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

FOURTH SECTION

CASE OF WAITE v. THE UNITED KINGDOM

(Application no. 53236/99)

JUDGMENT

STRASBOURG

10 December 2002

FINAL

10/03/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Waite v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Mr M. PELLONPÄÄ, *President,*
Sir Nicolas BRATZA,
Mr A. PASTOR RIDRUEJO,
Mrs E. PALM,
Mr M. FISCHBACH,
Mr J. CASADEVALL,
Mr S. PAVLOVSCHI, *judges,*
and Ms F. ELENS-PASSOS, *Deputy Section Registrar,*

Having deliberated in private on 19 November 2002,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 53236/99) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an United Kingdom national, Neville Charles Waite ("the applicant"), on 29 July 1999.

2. The applicant, who had been granted legal aid, was represented by Mr S. Creighton, a lawyer practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Ms H. Upton of the Foreign and Commonwealth Office, London.

3. The applicant, sentenced to detention at Her Majesty's Pleasure, alleged that he had not received an oral hearing when he was recalled to prison after being released on licence, that the grounds of recall were not connected with the purpose of his sentence and discriminatory and that he had no opportunity to obtain compensation or remedy for these matters. He invoked Articles 5 §§ 1, 4 and 5, 13 and 14 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 23 October 2001, the Court declared the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1964 and lives in London.

9. The applicant, then aged sixteen years, was convicted of the murder of his grandmother on 12 October 1981. At his trial, he had unsuccessfully raised the defence of diminished responsibility, based on the fact that he had been addicted to glue sniffing for several years. He was sentenced to detention at Her Majesty's Pleasure pursuant to section 53(1) of the Children and Young Persons Act 1933. His tariff (the portion of sentence representing punishment and deterrence) was set at 10 years.

10. On 26 January 1994, the applicant, aged 29 years, was released on life licence.

11. No concerns arose with his supervising probation officer until in April 1997 the applicant told her that he had been having a sexual relationship with MM, a 16-year-old youth. MM was regarded as a vulnerable youth and had been provided with the support of a social worker following his involvement in a theft offence.

12. In June 1997, the applicant was arrested on suspicion of being in possession of prohibited drugs (namely, ecstasy tablets). He was taken to a police station and released on bail. His probation officer sent him a registered letter requesting him to meet her on 20 June 1997. He did not attend the meeting or make any contact by telephone until 23 June 1997, when he agreed to meet her the next day.

13. On 24 June 1997, however, the applicant made a suicide attempt, taking 30 paracetamol tablets. He was discharged from hospital on 25 June 1997. He met his probation officer on 26 June 1997 and agreed to meet her again on 1 July 1997. He failed to keep the appointment, telephoning to say that he had overslept.

14. On 2 July 1997, he met with his probation officer and Mr L. from the Community Drug and Alcohol Services. During this meeting, the applicant admitted that he had been using drugs (LSD, ecstasy and cannabis) since his release from prison and that his use of ecstasy was beyond his control. He obtained the drugs from friends or acquaintances who expected him to do favours for them in return. He stated that he was no longer having a sexual

relationship with MM but that MM had been staying with him at his flat. He met with his probation officer again on 4 July 1997.

15. In her report of 4 July 1997, the probation officer stated:

> "Until October 1996 [the applicant's] response to his Licence, in terms of reporting for appointments, had been exemplary and he appeared to have made good progress in settling into the community, via stable employment and the allocation of his own council flat. It would appear however, that his resignation from his job in September 1996 significantly impacted on the sense of structure and purpose he then had about his day to day life which he now admits he has since found difficult to attain. Until recently, his presentation during our meetings gave no cause for concern. However, he now reports that he had been less than honest about the changes in his functioning as he feared a recall to prison, particularly given his initial stability and progress. In addition to his now admitted drug use, it would appear that [the applicant's] anxieties about his future are limited to: (a) his previous unsafe sexual practices and the possible consequences of this on his health; (b) his wish to have a long-term and supportive monogamous relationship; (c) his growing sense of loneliness and isolation despite a wide social network... and (d) a sense of stagnation about the course of his life, particularly in finding alternative employment to date, despite extensive efforts. These issues, alongside [the applicant's] behaviour over the past month, clearly indicate that he is vulnerable and that close monitoring of his situation at this time is crucial."

16. She concluded that he posed a risk to himself and that there are "no indications that he is a risk to the public in terms of dangerousness".

17. On 4 July 1997, the Assistant Chief Probation Officer prepared a report that stated:

> "[The applicant] had demonstrated, and recently admitted, that his behaviour has been both self-destructive (through drug misuse, relationships with others and a suicide attempt) and that he posed a risk to a minor. ... The area of risk to the public stems from his relationship with a minor."

