

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 17821/91

James Kay

against

the United Kingdom

REPORT OF THE COMMISSION

(adopted on 1 March 1994)

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is a British citizen, born in 1945, and detained in Broadmoor Special Hospital, Crowthorne, Berkshire (hereafter referred to as Broadmoor). He was represented before the Commission by Messrs. Irwin Mitchell & Co., solicitors, Sheffield.

3. The application is directed against the United Kingdom. The respondent Government were represented by their Agent, Mrs. A.F. Glover, Foreign and Commonwealth Office.

4. The case concerns the applicant's recall to Broadmoor, without prior medical assessment, on termination of a prison sentence and subsequent delays before the Mental Health Review Tribunal, which maintained the applicant's detention in hospital. The applicant invokes Article 5 paras. 1 and 4 of the Convention.

B. The proceedings

5. The application was introduced on 14 December 1990 and registered on 20 February 1991.

6. On 2 July 1991 the Commission decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.

7. The Government's observations were submitted on 31 October 1991. The Commission granted the applicant legal aid for the representation of his case on 13 December 1991. The applicant submitted his observations on 31 March 1992, after an extension of the time-limit fixed for this purpose.

8. On 15 January 1993 the Commission decided to hold a hearing of the parties. The parties submitted pre-hearing briefs: the Government on 18 June 1993, the applicant on 23 June 1993. The hearing was held on 7 July 1993. The Government were represented by Mrs. A.F. Glover, Agent, Foreign and Commonwealth Office, Mr. M. Baker, QC, counsel, Dr. P. Mason and Mr. P.W. Otley, Department of Health, Mr. H. Giles and Mr. N. Jordan, Home Office, and Dr. D. McGoldrick, Foreign and Commonwealth Office. The applicant was represented by Mr. O. Thorold, counsel, and Mr. C. Gillot, solicitor, Messrs. Irwin Mitchell & Co..

9. On 7 July 1993 the Commission declared the application admissible. The text of the Commission's decision on admissibility was sent to the parties on 20 July 1993 and they were invited to submit such further information or observations on the merits as they wished. The parties did not make any further submissions.

10. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

11. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C.A. NØRGAARD, President  
S. TRECHSEL  
F. ERMACORA  
G. JÖRUNDSSON  
J.-C. SOYER  
H.G. SCHERMERS  
H. DANELIUS  
Mrs. G.H. THUNE  
Sir Basil HALL  
MM. F. MARTINEZ  
C.L. ROZAKIS  
Mrs. J. LIDDY  
MM. M.P. PELLONPÄÄ  
B. MARXER  
G.B. REFFI  
M.A. NOWICKI  
B. CONFORTI

12. The text of this Report was adopted on 1 March 1994 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

13. The purpose of the Report, pursuant to Article 31 of the Convention, is:

- (i) to establish the facts, and
- (ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

14. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application as Appendix II.

15. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

16. In November 1970 the applicant killed the 12 year old daughter of a neighbour. The condition of the child's body indicated that she had been raped, asphyxiated, cut with a sharp instrument and bitten.

17. On 5 January 1971 the applicant pleaded guilty at Liverpool Crown Court to a charge of manslaughter on grounds of diminished responsibility. This plea was accepted and the applicant was made the subject of a Hospital Order and a Restriction Order without limit of time under sections 60 and 65 of the Mental

Health Act 1959 (now replaced by sections 37 and 41 of the Mental Health Act 1983, hereinafter referred to as the 1983 Act). Medical evidence before Liverpool Crown Court was that the applicant was suffering from a psychopathic disorder. In addition, the Court was aware that the applicant had a number of previous convictions including three for sexual offences. In July 1962 the applicant had been convicted of assaulting a girl under the age of 13 and been fined £15. In December 1963 he had been convicted of having sexual intercourse with a girl whose age was between 13 and 15 and he had been conditionally discharged. Finally, in January 1966 he had been convicted of rape and sentenced to 3 years' imprisonment.

