.

The criteria for determining this question are clearly set out in *Guzzardi* which makes no mention of a general proportionality test. The questions to be asked under Article 5 are well known. There are three. (a) Was there a deprivation of liberty applying the *Guzzardi* criteria? (b) Was it lawful and in accordance with a procedure prescribed by domestic law? (c) And did it fall within one of the prescribed purposes in Article 5(1)(a) to (f)?

In some cases it is necessary to *go further* and ask whether, even if the detention was lawful under domestic law, and fell within one of the specified categories, it was consistent with the object and purpose of Article 5 which is to protect and individual against arbitrariness. But it has never been suggested that this is a test for determining if a confinement amounts to a deprivation of liberty for the purposes of Article 5.

The approach advocated by the Commissioner would do away with the need to demonstrate that a detention was

lawful under domestic law – and it would do away with the need to bring a detention within the requirements of Article 5(1)(a) to (f). Providing it could be shown that a detention was, on the facts, proportionate Article 5 would not be engaged.

The drafters of the Convention deliberately spelt out a list of circumstances in which a deprivation of liberty can be justified under Article 5, which has been held to be exhaustive (see *Gillan* para. 21). It is entirely inconsistent with the object and purpose of the Convention to substitute a single and overarching proportionality test (which is what the Commissioner’s submission would amount to).

The final part of the Commission submission puts (p.10). amounts to a suggestion that if a detention is not capable of being brought within Article 5(1)(a) to (f) – but is otherwise judged to be proportionate – the best way to avoid the problem is to find that it is not a deprivation of liberty at all but a restriction on freedom of movement. There is no authority in the Strasbourg jurisprudence for so expedient an approach to the construction of Article 5.

Article 5(1)(b)

3. Assuming this did constitute a deprivation of liberty so as to engage Article 5, Respondent relies on Article 5(1)(b). He submits that this was detention to secure the fulfilment of an obligation prescribed by law [Respondent’s printed case para. 79, p. 33]. The obligations he points to are:
 - (a) The obligation to comply with the direction of CS Lambert not to proceed to RAF Fairford; and
 - (b) The obligation not to engage in conduct which would cause or precipitate a breach of the peace.
4. This argument did not form part of the Respondent’s petition to Your Lordships’ House for leave to the cross-appeal, which was expressly confined to Article 5(1)(c) (Respondent’s petition pp. 5-7, paras. 11-15). Nor is it supported by either of the interested parties.

Obligation not to breach the peace

5. Article 5(1)(b) concerns specific and concrete obligations imposed by law. In *Lawless v Ireland* [Vol 5 tab 39, para 9 p. 23] the Commission observed that Article 5(1)(b) "...does not contemplate arrest or detention for the prevention of offences against public peace and public order or against the security of the state, but for securing the execution of specific obligations imposed by law."
6. In *Engel v Netherlands* [Vol 5 tab 40, para 68, p. 672] The Court held that Article 5(1)(b) applies "...only those cases where the law permits the detention of a person to compel him to fulfil a *specific and concrete obligation* which he has *failed to satisfy*." The Court went on to observe that a wide interpretation of the words "obligation prescribed by law" would be incompatible with the rule of law which underpins the Convention, and would justify detention intended to "compel an individual to discharge their general duty of obedience to the law". That is precisely what the duty to keep the peace involves. (The same formulation is used in *Guzzardi* [Vol 5 tab 44, para 101]; and in *Ireland v UK* [Vol 5 tab 4, para 195]).
7. In *McVeigh, O'Neill & Evans v United Kingdom* [Vol 5 tab 45] the Commission emphasised that ordinarily Article 5(1)(b) could only apply where there had previously been a failure on the part of the detained person to comply with a legal obligation. It is true that in that case the Commission accepted (in the context of anti-terrorist legislation) that there could be exceptional circumstances where detention under Article 5(1)(b) could be justified in the absence of a prior failure on the part of the detained person to comply with their obligations. This was held to justify detention for the purposes of an interview on entry into the United Kingdom in order to investigate possible involvement in terrorism. But quite apart from the terrorist context (which was clearly the exceptional circumstance the Commission was referring to) the obligation in that case was expressly *imposed by law*. It was not the result of an executive decision by a police officer to confine an individual so as to prevent a breach of the peace.
8. The issue was however addressed directly by the ECHR, in connection with arrests for breach of the peace in *Steele and others v United Kingdom* [Vol 6 tab 60]. There it was held that arrest by the police to prevent a breach of the peace fell within Article

5(1)(c) not Article 5(1)(b): para. 46 50 [pp. 635-636]. The consequence of that classification is that the purpose of the arrest or detention must be to bring the individual before the court (see below). As the Divisional Court pointed out, an individual would be deprived of that safeguard under Article 5(1)(c) if detention for breach of the peace were to be re-classified as detention within Article 5(1)(b) [judgment paras 45-46].

