CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF JOHNSON v. THE UNITED KINGDOM

(119/1996/738/937)

JUDGMENT

STRASBOURG

24 October 1997

List of Agents

Belgium: Etablissements Emile Bruylant (rue de la Régence 67,
B - 1000 Bruxelles)

Luxembourg: Librairie Promoculture (14, rue Duchscher
(place de Paris), B.P. 1142, L - 1011 Luxembourg-Gare)

The Netherlands: B.V. Juridische Boekhandel & Antiquariaat
A. Jongbloed & Zoon (Noordeinde 39, NL - 2514 GC's-Gravenhage)

SUMMARY[1]

Judgment delivered by a Chamber

United Kingdom – continued detention of an individual no longer suffering from mental illness pending his placement in a hostel (Mental Health Act 1983)

I. ARTICLE 5 § 1 OF THE CONVENTION

Not disputed that applicant no longer suffering from mental illness which resulted in his confinement – however, this finding did not require authorities to order his immediate and unconditional discharge – review tribunal needed to have flexibility to assess in light of all relevant circumstances whether this course of action served interests of both applicant and community.

Review tribunal justified in proceeding cautiously in view of applicant's history of acts of unprovoked violence while at liberty – decision to make absolute discharge conditional on, *inter alia*, applicant undergoing a period of rehabilitation in a suitable hostel justified in circumstances – decision to defer release until suitable hostel found also justified in principle, provided that safeguards in place to ensure that release not unreasonably delayed – in instant case, applicant spent three and a half years in detention on account of authorities' failure to secure a placement – review tribunal lacked powers to ensure that a suitable hostel would be found within a reasonable time or to vary the terms of the hostel condition in view of difficulties encountered in finding a placement – no possibility to petition tribunal in between annual reviews or seek judicial review of terms of conditional discharge order.

Conclusion: violation (unanimously).

II. ARTICLE 5 § 4 OF THE CONVENTION

Arguments already raised and addressed under Article 5 § 1.

Conclusion: no separate issue arises (unanimously).

III. ARTICLE 50 OF THE CONVENTION

A. Non-pecuniary damage

Compensation awarded.

B. Costs and expenses

Reimbursement in part.

1. This summary by the registry does not bind the Court.

Conclusion: respondent State to pay applicant specified sums in respect of non-pecuniary damage and costs and expenses (unanimously).

COURT'S CASE-LAW REFERRED TO

24.10.1979, Winterwerp v. the Netherlands; 23.2.1984, Luberti v. Italy; 27.9.1990, Wassink v. the Netherlands; 20.3.1997, Lukanov v. Bulgaria; 27.5.1997, Eriksen v. Norway

In the case of Johnson v. the United Kingdom[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr F. GÖLCÜKLÜ,
Mr A. SPIELMANN,
Mr N. VALTICOS,
Sir John FREELAND,
Mr A.B. BAKA,
Mr P. KŪRIS,
Mr E. LEVITS,
Mr P. VAN DIJK,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 30 June and 26 September1997,

Delivers the following judgment, which was adopted on the last-mentioned date.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 9 September 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 22520/93) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 by a British citizen, Mr Stanley Johnson, on 8 July 1993.

Notes by the Registrar

1. The case is numbered 119/1996/738/937. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 §§ 1 and 4 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included *ex officio* Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21 § 4 (b)). On 17 September 1996, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr A. Spielmann, Mr N. Valticos, Mr A.B. Baka, Mr P. Kūris, Mr E. Levits and Mr P. van Dijk (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's and the applicant's memorials on 20 February 1997 and 25 February 1997 respectively.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 June 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr M.R. EATON, Deputy Legal Adviser,
Foreign and Commonwealth Office, *Agent*,
Mr J. EADIE, Barrister-at-Law, *Counsel*,
Ms J. FARENDEN, Department of Health,
Ms J. SWAINSON, Department of Health, *Advisers*;

(b) *for the Commission*
Mr N. BRATZA, *Delegate*;

(c) *for the applicant*
Mr E. FITZGERALD QC,
Mr O. THOROLD,

Ms U. BURNHAM, *Counsel*,
Mr A.K. BERGMAN, *Solicitor*.

The Court heard addresses by Mr Bratza, Mr Fitzgerald and Mr Eadie.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

6. The applicant was born in Leicester, England, in 1947.

A. The applicant's conviction

7. The applicant was convicted at Leicester Crown Court on 8 August 1984 of causing actual bodily harm to a woman passer-by in a random and unprovoked attack. He punched her in the head and in the abdomen and then walked off. Unbeknownst to the applicant, the woman was three months pregnant. The applicant had previous convictions for unprovoked assaults: in April 1974 he was sentenced to eighteen months' imprisonment for an assault on his mother; in December 1977 he was sentenced to four years' imprisonment for an assault in which he had struck a woman passer-by with a housebrick; in July 1981 he was sentenced to eighteen months' imprisonment for assaulting two girls walking along a city street. He also had convictions for robbery, criminal damage and various driving offences. The maximum sentence which the court could have imposed under section 47 of the Offences against the Person Act 1861 in respect of the current offence was a term of imprisonment of five years.

8. While on remand in Leicester Prison the applicant was diagnosed as suffering from "mental illness", manifested in delusions of conspiracy and victimisation and an obsession with astral projection. The precise diagnosis was of schizophrenia superimposed on a psychopathic personality. The applicant had a history of alcohol and drug abuse. He had never previously been diagnosed as mentally ill within the meaning of the Mental Health Act 1983 although, when on remand on a previous charge of actual bodily harm, he had been assessed for psychiatric treatment but had been found to be unsuitable.