18. After his conviction the applicant was sent to Broadmoor where he remained until November 1981 when he was transferred to Park Lane Hospital.

19. In March 1985 he sought discharge from hospital by means of an application to a Mental Health Review Tribunal as he was entitled to do under section 70 of the 1983 Act. The Secretary of State expressed serious reservations about the medical evidence presented on the applicant's behalf. The Tribunal found, however, that there was no evidence that the applicant was then suffering from any mental disorder. However, it took the view that it was appropriate for the applicant to remain liable to be recalled to hospital for further treatment. Therefore the Tribunal was obliged, under section 73 (2) of the Act, to order that the applicant be conditionally discharged from hospital. It made the relevant order on 19 March 1985.

20. The conditions of discharge related to residence, probation and medical supervision. The applicant left hospital on 9 April 1985. Whilst subject to conditional discharge the applicant was convicted on 14 April 1986 at Lancaster Crown Court of two offences, one of assault occasioning actual bodily harm, the other of unlawful wounding. The offences were committed on 20 and 21 October 1985 respectively and the victims were both young women.

21. In the absence of a medical recommendation for a hospital order under section 37 (2) of the 1983 Act, the applicant was not returned to hospital but was sentenced to 3 years' imprisonment for each offence, running consecutively. Leading counsel appearing on behalf of the applicant gave the following explanation to the Court for the absence of such a recommendation:

"There is no medical recommendation because as your Honour will know such a recommendation is only available if there is treatment available and a place available for treatment and such treatment is regarded as being likely to be successful. I have a medical report which indicates that this man suffers from a severe personality disorder which is thought to be unbreakable at the moment, although we know the speed at which medical science advances these days."

22. While in prison the applicant retained his status as a person conditionally discharged from hospital. On 30 June 1986 he applied for his case to be considered again by a Mental Health Review Tribunal. He sought his absolute discharge from hospital on the basis that he was not suffering from any mental disorder. The Tribunal, which considered his case on 18 December 1986, refused to grant an absolute discharge even though there was no medical evidence before it that the applicant was then suffering from any psychopathic disorder. The Tribunal refused such a discharge since it continued to take the view that it was

appropriate for the applicant to remain liable to be recalled to hospital for further treatment. In the light of the applicant's imprisonment the Tribunal ordered that the conditions of his discharge be suspended until the day of his release from prison.

23. In consequence, the applicant would, on the day of his release from prison, revert to the status of a person conditionally discharged from hospital. He would, under section 42 (3) of the 1983 Act, be liable to be recalled to hospital by a warrant issued by the Home Secretary. The applicant unsuccessfully challenged the 1986 decision of the Tribunal by way of judicial review.

24. The applicant remained in prison at Albany on the Isle of Wight. His earliest release date was 24 October 1989. On 4 August 1989 the applicant's solicitor wrote to the Home Office stating that the applicant was seeking reassurance that the Home Secretary would not exercise the power of recall. However, on 1 September 1989 the Home Secretary issued a warrant of recall stating that as soon as the applicant was released from prison he should be taken to and detained at Broadmoor Special Hospital, a secure establishment. In a letter addressed to the applicant at Albany prison dated 1 September 1989 the Home Secretary gave his reasons for this decision. He said that in the light of the offences of which the applicant was convicted in April 1986, he was not satisfied that the applicant no longer presented a serious risk to public safety.

25. The Secretary of State continued to have grave misgivings about the applicant's motivation for the 1970 offence. He was particularly concerned by a report that he had asked Dr. Loucas, a consultant forensic scientist at Broadmoor, to prepare in December 1986. Without interviewing the applicant and on the basis of the case papers, Dr. Loucas wrote that, "All reports stating 'not psychopathic' appear to be based on the uncritical acceptance of Mr. Kay's explanations for his offences (contradictory and deliberately misleading) without reference to his personal history ...".

