



**Trinity Term  
[2016] UKSC 46**

*On appeal from: [2014] EWCA Civ 553*

## **JUDGMENT**

### **Lee-Hirons (Appellant) v Secretary of State for Justice (Respondent)**

**before**

**Lady Hale, Deputy President**

**Lord Kerr**

**Lord Wilson**

**Lord Reed**

**Lord Toulson**

**JUDGMENT GIVEN ON**

**27 July 2016**

**Heard on 26 April 2016**

*Appellant*

Jenni Richards QC  
John McKendrick QC  
(Instructed by Stephens  
Scown LLP)

*Respondent*

Martin Chamberlain QC  
Oliver Jones  
(Instructed by The  
Government Legal  
Department)

**LORD WILSON: (with whom Lady Hale, Lord Kerr, Lord Reed and Lord Toulson agree)**

**A: INTRODUCTION**

1. A man is convicted of an offence. Satisfied that he is suffering from mental disorder, the court makes an order for his detention in hospital. Satisfied that it is necessary for the protection of the public, the court also makes a restriction order, which removes from the hospital the power to discharge him. In due course a tribunal directs his discharge from hospital on conditions. Afterwards, however, the Secretary of State for Justice (“the Minister”) exercises his power to recall the man to hospital, where he is subject to renewed detention. This appeal is about the explanation for the recall which the law requires the Minister to provide to the man both at the time of his recall and soon afterwards.

2. In this case the explanation provided on behalf of the Minister, the respondent, to Mr Lee-Hirons, the appellant, at the time of his recall was simply that his mental health had deteriorated. This generates three questions:

- (1) Was such an explanation legally sufficient?
- (2) If not, did it make the appellant’s renewed detention unlawful?
- (3) If his detention was unlawful, should the court formally so declare and, in particular, should it award him damages for it and, if so, how much?

Fifteen days after the appellant’s recall, a fuller oral explanation for it was provided to him. The Minister concedes that each of two separate legal principles required it to have been provided to him within three days of the recall and indeed in writing. These conceded breaches of the appellant’s rights generate three further questions:

- (4) Did the breaches make the appellant’s detention between the third and the fifteenth days following his recall unlawful?
- (5) If so, should the court formally so declare and, in particular, should it award him damages and, if so, how much?

(6) Even if they did not make his detention unlawful, should the court make the breaches the subject of a formal declaration and, in particular, should it award him damages for them and, if so, how much?

3. The appellant appeals against the order of the Court of Appeal dated 1 May 2014, whereby it dismissed his appeal against the dismissal of his application for judicial review of the Minister's explanations to him: [2014] EWCA Civ 553, [2015] QB 385. The leading judgment was given by Sir Stanley Burnton; and Jackson LJ (who added some observations of his own) and Patten LJ both agreed with it. In effect the answers to the questions given by the Court of Appeal were:

(1) Yes.

(2) Not applicable.

(3) Not applicable.

(4) No.

(5) Not applicable.

(6) Not addressed but the court's order means no.

## B: BACKGROUND

4. The appellant is aged 49. He has the misfortune to have suffered protracted mental disorder, namely a personality disorder and a chronic paranoid delusional disorder. The question whether he has also suffered mental illness, in particular paranoid schizophrenia, has for long been the subject of clinical disagreement. He has a long history of admission to psychiatric hospitals.

5. The appellant has 61 convictions for a variety of offences. In 2006 he was convicted of offences of arson and burglary. In the light of the nature or degree of his mental disorder and of all the other circumstances, the court then made a "hospital order" pursuant to section 37 of the Mental Health Act 1983 ("the Act"), by which it authorised his admission to and detention in a secure hospital. But, in the light of the perceived need to protect the public from serious harm, the court then also made a "restriction order" pursuant to section 41 of the Act, by which the power

to discharge the appellant was removed from the hospital and vested in the Minister or the First-tier Tribunal (Health, Education and Social Care Chamber). By section 79(1) of the Act, the appellant thereby became a “restricted patient” for the purposes of Part V of it.