She noted that there had been an openness about long-standing problems and some degree of insight coming out of the crisis of recent weeks that suggested that the applicant could work on them. She concluded that a final recommendation was difficult given the area of risk to himself and proposed that a psychiatric report be prepared concerning his current level of functioning and future prognosis and specifically an assessment of self-harm.

18. On 11 July 1997, the Parole Board considered the applicant's case and recommended his recall to prison.

19. On 21 July 1997, the Secretary of State accepted the recommendation, revoked the applicant's licence and recalled him to prison. He was informed that the reasons for his recall were

> "1. You have recently disclosed that you have been misusing drugs since your release in 1994, and following your arrest in June [1997] there is also a possibility that you will be convicted of the possession of, and intent to supply, illegal drugs.
>
> 2. You have been associating with a minor and you have admitted that your relationship was of a sexual nature.

3. You have breached your licence conditions by not maintaining contact with your supervising officer in accordance with her instructions and by not being open and honest with her.

4. You attempted suicide.

The Parole Board and the Secretary of State took the view that for your own safety and the safety of others it was inappropriate to allow you to remain at liberty."

20. On 29 July and 5 August 1997, the applicant submitted written representations to the Parole Board concerning his recall to prison. He admitted *inter alia* that before his arrest in June 1997 he had been taking 10 to 20 ecstasy tablets a day and that he had not been honest about his drugs abuse with his probation officer. He stated that his relationship with MM was now platonic and that he had terminated sexual contacts on discovering that he was 16. He stated that he had not been involved in drug dealing and hoped to be able to deal with his drug problem, now it was out in the open, with the assistance of the probation service within the community.

21. On 5 September 1997, the Parole Board considered the applicant's case. There was no oral hearing. It decided:

"The index offence involved the brutal murder of [the applicant's] grandmother, when he was 16. After constructive progress in prison, which included work on one of the key risk factors - drug abuse - he was released on licence in January 1994. In July 1997, [the applicant] was recalled to prison for drug misuse, including the possibility that he will be convicted of intention to supply, having a sexual association with a minor, breach of licence conditions and attempted suicide.

The Panel has considered all the relevant reports and taken careful note of [the applicant's] representations... In spite of the considerable attempts by the Local Probation Service to enforce [the applicant's] licence, his behaviour in recent months demonstrates that he is at risk not just to himself but to other members of the community. Irrespective of whether [the applicant] is convicted of an offence, he has admitted extensive illegal drug abuse and the concerns about his sexual involvement with a minor were sufficient to merit a case conference. Furthermore, the incidents of self harm indicate the need for thorough psychiatric assessment. It is in the interests of public safety and [the applicant's] longer term well being that the recall be confirmed. A full assessment of the factors underlying the breakdown of the licence needs to be made, together with plans to tackle what appears to be deep rooted problems of drug abuse and social isolation.

The Panel noted that [the applicant] has shown a willingness to co-operate with Probation and has demonstrated an ability to comply with the terms of his licence. Twelve months should be sufficient time for him to be assessed to stabilise and to tackle the problems identified."

22. On 14 October 1997, the applicant was informed that the Parole Board had considered his recall on the papers and upheld the decision to revoke his life licence. He was told that he would be informed of the date of the next review once the Crown Prosecution Service had made a decision regarding the case against him for drugs possession.

23. On 17 November 1997, the applicant was informed that the Crown Prosecution Service had decided not to prosecute him for the alleged drugs offence and that his case would be reviewed by the Parole Board in October 1998.

24. A number of reports were prepared to assist the Parole Board in the coming review.

25. In his report of 10 June 1998, Mr B., the Principal Case Officer stated:

> "[The applicant's] misuse of illegal substances for many years remains a major risk concern. However he acknowledges this and had taken steps to challenge this issue. If he can display the same harmony in the community as he has in the custodial setting there is no purpose served by his retention in custody. However constructive supervision and support will initially be required."

26. His probation officer stated in a report of 29 June 1998:

> "... provided that he is given the necessary support and receives sustained input to encourage his current anti-drugs attitude and drug-free status, he can safely be released into the community."

27. In a report of 23 June 1998, a forensic psychologist noted that "the major risk factor contributing to his committing the original offence ... was drugs abuse".

28. In July 1998, the applicant received his parole dossier. On seeking legal advice prior to his Parole Board review, the applicant was advised that the Prison Service had failed to apply the procedure applicable to his recall under the interim arrangements implemented pending the entry into force of the Crime Sentences Act 1997. He should under those administrative provisions have received an oral hearing concerning his recall, though this was not a statutory entitlement.