Obligation to comply with CS Lambert's "order" not to proceed to Fairford

9. The alternative way in which it is put is that CS Lambert had given an order that the coaches should not be permitted to proceed to Fairford – and the detention was effected to secure compliance with this order.
10. The Appellant submits that Mr. Lambert's decision to send the coaches back to London does not amount to a pre-existing "*obligation prescribed by law*" which the appellant had failed to fulfil. At best, it was a lawful operational decision taken by a police officer. There is no evidence that any order was in fact communicated to the appellant. Indeed the evidence is to the opposite effect. Nor is this a case in which there had been any previous non-compliance with a legal obligation (see *Engel*). The present case cannot be brought within the exception recognised in *McVeigh*. This case concerns breach of the peace, not terrorism – and the obligation postulated by the Commissioner was an executive order and not an *obligation prescribed by law*.
11. The decision to return the coaches was recorded, reasoned and so far defended on the basis that it was action taken squarely to prevent a breach of the peace. Re-casting it as action taken to secure compliance with CS Lambert's order that the passengers should be prevented from reaching Fairford is an afterthought. That is not a sufficiently concrete and specific pre-existing obligation. Instead, it falls within Article 5(1)(c) – *Steele* – which carries a requirement that the purpose of the detention must be to bring the person concerned before a court. This is entirely consistent with the position under domestic law: Where a person is arrested for a breach of the peace there is a requirement that they must be brought before a magistrates court as soon as reasonably practicable: *Williamson* [Vol II tab 14].

12. It would be very odd if an operational instruction issued with the intention of preventing a breach of the peace could convert a detention which *does not* fall within Article 5(1)(b) (because it is detention to prevent a breach of the peace) into one which *does* (because it is detention to secure the fulfilment of an operational decision taken to prevent a breach of the peace). If that were right, any arrest for breach of the peace could fall within Article 5(1)(b). This would simply be a back door means of getting around the fact that the general duty not to breach of the peace is an insufficiently concrete obligation to meet the requirements of Article 5(1)(b).
13. It would be especially odd if that result were to follow in a case such as the present where the individual was given no opportunity voluntarily to comply. This is not one of those cases in which a person has been arrested for obstruction of a police officer after persisting in a particular course of action which they have been ordered to stop.

Article 5(1)(c)

14. The correct construction of Article 5(1)(c) was exhaustively and authoritatively considered by the Commission and the Court in *Lawless v Ireland* [Vol 5 tab 39, pp. 23-27 paras. 9-13] by reference to the language used in Article 5(1)(c) (both in the English and the French texts), the object and purpose of the provision, its relationship with Article 5(3), and the *travaux préparatoires*. The Court concluded that the words “*effected for the purpose of bringing him before the competent legal authority*” qualify all three forms of detention contemplated by Article 5(1)(c), including arrest or detention “*when it is reasonably considered necessary to prevent him committing an offence*”.
15. In *Brogan v United Kingdom* [Vol 6 tab 53] the Court held that Article 5(1)(c) imposed an obligation of *original purpose*: paras. 51-54. It must have been the intention of the person making the arrest or effecting the detention to bring the detained before a court at the time the arrest was made. In that case the Court was satisfied that it had been the intention of the authorities to bring criminal charges and produce the applicants before a court if the evidence obtained, including the evidence obtained by questioning the applicants was sufficient to justify this. Article 5(3) imposed an obligation of *performance*. The detained person must in fact be produced before a court promptly. However the Court in *Brogan*

also recognised that Article 5(3) would not be breached if a detained was in fact released before it was practicable to produce him before a court: para. 58. It would be absurd if the state was required to continue a person's detention when there were no longer grounds to justify it merely in order to meet the requirement of production before a court.

16. The effect of these two decisions is clear:

- (a) The requirement that an arrest or detention under Article 5(1)(c) must be effected with the original purpose of bringing the detained person before a court applies to all three forms of detention authorised by the paragraph. It applies in other words not only to arrest on reasonable suspicion but also to arrest or detention for the "*when it is reasonably considered necessary to prevent him committing an offence*". It thus applies to arrest or detention to prevent a breach of the peace.
- (b) As is clear from its wording, Article 5(3) also applies to all three forms of detention authorised by Article 5(1)(c). A person detained on any of those grounds has the right to be brought promptly before a judge. Thus, the obligation of performance is consistent with the obligation of original purpose.
- (c) But it does not follow that the person must in fact be produced before a court. If circumstances change, so that detention is no longer justified, then he can properly be released before he is brought before a court without infringing either Article 5(1)(c) or Article 5(3).

17. All of this is entirely consistent with domestic law governing arrest for breach of the peace. As Dyson L.J. explained in *Williamson* [Vol II tab 14 paras 19-21]:

- (a) A person arrested for breach of the peace must be taken to a police station and brought before a magistrates court as soon as practicable (*cf.* Article 5(1)(c) as interpreted in *Lawless*).
- (b) If a police officer considers that there is no longer a real danger of a repetition and that a court-imposed bindover is

unnecessary, then continued detention is unlawful and he must release (*cf.* the ruling on Article 5(3) in *Brogan*).

- (c) If there is a continuing danger of repetition then then detention can lawfully continue, but it will become unlawful if the person is not produced before a magistrates court as soon as reasonably practicable (*cf.* Article 5(3)).

18. As the Divisional Court pointed out (judgment para. 46) it follows that a person may only be detained to prevent a breach of the peace where the purpose – at the time of the detention – is to bring him before a magistrate to be bound over. This applies not just to arrest but to detention short of arrest (eg detention by a private citizen). As May LJ put it (at para. 23):

“There is a common law power of detention to prevent a breach of the peace which may not also amount to arrest (see *Albert v Lavin*). If a person is arrested and detained (or just detained) for any prolonged period, they must be taken before a magistrates court.”

19. The Divisional Court’s conclusion (at para. 46) was that the position at common law is entirely consistent with Article 5(1)(c) as interpreted in *Lawless*. This was because a detention which was for a very short time (transitory detention) would not amount to a deprivation of liberty within the meaning of Article 5. It was “scarcely detention” at all. It was better characterised as the use of reasonable force. If a person was momentarily detained, there was no obligation to bring him before a magistrate, provided he is released unconditionally the moment the threatened breach of the peace is past. But anything which extended beyond a transitory detention would not be justified unless there was an arrest with a view to bringing the person before a magistrates court. As May L.J. observed:

“How long transitory detention of this kind without arrest may lawfully last will depend on the facts of the case, but it cannot be for long.”

As to the present case, there was no doubt;

“...detention on the coach for two-and-a-half hours went far beyond anything which could conceivably constitute transitory detention such as I have described.”

The Respondent's challenge to Lawless

20. The Respondent and the interested parties all submit that *Lawless* was wrongly decided and that Your Lordships' House should not follow it. The arguments are most clearly summarised in the Commissioner's printed case at p. 11.
21. Section 2 of the Human Rights Act does not of course oblige domestic courts to follow a decision of the Strasbourg Court. There are examples where Your Lordships' House has not done so. However, none is an appropriate comparison. This is not a case where the reasoning of the Court was unclear or unsound or where the law has changed significantly since the date of the decision. Nor is it a case where the ECHR has misunderstood or mischaracterised provisions of domestic law. Still less is it a situation in which evolving standards, or the emergence of a European consensus requires the re-evaluation of an earlier ruling of the court.
22. As to the merits, the Commissioner makes 8 points:
 - (1) First, he relies what is suggested to be the natural construction of the words of 5(1)(c). But the Court and Commission extensively examined all relevant sources of interpretation in *Lawless*. It has never been questioned in any subsequent decision. Indeed, it has been confirmed (see eg *De Jong v Netherlands* [Vol 5 tab 49 para. 44 p. 35])
 - (2) Secondly, he invokes the object and purpose of Article 5. But this again was considered in *Lawless*. Indeed, the Court expressly stated that the interpretation which followed from the natural construction of the words was entirely in keeping with the object and purpose of the provision.
 - (3) Thirdly, he suggests that the principle in *Brogan* (that a person can be released if circumstances change is

inconsistent) with the principle in *Lawless*. But this is not so. *Lawless* establishes a principle relating to *original purpose*. *Brogan* allows for the possibility that circumstances may change so that a person can come to be released before they are produced before a court. The resulting position is entirely consistent with domestic common law principles governing detention following arrest for breach of the peace. If the Court in *Brogan* considered that *Lawless* wrongly decided, it would have said so. Instead, it affirmed the *Lawless* approach to construction.

- (4) Fourthly, he invokes a general proportionality principle of fair balance. But it is difficult to imagine that the Court overlooked this in *Lawless*, and that it has continued to overlook it ever since.
- (5) Fifthly, the Commissioner points to the differently worded provisions of Article 9 of the ICCPR and suggests that the ECHR has recognised that the Convention should, where possible, be interpreted in harmony with the ICCPR. But here there is an authoritative interpretation of a differently worded provision.
- (6) The Commissioner's sixth point involves the suggestion that an acceptance of the *Lawless* principle would require people to be detained even when there were no longer grounds to fear a breach of the peace. For the reasons I have already outlined, that is wrong.
- (7) His seventh point is that *Lawless* was concerned with extended administrative detention. That is right and it is a point of distinction. But this aspect of the reasoning in *Lawless* was based on the correct approach to construction of Article 5(1)(c). In that respect it was not, as Mr. Pannick suggests, a fact-sensitive decision.
- (8) Finally, he suggests that the interpretation of Article 5(1)(c) in *Lawless* carries less weight because it was not a necessary part of the Court's ultimate decision – given that there was a derogation in place which the Court upheld. But this involves a *non-sequitur*. The reverse is in fact the case. It was only necessary for the court to consider the validity of the derogation because the conduct complained of would

otherwise have amounted to a breach of Article 5. So the construction given to Article 5 was an essential step in the Court's reasoning.

Ben Emmerson QC
Michael Fordham QC

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