6. The appellant’s detention took place in medium-secure hospitals first in Dawlish and, from 2009, in Doncaster. On 27 April 2012, under section 73(2) of the Act, the First-tier Tribunal made a direction, which on 24 August 2011 it had in principle resolved to make but had deferred, that he should be conditionally discharged from the hospital in Doncaster. In so directing, the tribunal overruled the concerns of the appellant’s responsible clinician that the risks of his discharge, even on a conditional basis, were too great. Having received evidence from Mr Hart, the appellant’s proposed social supervisor at a registered care home for ex-offenders in Lancaster, the tribunal approved a plan that the appellant should move there on 11 June 2012. There were eight conditions, including that he should reside only at places approved by Mr Hart, that he should accept treatment directed by whoever was to become his responsible clinician, that he should not drink alcohol, that he should not approach members of the public in order to promote his (very intense) religious beliefs and that he should not contact an identified woman.

7. From 11 June 2012 to 19 July 2012 the appellant resided at the care home in Lancaster.

8. On 19 July 2012 both Mr Hart, who had indeed become the appellant’s social supervisor at the home, Ms Weldon, who was a psychologist attached to the home, and Dr Omar, who had become his responsible clinician in Lancaster, resolved to invite the Minister to consider whether to exercise his power under sections 42(3) and 73(4)(a) of the Act to recall the appellant to a secure hospital. That afternoon Mr Hart telephoned Mr Elliott, who was a senior case-worker at the National Offender Management Service within the Ministry of Justice (“the Ministry”). Mr Elliott was responsible for acting on behalf of the Minister in deciding whether to recall conditionally discharged patients to hospital. Immediately after their conversation, Mr Hart sent to Mr Elliott, by email, a statement in which he outlined the concerns of himself and of Ms Weldon, who had together seen the appellant that morning, and of Dr Omar. In the statement Mr Hart suggested that in the appellant there was a greater component of mental illness (as opposed to other types of mental disorder) than had at first been observed; that his mental health had deteriorated; that he had become fixated upon securing change of the conditions of his discharge; that he had been craving alcohol; that his presentation had become more unpredictable; that he had threatened to assault somebody; that he had been ranting and swearing in the office; that, against Dr Omar’s advice, he had refused to take all medication; that he was likely to abscond and thereupon to abuse alcohol and to seek to contact the woman identified in one of the conditions; that the only option was to

recall him; and that a bed was available for him in a medium-secure hospital in Manchester.

9. Mr Elliott immediately resolved that the appellant should be recalled to the hospital in Manchester. One hour after receiving Mr Hart's email, he sent to Mr Hart by email a warrant for the appellant's recall. It recited no reason for the recall. When, however, Mr Hart thereupon informed the appellant that he had been recalled to a hospital in Manchester, he added that the reason for his recall was that his mental health had deteriorated. No fuller explanation was provided to the appellant that day; and, as I have indicated, the warrant with which he was then served would not have enlightened him. That evening police officers took him from Lancaster to the hospital in Manchester. He was unhappy but cooperative. Mr Hart at once confirmed to Mr Elliott by email that the warrant had been executed.

10. Nothing in the evidence casts doubt on the appellant's assertions that, when he arrived there, the hospital in Manchester knew nothing about him; that, during that evening, Dr Kasmi, a consultant forensic psychiatrist who was to become his responsible clinician there, asked him why he had been recalled; and that even two days later the nursing staff remained unable to explain to him the reasons for his recall.

11. Within a month of recalling a restricted patient to hospital, the Minister is obliged by section 75(1)(a) of the Act to refer his case to the First-tier Tribunal. In the appellant's case the Minister did so at once, namely on 20 July 2012.

12. On 24 July 2012 an officer in the Ministry, not Mr Elliott, sent a profoundly unsatisfactory letter to the hospital in Manchester. It was no doubt intended to be addressed to the appellant's responsible clinician there, namely Dr Kasmi. But it was addressed to Dr Omar even though the writer should have been well aware that he had been the appellant's responsible clinician in Lancaster. It enclosed a copy of the warrant which, for some reason, the writer understood not yet to have been executed. The writer was equally unaware of the fact that the Minister had already referred the appellant's case to the tribunal. In the letter the writer stated that the appellant should be informed of the reasons for his recall within 72 hours of admission; but 72 hours had passed by the date of the letter. Nor did the letter in any way identify the reasons for the recall; it did not even attach the statement which Mr Hart had emailed to Mr Elliott on 19 July. One surely needs to hope that the letter represents an isolated example of incompetence and that it does not betoken within the Ministry a cavalier attitude towards recall wholly inappropriate to the discharge of its grave responsibilities.