9. The applicant's diagnosis (see paragraph 8 above) was confirmed by two psychiatrists. The Crown Court accordingly imposed a hospital order on him under section 37 of the 1983 Act. He was also made subject to a restriction order without limit in time under section 41 of the same Act, the court being satisfied that this order was necessary for the protection of the public from serious harm.

B. The applicant's admission to Rampton Hospital

10. On 15 August 1984 the applicant was admitted to Rampton Hospital, a maximum security psychiatric institution. Between the date of his admission and up to 2 November 1987 he remained under the supervision of Dr J. McConnell, the responsible medical officer ("RMO"). Dr I. Wilson acted as his RMO from 3 November 1987 until the date of his final discharge.

11. When the applicant was admitted to Rampton Hospital Dr McConnell recorded that he was suffering from schizophrenia superimposed on a psychopathic personality. Soon after his admission the applicant was administered antipsychotic drugs, and it would appear that he responded well to treatment to the extent that by 29 May 1985 he had developed full insight into his mental illness. The applicant ceased taking medication in March 1988 (see paragraph 33 below).

12. The applicant's detention was reviewed on several occasions between December 1986 and January 1993 by a Mental Health Review Tribunal ("the Tribunal") pursuant to the provisions of section 70 of the 1983 Act.

C. The 1986 review

13. The first review was held in December 1986. The Tribunal had before it the psychiatric report of Dr McConnell, the applicant's RMO at the time, as well as a similar report drawn up by Dr J.D. Earp, a consultant psychiatrist, at the request of the applicant's solicitor.

14. While noting the applicant's great progress since the date of his admission to Rampton Hospital (see paragraph 11 above), Dr McConnell stated that he was still suffering from schizophrenia, superimposed on a psychopathic personality. He was also reported to be devious in his attitude to the staff at the hospital. Dr McConnell concluded that the applicant continued to require treatment and was unfit to be discharged. Dr Earp expressed the opinion that the applicant showed ample signs of psychopathic disorder with superimposed mental illness and that the mental illness had the characteristics of a paranoid schizophrenic condition. He did not recommend any change in the applicant's current status.

15. In its decision of 17 December 1986, the Tribunal stated that it was satisfied that the applicant was suffering from mental illness or a form of that disorder of a nature or degree which made it appropriate for him to be liable to be detained and that it was necessary for his health or safety and for the protection of other persons that he should receive medical treatment in Rampton Hospital.

The applicant continued therefore to be detained after that date.

D. The 1987 and 1988 reviews

16. The applicant's case came up for review on 14 August 1987 and again on 10 February 1988. On both occasions the Tribunal decided to make no direction for his discharge or reclassification of his illness, believing that it was necessary for his own health and safety as well as for the protection of other persons in the community at large that he continue to receive medical treatment for his condition in hospital.

E. The 1989 review

17. A fourth review took place in June 1989. The Tribunal had before it a psychiatric report drawn up on 5 October 1988 by Dr Wilson who had taken over from Dr McConnell as the applicant's RMO following her retirement; an assessment of the applicant's condition prepared on 29 March 1989 by Dr D. Cameron, a consultant psychiatrist, based on, *inter alia*, an interview with the applicant on 16 March 1989; and a further assessment dated 5 May 1989 drawn up by Dr Earp, who had interviewed the applicant on 20 April 1989.

Dr Wilson and Dr Earp both concluded that the applicant was free of symptoms of mental illness. Dr Earp's view was that the applicant was no longer detainable under the 1983 Act. While recommending a discharge, Dr Earp noted that arrangements were being made by Dr Cameron (see below) to secure accommodation for the applicant in a hostel for persons suffering from drink-related problems. Dr Wilson for his part felt that the applicant still needed to undergo a period of rehabilitation and was not fit for discharge at that time. In his report Dr Cameron concluded that the applicant was best described as "a schizoid personality with a history of explosive anti-social behaviour induced by intoxication" and that he could benefit from a stay in a hostel for people with drink-related problems following his discharge from Rampton Hospital. Dr Cameron offered to facilitate the applicant's transfer to a hostel which he had in mind and to act as his psychiatric supervisor.

18. The Tribunal ruled on 15 June 1989 as follows:

> "The Tribunal accepts the medical evidence that the patient is not now suffering from mental illness. The episode of mental illness from which he formerly suffered has come to an end. He is not now in receipt of any psychotropic medication."

However the Tribunal continued:

> "The [applicant] had an unrealistic opinion of his ability to live on his own in the community after nearly five years in Rampton Hospital and required rehabilitation under medical supervision and that such rehabilitation (and its associated support) can be provided only in a hostel environment. Further, the Tribunal is of the opinion that the recurrence of mental illness requiring recall to hospital cannot be excluded until after successful rehabilitation of that nature."

19. On that basis, the Tribunal ordered the applicant's conditional discharge, the conditions being that the applicant be subject to the psychiatric supervision of Dr Cameron and to the social-worker supervision of a nominated psychiatric social worker, and reside in a supervised hostel approved by Dr Cameron and the nominated psychiatric social worker.

The applicant's discharge was to be deferred until arrangements could be made for suitable accommodation.

F. The search for hostel accommodation

20. Following the 1989 review, considerable efforts were made to secure hostel accommodation for the applicant, but to no great avail. In the report of a senior social worker dated 6 October 1989, it was noted that no progress had been made on account of, *inter alia*, the limited number of hostel placements in the area catering for the applicant's specific needs. The applicant himself also seemed intent on portraying himself in a negative light when visiting hostels, with the result that he confirmed their initial anxieties about accepting him.