26. Section 75 (1) (a) of the 1983 Act obliges the Home Secretary, when issuing a warrant of recall under section 42 (3), to refer the case to a Mental Health Review Tribunal. The Home Secretary advised the applicant that his case would indeed be referred to such a Tribunal.

27. The applicant promptly sought judicial review of the Home Secretary's decision in order to quash the Home Secretary's warrant of recall on the ground that it was issued unlawfully.

28. The applicant's application for judicial review was heard first by Mr. Justice McCullough, who gave judgment refusing the applicant relief on 23 October 1989, the day before the applicant was due to be released from prison. The applicant was subsequently transferred on 24 October 1989 from Albany prison to Broadmoor, where he remains in detention. On the same day the Secretary of State referred the case to a Mental Health Review Tribunal. The applicant also applied to the Tribunal.

29. The Tribunal was ready to sit on 22 March 1990, but at the request of the applicant's solicitors the hearing date was postponed until June 1990. This second hearing date was again postponed due to a request from the applicant's solicitors. The Home Secretary obtained a medical report on the applicant after he was transferred from Albany to Broadmoor. That report was prepared by a clinical psychiatrist, Dr. Enda Dooley and was dated 24 November 1989. Dr. Dooley concluded that the applicant was suffering from a psychopathic disorder.

30. The applicant entered an appeal against the refusal of relief on judicial review by Mr. Justice McCullough. The Court of Appeal rejected the appeal on 3 July 1990. Leave to appeal to the House of Lords was refused by the Court of Appeal. The applicant was discouraged from applying to the House of Lords for leave to appeal because of an earlier refusal of such leave in his first judicial review proceedings. Further he was advised by counsel that, in the light of the decision of the Court of Appeal, English courts could provide him with no other remedy.

31. The Mental Health Review Tribunal heard the applicant's case on 25 and 26 November 1991. No fresh evidence was placed before the Tribunal on behalf of the applicant, who by then had withdrawn his application to the Tribunal, leaving the Secretary of State's referral. He declined to attend the hearing, but was represented by his solicitor and counsel. The Tribunal directed that the applicant should not be discharged from hospital because, following medical evidence submitted by a Dr. Ferris, it was not satisfied that the applicant "is not suffering from a continuing psychopathic disorder of such a nature or degree as to make it appropriate for him to be liable to be detained in hospital for medical treatment and that there is reason to believe, taking into account particularly the 1985 assaults, that it is necessary for the protection of others that he receive such treatment".

#### B. Relevant domestic law and practice

##### Hospital order

32. Section 37 of the Mental Health Act 1983 (the 1983 Act) empowers a Crown Court to order a person's admission to and detention in a hospital specified in the order (a hospital order).

33. The court can only make a hospital order if it is satisfied on the evidence of two registered medical practitioners that the offender is mentally disordered and that -

- (a) the disorder is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and, in the case of psychopathic disorder ... that such treatment is likely to alleviate or prevent a deterioration of his condition, and
- (b) the court is of the opinion ... that the most suitable method of disposing of the case is by [a hospital order].

##### Restriction order

34. Section 41 of the 1983 Act empowers a Crown Court at the same time as it makes a hospital order to make a restriction order without limit of time.

35. A restriction order may be made if it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm to make the order.

##### Application to the Mental Health Review Tribunal

36. Under section 70 of the 1983 Act a person who is subject to

a hospital order and restriction order ("a restricted patient"), and who is detained in hospital, can apply to a Mental Health Review Tribunal after he has been detained for six months. After he has been detained for twelve months he can re-apply annually. (Under section 71 of the 1983 Act the Secretary of State may at any time refer the case of a restricted patient to a Tribunal and must do so when his case has not been considered by a Tribunal for three years.)

