

Psychiatric evidence and mandatory disposal: Article 5 compliance?

Kevin Kerrigan*

Abstract

This Article considers the position of defendants charged with murder who are found to be unfit to plead or insane at the time of the offence. If the court is satisfied that the defendant did the act charged as murder then the judge has no option but to impose a hospital order with restrictions. This Article examines the statutory requirements for medical evidence prior to a finding of unfitness or insanity and asks whether this satisfies the requirements of Article 5 of the European Convention on Human Rights. It concludes that there is no obvious justification for requiring defendants to be sent to hospital in the absence of a conviction where the medical evidence does not indicate that such a disposal is necessary. It follows that the current practice is likely to violate the Convention.

Introduction

Disposal of cases in unfitness and insanity cases

The passing of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (the 1991 Act) introduced a significantly more enlightened framework for dealing with defendants who were unfit to plead or insane. First, it implemented a trial of the facts procedure to ensure that unfit accused could be acquitted outright if it could not be proved that they had done the act charged as the offence. Secondly, it gave the judge a much broader discretion in respect of disposal options.¹ Whereas previously an unfit or insane accused faced a mandatory admission to hospital order with restrictions,² the 1991 Act permits the judge to impose a range of additional disposals, namely an admission order without restrictions, a guardianship order, a supervision and treatment order or, if appropriate, an order for absolute discharge.³

* Solicitor and Principal Lecturer in Law, Northumbria University. I would like to thank Professor Don Grubin for his helpful comments on an earlier draft of this paper. I am responsible for any remaining errors.

1 For a discussion of the 1991 reforms see White, *The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991* [1992] *Crim LR* 4.

2 *Criminal Procedure (Insanity) Act 1964* (The 1964 Act) prior to 1991 permitted only one disposal – an admission order with restrictions without limit of time.

3 1991 Act section 3 – this introduced the range of disposals into the 1964 Act section 5(2)(b).

Statutory requirements for medical evidence in unfitness and insanity cases

A jury is not permitted to find that a person is unfit to plead except on the oral or written evidence of two doctors at least one of whom is approved under section 12 of the Mental Health Act 1983.⁴ The same requirement applies to a finding of insanity.⁵ The role of the psychiatrist in cases where offenders may be unfit or insane involves an assessment of whether the tests for unfitness⁶ or insanity⁷ are met in view of the state of the accused. In cases other than murder, the psychiatrist may often be asked for an opinion regarding disposal, which is dependent to a significant degree on the type of mental disorder the accused is found to suffer from.

Residual mandatory disposal for murder cases

Section 5(3) of the Criminal Procedure (Insanity) Act 1964 (the 1964 Act) provides that the range of disposals outlined above “shall not apply where the offence to which the special verdict or findings relate is an offence the sentence for which is fixed by law”. In such cases the only disposal available is an admission order with a restriction order without limit of time.⁸ The only offence for which the sentence is fixed by law is murder. This provision thus represents a mandatory disposal for those found unfit to plead to the indictment or those acquitted by way of the special verdict of not guilty by reason of insanity because they were insane at the time of the commission of the offence.

Triggering Article 5 of the European Convention

Article 5 of the European Convention on Human Rights protects the right to liberty and security of the person. The right is not absolute but is subject to interference where the deprivation is “lawful”, “in accordance with a procedure prescribed by law” and for a permitted reason. These reasons include detention as a consequence of conviction for a criminal offence under Article 5(1)(a) and detention of those who are of “unsound mind” under Article 5(1)(e). It is important to note that defendants who are found unfit to plead or insane are not convicted of a criminal offence.⁹ It follows that Article 5(1)(a) cannot justify their detention. If detention is to be justified, then, it must comply with the requirements of Article 5(1)(e). The leading case of *Winterwerp v Netherlands*¹⁰ considered a challenge to detention under Dutch mental health legislation. The European Court of Human Rights made the following important ruling regarding detention for mental disorder:

“The next issue to be examined is the ‘lawfulness’ of the detention for the purposes of Article 5 (1) (e). Such ‘lawfulness’ presupposes conformity with the domestic law in the first place and also ... conformity with the purpose of the restrictions permitted by Article 5 (1) (e); it is required in respect of both the ordering and the execution of the measures involving

4 1964 Act section 4(6).