29. An application for legal aid for bringing judicial review proceedings was made on 16 July 1998 and legal aid granted on 7 September 1998.

30. On 9 September 1998, the Prison Service informed the applicant:

> "We have now looked into the circumstances surrounding the revocation of [the applicant's] life licence in July 1997. While we accept that, due to an oversight, the procedures did not follow the interim arrangements for dealing with HMP detainees, there is, in our view, no question that [the applicant's] recall to prison was or is in any way unlawful or invalid...
>
> Under the circumstances, we see no reason or justification for any declaration or order directing his release or authorising compensation."

31. On 30 September 1998, the applicant applied for judicial review. Leave was granted on 6 October 1998. The full hearing of his case was not scheduled to take place until 1999.

32. An oral hearing was held by the Parole Board on 27 October 1998, at which the applicant was present and represented, following which it directed the applicant's release. In its decision it stated:

"In reaching its decision the panel took account of the following:

(i) the absence of any violence or threat of violence since the index offence either in prison or when on licence for three and a half years;

(ii) your acceptance of an inappropriate lifestyle when previously released on licence and your frank acknowledgement of your drug abuse during that time;

(iii) the fact that since recall you have been drug free;

(iv) reports of your increased maturity and strong motivation to keep clear of drugs and the drug scene in future;

(v) the greater relevance of the proposed community based drugs rehabilitation and relapse prevention programme that is available through drug link;

(vi) the agreement of the Inner London Probation Service to provide an approved probation hostel place for up to twelve weeks to assist in your reintroduction to the community and the help you will receive in obtaining employment;

(vii) your acceptance of the need to be totally honest with your supervising probation officer in future..."

33. The applicant was released on 17 November 1998.

34. In advice dated 8 January 1999, counsel advised that since he had been released no further purpose could be served by continuing with the judicial review application. There was no prospect of obtaining any damages for the period spent in detention after recall.

35. On 6 March 1999, the judicial review proceedings were ended by a consent order.

36. On 21 December 1999, the applicant was again recalled to prison, following his arrest for possession of a Class A drug (ecstasy) and a Class B drug (cannabis). His recall was recommended by the Parole Board and he continues to be detained in prison on the recommendation of the Parole Board following periodic reviews of his case. He is currently detained in open prison and his next review is scheduled for December 2002.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Detention during Her Majesty's Pleasure

37. English law imposes a mandatory sentence for the offence of murder in respect of offenders under the age of 18 known as *detention during Her Majesty's Pleasure* (section 53(1) of the Children and Young Persons Act 1933); in respect of offenders between the age of 18 and 20 years, *custody for life* (section 8(1) of the Criminal Justice Act 1982), and in respect of

offenders aged 21 and over, *life imprisonment* (section 1(1) of the Murder (Abolition of Death Penalty) Act 1967).

38. Mandatory life sentences are fixed by law, in contrast to discretionary life sentences which can be imposed at the discretion of the trial judge on persons convicted of certain violent or sexual offences (e.g. manslaughter, rape or robbery). The principles underlying the imposition of a discretionary life sentence are:

(i) that the offence is grave, and

(ii) that there are exceptional circumstances which demonstrate that the offender is a danger to the public and that it is not possible to say when the danger will subside.

39. Discretionary life sentences are indeterminate in order that "the prisoner's progress may be monitored ... so that he will be kept in custody so long as public safety may be jeopardised by his being let loose at large" (R v. Wilkinson [1983] 5 Cr. App. Rep. 105, p. 108).

B. Categorisation of detention "during Her Majesty's Pleasure"

40. The notion of detention during Her Majesty's Pleasure had its origins in an Act of 1800 for "the safe custody of insane persons charged with offence". Section 1 provided that defendants acquitted of a charge of murder, treason or felony on the grounds of insanity at the time of the offence were to be detained in "strict custody until His Majesty's pleasure" and described their custody as being "during His [Majesty's] pleasure".

41. In 1908, detention during His Majesty's pleasure was introduced in respect of offenders aged ten to sixteen and then extended to cover those under eighteen in 1933. The provision in force at present is Section 53(1) of the Children and Young Persons Act 1933 (as amended) which provides:

> "A person convicted of an offence who appears to the Court to have been under the age of eighteen years at the time the offence was committed shall not, if he is convicted of murder, be sentenced to imprisonment for life nor shall sentence of death be pronounced on or recorded against any such person but in lieu thereof the court shall ... sentence him to be detained during Her Majesty's pleasure and, if so sentenced, he shall be liable to be detained in such a place and under such conditions as the Secretary of State may direct."

42. In the case of *ex parte Prem Singh* on 20 April 1993, Evans LJ in the Divisional Court held as follows in respect of detention during Her Majesty's Pleasure:

> "At the time of sentencing, the detention orders under section 53 were mandatory. It is indeed the statutory equivalent for young persons of the mandatory life sentence for murder. But the sentence itself is closer in substance to the discretionary sentence of which part is punitive (retribution and deterrence) and the balance justified only by the interests of public safety when the test of dangerousness is satisfied. The fact that the mandatory life prisoner may be given similar rights as regards release on licence does not alter the fact that the mandatory life sentence is justifiable as punishment for the

whole of its period: see R. v. Secretary of State, ex. p. Doody & others [1993] Q.B. 157 and Wynne v. UK (E.C.H.R. 1st December 1992). The order for detention under section 53 is by its terms both discretionary and indeterminate: it provides for detention 'during Her Majesty's pleasure'. (Section 53(4) which expressly authorised the Secretary of State to discharge the detainee on licence 'at any time' was repealed by the Parole Board provisions of the Criminal Justice Act 1967, but this does not, in my judgment, alter the nature of the sentence in any material respect.) I would decide the present case on the narrow ground that, notwithstanding Home Office and Parole Board practice, the applicant should be regarded as equivalent to a discretionary life prisoner for the purpose of deciding whether Wilson rather than Payne governs his case."

43. The Divisional Court accordingly held that the applicant in that case, who was detained during Her Majesty's pleasure, should be afforded the same opportunity, as would be given a discretionary life prisoner, to see the material before the Parole Board when it decided upon whether he should be released after his recall to prison on revocation of his licence.

C. Release on licence and revocation of licences

44. Persons sentenced to mandatory and discretionary life imprisonment, custody for life and those detained during Her Majesty's Pleasure have a "tariff" set in relation to the period of imprisonment they should serve in order to satisfy the requirements of retribution and deterrence. After the expiry of the tariff, the prisoner becomes eligible for release on licence. Applicable provisions and practice in respect of the fixing of the tariff and release on licence have been subject to change in recent years, in particular, following the coming into force on 1 October 1992 of the Criminal Justice Act 1991.

45. Under the relevant provisions of the Criminal Justice Act 1967, the regime applying to the release of discretionary and mandatory life prisoners was the same. Section 61(1) of the 1967 Act provided *inter alia* that:

"The Secretary of State may, if recommended to do so by the Parole Board, release on licence a person serving a sentence of imprisonment for life or custody for life or a person detained under section 53 of the Children and Young Persons Act 1933 (young offenders convicted of grave crimes), but shall not do so in the case of a person sentenced to imprisonment for life or custody for life or to detention during Her Majesty's pleasure or for life except after consultation with the Lord Chief Justice of England and the trial judge if available."

46. The 1991 Act instituted changes to the regime applicable to the release of discretionary life prisoners following the decision of the European Court of Human Rights in the case of *Thynne, Wilson and Gunnell v. the United Kingdom* (judgment of 25 October 1990, Series A no. 190-A).

Pursuant to section 34 of the 1991 Act, after the tariff expired, the prisoner could require the Secretary of State to refer his case to the Parole Board which had the power to order his release if it was satisfied that it was no longer necessary for the protection of the public that the prisoner should

be confined. Pursuant to the Parole Board Rules 1992 which came into force on 1 October 1992, a prisoner was entitled to an oral hearing, to disclosure of all evidence before the Parole Board and to legal representation. He was also entitled to call witnesses on his behalf and to cross-examine those who have written reports about him.

47. The regime applicable to mandatory life prisoners and prisoners detained during Her Majesty's Pleasure was, however, preserved within section 35 of the 1991 Act. Section 35 of the 1991 Act provided insofar as relevant:

> "(2) If recommended to do so by the Board, the Secretary of State may, after consultation with the Lord Chief Justice together with the trial judge if available, release on licence a life prisoner who is not a discretionary life prisoner."

48. The criterion for determining whether re-detention was justified was that of dangerousness, meaning a consideration of whether the offence constitutes an unacceptable risk of physical danger to the life or limb of the public (see *R v. Secretary of State for the Home Department, ex parte Prem Singh*, unreported, transcript pp. 26F-27B; *Singh v. the United Kingdom*, judgment of 21 February 1996, *Reports of Judgments and Decisions* 1996-I, at § 39).

49. Pursuant to section 39 of the 1991 Act, the Secretary of State could, on recommendation of the Parole Board, revoke the licence of such a life prisoner who had been released on licence. In such circumstances, the prisoner had the right to make written representations with respect to his recall and for a review to be carried out by the Board. Where the Board then recommended release on licence, the Secretary of State was under a duty to give effect to that recommendation (section 39(5)).

D. Recent Developments

50. In light of the judgments of the Court in the cases of *Singh v. the United Kingdom* (cited above, p. 280), and *Hussain v. the United Kingdom* (judgment of 21 February 1996, *Reports* 1996-I, p. 252), the Secretary of State announced, on the 23 July 1996, the introduction of interim measures taking effect from 1 August 1996 which changed the procedure under which the cases of prisoners detained during Her Majesty's Pleasure were reviewed by the Parole Board.

51. Pursuant to these measures, the review took the form of an oral hearing at which prisoners were entitled to legal representation and to examine and cross-examine witnesses. Prisoners also normally received full disclosure of all material relevant to the question of whether they should be released prior to the hearing. Pending amendment of section 53(2) of the 1991 Act, the Parole Board did not, however, have power to direct the

release of any prisoner (save in circumstances provided for in section 39 of the 1991 Act above).

52. On 1 October 1997, the Crime (Sentences) Act 1997 came into force, giving statutory effect to the interim arrangements. Section 28(5) further provided that the Secretary of State was under a duty to release a prisoner detained during Her Majesty's Pleasure where so directed by the Parole Board.

THE LAW

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

53. Article 5 § 4 of the Convention 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."

A. The parties' submissions

54. The applicant submitted that he did not disagree that the Parole Board was a court for the purposes of Article 5 § 4 when deciding whether or not to confirm recall of a prisoner following revocation of a licence. The critical issue was whether this provision was violated by the failure to afford the applicant an oral hearing with adversarial procedures before the Board in September 1997. He argued that issues arose concerning his character and mental state, e.g. his psychological state resulting in his previous suicide attempt and the significance of his drugs abuse which rendered an oral hearing essential to the fairness of the proceedings (relying on *Hussain v. the United Kingdom* and *Singh v. the United Kingdom,* cited above). He pointed out that at the subsequent oral hearing that did take place some time later all the issues were fully examined and the panel came to the conclusion that he had not posed any risk of violence and directed his release.

55. The Government submitted that on his recall to prison the applicant had access to a court satisfying the requirements of Article 5 § 4 of the Convention. The Parole Board which authorised his continuing detention was independent of the executive and the parties and had the power to direct the Secretary of State to order the applicant's release. While minors and persons of unsound mind were entitled to an oral hearing, with representation, this was not always the case. An oral hearing was not essential to the fairness of the proceedings in the applicant's case as he did not dispute the facts that led to his recall, as he had been provided with all

the materials before the Board and had made written representations to the Board and on the basis of the facts admitted, the Board was bound to conclude that public protection required that he be confined. The review took place approximately six weeks after recall and was therefore prompt. The decision in October 1998 to direct release was based on the progress that he had made since his first recall to prison. The applicant's second recent recall on drug related matters to prison indicated that he continued to raise matters of grave concern having regard to the circumstances in which the original murder offence came to be committed.

B. The Court's assessment

56. The Court recalls that where a national court, after convicting a person of a criminal offence, imposes a fixed sentence of imprisonment for the purposes of punishment, the supervision required by Article 5 § 4 is incorporated in that court decision (see *De Wilde, Ooms and Versyp v. Belgium,* judgment of 18 June 1971, Series A no. 12, pp. 40-41, § 76, and *Wynne v. the United Kingdom,* judgment of 18 July 1994, Series A no. 294-A, p. 15, § 36). This is not the case, however, in respect of any ensuing period of detention in which new issues affecting the lawfulness of the detention may arise (see *Weeks v. the United Kingdom,* judgment of 2 March 1987, Series A no. 114, p. 28, § 56, and *Thynne, Wilson and Gunnell v. the United Kingdom,* (cited above, pp. 26-27, § 68). Thus, in the *Hussain* judgment (cited above, pp. 269-70, § 54), the Court decided in respect of a young offender detained during Her Majesty's pleasure that, after the expiry of the tariff period, Article 5 § 4 required that he should be able periodically to challenge the continuing legality of his detention since its only justification could be dangerousness, a characteristic subject to change. Where in the *Singh* case (cited above, p. 285, §§ 8-10), the applicant was recalled to prison after release on licence due to alleged concerns about his conduct, the Court on the same basis found issues of lawfulness potentially arose concerning the grounds for his continued detention which attracted the guarantees of Article 5 § 4.

57. In this case, the applicant was released on life licence in January 1994 after expiry of his tariff. He was recalled to prison on 21 July 1997 by the Secretary of State on recommendation of the Parole Board following concerns as to his conduct, which included misuse of drugs, a sexual relationship with a minor, attempted suicide and failure to keep contact with his supervising probation officer. The Court finds, in light of the above case-law, that the applicant was entitled under Article 5 § 4 to proceedings to have any issues of lawfulness of this re-detention determined by a court.

58. While the Parole Board considered the applicant's written representations concerning his recall on 5 September 1997, no oral hearing took place and the applicant had no opportunity to examine or cross-

examine witnesses relevant to the allegations that his conduct posed a risk to the public. The applicant should in fact have received such a hearing under the administrative provisions applying pending the entry into force of the Crime Sentences Act 1997. The Government have argued that this oversight was not material in the applicant's case, as he had admitted the facts leading to recall and on the basis of those facts the Board was bound to conclude that public protection required that he be confined.

59. The Court is not persuaded by the Government's argument which appears to be based on the speculative assumption that whatever might have occurred at an oral hearing the Board would not have exercised its power to release. Article 5 § 4 is first and foremost a guarantee of a fair procedure for reviewing the lawfulness of detention – an applicant is not required, as a precondition to enjoying that protection, to show that on the facts of his case he stands any particular chance of success in obtaining his release. In matters of such crucial importance as the deprivation of liberty and where questions arise involving, for example, an assessment of the applicant's character or mental state, the Court's case-law indicates that it may be essential to the fairness of the proceedings that the applicant be present at an oral hearing. In such a case as the present, where characteristics pertaining to the applicant's personality and level of maturity and reliability are of importance in deciding on his dangerousness, Article 5 § 4 requires an oral hearing in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses (see the above-mentioned *Singh* judgment, p. 300, §§ 67-68).

60. The Court concludes that there has been in that respect a violation of Article 5 § 4 of the Convention.

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

61. Article 5 § 1 of the Convention provides as relevant:

> "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:
>
> (a) the lawful detention of a person after conviction by a competent court..."

A. The parties' submissions

62. The applicant argued that there was no sufficient connection between his recall to prison and the circumstances of the original offence to justify his detention under Article 5 § 1(a). His failure to keep appointments was not an adequate ground for recall, while the misuse of drugs bore no similarity to his behaviour prior to the original offence, which was located in a climate of authoritarian family relationships, bullying and lack of

support. His attempt at suicide was an illegitimate ground for detention, showing no danger to the public, while his relationship with MM was supportive rather than abusive.

63. The Government submitted that the applicant's detention after recall was justified by his original sentence for murder. There was a causal link between that sentence and his recall as his admitted failure to keep appointments with his probation officers, his abuse of drugs and unstable behaviour were sufficient grounds to conclude that he constituted a danger to the public. The circumstances of his recall also bore sufficient similarity to the original offence to cause concern.

B. The Court's assessment

64. The question arises whether the continued detention of the applicant after recall on 21 July 1997 under the original life sentence imposed on him for murder in 1981 complied with the requirements of Article 5 § 1 of the Convention.

65. It is not contested that this detention was in accordance with a procedure prescribed by English law and otherwise lawful under English law. The Court's case-law indicates however that it may be necessary to look beyond the appearances and the language used and concentrate on the realities of the situation (*Van Droogenbroeck v. Belgium*, judgment of 24 June 1982, Series A no. 50, p. 20, § 20). In *Weeks v. the United Kingdom* (cited above, p. 23, § 42), which concerned the recall to prison by the Secretary of State of an applicant who had been released from a discretionary life sentence for robbery, the Court interpreted the requirements of Article 5 as applying to the situation as follows:

> "The lawfulness required by the Convention presupposes not only conformity with domestic law but also, as confirmed by Article 18, conformity with the purposes of the deprivation of liberty permitted by the sub-paragraph (a) of Article 5 § 1 (see as the most recent authority the Bozano judgment of 18 December 1986, Series A no. 111, p. 23, § 54). Furthermore, the word 'after' in sub-paragraph (a) does not simply mean that the detention must follow the 'conviction' in point of time: in addition, the 'detention' must result from, 'follow and depend upon' or occur 'by virtue' of the 'conviction' (*ibid*., pp. 22-23, § 3, and the Van Droogenbroeck judgment ... p. 19, § 35). In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue (see the above mentioned Van Droogenbroeck judgment, p. 21, § 39)."

66. The Court recalls that in the *Weeks* case it was found that the discretionary life sentence imposed on the applicant was an indeterminate sentence expressly based on considerations of his dangerousness to society, factors which were susceptible by their very nature to change with the passage of time. On that basis, his recall, in light of concerns about his unstable, disturbed and aggressive behaviour, could not be regarded as arbitrary or unreasonable in terms of the objectives of the sentence imposed

on him and there was sufficient connection for the purposes of Article 5 § 1(a) between his conviction in 1966 and recall to prison in 1977 (judgment cited above, pp. 25-27, §§ 46-51). More recently, in *Stafford v. the United Kingdom* ([GC], no. 46295/99, ECHR 2002-IV, §§ 81-83), the Court found a breach of Article 5 § 1 where the detention after recall of an adult mandatory life prisoner was based on the risk of non-violent offending unconnected with the basis of his original detention of murder many years before.

67. The Court recalls that in this case the applicant's conduct prior to his recall was causing concern to his supervising probation officer on a number of grounds. The decision for his recall made by the Secretary of State identified four concerns – misuse of drugs, involving arrest for possession, a sexual relationship with a minor, failure to maintain contact with his probation officer and to be honest with her and his attempted suicide. The applicant has argued that these grounds did not disclose any risk of danger to the public which could be related to his original conviction for murder, *inter alia* as his relationship with the minor was not abusive, the drugs incident was not in any way assimilable to the circumstances of the murder and his attempted suicide disclosed only a risk to himself.

68. The Court notes that the probation officer was aware from April 1997 of the applicant's relationship with a minor but that this did not lead to any specific action. It was not until his arrest for possession of drugs, attempted suicide and failure to attend meetings with his probation officer that it appears that serious consideration was given to the question whether he was showing signs of posing a risk to the public. While it is true that his probation officer took the view that he was primarily a risk to himself and the Assistant Chief Probation Officer referred specifically to the relationship with the minor, the Court is satisfied that the decision to recall was nonetheless to a decisive degree influenced by his arrest for drugs possession and his admission that his drugs habit was beyond control. This, combined with his failure to co-operate with his probation officer who was supervising his rehabilitation in the community, provided, in the Court's view, grounds for concluding that he was no longer reliable and that his conduct was unpredictable. Having regard to the circumstances of this case and, in particular, having regard to the fact that the offence of murder in 1981 was committed against a background of substance abuse, the Court finds sufficient connection, as required by the notion of lawfulness in Article 5 § 1(a) of the Convention, between the recall and the original sentence for murder in 1981.

69. The Court concludes that there has been no violation of Article 5 § 1 disclosed in the present case.

III. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

70. Article 5 § 5 of the Convention provides:

> "Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

71. The applicant complained that he had no enforceable right to compensation in respect of the violation of Article 5 § 4 above.

72. The Government argued that his detention had been lawful in domestic terms and also in compliance with the Convention. In any event, it was not the lack of oral hearing which had been causative of his detention, but rather the unacceptable risk that he posed to the public.

73. The Court has found above a violation of Article 5 § 4 in that the applicant did not receive a review of the lawfulness of his detention in accordance with the requirements of that provision. No possibility of obtaining compensation existed at that time in domestic law in respect of that breach of the Convention. The applicability of Article 5 § 5 is not dependent on a domestic finding of unlawfulness or proof that but for the breach the person would have been released (see *Thynne, Wilson and Gunnell*, p. 31, § 82, and the authorities cited therein).

74. There has, accordingly, been a violation of Article 5 § 5 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

75. The applicant complained that he had been discriminated against in the enjoyment of his rights under Articles 5 and 8 of the Convention.

76. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 5 is set out above (paragraph 61) while Article 8 provides as relevant in its first sentence:

> "1. Everyone has the right to respect for his private ... life..."

A. The parties' submissions

77. The applicant submitted that the decision to recall him on grounds of his relationship with a 16-year-old boy breached Articles 5 and 8 of the Convention in conjunction with Article 14. He was engaged in a consensual homosexual relationship and there was no suggestion that it was abusive. If

he had been engaged in a relationship with a 16-year-old girl, this would have been lawful and constituted neither a criminal offence nor grounds for recall to prison. The applicant noted that the Government appeared to concede that if his homosexual relationship had formed a basis for recall that there would have been a violation of Article 8, referring to the case of *Sutherland v. the United Kingdom* ([GC], no. 25186/94, judgment of 27 March 2001). He disputed their assertion that this was not a reason for his recall, pointing out that it was included in the grounds of the decision and would not have figured there if it had been irrelevant. The relationship had the taint of illegality because of the discriminatory laws existing as to the age of consent for homosexual activity and it was very unlikely that a mutually supportive relationship with a 16-year-old girl would have been advanced as a ground of recall.

78. The Government submitted that the applicant was not discriminated against on the basis of his sexual orientation. They pointed out that his association with MM was known from April 1997 and did not lead by itself to his recall to prison. The reference to that relationship in the reasons for recall had to be read in context, namely the fact that MM was aged 16 and a vulnerable individual was relevant to the question whether he posed a risk to the public when taken in association with his drug abuse and unstable behaviour. Furthermore, the applicant was not recalled to prison simply due to that relationship. The principal reason was his admitted drug abuse in circumstances where the original murder offence had been committed under the influence of "glue sniffing".

B. The Court's assessment

79. For the purposes of Article 14 a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Moreover, the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Camp and Bourimi v. the Netherlands*, no. 28369/95, ECHR 2000-X, § 37).

80. The Court recalls that in this case the decision for the applicant's recall included reference to his relationship with a minor who was male. At that time, the age of consent for male consensual adult homosexual relations was set at 18, while the age of consent for heterosexual relations was 16. The age for male homosexuals was not brought down to 16 until a few years later when the Sexual Offences (Amendment) Act 2000 came into force. The Court does not consider that it must necessarily be assumed that it would not have been of concern to the probation service if the applicant, a

prisoner on life licence, had become involved in a relationship with a girl of 16 years. In their assessment of any risk of dangerousness to the public of a person convicted of murder, it would have been inevitable that his relationships, as with other aspects of his life affecting his stability, would have come under scrutiny, whether contrary to the criminal law or not. Furthermore, as the Government points out, the relationship with MM was known for some months without any action being taken. It appears that it was his arrest for drugs offences and his failure to keep in contact with his probation officer which gave rise to serious alarm. While therefore the relationship with MM was referred to in the reports, the Court does not find that it can be considered as playing a determinative role in his recall to prison.

81. In the circumstances, it has not been established that the applicant has been treated differently in the enjoyment of his rights under Articles 5 or 8 of the Convention on grounds of his sexual orientation. There has therefore been no violation of Article 14 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

82. Article 13 provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

83. The Court has found above violations of Article 5 §§ 4 and 5 of the Convention. No separate issue arises under Article 13 in the present case.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

84. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

85. The applicant claimed non-pecuniary damages for the period of 21 July 1997 to 17 November 1998. He considered that he had been wrongfully detained during these fifteen months and that his suffering and distress had been aggravated by factors of discrimination. He proposed the sum of 35,000 pounds sterling (GBP) as being appropriate.

86. The Government considered that a finding of a violation would provide just satisfaction to the applicant in this case. In any event, his claim

for non-pecuniary damage was unreasonable and excessive, in particular as the applicant had not been deprived of his liberty erroneously. No more than GBP 5,000 would be appropriate in their view.

87. The Court notes that it has found procedural breaches of Article 5 §§ 4 and 5 above. It has not upheld the applicant's complaints that he was deprived of his liberty in violation of Article 5 § 1 or that there has been discrimination. Nonetheless, in the circumstances, it considers that the applicant must have suffered feelings of frustration, uncertainty and anxiety which cannot be compensated solely by the findings of violations. Having regard to awards given in similar cases, the Court awards, on an equitable basis, 2,500 euros (EUR).

B. Costs and expenses

88. The applicant claimed GBP 7,945.35, inclusive of value-added tax (VAT), for costs and expenses in proceedings before this Court.

89. The Government considered this claim excessive, submitting that the hourly rate for the solicitor was high (GBP 240) and pointing out that there had been no oral hearing.

90. Noting that the applicant was only partly successful in his complaints and the relative lack of complexity of the procedures in this case, the Court makes an award of EUR 8,000, plus any VAT that may be payable.

C. Default interest

91. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank to which should be added three percentage points (see *Christine Goodwin v. the United Kingdom* [GC], application no. 28957/95, § 124, to be published in ECHR 2002-...).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

2. *Holds* that there has been no violation of Article 5 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 5 § 5 of the Convention;

4. *Holds* that there has been no violation of Article 14 of the Convention;

5. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention the following amounts, to be converted into pounds sterling at the rate applicable at the date of settlement:

(i) EUR 2,500 (two thousand five hundred euros) in respect of non-pecuniary damage;

(ii) EUR 8,000 (eight thousand euros) in respect of costs and expenses together with any value-added tax that may be payable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 10 December 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise ELENS-PASSOS
Deputy Registrar

Matti PELLONPÄÄ
President