#### Absolute discharge

37. Under section 73(1) of the 1983 Act, read with section 72(1), where an application is made to a Tribunal by a restricted patient who is subject to a restriction order (as opposed to a restriction direction imposed by the Secretary of State on transfer of a person from prison to hospital), or where his case is referred to the Tribunal by the Secretary of State, the Tribunal is required to direct the absolute discharge of the patient if satisfied -

- (a) (i) that he is not then suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or
- (ii) that it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment; and
- (b) that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.

38. By virtue of section 73(3) of the 1983 Act, where a patient is absolutely discharged he ceases to be liable to be detained by virtue of the hospital order and the restriction order ceases to have effect.

#### Conditional discharge

39. Under section 73(2) of the 1983 Act, where the Tribunal is satisfied as to either of the matters referred to in paragraph (a) above, but not as to the matter referred to in paragraph (b) above, it is required to direct the conditional discharge of the patient. By virtue of section 73(4) a patient who has been conditionally discharged may be recalled by the Secretary of State under section 42(3) and must comply with the conditions attached to his discharge. In contrast to the case of absolute discharge, a conditionally discharged patient does not cease to be liable to be detained by virtue of the relevant hospital order.

#### Secretary of State's power of recall

40. The Secretary of State has power to recall a patient who he himself has conditionally discharged under section 42(2) of the 1983 Act, or who has been conditionally discharged by a Tribunal under section 73(2) of the 1983 Act. This power is given by section 42(3) of the 1983 Act which says :

"The Secretary of State may at any time during the continuance in force of a restriction order in respect of a patient who has been conditionally discharged under sub-section (2) above by warrant recall the patient to such hospital as may be specified in the warrant."

## Referral to a Tribunal

41. Under section 75(1)(a) of the 1983 Act, when a restricted patient who has been conditionally discharged is subsequently recalled to hospital, the Secretary of State is required, within one month of the day on which the patient returns or is returned to hospital, to refer his case to a Tribunal.

### III. OPINION OF THE COMMISSION

#### A. Complaints declared admissible

42. The Commission has declared admissible the applicant's complaints

- that, by his recall to Broadmoor Special Hospital in October 1989, he was illegally deprived of his liberty, not being a person of unsound mind within the meaning of Article 5 para. 1 (e) (Art. 5-1-e) of the Convention, and
- that the lawfulness of his continued detention in that hospital was not speedily determined by the competent judicial authorities.

#### B. Points at issue

43. The following are the points at issue in the present case:

- whether there has been a violation of Article 5 para. 1 (Art. 5-1) of the Convention, and
- whether there has been a violation of Article 5 para. 4 (Art. 5-4) of the Convention.

#### C. As regards Article 5 para. 1 (Art. 5-1) of the Convention

44. The relevant parts of Article 5 para. 1 (Art. 5-1) of the Convention read as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

- (e) the lawful detention ... of persons of unsound mind..."

45. The applicant complains of a violation of Article 5 para. 1 (Art. 5-1) of the Convention by virtue of the Secretary of State's warrant of recall of 1 September 1989. This warrant authorised the applicant's return to Broadmoor Special Hospital on 24 October 1989. The applicant claims that he was illegally deprived of his liberty because the Secretary of State was not in possession of any evidence at the material time that the applicant was a person of unsound mind, within the meaning of Article 5 para. 1 (e) (Art. 5-1-e) of the Convention, or that he was in need of continued compulsory confinement. He submits that, on the contrary, the available evidence, in particular the 1985 and 1986 decisions of the Mental Health Review Tribunal, showed that he was not suffering from any mental disorder. Furthermore, the Secretary of State had considerable notice that the applicant was due for release from prison and therefore could have taken steps to procure up-to-date medical reports beforehand.

46. The Government contend, inter alia, that the warrant of



recall was in accordance with Article 5 para. 1 (Art. 5-1) of the Convention, because the applicant was suffering and continues to suffer from a psychopathic disorder. Moreover, being subject to a conditional discharge since 1985, the applicant was liable to recall at any time, even if he had been released from prison. They affirm that it would have been impossible for a reliable report to have been made on the applicant's mental health while he was in prison because the conditions there were inappropriate and the applicant had previously been uncooperative in the preparation of such reports.

47. The Commission recalls the minimum conditions attached to the lawfulness of the detention of a person of unsound mind within the meaning of Article 5 para. 1 (e) (Art. 5-1-e) of the Convention (Eur. Court H.R., Winterwerp judgment of 24 October 1979, Series A no. 33, p. 18, para. 39; X. v. the United Kingdom judgment of 5 November 1981, Series A no. 46, p. 18, para. 40):

- the detention must be effected in accordance with a procedure prescribed by law, i.e. domestic law;
- except in emergency cases, the individual concerned must be clearly shown to be of unsound mind, i.e. a true mental disorder must be established before a competent authority on the basis of objective medical expertise;
- the mental disorder must be of a kind or degree warranting compulsory confinement; and
- the validity of continued confinement depends upon the persistence of such a disorder.

48. The aim of these minimum conditions is to ensure that the deprivation of liberty is consistent with the general purpose of Article 5 (Art. 5), namely the protection of individuals from arbitrariness (Eur. Court H.R., Herczegfalvy judgment of 24 September 1992, Series A no. 244, p. 21, para. 63).

49. As regards the facts of the present case the Commission notes that the applicant's recall to Broadmoor was in accordance with the procedures prescribed by domestic law. The applicant was subject to hospital and restriction orders pursuant to sections 37 and 41 of the Mental Health Act 1983. In 1985 he was released on conditional discharge which left him liable to be recalled to hospital. This situation was merely suspended when he was serving his prison sentence after assaulting two women.

50. The Commission acknowledges that the Secretary of State was entitled to be concerned about the protection of the public in the light of the applicant's history of psychopathy and his serious criminal record involving extreme violence towards girls and women. However, this background could not, in the Commission's view, dispense with the need to obtain up-to-date medical evidence about the applicant's mental health before ordering his recall to hospital.

51. The weight of medical evidence at the material time was in the applicant's favour, for the most recent decision of the Mental Health Review Tribunal in 1986 had found that there was no evidence that the applicant was then suffering from any psychopathic disorder. The Commission cannot accept that a dissenting report from a Broadmoor doctor prepared in 1986 on the basis of case papers, without interviewing the applicant himself, can outweigh that finding or provide a sufficient scientific basis for the applicant's continued compulsory confinement in hospital nearly three years later.

52. The Commission cannot accept the Government's contention that it was impossible to have the applicant assessed while he was in prison. It is aware that remand prisoners may undergo psychiatric examination in prison for the purpose of expert reports to be submitted at trial. It is also aware that any prisoner showing signs of mental disturbance may receive psychiatric assessment and treatment whilst remaining in prison custody. Prison may not be the ideal environment for such assessments, but some evaluation can be made.

53. The Commission considers that when the Secretary of State decided to recall the applicant to Broadmoor certain minimum conditions of lawfulness were not respected. In particular, there was no up-to-date objective medical expertise showing that the applicant suffered from a true mental disorder, or that his previous psychopathic disorder persisted. This disorder was only confirmed a month after the applicant's recall.

54. In the absence of any emergency in the present case, the Commission finds no particular circumstances to justify this omission. Accordingly, the applicant's recall and return to Broadmoor on 24 October 1989 cannot be qualified as the lawful detention of a person of unsound mind for the purposes of Article 5 para. 1 (e) (Art. 5-1-e) of the Convention.

#### CONCLUSION

55. The Commission concludes, by 16 votes to 1, that in the present case there has been a violation of Article 5 para. 1 (Art. 5-1) of the Convention.