21. The nominated psychiatric social worker (see paragraph 19 above), Mr D. Patterson, contacted a number of hostels. In his report of 4 April 1990, Mr Patterson described how his search for hostel accommodation for the applicant had been "a time-consuming, lengthy and frustrating" experience both for himself and the applicant. One hostel visited had rejected the applicant almost immediately. Another rejected him without seeing him and the housing associations running hostels in conjunction with the Probation Service also felt unable to offer him accommodation for some time on account of staff composition. It would appear that all potential hostels expressed concern about the applicant's drinking problem and his previous history of assaults on women which might present a threat to female residents and members of staff.

Mr Patterson indicated that the applicant during this time had not always shown a realistic appreciation of the lifestyle needed to achieve a successful rehabilitation.

However, one hostel, Ashcroft, did express interest in accepting the applicant on condition that he agree to and successfully complete an eight-week trial period in an open ward in a local hospital. Mr Patterson believed that Ashcroft was the only viable option, although the applicant remained rather ambivalent about exploring this possibility.

G. The 1990 review

22. On 19 January 1990 the applicant applied to the Tribunal to have his detention reviewed, hoping for an absolute discharge. The Tribunal met in May 1990 and heard the applicant in person. It had before it Mr Patterson's report on attempts to find suitable accommodation for the applicant (see paragraph 21 above), as well as his views on the applicant's suitability for absolute discharge. Mr Patterson had concluded that he would be fearful of granting an absolute discharge since the applicant, if left to his own devices and without suitable support, could quickly find himself in trouble again. He was in favour of the applicant spending an eight-week trial period in a local hospital, which would provide the basis for acceptance by the Ashcroft hostel.

23. The Tribunal also considered a report prepared by Dr Wilson, dated 12 February 1990. Dr Wilson confirmed in this report that the applicant was no longer mentally ill. He stated that the terms of the earlier conditional discharge were still being pursued but that it had not yet been possible to find suitable accommodation. He recommended that the applicant be discharged as soon as appropriate arrangements could be made.

24. The Tribunal noted in its ruling of 9 May 1990 that the necessary arrangements for supervised accommodation had not been easy to make "probably because the patient is himself not easy to please". The Tribunal accepted the reasoning of the 1989 Tribunal (see paragraph 18 above). Although acknowledging that the applicant's clear preference was for an absolute discharge, the Tribunal considered that it was in the interests of the applicant and the public that "he remain liable to hospital recall and to have the support that is assured by a discharge that is conditional".

Accordingly, the Tribunal once again directed the applicant's conditional discharge but deferred the discharge until suitable arrangements had been made for supervised accommodation.

H. The applicant's trial leave

25. On 10 September 1990 the applicant commenced trial leave at another hospital, Carlton Hayes, which was less secure than Rampton Hospital (see paragraph 22 above). He was allowed increasing freedom in the form of time away from the hospital. On 9 October 1990, after drinking in a local pub, he returned to the hospital late at night and assaulted a patient whom he alleged had provoked him. Thereafter the placement began to break down completely. In a report dated 12 December 1990, Dr Cameron, the supervising psychiatrist, noted that the applicant had terrorised the nursing staff and had began to reject the rehabilitation plans which had been foreseen for him. He was returned to Rampton Hospital on 22 October 1990.

Back in Rampton Hospital, the applicant was given the choice to return to the pre-discharge unit there, where he could pursue other pre-discharge possibilities, or to go to another ward containing more long-term patients. The applicant chose the latter option.

I. The 1991 review

26. A sixth review was carried out in April 1991. The Tribunal considered a progress report drawn up by Dr Wilson on 4 January 1991, the report prepared in December 1990 by Dr Cameron (see paragraph 25 above) and a report of Mr Patterson dated 22 January 1991.

27. Dr Wilson noted in his report the failure of the trial-leave period (see paragraph 25 above) and the difficulty in rekindling the applicant's motivation. Dr Wilson concluded:

> "[the applicant] is not mentally ill and does not require to remain in Rampton Hospital. Since June 1989 attempts to obtain his conditional discharge have been foiled by his inability to cooperate with the arrangements made and it is now difficult to envisage any conditions of his discharge that would be acceptable to [the applicant]."

28. Dr Cameron's report of 12 December 1990 expressed pessimism about the applicant's future in the light of the failure of the trial-leave period. He indicated that the applicant suffered from an explosive disorder of personality which meant that "when he is not in the middle of an explosion he is not in the formal sense mentally ill". Dr Cameron had no doubt that intoxication had played some part in the breakdown of the rehabilitation process and was convinced that the applicant's intoxicated explosions would likely recur whenever he was granted freedom into the community with access to intoxicants. Dr Cameron also considered that any

further attempt at rehabilitation through general psychiatric routes would be inappropriate and for this reason was reluctant to continue as his psychiatric supervisor.

29. In his report Mr Patterson noted that the applicant's failure to complete successfully the trial-leave period ruled out any prospect of his acceptance by the Ashcroft hostel.

30. On 9 April 1991 the Tribunal found that the applicant was not 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 made it appropriate for him to be detained in hospital for medical treatment. However, the Tribunal was satisfied that it was appropriate for the applicant to remain liable to be recalled to hospital for further treatment. The reasons given were that the applicant did not accept sufficient responsibility for his own behaviour to be able to cope with the pressures of life in the community without a considerable degree of supervision and support. Hence the applicant was again ordered to be conditionally discharged, such discharge to be deferred until alternative supervised accommodation could be found.