13. On 3 August 2012, namely 15 days following his recall, the appellant was apprised of the reasons for it. Dr Kasmi, who had somehow secured a copy of Mr Hart's statement, then read it out to the appellant and discussed it with him. But he did not give the appellant a copy of it nor provide him with any other written explanation of the reasons for his recall.

14. As quickly as 13 August 2012 the appellant's long-standing and energetic solicitors in Cornwall wrote a pre-action letter to the Ministry, by which he challenged the lawfulness of the decision to recall him to hospital. On 19 October 2012 his application for judicial review was issued. It is clear from the judgment by which Dingemans J dismissed the application (reported together with the judgments in the Court of Appeal at [2015] QB 385) that at that stage the appellant's primary case was that there were insufficient grounds for the Minister's decision to recall him. But it was only his secondary case that he took to the Court of Appeal, namely that there was an unlawful failure to explain the reasons for the recall to him; that the failure infected the legality of his detention; but that, even if it did not do so, it nevertheless generated a right to a declaration and damages.

15. This court is not concerned with the outcome of the proceedings before the First-tier Tribunal but understands that the appellant remains presently detained in hospital, albeit no longer the one in Manchester.

### C: THE CONCEDED BREACHES

16. In April 1993 the Department of Health issued a circular to local authorities, LAC (93)9, and guidelines to health authorities, HSG (93)20, both of which were entitled "Recall of mentally disordered patients subject to Home Office restrictions on discharge". The two documents are in much the same terms and remain substantially operative today. In annexes they state the government's policy towards the provision to recalled patients of an explanation for their recall. The annexes introduce the subject by pointing out that a patient recalled to hospital may be in an excitable and nervous state and that it is difficult to expect whoever is escorting him to hospital to provide a full explanation of the decision to recall him. Accordingly, so they continue, a three-stage procedure should be applied:

(1) at the time of the patient's return to hospital, the person returning him should inform him in simple terms that he is being recalled by the Minister and that, to the extent possible, a further explanation will be given later;

(2) as soon as possible after re-admission to hospital and in any event within 72 hours of it the patient's responsible clinician or another specified

person at the hospital should explain to him the reasons for his recall and ensure so far as possible that he understands them; and

(3) within 72 hours of his re-admission the patient should be provided with a written explanation of the reasons for his recall.

17. Where a public authority issues a statement of policy in relation to the exercise of one of its functions, a member of the public to whom it ostensibly applies, such as this appellant, has a right at common law to require the authority to apply the policy, so long as it is lawful, to himself unless there are good reasons for the authority not to do so: *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546, paras 29-31.

18. But the appellant also had rights under article 5 of the European Convention on Human Rights (“the Convention”):

(1) Para 1(e) provides that the lawful detention of persons of unsound mind is a case in which deprivation of liberty is permissible so long as it is in accordance with a procedure prescribed by law.

(2) Para 2 provides:

“Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”

(3) Para 4 provides that everyone deprived of his liberty should be entitled to take proceedings by which a court will speedily decide the lawfulness of his detention.

(4) Para 5 provides that every victim of detention in contravention of any of the earlier paragraphs should have an enforceable right to compensation.

19. No issue arises in respect of para 4 of article 5 of the Convention. The Minister’s obligation under section 75(1)(a) is to refer the case of a recalled patient to the tribunal within a month. But we can leave open whether, were he to delay the reference for that full month, he would nevertheless be in breach of para 4; for his practice is to make the reference much more quickly, as exemplified by his immediate reference of the appellant’s case. The result was that, within a day of his recall, the tribunal was seised of a jurisdiction to direct his further discharge.



Equally, within 25 days of his recall, the appellant's solicitors had, by their pre-action letter, set in train the present proceedings, the focus of which has been the lawfulness of the Minister's decision to recall him. So there was no violation of para 4.

20. In relation to para 2 of article 5 of the Convention the Minister submits that, in the case of the recall of a restricted patient, implementation of the three-stage procedure set out in the issued policy would satisfy the patient's Convention rights thereunder. He accepts that, although it is convenient for him to delegate to those on the ground the task of explaining to the patient the reasons for the decision to recall, the obligation to do so remains on him as the maker of that decision. He contends that the first stage of the procedure, applicable to the time of the recall to hospital, was duly implemented and indeed that, when Mr Hart then explained to the appellant that the reason for his recall was a deterioration in his mental health, the explanation went slightly further than was required at the first stage. Inevitably, however, the Minister concedes that the second and third stages of the procedure were not implemented: for an adequate explanation was provided to the appellant not within three days but only within 15 days of the recall and, which seems to be agreed to have been less significant, an explanation in writing was provided to him not within three days but only months later in response to the present proceedings.