D. As regards Article 5 para. 4 (Art. 5-4) of the Convention

56. Article 5 para. 4 (Art. 5-4) of the Convention provides as follows:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

57. The applicant complains to the Commission of a breach of Article 5 para. 4 (Art. 5-4) of the Convention and alleges that the lawfulness of his detention at Broadmoor was not speedily decided by a court. He submits, inter alia, that the Secretary of State only has power to refer a case such as his to the Mental Health Review Tribunal from the day on which the patient returns to hospital, and no later than one month afterwards. There is usually then a six months' delay between the Secretary of State's referral and the Tribunal's hearing.

58. The Government assert that the judicial review proceedings instituted by the applicant after his recall in large part satisfied the requirements of Article 5 para. 4 (Art. 5-4) of the Convention. These proceedings, combined with the referral of the applicant's case to the Mental Health Review Tribunal on the day of the recall, complied with the requirements of this Convention provision. A certain lapse of time is necessary to enable an assessment of the patient to be made by the responsible medical officers and the Tribunal hearings are usually held within six months of referral. Whilst the Tribunal decision taken in the present case was not speedy it could have been taken earlier if the applicant had pressed the matter and had not himself caused delays in what was a complex case.

59. The Commission recalls that in the X v. the United Kingdom

case the Court held that the limited judicial control available in habeas corpus proceedings and before Mental Health Review Tribunals, which prior to 1983 could not order the discharge of patients like the applicant, did not adequately ensure the right guaranteed by Article 5 para. 4 (Art. 5-4) of the Convention (Eur. Court H.R., *X v. the United Kingdom* judgment of 5 November 1981, Series A no. 46, pp. 21-26, paras. 48-62).

60. In the present case the applicant did not take habeas corpus proceedings. He applied for judicial review of the Secretary of State's decision to recall him to Broadmoor. The Commission is aware, however, that the remedy of judicial review does not envisage the taking of medical evidence. Nor does it involve a determination of whether existing medical evidence is sufficient to demonstrate that the individual is truly suffering from a mental disorder at the material time. The Government concede that this remedy alone would not have satisfied Article 5 para. 4 (Art. 5-4) of the Convention.

61. The Commission notes that Mental Health Review Tribunals reach their decisions on the basis of independent and objective medical evidence, which they evaluate themselves. Since the Mental Health Act 1983 the Tribunals have been vested with the power to discharge, either conditionally or absolutely, patients like the applicant if the medical evidence shows that they are no longer suffering from a mental disorder. In substance, therefore, the Commission considers that Mental Health Review Tribunals provide the necessary judicial guarantees of Article 5 para. 4 (Art. 5-4) of the Convention.

62. However, the problem arises in the present case whether the Mental Health Review Tribunal acted with the speed required by Article 5 para. 4 (Art. 5-4) of the Convention.

63. The Commission refers to the Court's case-law that periods of eight weeks to five months in mental health determinations are difficult to reconcile with the notion of "speedily" in Article 5 para. 4 (Art. 5-4) of the Convention (cf. Eur. Court H.R., *E. v. Norway* judgment of 29 August 1990, Series A no. 181-A, p. 27, para. 64; *Van der Leer* judgment of 21 February 1990, Series A no. 170-A, pp. 14-15, paras. 32-36).

64. The Commission notes that it was not contested by the Government that the Mental Health Review Tribunal frequently takes up to six months to determine cases like the applicant's. In the present instance the determination took just over two years: from 24 October 1989, when the Secretary of State referred the case, until 26 November 1991, when the Tribunal directed that the applicant should not be discharged. The first hearing date proposed by the Tribunal was 22 March 1990, nearly five months after referral.

65. In the Commission's view the system itself is inherently too slow. Accordingly, it does not deem relevant the applicant's subsequent requests for adjournments and, later, his apparent disinterest. It considers that the absence of any psychiatric assessment prior to the applicant's recall demonstrates a deficiency in the system, which contributed to the delays before the Tribunal. In all the circumstances, the Commission is of the opinion that the proceedings before the Mental Health Review Tribunal were not conducted "speedily", within the meaning of Article 5 para. 4 (Art. 5-4) of the Convention.