J. The 1993 review

31. The applicant's final review took place in January 1993. He was assessed prior to this review by Dr Wilson, who indicated that the applicant had no symptoms of mental illness and, provided that the topic of rehabilitation was avoided, he was constantly pleasant, friendly and cooperative. Dr Wilson concluded:

> "There is no basis for [the applicant] continuing to be classified as suffering from mental illness and with the benefit of hindsight it appears unlikely that he ever experienced more than a drug-induced psychosis ... He does not require to remain in Rampton Hospital but it is difficult to envisage any conditions of his discharge that would be acceptable to him and his current application for an absolute discharge must now be considered on its merits."

32. On 12 January 1993 the Tribunal ordered the applicant's absolute discharge on the basis that the applicant

> "is not now suffering from any form of mental disorder and that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment".

33. In reaching this conclusion the Tribunal had regard to Dr Wilson's oral evidence. It noted from his evidence that the applicant had not suffered from mental illness since 1987 and was not suffering from any other form of mental disorder. Medication had been withdrawn in March 1988. The applicant had shown consideration and kindness to other patients in his ward and he was "often acting more like a member of staff than a patient".

Furthermore, the Tribunal noted that Dr Wilson considered that the index offence was not to be regarded as a result of mental illness but of a likely combination of drugs and alcohol. The applicant had suffered a psychotic episode whilst on remand which Dr Wilson attributed to the stress of prison and the withdrawal of drugs and alcohol. According to Dr Wilson there was no evidence that this illness was likely to recur and there was no medical basis to believe that the applicant would be dangerous if released.

While having regard to the view of the Secretary of State that only a conditional discharge was appropriate at that stage, the Tribunal concluded that it was proper and in the interests of justice to grant the applicant an absolute discharge.

K. The applicant's unconditional discharge

34. The applicant was released from Rampton Hospital on 21 January 1993. Since then, he has not relapsed into mental illness. At the hearing the Court was informed that the applicant had recently been given a conditional discharge following his conviction of a minor public-order offence arising out of an altercation with a neighbour. He was also facing a charge of cultivating cannabis.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Mental disorder

35. Section 1 (2) of the Mental Health Act 1983 ("the 1983 Act") defines "mental disorder" as mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind. A personality disorder would not, of itself, justify detention unless it came within the definition of psychopathic disorder, namely "a persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive behaviour or seriously irresponsible conduct on the part of the person concerned".

Under section 1 (3) of the Act, dependence on alcohol or drugs is not to be construed as a form of mental disorder.

B. Hospital order

36. Section 37 of the 1983 Act empowers a court to order a person, on being convicted of a criminal offence punishable with imprisonment, to be admitted to and detained in a specified hospital ("a hospital order").

37. The court can only make a hospital order if it is satisfied on the written or oral evidence of two registered medical practitioners that the offender is suffering from mental disorder (see paragraph 35 above) and that

> "the mental 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 or mental impairment, that such treatment is likely to alleviate or prevent a deterioration in his condition" (section 37 (2) (a) (i))

and

> "the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of a [hospital order]" (section 37 (2) (b) (ii)).

Under section 37 (7) a hospital order must specify the form or forms of mental disorder from which the offender is suffering, as confirmed by the evidence of two practitioners.

C. Restriction order

38. Section 41 of the 1983 Act empowers a court to make a restriction order (with or without limit of time) at the same time as it makes a hospital order. The restriction order gives the Secretary of State, *inter alia*, increased powers over the movement of a patient and 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 still at large, that it is necessary for the protection of the public from serious harm to make the order. A restriction order also confers a power to recall or conditionally discharge a patient at any time and restricts the powers of the Mental Health Review Tribunal (see paragraph 39 below) to order release more narrowly than in the case of an ordinary mental patient.

D. The Mental Health Review Tribunal ("the Tribunal")

39. 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, may apply to the Tribunal after six months' detention for a review of his detention. After twelve months' detention such applications may be made annually. The Secretary of State may at any time refer the case of a restricted patient to the Tribunal (section 71 of the 1983 Act). Tribunals are made up of a legally qualified member who sits as the chairperson, a medically qualified member who interviews the patient and a lay member.

E. Absolute discharge

40. Under section 73 (1) and (2) of the 1983 Act, read in conjunction with section 72 (1), where an application is made to the Tribunal by a restricted patient 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 it is satisfied

(a) (i) that the patient 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 the patient 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 (section 73 (1) of the 1983 Act); and

(b) that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment (section 73 (2) of the 1983 Act).

41. Pursuant to section 73 (3), 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.

F. Conditional discharge

42. Under section 73 (2) of the 1983 Act, where the Tribunal is satisfied as to either of the matters referred to at (a) in paragraph 40 above but not as to the matter referred at (b) in paragraph 40 above, it is required to direct the conditional discharge of the patient. Lady Justice Butler-Ross, giving judgment in the case of *R. v. Merseyside Mental Health Review Tribunal, ex parte K* ([1990] 1 All England Law Reports, Court of Appeal), explained the nature of this power as follows:

> "Section 73 gives to the tribunal the power to impose a conditional discharge and retain residual control over patients not then suffering from mental disorder or not to a degree requiring continued detention in hospital. This would appear to be a provision designed both for the support of the patient in the community and the protection of the public, and it is an important discretionary power vested in an independent tribunal, one not lightly to be set aside in the absence of clear words."(at pp. 699–700)

43. By virtue of section 73 (4) of the 1983 Act, a patient who has been conditionally discharged may be recalled by the Secretary of State and must comply with the conditions attached to his discharge. In contrast to absolute discharge, a conditionally discharged patient does not cease to be liable to be detained by virtue of the relevant hospital order.