5 1991 Act section 1(1). Additionally, section 1(2) provides that for insanity cases the provisions of section 54(2) and (3) of the Mental Health Act apply so as to permit a medical report without it being proved in evidence subject to certain safeguards. This does not appear to apply to unfitness cases.

6 *R v Pritchard* (1836) 7 C & P 303. See Blackstones *Criminal Practice* 2002 D11.17. The jury direction in

this case has since become firmly embodied in the law and has been approved on numerous occasions – see *R v Friend* [1997] 2 All ER 1011.

7 *McNaughtens’s Case* (1843) 10 Cl & F 200, [1843–60] All ER Rep 229. See Blackstones 2002 A3.12–3.18.

8 1991 Act Schedule 1 para 2(2).

9 1964 Act section 4A(2); 1964 Act section 1.

10 (1979) 2 EHRR 387.

deprivation of liberty. ... in a democratic society subscribing to the rule of law, no detention that is arbitrary can ever be regarded as 'lawful'. ... In the Court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'. The very nature of what has to be established before the competent national authority – that is, a true mental disorder – calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder."¹¹

For present purposes the essential requirements for detention under Article 5(1)(e) are thus:

- (i) the defendant is reliably shown on the basis of objective medical expertise to have a true mental disorder;
- (ii) the disorder is of a kind or degree warranting compulsory confinement; and
- (iii) the disorder must persist throughout the detention. This in turn requires periodic access to an authority with the characteristics of a court in order to review the lawfulness of the continued detention under Article 5(4).

In *Verbanov v Bulgaria*¹² the European court confirmed the *Winterwerp* criteria and also emphasized the need to avoid arbitrary decision-making:

"The Court further reiterates that a necessary element of the "lawfulness" of the detention within the meaning of Article 5(1)(e) is the absence of arbitrariness. The detention of an individual is such a serious measure that it is only justified where other, less severe measures, have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. The deprivation of liberty must be shown to have been necessary in the circumstances."¹³

The principles in *Winterwerp* have recently been followed in the domestic courts in *R (H) v Mental Health Review Tribunal for North and East London Region*.¹⁴ The Court of Appeal considered the Mental Health Act 1983 requirements for discharge of restricted patients.¹⁵ Lord Woolf said of the Article 5(1)(e) requirements as follows:

"... the test is whether it can 'reliably be shown' that he or she suffers from a mental disorder sufficiently serious to warrant detention."¹⁶

The Court found that the statutory provisions effectively reversed the burden of proof required by the Convention. The provisions could not be interpreted compatibly with the Convention right so the Court granted a declaration of incompatibility under section 4 of the Human Rights Act 1998.¹⁷

11 *Ibid.* at paragraph 39.

12 Application no. 31365/96, European Court of Human Rights, judgment 5 October 2000.

13 *Ibid.* at paragraph 46.

14 [2001] EWCA Civ 415 [2002] Q.B. 1.

15 See sections 72 and 73.

16 *Ibid.* at paragraph 29.

17 The government subsequently made a remedial order under section 10 of the Human Rights Act to make the law compatible with Article 5 – Mental Health Act 1983 (Remedial) Order 2001, 2001/3712.

Is Article 5 breached by compulsory admission to hospital?

Central to the justification for detention under Article 5(1)(e) is the medical evidence. It must reliably show that the person has a true mental disorder which requires confinement. The potential problem with the tests for unfitness and insanity is that they do not mirror the requirements of the Convention for lawful detention.¹⁸ Moreover, the legislation does not require the judge to consider whether the person suffers from a “true mental disorder” before imposing an admission order.¹⁹ It follows that a person could be admitted to hospital without any evidence that they are currently suffering from a mental disorder, or even with contrary evidence. Such a situation would be in clear conflict with the Article 5 principles outlined above. As will be seen, the Human Rights Act 1998 provides a remedy for this defect in respect of most cases but not where the charge is murder.

The medical evidence in unfitness cases goes to the question of ability to participate in the proceedings. This has been interpreted as meaning that the accused can, “understand and reply rationally to the indictment ... exercise his right to challenge jurors, understand the details of the evidence ... instruct his legal advisers and give evidence himself...”²⁰ It follows that an accused can be unfit to plead without having a recognised mental disorder, let alone one requiring detention. Indeed, courts have upheld findings that accused are unfit in cases where no mental health problem at all was identified but rather a physical communication problem.²¹ Such cases are rare²² but the overriding point is that the medical evidence is used to ascertain a different issue (fitness) from that required by the Convention (mental disorder).

The medical evidence in an insanity case goes to the question of whether an accused was insane under the test in *McNaughten's Case*:

“... it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know what he was doing was wrong.”²³

The courts have made clear on a number of occasions that this test does not necessarily conform to medical conceptions of mental disorder. In *R v Sullivan*²⁴ Lord Diplock rejected medical evidence that an epileptic seizure should not be a disease of the mind where it is only transitory:

“The nomenclature adopted by the medical profession may change from time to time ... But the meaning of the expression ‘disease of the mind’ as the cause of a ‘defect of reason’ remains

18 See generally *Emmerson and Ashworth, Human Rights and Criminal Justice Sweet and Maxwell, 2001, pages 296 et. seq.*

19 The legislation in fact imposes no express limits on the judge's ability to impose an admission order. Section 5(2)(b) of the 1964 Act as amended imposes a suitability test in respect of community-based disposals but this does not apply to the hospital disposal.

20 *R v Friend op. cit.*

21 See *Pritchard op. cit.* where the accused was deaf and speech impaired, and *R v Governor of Stafford Prison ex parte Emery [1909] 2 KB 81* where the accused was deaf and could not read or communicate through sign language. *Darling J* said at page 87–88: ‘It is contended that the prisoner has not been found to be insane, and that therefore there is no jurisdiction to order him to be

detained in custody. It seems to me that the finding of the jury amounts to a finding that the prisoner is non-sane so as to give the court jurisdiction to act under s.2 of the Criminal Lunatics Act, 1800. It is not merely a finding that he stands mute by the visitation of God ... but it is a distinct finding that he is incapable of understanding and following the proceedings and of making his own view, if any, known.’

22 But they are not unknown. There were at least 2 such findings in the first 5 years of the operation of the 1991 Act. See *McKay and Kearns An Upturn in Unfitness to Plead? Disability in Relation to the Trial under the 1991 Act [2000] Crim LR 535.*

23 (1843) 10 Cl & F 200 at page 210 per *Tyndal C.J.*

24 [1984] AC 156.

unchanged for the purposes of the application of the M'Naughten rules ... it matters not whether the aetiology of the impairment is organic, as in epilepsy, or functional, or whether the impairment itself is permanent or is transient and intermittent, provided that it subsisted at the time of commission of the act."²⁵

This built on earlier dictum to similar effect in *R v Kemp*²⁶ where the medical evidence differed as to whether lack of mens rea due to arteriosclerosis was caused by a disease of the mind. Devlin J ruled that it did not matter which medical evidence was accepted:

"In my judgment the words ... are not to be construed as if they were put in for the purpose of distinguishing between diseases which have a mental origin and diseases which have a physical origin ... Hardening of the arteries is a disease which is shown on the evidence to be capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, of its reasoning, understanding and so on ... and so is a disease of the mind ... within the meaning of the Rules."²⁷

This case, along with others where insanity has been found such as *R v Hennessey*²⁸ (hyperglycaemia) and *R v Burgess*²⁹ (sleepwalking) clearly show that insanity does not necessarily entail a mental disorder requiring detention.

There is an additional difficulty in respect of insanity. It should be recalled that the special verdict is returned only if the accused was insane *at the time of the offence*. It follows that the medical evidence must look back in time rather than considering the position of the accused when he or she appears before the court. There could be a long delay between the offence being committed and the trial taking place. Even if the accused was suffering from a mental disorder requiring detention at the time of the offence this does not mean that the same must hold true at the time of the trial. Treatment received in the interim or changed circumstances may mean that the disorder has abated. The European Court has ruled that the Convention requires that:

"... no deprivation of liberty of a person considered as being of unsound mind may be deemed in conformity with Article 5(1)(e) of the Convention if it has been ordered without seeking the opinion of a medical expert. Any other approach falls short of the required protection against arbitrariness, inherent in Article 5 of the Convention. ... Furthermore, the medical assessment must be based on the actual state of mental health of the person concerned and not solely on past events. *A medical opinion cannot be seen as sufficient to justify deprivation of liberty if a significant period of time has elapsed.*³⁰

The upshot for both unfitness and insanity cases is that hospital detention under the 1964 Act may often not meet the criteria in Article 5 and will therefore violate the Convention.

The impact of the Human Rights Act 1998 on compulsory hospital disposal

It is submitted that the Human Rights Act can and should be used to avoid breaches of Article 5 in the disposal process. Judges ought to have in mind that they are a public authority under the Act³¹ and must therefore act compatibly with the Convention rights unless prevented from doing so by primary legislation.³² The Act permits defendants to rely on the Convention rights in any

25 *Ibid.* at page 172.

26 [1957] 1 QB 399.

27 *Ibid.* at page 408.

28 [1989] 1 WLR 287.

29 [1991] 1 QB 92.

30 *Verbanov v Bulgaria op. cit.*, *emphasis added*.

31 Human Rights Act section 6(3).

32 *Ibid.* section 6(1).

legal proceedings³³, which clearly includes the criminal trial and the disposal process. Moreover, section 3 of the Human Rights Act requires the courts to interpret all legislation, including the 1964 Act, compatibly with the Convention rights unless it is impossible to do so.³⁴

It follows that despite the legislation apparently *permitting* the judge to detain a person in breach of Article 5, it does not *require* such an approach. The 1991 Act introduced the range of “non-detention” disposals outlined earlier. The courts must therefore draw a distinction between a *finding* of unfitness or insanity and the appropriate *disposal* of a defendant who has been found to be unfit or insane. In this way the legal tests for unfitness and insanity can remain as they are³⁵ but detention will not be ordered unless there is clear medical evidence that the accused currently suffers from a true mental disorder. If this evidence has not emerged from the psychiatric reports leading to the finding of unfitness or insanity then separate medical evidence will be required. In those cases where the evidence does not show there is a mental disorder the accused must be dealt with by way of a community-based disposal.

The insuperable problem of mandatory disposal

As has been seen, where the accused was charged with murder then the trial judge has no choice but to impose an admission order with a restriction order. This mandatory disposal seems on the face of it to violate Article 5 as in those cases where the evidence does not show the accused has a mental disorder the accused will nonetheless be sent to hospital. The Human Rights Act cannot lead to a different conclusion as it preserves the validity and enforceability of legislation that cannot be interpreted compatibly with the Convention – sometimes referred to as “irredeemable incompatibility”.³⁶ Moreover, a judge does not act unlawfully under the Human Rights Act if s/he is compelled to so act by legislation that is incompatible with the Convention.³⁷

The Court of Appeal recognised the apparent impasse in *R v Heather Grant*³⁸. The main issue in the case was whether the defence of provocation could be relied upon in the trial of the facts, the Court of Appeal ruling that it could not.³⁹ The Court also rejected an Article 6 submission that the decision of the prosecution to charge murder amounted to pre-determination by a body that was not independent and impartial.⁴⁰ However, their Lordships identified one important point of concern:

33 *Ibid.* section 7(1)(b).

34 *Ibid.* section 3(1).

35 Note that there has been substantial criticism of the current tests. It is not here suggested that the tests are faultless, only that the Convention does not require the alteration of the substantive tests, but a change in the approach towards disposal.

36 *Per Lord Hobhouse in R v DPP ex parte Kebilene* [2000] 2 A.C. 326. In *Poplar v Donoghue* [2001] 3 WLR 183 the Court of Appeal recognised the limits of the section 3 interpretative duty: “... if it is necessary in order to obtain compliance to radically alter the effect of the legislation this will be an indication that more than interpretation is involved ... In this case [counsel] contends that all that is required is to insert the words ‘it is reasonable to do so’ into the opening words of [the provision]. The amendment may appear modest but its

effect would be very wide indeed. It ... would defeat Parliament’s original objective ... It would involve legislating” (*Per Lord Woolf at paragraphs 76–7.*) See also *Re S (Children) (Care Order: Implementation of Care Plan* [2002] UKHL 10; [2002] 2 All E.R. 192.

37 Section 6(2)(a).

38 [2001] EWCA Crim 2611, 22 November 2001.

39 The issue had been left open by the House of Lords in *R v Antoine* [2001] 1 AC 340. See Kerrigan, *Unfitness to Plead, Insanity and the Mental Element in Crime* [2000] *Journal of Mental Health Law* 121.

40 Their Lordships noted that Article 6 did not apply to pre-charge decisions, or, following *R v Moore, Kerr and Haroon* [2001] EWCA Crim 2024, to the trial of the facts. Moreover, there could be no criticism of the CPS charging decision, which had fully complied with the Code for Crown Prosecutors – see paragraph 49 of the judgment.

“... whether the procedures give proper effect to the second of the conditions laid down for detention under Article 5(1)(e). To adopt the formulation in *R (H) v London North and East Mental Health Review Tribunal*, ‘the test is whether it can be reliably shown that the [person] suffers from a mental disorder sufficiently serious to warrant detention’. The procedures under the 1964 Act are not directed specifically to that question. The issue under section 4 is whether the defendant has sufficient intellect to instruct his legal team, to plead to the indictment, to challenge jurors, to understand the evidence and to give evidence. Those criteria do not correspond directly to the criteria for a mental disorder sufficiently serious to warrant detention and it may be possible for a person to be found unfit to be tried without his suffering from a mental disorder sufficiently serious to warrant detention. Yet once a person facing a charge of murder has been found to be unfit to be tried, there is no further consideration of his mental condition under the statutory procedures prior to admission to hospital. ... This feature of the procedure does raise the question of whether detention is ‘arbitrary’ in the sense explained by the European Court of Human Rights in *Winterwerp* and *Johnson*.⁴¹

Although these comments relate to the unfitness procedure they are equally applicable to insanity cases. If the detention is arbitrary then the only domestic remedy is a declaration of incompatibility under section 4 of the Human Rights Act. A trial judge does not have jurisdiction to make such an order so defendants will have to appeal in order to seek an order.⁴² The government would then have to consider whether to introduce a remedial order. It should be noted that despite the potential for a breach of Article 5, the medical evidence might be sufficient for the judge to find a mental disorder requiring detention. In such cases then, although the judge has no discretion over the disposal, the detention will not in fact violate Article 5. Indeed, the Court of Appeal in *Heather Grant* found that “the conditions for detention, albeit not considered in terms under the statutory procedure, were in fact met.” All of the medical evidence stated that the appellant suffered from mental impairment, albeit one expert said that guardianship could have been considered had the statute not precluded it.

Deference to Parliament?

The Court of Appeal did not therefore have to resolve the issue of compatibility in the instant case. Their Lordships thought that the apparent breach might be avoided by taking a wide view of the discretion of Parliament within Article 5:

41 *R v Heather Grant* *op. cit.* paragraph 52.

42 There is no right of appeal to the Court of Appeal against the disposal under section 5 of the 1964 Act as it is not a sentence. However, as the *Heather Grant* case makes clear, the appellant can appeal by way of case stated to the Divisional Court. The prohibition on such appeals in relation to matters on indictment (Supreme Court Act 1981 section 28(2)) does not apply as once the accused is found unfit, the trial ends. There is a problem in relation to a section 5 disposal following a special verdict in that the Divisional Court in *R v Snaresbrook Crown Court ex parte Damaar* 16 June 2000 found the disposal related to a trial on indictment so as to prevent a judicial review: “For my part, I have every sympathy

with the proposition that an order made affecting the liberty of an acquitted defendant ought to be subject to review. That it is not presently subject to review is, to my mind, the clear consequence of the provisions of the Criminal Appeal Act on the one hand, and section 29(3) of the Supreme Court Act on the other. Regrettably it is not a matter which is capable of being addressed, as it seems to me, by this Court.” Per Rose LJ. The same would apply to a case stated appeal. There is thus no apparent mechanism by which a declaration of incompatibility can be sought. The answer could lie in a revisiting of the decision in *Damaar*. If not, then the only remedy is an application to the Strasbourg Court.