#### CONCLUSION

66. The Commission concludes, by 15 votes to 2, that in the present case there has been a violation of Article 5 para. 4

(Art. 5-4) of the Convention.

E. Recapitulation

67. The Commission concludes, by 16 votes to 1, that in the present case there has been a violation of Article 5 para. 1 (Art. 5-1) of the Convention (para. 55 above).

68. The Commission concludes, by 15 votes to 2, that in the present case there has been a violation of Article 5 para. 4 (Art. 5-4) of the Convention (para. 66 above).

Secretary to the Commission                      President of the Commission

(H.C. KRÜGER)

(C.A. NØRGAARD)

(Or. English)

PARTIALLY DISSENTING OPINION OF Mr. TRECHSEL

While I fully agree with the majority as far as the violation of Article 5 para. 1 of the Convention is concerned, I cannot agree that paragraph 4 of that Article was also violated.

It is true that, as the Government conceded (paragraph 58 of the Report), the applicant's appeal to the Mental Health Review Tribunal was not decided "speedily" as required by Article 5 para. 4 of the Convention. However, it is in my view obvious that during the later stages of those proceedings, i.e. after 22 March 1990, the applicant took the initiative to further delay a decision by repeatedly asking for adjournments of hearings (para. 29). In view of this attitude I have come to the conclusion that the applicant is now estopped from complaining about the length of proceedings under Article 5 para. 4 of the Convention.

(Or. English)

DISSENTING OPINION OF Mr. SCHERMERS

The main reason why I do not share the opinion of the majority of the Commission concerns the proof surrounding the applicant's mental health. It is true that there was no decisive evidence of psychopathic disorder in 1989, but it is also true that the applicant had then been in prison for some three years. He had therefore not lived under normal conditions, which made the establishment of convincing proof at that time difficult.

Weighing the interests of the applicant against the risks he posed for society, one must take account of the following elements :

- (1) the prior conduct of the applicant;
- (2) the different reports which concluded that he suffered from a mental disorder, and which at least doubted whether this disorder was at all curable;
- (3) the fact that the applicant was liable to recall at any time, being subject to a conditional discharge.

In these circumstances and taking account of the discretion which should be left to the national authorities, I accept that the detention was lawful under Article 5 para. 1 (e) of the Convention.

A further medical examination at the time of his release from the Albany prison could have shown the absence of any symptoms of psychopathic disorder at that particular moment. It could not have offered any guarantee that the applicant would not again commit crimes similar to those which he had committed six times before. It is significant that in December 1986 the Mental Health Review Tribunal had refused the applicant's absolute discharge from hospital because it was considered appropriate to leave open the possibility of recalling the applicant to hospital for further treatment if the need were to arise after the applicant's release from prison. In these circumstances I find it acceptable that no further medical examination was requested before the applicant was due for release from prison.

With respect to Article 5 para. 4 I share the opinion expressed by Mr. Trechsel.

#### APPENDIX I

##### HISTORY OF THE PROCEEDINGS

Date	Item
14 December 1990	Introduction of application
20 February 1991	Registration of application
Examination of admissibility	
2 July 1991	Commission decision to communicate the case to the respondent Government and to invite the parties to submit observations on admissibility and merits
31 October 1991	Government's observations
13 December 1991	Commission's grant of legal aid
31 March 1992	Applicant's observations in reply
15 January 1993	Commission's decision to hold a hearing
7 July 1993	Hearing on admissibility and merits
7 July 1993	Commission's decision to declare application admissible
Examination of the merits	
20 July 1993	Decision on admissibility transmitted to parties. Invitation to parties to submit further observations on the merits
4 December 1993	Commission's consideration of state of proceedings
1 March 1994	Commission's deliberations on the merits, final vote and consideration of text of the Report. Adoption of Report