44. Under section 73 (7) of the 1983 Act, a tribunal can defer a direction for the conditional discharge of a restricted patient until such arrangements as appear to be necessary for the purpose of discharge have been made to their satisfaction. However, in the case of restricted patients, whose discharge has been accordingly deferred, the Tribunal does not have the power to direct the discharge if the specified conditions are not fulfilled or to adjourn its consideration of the case to await further developments or to recommend that the patient be granted leave of absence or to specify a time within which the conditions are to be complied with and to reconvene the proceedings failing such compliance with the time fixed. However, once the case comes back before the Tribunal on an application by the patient (which at the earliest will be the following year) or on a reference from the Secretary of State (which may be at any time) the Tribunal must consider the case afresh. In *Secretary of State for the Home Department v. Oxford Regional Mental Health Review Tribunal and another* ([1987] 3 All England Law Reports, House of Lords), Lord Bridge noted that there was no basis in the 1983 Act or in the rules of the Mental Health Review Tribunal to defer a conditional discharge until a fixed date. He stated:

> "...it is impossible for a tribunal in making a deferred direction for conditional discharge to predict how long it will take to make the necessary arrangements. The decision should simply indicate that the direction is deferred until the necessary arrangements have been made to the satisfaction of the tribunal and specify what arrangements are required, which can normally be done, no doubt, simply by reference to the conditions to be imposed. Whoever is responsible for making the arrangements should then proceed with all reasonable expedition to do so and should bring the matter to the attention of the tribunal again as soon as practicable after it is thought that satisfactory arrangements have been made ..."(at p. 13)

45. The Secretary of State may also order a patient's conditional or absolute discharge (section 42 of the 1983 Act).

PROCEEDINGS BEFORE THE COMMISSION

46. In his application (no. 22520/93) of 8 July 1993 to the Commission, Mr Johnson alleged that his continued detention from June 1989 to January 1993 constituted a violation of Article 5 §§ 1 and 4 of the Convention. He also claimed that his detention was in breach of Article 3 of the Convention in view of its overall length, including during a period when he was no longer suffering from mental illness. He further maintained that the conditions governing his release violated Article 8 of the Convention.

47. On 18 May 1995 the Commission declared the application admissible in respect of the complaints under Article 5 §§ 1 and 4 of the Convention and declared the remainder of the application inadmissible. In its report of 25 June 1996 (Article 31) it expressed the opinion that there had been a violation of Article 5 § 1 (by fifteen votes to one) and that the applicant's complaint under Article 5 § 4 did not give rise to any separate issue (by fifteen votes to one). The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

48. In their memorial and at the hearing, the Government asked the Court to find that there had been no breach of the applicant's rights guaranteed under Article 5 §§ 1 and 4 of the Convention.

49. The applicant for his part requested the Court in his memorial to find and declare that his rights under Article 5 §§ 1 and 4 and under Article 8 had been violated and to award him just satisfaction under Article 50 of the Convention. While maintaining his complaints under Article 5 §§ 1 and 4, he stated before the Court that he no longer sought a finding of a violation of Article 8 of the Convention.

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1997), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

50. The applicant complained that his detention between 15 June 1989, the date when the Tribunal first found him to be no longer suffering from mental illness, and 12 January 1993, the date when his absolute discharge was ordered, was in violation of Article 5 § 1 of the Convention. Article 5 § 1 provides in so far as relevant for the present case:

> "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 ...;
>
> ..."

51. Mr Johnson in his primary submission maintained that the June 1989 Tribunal should have ordered his immediate and unconditional discharge. Having regard to the strength of the psychiatric evidence before it (see paragraphs 17–19 above) and to its own assessment of his condition, that Tribunal was satisfied that he was no longer suffering from mental illness. This finding was confirmed by three successive Tribunals before he was finally released from Rampton Hospital. Relying on the Court's Winterwerp v. the Netherlands judgment of 24 October 1979 (Series A no. 33) he asserted that the authorities could not invoke any margin of appreciation to justify his continued detention beyond 15 June 1989 leaving aside any short period of time which might be needed to implement arrangements for his discharge. He had made a full recovery from the episode of mental illness specified in the hospital order which the domestic court had imposed on him (see paragraph 9 above). The Tribunal had not been justified in denying him an immediate and unconditional discharge on account of a possible risk of recurrence of mental illness given that any such risk had been neutralised by reason of the treatment he had received in Rampton Hospital.

52. While acknowledging by way of an alternative submission that the discharge of a person who is found to be no longer of unsound mind may be made subject to conditions, the applicant contended that any such conditions must not hinder immediate or near-immediate release and certainly not delay it excessively as occurred in his case. The imposition of the hostel residence condition was not only an onerous, unnecessary and disproportionate requirement which could in itself be considered to be a

breach of Article 5 § 1 of the Convention if implemented, it was also causative of a delay of three years and seven months before he was eventually released. When imposing the hostel condition, the 1989 Tribunal had neither the legal powers to direct a hostel to accept him nor to specify a time-limit for the implementation of the condition. He maintained that the failure to secure a suitable hostel and the consequential delay in his discharge could not be attributed to him given that the hostels approached had all rejected him.

53. While disputing the lawfulness of the hostel requirement (see paragraph 52 above) and the benefit which he would have gained from it, the applicant asserted that it was for the authorities to ensure that a placement in a hostel could be guaranteed if not immediately then within a matter of weeks, if they considered such a course of action necessary. In no event could a deferral of discharge for three and a half years pending the finding of a placement be justified in the instant case either on the basis of a margin of appreciation or on account of lack of resources.