“The answer to it may lie, but does not necessarily do so, in Mr Eadie’s submission that this is a difficult and complex area where Parliament has carried out the requisite balancing exercise and has concluded that, where it has been found by a jury that a person is unfit to be tried and has done the act charged as murder, the automatic consequence ought to be admission to hospital as prescribed in s.5 (subject to the person’s right to make an immediate application to the MHRT and to the other protections afforded to a person subject to detention under these provisions); that the court should afford a measure of deference to Parliament in such a field; and that in all the circumstances the procedure is not to be stigmatised as arbitrary for the purposes of Article 5.”⁴³

This appears to be a type of “discretionary area of judgment” approach. The courts have developed this doctrine as a domestic version of the Convention concept of margin of appreciation. It recognises the respective roles of Parliament and the courts and affords a degree of deference to the executive and legislative branches of government on the basis of their democratic mandate, particularly in areas of social, economic or political policy.⁴⁴

The Court of Appeal obviously did not consider the matter in detail and it is submitted that had it done so, it would have rejected the notion that the court should defer to Parliament in this field. First, the issue concerned relates not so much to matters of social, economic or political judgment but to a matter of high constitutional importance – the right to liberty of the person. Secondly, even if it is accepted that this is an area of social policy, it is not clear what the justification for the policy is. Unless deference is equated with unquestioning acceptance, the court must be able to address the reason for a particular policy.⁴⁵ Bland assertions that this is a difficult and complex area are insufficient, particularly at a time when even the mandatory sentence for murder is subject to heightened scrutiny.⁴⁶ Thirdly, drawing upon Canadian jurisprudence, it can be seen that the margin of discretion ought to be drawn more narrowly where, as in criminal proceedings, the state is pitted against the individual:

“[T]he courts will judge the legislature’s choice more harshly in areas where the government plays the role of the ‘singular antagonist of the individual’ ...”⁴⁷

Fourthly, the discretionary area of judgment should be narrower in areas where the courts are particularly well suited to deciding the issues. It is suggested that this holds true in respect of requirements for evidence of mental disorder and the need for detention.⁴⁸ The idea that Parliament is better placed to balance the respective interests of the public and the individual in cases where people are detained on the basis of unsound mind is unsustainable. Fifthly, it should

43 *Ibid.* at paragraph 53.

44 See Lester and Pannick, *Human Rights Law and Practice*, Butterworths 1999, paragraph 3.26, followed by Lord Hope in *R v DPP ex parte Kebilene* *op. cit.*

45 *Wilson v First County Trust Ltd (No.2)*. [2001] EWCA Civ 633, [2001] 2 WLR 42.

46 *Stafford v United Kingdom*, Application no. 46295/99, European Court of Human Rights judgment 28 May 2002. The Court ruled that the mandatory life sentence for murder ought to be treated in the same manner as discretionary life sentences in terms of release procedures.

47 Per McLachlin J in *RJR McDonald Inc v Canada (A-G)* (1995) 127 DLR 4th 1.

48 Some support for this can be drawn from the House of Lords judgment in *R v A* [2001] UKHL 25; [2001] 2 WLR 1546 which related to legislative inroads into the right to cross-examine witnesses in sexual offence trials. Lord Steyn accepted that some deference may need to be recognised but went on: “... when the question arises whether in the criminal statute in question Parliament adopted a legislative scheme which makes an excessive inroad into the right to a fair trial the court is qualified to make its own judgment and must do so” (paragraph 36). The same holds true, it is argued, for the right to liberty.

be recalled that the European Court has been emphatic in its requirement for medical evidence prior to detention. The only exception identified has been emergency situations.⁴⁹ Mandatory disposal for those charged with murder is not a permissible extension of this principle. Finally, the rule against arbitrary detention requires an assessment of the circumstances of the individual case and a consideration of other less intrusive measures.⁵⁰ This is clearly not possible if the balance is struck by Parliament; the very essence of the right is undermined.

The right to make an immediate application to the tribunal⁵¹ and the Home Secretary's duty to refer the case after 6 months if there has been no application,⁵² although important safeguards, cannot render the detention lawful in Convention terms. The right to liberty in Article 5(1) and the right of access to a court in Article 5(4) are separate rights. Unlawful detention remains unlawful notwithstanding the ability to apply for review of its lawfulness.

In conclusion, it is submitted that the provisions of the 1964 Act for the mandatory admission to hospital of unfit or insane defendants who were charged with murder is irredeemably incompatible with the Convention. If the provisions remain in place there is bound to arise a case where the medical evidence is insufficient to justify detention. A declaration of incompatibility or a successful application to the European Court in Strasbourg is the likely consequence.

49 *Winterwerp op. cit.* paragraph 39.

50 *Verbanov v Bulgaria op. cit.* paragraph 46.

51 *Mental Health Act 1983 section 69(2)(a).*

52 *Ibid.* section 71(5).