21. The Minister therefore concedes that:

(1) he breached the appellant's right at common law to receive within three days an adequate explanation for the recall in accordance with published policy; and

(2) he also breached the appellant's analogous right under article 5(2) of the Convention to be informed promptly of the reasons for his recall.

22. The Minister makes no further concessions. So it is almost time to consider the questions identified in para 2 above. But first they must be placed in context.

#### D: CONTEXT

23. The context is that, for seven reasons, the way in which the Minister both reaches and implements a decision to recall a restricted patient to hospital is a function of great importance which he must approach with scrupulous care:

(1) He is depriving a person of liberty. We can be proud of the fact that, even in the dark ages, our law recognised the need for strict control of a deprivation of liberty: “no free man”, so King John was obliged to concede in clause 39 of Magna Carta (9 Hen 3), “is to be arrested, or imprisoned ... nor will we go against him or send any against him, except by the lawful judgment of his peers or by the law of the land”.

(2) Only exceptionally will the law countenance a deprivation of liberty at the direction of the executive, rather than of the judiciary before whom protections are built into the system.

(3) In particular the procedure entitles the Minister to effect a person’s recall without having received any representations by him or on his behalf.

(4) Often, as in the present case, the Minister is depriving a person of liberty shortly after a judicial body concluded that, albeit subject to conditions, he was, on the contrary, entitled to liberty.

(5) The person whom the Minister is depriving of liberty is, as a restricted patient, a member of “a particularly vulnerable group and therefore any interference with their rights must be subject to strict scrutiny” (*Zagidulina v Russia*, European Court of Human Rights (“ECtHR”), 2 May 2013, Application No 11737/06, para 52). The patient may well be unable to respond to his recall in a manner which, objectively, would best serve his interests.

(6) The recall deprives the person of liberty for an indefinite length of time subject only to the possibility of further discharge at some stage.

(7) The recall exposes the person to the possible administration to him of medical treatment without his consent pursuant to section 58(3)(b) of the Act.

#### E: QUESTIONS (1), (2) AND (3)

24. The appellant cannot contend that the explanation provided to him by Mr Hart at the time of his recall failed to comply with the Minister’s published policy referable to the provision of an explanation at that first stage. In this regard the appellant invokes a different strand of the common law; and the cornerstone of his submission is the decision of the House of Lords in *Christie v Leachinsky* [1947] AC 573. There police officers arrested the respondent without a warrant. They told

him that they were arresting him for an offence categorised as a misdemeanour, for which there was no power to arrest without a warrant. In fact they had reasonable grounds for suspecting that he had committed a felony, namely larceny of a bale of cloth, which, but for the deficit identified by the House of Lords, would have entitled them to arrest him without a warrant. The deficit was that they did not tell him that they were arresting him on suspicion of larceny of the cloth. Viscount Simon said at p 586:

“... in normal circumstances an arrest without warrant either by a policeman or by a private person can be justified only if it is an arrest on a charge made known to the person arrested.”

Lord Simonds said at p 592:

“Arrested with or without a warrant the subject is entitled to know why he is deprived of his freedom, if only in order that he may, without a moment’s delay, take such steps as will enable him to regain it.”

And at p 593 he referred to “the principle, which lies at the heart of the matter, that the arrested man is entitled to be told what is the act for which he is arrested”.

Lord du Parc expressed it starkly at p 598:

“... a man is entitled to his liberty, and may, if necessary, defend his own freedom by force. If another person has a lawful reason for seeking to deprive him of that liberty, that person must as a general rule tell him what the reason is, for, unless he is told, he cannot be expected to submit to arrest, or blamed for resistance.”

25. When Mr Hart told the appellant that the ground for his recall was a deterioration in his mental health, the Minister’s duty about what to explain to him at that first stage was in my view satisfied. It was an accurate summary of the ground. Deterioration in health is not the only permissible ground for recall. For example the commission of a crime or the breach of a condition would, if of “sufficient significance” (*R (MM) v Secretary of State for the Home Department* [2007] EWCA Civ 687, para 50, Toulson LJ), justify a recall. Just as in the *Christie* case the officers had to tell the respondent only that the ground of his arrest was the suspected larceny of the cloth, without any need to refer to the grounds for their suspicion, so there was no need at that stage for Mr Hart or anyone else to communicate to the appellant

the grounds for considering that his mental health had deteriorated. In any event, had he wanted to understand those grounds, the appellant had only to recall his discussion with Mr Hart and Ms Weldon that morning when, as Mr Hart's written note makes clear, they had ventilated their concerns with him. It was reasonable for the Department of Health, when introducing its guidelines, to have suggested both that, at the time of his recall, a restricted patient is likely to be under stress and probably not able to digest a detailed presentation of the reasons for it and that those, for example the police, deputed to effect the recall, often in an emergency, might well know little or nothing about the background to it. Equally the effect of the Minister's immediate reference of the appellant's case to the First-tier Tribunal was that the failure to have provided him with detailed reasons for the recall at that stage did not delay his recourse to that facility for seeking renewed discharge.

26. If, as I conclude, there was at the time of his recall no breach of the appellant's right at common law, was there nevertheless a violation at that time of his right under article 5(2) of the Convention?

27. Inevitably I reach for the decision of the European Commission of Human Rights, and thereafter of the ECtHR, on facts closest to those of this appeal: *X v United Kingdom* (1981) 4 EHRR 188. The applicant, a restricted patient, challenged the Home Secretary's recall of him in 1974 to a secure hospital following his conditional discharge, pursuant to the Mental Health Act 1959. Reporting in July 1980 to the ECtHR, the Commission concluded that his recall did not violate article 5(1) of the Convention. In relation to article 5(2), however, the Commission accepted at para 107 that:

“it may not be the role of police officers, who are charged with the sometimes delicate task of arresting a patient, to inform him of the detailed reasons of arrest or recall, as they are not qualified to assess the patient's condition and his ability to understand the position. However, the responsibility of informing the patient or his representatives will, in such circumstances, fall on the medical officers concerned.”

Then in its report the Commission added - and this is the high point of the appellant's submissions in this connection:

“Nevertheless this obligation has to be discharged promptly, ie at the latest on arrival at the hospital.”

In the event, in the light of an unresolved dispute between the applicant and the hospital as to what he had been told on arrival, the Commission concluded that a violation of article 5(2) had at any rate occurred seven weeks later when his solicitors' request for reasons for the recall had been inadequately addressed on behalf of the Home Secretary.

28. Two points are worthy of note:

(1) Under section 66 of the Mental Health Act 1959, the power to discharge a restricted patient was vested solely in the Home Secretary and the role of a tribunal, namely the Mental Health Review Tribunal, was only advisory.

(2) By way of swift response to the Commission's report (and as the ECtHR was informed when in 1981 it came to consider the Commission's reference - see para 16 of its judgment), the Home Secretary issued advisory circulars about the stages at which recalled patients should be informed of the reasons for their recall, which closely parallel the circulars still operative today.

29. Upon reference to it of the *X* case, the ECtHR agreed with the Commission that the relief available in the *habeas corpus* proceedings which the applicant had swiftly taken was inadequate to satisfy his right under para 4 of article 5 of the Convention and, in that there was at that time no other avenue by which to challenge his continued detention, his right under that paragraph had been violated. When it turned to para 2, the court stressed the link between it and para 4:

“66. ... anyone entitled ... to take proceedings to have the lawfulness of his detention speedily decided cannot make effective use of that right unless he is promptly and adequately informed of the facts and legal authority relied on to deprive him of his liberty.”

Its conclusion was that, in that the complaint under para 2 was no more than an aspect of the complaint under para 4, there was no need to rule separately upon it.

30. In *Fox, Campbell and Hartley v United Kingdom* (1990) 13 EHRR 157 the ECtHR held that, in arresting the applicants in Northern Ireland on no more than a suspicion that they were terrorists, the UK authorities had deprived them of their liberty in violation of para 1 of article 5. But the court rejected their complaint under para 2. It explained the paragraph as follows:

“40. ... This provision is an integral part of the scheme of protection afforded by article 5: by virtue of paragraph (2) any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph (4). Whilst this information must be conveyed ‘promptly’ (in French: *‘dans le plus court délai’*), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.”

31. The Commission’s throw-away remark in the *X* case that article 5(2) requires detailed reasons for a recall to be provided to a restricted patient “at the latest on arrival at the hospital” is far too slender a thread on which to hang a conclusion that the appellant’s right under para 2 was breached on the day of his recall. The remark shows no understanding of the “special features” of a recall which, often effected in an emergency, may, as in the case of the appellant, render the hospital unacquainted with those reasons until later. The flexibility, albeit limited, of the court’s analysis in the *Fox* case is much to be preferred.

32. In relation to the explanation required to be provided to the appellant at the time of his recall, I conclude that the demands of article 5(2) did not extend beyond the demands of the common law. Their demands were met. In answer to the first question, the Court of Appeal was right to conclude that Mr Hart’s explanation to him at that time was legally sufficient; and it followed that the second and third questions were indeed not applicable.

33. The court is told that, since 2012, it has become the Minister’s practice to include within the warrant to be served upon the restricted patient at the time of recall a brief reason for it. Indeed, in the “Mental Health Act 1983: Code of Practice” published in 2015, the Department of Health goes further than the guidance given in 1993 in relation to stage one when it states at para 4.19:

“Where a conditionally discharged patient is to be recalled to hospital, a brief verbal explanation of the Secretary of State’s reasons for recall must be provided to the patient at the time of recall unless there are exceptional reasons why this is not possible, eg the patient is violent or too distressed.”

Were this guidance to be followed and were the warrant served upon the patient also to include a brief reason for the recall, the Minister's obligations to provide an explanation for it at the time of his recall would be likely to be discharged.

F: QUESTIONS (4) and (5)

34. The starting point for consideration of the fourth question, namely the effect of the conceded breaches on the lawfulness of the appellant's actual detention, is the decision of this court in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245. The Home Secretary had, so the majority held, infringed the rights of two men in reaching a decision to detain them pending deportation by reference to unpublished criteria inconsistent with her published criteria. Also by a majority, the court decided that the infringement had rendered their actual detention unlawful. It was obvious that the criteria by reference to which the Home Secretary decided whether initially to detain the men, and thereafter whether to continue to detain them, bore in principle, ie at least theoretically, on the decision to detain them even though, as the court also proceeded to find, they would nevertheless have fallen to be detained by reference to the published criteria. Lord Dyson said:

“68. ... It is not every breach of public law that is sufficient to give rise to a cause of action in false imprisonment. In the present context, the breach of public law must bear on and be relevant to the decision to detain.”

Lady Hale said:

“207. ... the breach of public law duty must be material to the decision to detain and not to some other aspect of the detention and it must be capable of affecting the result - which is not the same as saying that the result would have been different had there been no breach.”

Lord Kerr added at para 248 that the breach had to have a “direct” bearing on the decision to detain.

35. Lord Kerr's adjective took centre-stage in this court's decision in *R (Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23, [2011] 1 WLR 1299, which swiftly followed the *Lumba* case. In breach of a rule and indeed by way of departure from her own policy the Home Secretary had failed on about 12 occasions in the course of less than two years to conduct a monthly review of

whether the appellant should continue to be detained. By a majority the court held that her failures had rendered his detention unlawful. Lady Hale said at para 77 that the departure from policy was “so obvious and so persistent and so directly related to the decision to continue to detain that it was clearly ‘material’ in the *Lumba* sense”. Lord Kerr stressed at paras 83 and 88 that the public law error touched “directly” on the decision to detain.

36. The first of three decisions on the other side of the line is that of the House of Lords in *R (Saadi) v Secretary of State for the Home Department* [2002] UKHL 41, [2002] 1 WLR 3131, and, following the appellant’s application to it, also of the ECtHR in *Saadi v United Kingdom* (2008) 47 EHRR 427. The reason why the appellant had been detained was to enable the determination of his claim for asylum to be subject to a fast-track procedure but for three days a different explanation for his detention was provided to him. The House of Lords held that the error did not affect the legality of his detention. The ECtHR held that, in informing him only after three days of the true reason for his detention, the Secretary of State had failed to inform him of it “promptly” and so had breached his right under article 5(2) of the Convention; but there was no suggestion that the breach had affected the validity of his detention.

37. The second of the decisions is that of the House of Lords in *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39, [2003] 1 WLR 1763. Police officers were statutorily entitled in limited circumstances to defer compliance with an arrested person’s request to see a solicitor but they were required as soon as practicable to tell him their reason for deferring it. It was held that their breach of the latter requirement did not make the appellant’s detention unlawful. Lord Millett at para 61 described his claim to that effect as “hopeless”.

38. The third of the decisions is that of this court in *R (Kaiyam) v Secretary of State for Justice* [2014] UKSC 66, [2015] AC 1344. The court held that the Secretary of State had breached the rights of prisoners, implied by article 5 of the Convention, to be given access to programmes which might enable them to demonstrate to the Parole Board that they no longer represented an unacceptable danger to the public. Lord Mance and Lord Hughes considered that the implied rights were analogous to rights under article 5(4). They stated - unequivocally - at para 37 that a breach of article 5(4) did “not directly impact on the lawfulness of detention”; and they held at para 38 that, likewise, breach of the implied rights did not affect the lawfulness of the prisoners’ detention.

39. In my opinion there is no link, let alone a direct link, between, on the one hand, the Minister’s wrongful failure for 12 days to provide to the appellant an adequate explanation for his recall and, on the other, the lawfulness of his detention. The failure did not delay reference of his case to the First-tier Tribunal. Nor has the



appellant suggested that it delayed institution of the present proceedings. Even if it had created delay, the unequivocal statement of Lord Mance and Lord Hughes in the *Kaiyam* case about the limited effects of a violation of article 5(4) would appear to exclude the relevance of the delay to the validity of the detention itself. The case closest to the present is the *Saadi* case where the difference was one only of degree (namely a delay of three days rather than of 12) and not of kind.

40. The wise judge will also address the consequences of the argument presented to him. In the present case there was a clear departure from the 72-hour policy, in relation to which the Minister can claim no extenuating circumstances. But it is easy to imagine lively arguments in other cases about either the adequacy of the reasons provided to the patient for the recall or the practicability of having provided them to him within that time-frame. I would be very concerned if the right of a restricted patient to walk out of hospital - or to seek to do so - should depend upon where the stronger of such an argument lies.

41. I therefore consider that the Court of Appeal was right to conclude, in answer to the fourth question, that the conceded breaches did not make the appellant's detention for those 12 days unlawful; and to conclude that the fifth question was therefore inapplicable.

#### G: QUESTION (6)

42. As a result of the conceded breaches, the appellant suffered no pecuniary loss. But in his evidence, unchallenged by the Minister, he says that in the months following his recall to hospital he suffered great distress. Nevertheless, as one would expect, he attributes his distress to the recall itself. He does not identify the failure for 12 days to have provided him with the reasons for it as an additional cause of it and, although one may infer that to some extent it increased his level of frustration and anxiety, the time-span of only 12 days precludes any inference that it caused significant non-pecuniary injury.

43. The appellant is not entitled to damages for the breach of his right at common law to receive an adequate explanation for his recall within the time identified by published policy. The breach does not amount to a tort and there is nothing to suggest that damages would have been available to the appellant in any ordinary action which he might have brought against the Minister in that respect; see section 31(4)(b) of the Senior Courts Act 1981.

44. But the Minister's concession is also of a breach of the appellant's right under article 5(2) of the Convention. Thus the claim for damages must be appraised also

through the prism of section 8 of the Human Rights Act 1998 which in particular requires the court, by subsection (3), to make an award of damages for the breach only if it “is necessary to afford just satisfaction” to the appellant and, by subsection (4), to take into account the principles applied by the ECtHR in relation to the award of compensation under article 41 of the Convention. In *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673, Lord Bingham of Cornhill stressed at paras 4 and 9 that the focus of the Convention was upon securing the observance of minimum standards in the protection of human rights and that compensation to the victim of a breach was of secondary, if any, importance to it. Before the House, however, was a violation of article 6; and, having referred to the specific provision under article 5(5) for compensation for violation of any of the earlier paragraphs of that article, Lord Bingham stressed in para 7 the risk of error if the decisions of the ECtHR in relation to one article were read across so as to apply to another.