54. The Government contended that Article 5 § 1 (e) of the Convention should not be interpreted in a way which requires the authorities in all cases to order the immediate and unconditional release of a patient who is no longer suffering from mental illness. Such an approach in the instant case would have prevented the 1989 Tribunal from assessing whether or not the applicant's own interests and those of the community would be best served by ordering his immediate and unconditional release because of his apparent recovery. The Tribunal needed to have sufficient flexibility or discretion to assess those twin interests, having regard to the applicant's previous history of unprovoked and indiscriminate violence and to the unpredictable nature of mental illness especially where, as in the applicant's case, it manifested itself in violent behaviour.

55. Having regard to these considerations, the Tribunal was in the Government's view justified in ordering a conditional discharge. The assessments of Dr Wilson and Dr Cameron confirmed the need for caution since they had both considered that the applicant was not yet ready to be given an absolute discharge without having first completed a period of rehabilitation in a supervised hostel environment (see paragraph 17 above). The hostel requirement was not an onerous and restrictive condition but an essential component of the applicant's treatment strategy which allowed the authorities to assess whether his apparent recovery could be sustained outside Rampton Hospital.

56. The Government maintained that the authorities had made considerable efforts to secure a suitable hostel, including before the 1989 Tribunal had met (see paragraph 17 above), but the applicant's intransigence and lack of cooperation, especially after October 1990, did not facilitate their task (see paragraphs 20 and 21 above). It took in fact thirteen months to find a hostel which was conditionally willing to accept

him (see paragraph 21 above). Furthermore, some delay in finding supervised accommodation in the post-discharge phase was necessary and inevitable, having regard to the need to plan and organise arrangements carefully. In view of the applicant's case-history particular care was required in finding him an appropriate hostel. Given that he had still not complied with the hostel requirement, the 1990 and 1991 Tribunals were justified in continuing to defer his discharge, especially since the incident in Carlton Hayes (see paragraph 25 above) had confirmed the view of the 1989 Tribunal that the risk of recurrence of mental illness could not be excluded.

57. The Commission considered that the 1989 Tribunal was justified in the circumstances in proceeding cautiously, having regard to the interests at stake and to the applicant's history of violence. However, even if a phased discharge entailing some period of deferral of release from detention might in principle be justified, the applicant's release could not be deferred indefinitely. Neither the Tribunal nor the authorities had the power to direct a hostel to accept him or to fix a time-limit within which a hostel was to be found failing which he should be discharged or his case referred back to the Tribunal. For these reasons, the Commission found that the applicant's detention after June 1989, irrespective of his attitude during the search for a hostel, violated Article 5 § 1 of the Convention.

58. The Court considers at the outset that it is appropriate to examine the lawfulness of the applicant's continued detention after 15 June 1989 under Article 5 § 1 (e) alone of the Convention, even if the lawfulness of his detention, at least up until that date, could also possibly be grounded on Article 5 § 1 (a) since it resulted from a "conviction" by a "competent court" within the meaning of that sub-paragraph. While the applicability of one ground listed in Article 5 § 1 does not necessarily preclude the applicability of another and a detention may be justified under more than one sub-paragraph of that provision (see the Eriksen v. Norway judgment of 27 May 1997, *Reports of Judgments and Decisions* 1997-III, pp. 861–62, § 76), it is to be noted that the applicant was detained at Rampton Hospital on the basis of a hospital and a restriction order without limit in time made under the Mental Health Act 1983 in order to undergo psychiatric treatment (see paragraph 9 above). Indeed, it has not been disputed that the lawfulness of the applicant's detention after 15 June 1989 falls to be determined on the basis of Article 5 § 1 (e) to the exclusion of Article 5 § 1 (a).

59. The Court also notes that those appearing before it have not contested that the applicant's continued detention was lawful under domestic law, having regard to the Tribunal's powers under section 73 (2) and (7) of the 1983 Act to impose conditions on the discharge of patients who are no longer mentally ill within the meaning of section 1 (2) of that Act and to defer a discharge until those conditions have been fulfilled. For its part, the Court sees no reason to find that the applicant's continued

detention was not in conformity with the substantive and procedural rules governing the making of a conditional or deferred conditional discharge. It notes in fact that the Court of Appeal has considered that a Tribunal's competence to order the conditional rather than absolute discharge of a person no longer suffering from mental illness is an important discretionary power (see paragraph 42 above); moreover, a Tribunal's power to defer a conditional discharge without specifying a time-limit for the finalisation of the appropriate arrangements has been affirmed by the House of Lords (see paragraph 44 above).

60. The Court stresses, however, that the lawfulness of the applicant's continued detention under domestic law is not in itself decisive. It must also be established that his detention after 15 June 1989 was in conformity with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion (see, among many authorities, the Wassink v. the Netherlands judgment of 27 September 1990, Series A no. 185-A, p. 11, § 24) and with the aim of the restriction contained in sub-paragraph (e) (see the above-mentioned Winterwerp judgment, p. 17, § 39). In this latter respect the Court recalls that, according to its established case-law, an individual cannot be considered to be of "unsound mind" and deprived of his liberty unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, and of sole relevance to the case at issue, the validity of continued confinement depends upon the persistence of such a disorder (see the Winterwerp judgment cited above, pp. 21–22, § 40; and the Luberti v. Italy judgment of 23 February 1984, Series A no. 75, pp. 12–13, § 27).

61. By maintaining that the 1989 Tribunal was satisfied that he was no longer suffering from the mental illness which led to his committal to Rampton Hospital, Mr Johnson is arguing that the above-mentioned third condition as to the persistence of mental disorder was not fulfilled and he should as a consequence have been immediately and unconditionally released from detention.

The Court cannot accept that submission. In its view it does not automatically follow from a finding by an expert authority that the mental disorder which justified a patient's compulsory confinement no longer persists, that the latter must be immediately and unconditionally released into the community.

Such a rigid approach to the interpretation of that condition would place an unacceptable degree of constraint on the responsible authority's exercise of judgment to determine in particular cases and on the basis of all the relevant circumstances whether the interests of the patient and the community into which he is to be released would in fact be best served by this course of action. It must also be observed that in the field of mental illness the assessment as to whether the disappearance of the symptoms of

the illness is confirmation of complete recovery is not an exact science. Whether or not recovery from an episode of mental illness which justified a patient's confinement is complete and definitive or merely apparent cannot in all cases be measured with absolute certainty. It is the behaviour of the patient in the period spent outside the confines of the psychiatric institution which will be conclusive of this.

62. It is to be recalled in this respect that the Court in its Luberti judgment (cited above, pp. 13–15, § 29) accepted that the termination of the confinement of an individual who has previously been found by a court to be of unsound mind and to present a danger to society is a matter that concerns, as well as that individual, the community in which he will live if released. Having regard to the pressing nature of the interests at stake, and in particular the very serious nature of the offence committed by Mr Luberti when mentally ill, it was accepted in that case that the responsible authority was entitled to proceed with caution and needed some time to consider whether to terminate his confinement, even if the medical evidence pointed to his recovery.

63. In the view of the Court it must also be acknowledged that a responsible authority is entitled to exercise a similar measure of discretion in deciding whether in the light of all the relevant circumstances and the interests at stake it would in fact be appropriate to order the immediate and absolute discharge of a person who is no longer suffering from the mental disorder which led to his confinement. That authority should be able to retain some measure of supervision over the progress of the person once he is released into the community and to that end make his discharge subject to conditions. It cannot be excluded either that the imposition of a particular condition may in certain circumstances justify a deferral of discharge from detention, having regard to the nature of the condition and to the reasons for imposing it. It is, however, of paramount importance that appropriate safeguards are in place so as to ensure that any deferral of discharge is consonant with the purpose of Article 5 § 1 and with the aim of the restriction in sub-paragraph (e) (see paragraph 60 above) and, in particular, that discharge is not unreasonably delayed.

64. Having regard to the above considerations, the Court is of the opinion that the 1989 Tribunal could in the exercise of its judgment properly conclude that it was premature to order Mr Johnson's absolute and immediate discharge from Rampton Hospital. While it is true that the Tribunal was satisfied on the basis of its own assessment and the medical evidence before it (see paragraphs 17 and 18 above) that the applicant was no longer suffering from mental illness, it nevertheless considered that a phased conditional discharge was appropriate in the circumstances. It is to be noted that this approach was endorsed by Dr Cameron and Dr Wilson, the latter having been closely involved with the applicant's treatment since 3 November 1987 (see paragraph 10 above). As an expert review body which included a doctor who had interviewed the applicant (see

paragraph 39 above), the Tribunal could properly have regard to the fact that as recently as 10 February 1988 (see paragraph 16 above) the applicant was still found to be suffering from mental illness and that his disorder had manifested itself prior to his confinement in acts of spontaneous and unprovoked violence against members of the public. It was not therefore unreasonable for the Tribunal to consider, having regard to the views of Dr Wilson and Dr Cameron, that the applicant should be placed under psychiatric and social-worker supervision and required to undergo a period of rehabilitation in a hostel on account of the fact that "the recurrence of mental illness requiring recall to hospital cannot be excluded" (see paragraph 18 above). The Tribunal was also in principle justified in deferring the applicant's release in order to enable the authorities to locate a hostel which best suited his needs and provided him with the most appropriate conditions for his successful rehabilitation.

65. As to the conditions imposed on Mr Johnson's discharge, it is to be noted that the requirement to remain under the psychiatric supervision of Dr Cameron and the social-worker supervision of Mr Patterson (see paragraph 19 above) would not have hindered his immediate release from Rampton Hospital into the community and cannot be said to raise an issue under Article 5 § 1 of the Convention.

66. However, while imposing the hostel residence requirement on the applicant and deferring his release until the arrangements had been made to its satisfaction, the Tribunal lacked the power to guarantee that the applicant would be relocated to a suitable post-discharge hostel within a reasonable period of time. The onus was on the authorities to secure a hostel willing to admit the applicant. It is to be observed that they were expected to proceed with all reasonable expedition in finalising the arrangements for a placement (see paragraph 44 above). While the authorities made considerable efforts to this end, these efforts were frustrated by the reluctance of certain hostels to accept the applicant as well as by the latter's negative attitude with respect to the options available (see paragraphs 20 and 21 above). They were also constrained by the limited number of available placements. Admittedly, a suitable hostel may have been located within a reasonable period of time had the applicant adopted a more positive approach to his rehabilitation. However, this cannot refute the conclusion that neither the Tribunal nor the authorities possessed the necessary powers to ensure that the condition could be implemented within a reasonable time. Furthermore, the earliest date on which the applicant could have had his continued detention reviewed was twelve months after the review conducted by the June 1989 Tribunal (see paragraph 44 above). In between reviews the applicant could not petition the Tribunal to have the terms of the hostel residence condition reconsidered; nor was the Tribunal empowered to monitor periodically outside the annual reviews the progress made in the search for a hostel and to amend the deferred conditional discharge order in the light of the difficulties encountered by the authorities. While the Secretary of State

could have referred the applicant's case to the Tribunal at any time (see paragraph 44 above) it is to be noted that this possibility was unlikely to be effected in practice since even at the date of the January 1993 Tribunal the authorities maintained their opposition to the applicant's release from detention until he had fulfilled the hostel condition (see paragraph 33 above).