45. In *R (Faulkner) v Secretary of State for Justice* and *R (Sturnham) v Parole Board* [2013] UKSC 23 and 47, [2013] 2 AC 254, the rights of two prisoners under article 5(4) to a speedy review of their continued detention by the Parole Board had been breached. In the first case the wrongful delay was about ten months and in the second it was about six months. In the first case this court reduced the award of damages to £6,500 and in the second it restored an award of £300. In explaining the court’s decisions Lord Reed conducted a masterly exposition of the approach of the ECtHR to damages for violations of article 5(4). Having observed at para 53 that the ECtHR was prepared, without direct proof, to presume harm in the form of feelings of frustration and anxiety and in answer to his question “is there a *de minimis* principle?”, he concluded that:

“66. ... a delay [in the conduct of the requisite review] of three months or more is likely to merit an award, whereas the stress and anxiety which can be inferred from a delay of shorter duration are unlikely to be of sufficient severity.”

46. In *Damages and Human Rights*, 2016, Hart Publishing, Dr Varuhas argues in chapter 5(1) that in the *Faulkner* and *Sturnham* cases this court has sought too rigidly to apply the principles of the ECtHR, such as they are, to awards of compensation for Convention violations. Be that as it may, it is clear to me that damages should not be payable to the appellant for the breach of his right under article 5(2) of the Convention any more than that they should be payable for the breach of his right at common law. He has failed to establish that their effects on him were sufficiently grave. Nor would a formal declaration in this court’s order add anything to my recording in this judgment of the Minister’s concessions. No doubt under pressure, the Court of Appeal failed in its judgments to address the sixth question, squarely raised though it had been. But that court’s wholesale dismissal of the appeal incorporates the correct, negative, answer.

## H: DISPOSAL

47. I therefore propose that the appeal should be dismissed.

### **LORD REED:**

48. I respectfully agree with the judgment of Lord Wilson, and wish only to add some brief observations in relation to the legal consequences, under the common law, of the Secretary of State's failure to comply with the administrative policy under which the appellant should have been provided, after being recalled to hospital, with a full explanation of the reasons for the decision to recall him.

49. It was decided on 19 July 2012 that the appellant should be recalled to hospital, and the decision was implemented that day. There was, under the common law, a duty to give the appellant reasons for that decision. That duty followed from the fact that the effect of the decision was to deprive him of his liberty. For the reasons explained by Lord Wilson at para 25, the Secretary of State complied with that duty. The case illustrates the extent to which the common law duty to give reasons for a decision is context-specific, in the sense that what is required in order to comply with the duty depends on the context in which it arises.

50. Quite separately, the Secretary of State had adopted an administrative policy that a full explanation of the decision to recall should be provided to patients within 72 hours of their re-admission to hospital. That policy was adopted in the context of a statutory scheme governing the discharge of restricted patients, under the Mental Health Act 1983 as amended, which imposes on the Secretary of State a duty to refer the patient's case to the First-tier Tribunal within a month of his recall to hospital, as Lord Wilson explains at para 11. On such a reference, the tribunal has the power to order the patient's discharge. It is conceded that the adoption of the policy created a public law duty to comply with it, absent good reason for non-compliance. That duty arose under the common law in accordance with principles of good administration. It is conceded that there was a failure to comply with that duty in the appellant's case.

51. At the hearing of the appeal, the discussion of the effect of that failure focused primarily upon the appellant's Convention rights. So far as the legal consequences under the common law are concerned, the failure to comply with the policy did not in my view render the decision to recall invalid, either ab initio or with effect from the expiry of the 72-hour period.

52. That is so for three reasons. First, the duty is to provide reasons ex post facto. It remains capable of meaningful performance even after the 72-hour period has expired. Such performance can if necessary be enforced. Delayed performance does not, in this situation, call into question the validity of the antecedent decision. Secondly, the duty to refer the case to the tribunal within a month provides a statutory mechanism for ensuring that an adequate justification is provided for the patient's detention in hospital, failing which he will be discharged. It would be inconsistent with the statutory framework governing discharge if an entitlement to release arose under the common law as soon as there had been a failure to comply with the administrative policy. Thirdly, it would be perverse if the legal consequence of the breach of a duty imposed for the sake of good administration was one which itself created administrative chaos, such as would occur if patients whose condition might require detention in hospital were entitled to walk out of the hospital as soon as the 72 hours had expired.

53. For these reasons, in addition to those given by Lord Wilson, I agree that the failure to comply with the policy did not affect the validity of the decision to recall the appellant, or therefore the lawfulness of his consequent detention.