67. In these circumstances, it must be concluded that the imposition of the hostel residence condition by the June 1989 Tribunal led to the indefinite deferral of the applicant's release from Rampton Hospital, especially since the applicant was unwilling after October 1990 to cooperate further with the authorities in their efforts to secure a hostel, thereby excluding any possibility that the condition could be satisfied. While the 1990 and 1991 Tribunals considered the applicant's case afresh, they were obliged to order his continued detention since he had not yet fulfilled the terms of the conditional discharge imposed by the June 1989 Tribunal.

Having regard to the situation which resulted from the decision taken by the latter Tribunal and to the lack of adequate safeguards, including provision for judicial review to ensure that the applicant's release from detention would not be unreasonably delayed, it must be considered that his continued confinement after 15 June 1989 cannot be justified on the basis of Article 5 § 1 (e) of the Convention (see paragraph 63 above).

For these reasons, the Court concludes that the applicant's continued detention after 15 June 1989 constituted a violation of Article 5 § 1 of the Convention.

68. Having regard to this finding, the Court does not propose to consider the applicant's submission that the hostel condition constituted in itself a violation of Article 5 § 1 of the Convention given that it was never in fact implemented (see paragraph 52 above).

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

69. The applicant further submitted that his detention gave rise to a breach of Article 5 § 4 of the Convention, which provides:

> "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."

70. He contended that in making a deferred conditional discharge order the 1989 Tribunal lacked the necessary judicial powers to ensure compliance with the terms of that discharge. It was not competent to mandate the provision of hostel accommodation (see paragraph 52 above) or to direct that that condition be fulfilled by a fixed date. The Tribunal therefore lacked the attributes of a court for the purposes of Article 5 § 4.

71. The Commission considered that the applicant's complaint under Article 5 § 4 did not give rise to any separate issue, having regard to its finding under Article 5 § 1. Although disputing the Commission's finding of a violation of Article 5 § 1, the Government agreed with this approach to the applicant's complaint under Article 5 § 4.

72. The Court notes that the issues raised by the applicant under this head have already been examined in the context of his complaint under Article 5 § 1. Like the Commission, the Court concludes that the applicant's complaint under Article 5 § 4 gives rise to no separate issue.

III. APPLICATION OF ARTICLE 50 OF THE CONVENTION

73. The applicant requested the Court to grant him just satisfaction under Article 50 of the Convention, which provides as follows:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Non-pecuniary damage

74. The applicant claimed 100,000 pounds sterling (GBP) by way of compensation for the loss he sustained as a result of his unlawful detention between 15 June 1989 and 12 January 1993. He sought to justify the amount claimed with reference to comparable awards made by English courts in false imprisonment cases. Before the Court, and with reference to the award made to the applicant in the Lukanov v. Bulgaria judgment of 20 March 1997 (Reports 1997-II), he suggested that any award should not be less than GBP 43,000, having regard to the length of his detention.

75. The Delegate of the Commission drew the attention of the Court to the fact that the domestic case-law relied on by the applicant concerned cases of false imprisonment and was based on facts which could not be compared to those of the case in issue. The applicant's detention after 15 June 1989 was in fact lawful under domestic law, having regard to the provisions of the Mental Health Act 1983.

76. The Government considered that the finding of a breach of the Convention would constitute just satisfaction. In any event, any award made should be modest in view of the fact that the applicant's behaviour contributed substantially to the length of time he spent in detention.

77. While it is true that the applicant spent an excessive amount of time in a maximum security psychiatric hospital after it was conclusively shown that he was no longer suffering from mental illness, it must also be noted that the delay in his release cannot be attributed entirely to the authorities. In the first place, some period of deferment of release was inevitable, having regard to the need to locate a hostel suited to the applicant's situation (see paragraph 64 above). Secondly, the applicant's negative attitude towards his rehabilitation did not facilitate their task and after October 1990 he refused to cooperate further with the authorities in finding a suitable hostel. Having regard to these factors, the Court decides to award the sum of GBP 10,000.

B. Costs and expenses

78. The applicant claimed GBP 39,221.50 inclusive of value-added tax in respect of the costs and expenses incurred in bringing proceedings before the Convention institutions. He was in receipt of legal aid from the Council of Europe.

79. The Delegate of the Commission did not express a view on the amount claimed. The Government proposed a maximum figure of GBP 25,000, contending that certain of the costs claimed were neither necessary nor reasonably incurred.

80. Having examined the detailed schedule of costs and expenses submitted by the applicant, the Court considers that the maximum amount proposed by the Government represents an equitable basis for an award under this head. It therefore awards GBP 25,000 less the amounts received in legal aid from the Council of Europe which have not already been taken into account in the claim.

C. Default interest

81. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a breach of Article 5 § 1 of the Convention;
2. *Holds* that the applicant's complaint under Article 5 § 4 of the Convention gives rise to no separate issue;
3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, 10,000 (ten thousand) pounds sterling in respect of non-pecuniary damage;

(b) that the respondent State is to pay the applicant, within three months, in respect of costs and expenses, 25,000 (twenty-five thousand) pounds sterling inclusive of value-added tax, less 30,226 (thirty thousand two hundred and twenty-six) French francs to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment;

(c) that simple interest at an annual rate of 8% shall be payable on the above sums from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 October 1997.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar