



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

COURT (CHAMBER)

**CASE OF HUSSAIN v. THE UNITED KINGDOM**

*(Application no. 21928/93)*

JUDGMENT

STRASBOURG

21 February 1996

**In the case of Hussain v. the United Kingdom<sup>1</sup>,**

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

Mr R. RYSSDAL, *President*,

Mr F. GÖLCÜKLÜ,

Mr R. MACDONALD,

Mr A. SPIELMANN,

Mr N. VALTICOS,

Mrs E. PALM,

Mr F. BIGI,

Sir John FREELAND,

Mr P. JAMBREK,

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

Having deliberated in private on 28 September 1995 and 26 January 1996, Delivers the following judgment, which was adopted on the last-mentioned date

## PROCEDURE

1. The case was referred to the Court on 8 December 1994 by the European Commission of Human Rights ("the Commission") and on 23 December 1994 by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government"), within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 21928/93) against the United Kingdom lodged with the Commission under Article 25 (art. 25) on 31 March 1993 by a Pakistani national, Mr Abed Hussain. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory

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<sup>1</sup> The case is numbered 55/1994/502/584. 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.

<sup>2</sup> Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). The object of the request and of the application 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 para. 4 (art. 5-4) of the Convention. The Commission further sought a decision as to whether there had been a breach of Article 14 (art. 14) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 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 President of the Court decided that in the interests of the proper administration of justice this case and the case of *Singh v. the United Kingdom* (no. 56/1994/503/585) should be heard by the same Chamber (Rule 21 para. 6) and that a joint hearing should be held. The Chamber to be constituted included *ex officio* Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 January 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr R. Macdonald, Mr A. Spielmann, Mr N. Valticos, Mrs E. Palm, Mr F. Bigi and Mr P. Jambrek (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 13 April 1995 and the applicant's memorial on 18 April. The Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 27 September 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr I. CHRISTIE, Foreign and Commonwealth Office,	<i>Agent,</i>
Mr D. PANNICK QC, Mr M. Shaw, Barrister-at-Law,	<i>Counsel,</i>
Mr H. CARTER, Mr H. BAYNE, Mr R. HARRINGTON,	
Home Office,	<i>Advisers,</i>

(b) for the Commission

Mr N. BRATZA,	<i>Delegate,</i>
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(c) for the applicant

Mr E. FITZGERALD QC, Mr J. COOPER, Barrister-at-Law,	<i>Counsel,</i>
Ms K. AKESTER,	<i>Solicitor.</i>

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

## AS TO THE FACTS

### I. CIRCUMSTANCES OF THE CASE

6. Mr Abed Hussain was born in 1962 and is currently detained in Lindholme prison.

7. On 12 December 1978, the applicant - then aged 16 - was convicted at Leeds Crown Court of the murder of his younger brother, aged 2. The applicant had inflicted severe injuries on the infant while looking after him. He received a mandatory sentence of detention "during Her Majesty's pleasure" pursuant to section 53 (1) of the Children and Young Persons Act 1933 (as amended) (see paragraph 23 below). Its effect was to render the applicant "liable to be detained in such a place and under such conditions as the Secretary of State [for the Home Department] may direct".

8. In passing sentence on the applicant, the judge stated:

"I regard you as someone who has demonstrated himself to be a cruel and unfeeling young man. I think you are -certainly for the time being - a dangerous person."

The applicant appealed against both his conviction and sentence. The Court of Appeal dismissed his appeal on 5 March 1980.

9. Mr Hussain was first detained in the youth wing of Liverpool prison and then in a young offenders' institution before being transferred to an adult prison.

10. Under the administrative procedures governing such sentences as that received by the applicant, a "tariff" period is set to fix the number of years' detention necessary to satisfy the requirements of retribution and deterrence (see paragraph 27 below). In this regard, in 1978 the trial judge wrote to the Secretary of State:

"Over the two or three days immediately preceding the baby's death, [the applicant] had undoubtedly treated him with very considerable violence by slapping, kicking and shaking. The baby was covered with over 60 bruises and his brain and spine were injured. Since [the applicant] denied ever having laid hands on him, it was not possible to discover why he had acted with such violence. [The applicant] is unquestionably an unscrupulous young liar, but the most unusual feature of him was his impassivity. He demonstrated no feeling whatsoever for his brother's injuries and death. This gave me the impression that he is very probably a very dangerous young man who is quite unmoved by brutality. I am anxious that this aspect of his character should be borne fully in mind whenever the question of release arises. He still has three young siblings and their safety must be a predominant consideration. I am deeply concerned at the appearance of normality this young man gives; it is probably very misleading. I cannot recommend any period for his detention. It will have to continue until one can say with reasonable certainty that maturation has rendered him

safe. The difficulty is that he is already 'old for his years', as one police officer described him. Maturation here involves much more than simply a young boy growing up. I can do no more than sound this sombre note of warning."

11. It was not until 1986 that the applicant's tariff was set, at fifteen years, by the Secretary of State after a confidential process of consultation involving the trial judge and the Lord Chief Justice. In the course of this process, in which the applicant had no sight of any of the documents, the trial judge recommended a period of ten years "in view of the young age of [the] prisoner at the time of the offence"; the Lord Chief Justice agreed but stated that this should be "the absolute minimum". However, the Secretary of State commented: "I cannot accept the judicial tariff as matching the gravity of one of the most appalling offences I have encountered."

He accordingly increased the proposed tariff by five years. The applicant first learnt about these details through a letter from the Home Office of 6 October 1994, sent in accordance with the House of Lords' judgment of 24 June 1993 (see paragraph 30 below).

12. In the course of the applicant's detention the Parole Board (see paragraph 37 below) has so far considered whether or not to recommend the applicant's release on four occasions.

13. The first Parole Board review took place in December 1986. The reports of progress were positive and, as later disclosed to the applicant:

"the Local Review Committee [see paragraph 38 below], who felt that the risk was acceptable, considered Mr Hussain suitable to be given a provisional release date."

The Parole Board did not however recommend the applicant's release but it did recommend that he be transferred to a less restrictive category C prison with a further review to commence in August 1990. At the time, the applicant did not see any of the reports before the Parole Board and had no opportunity to appear before it.

14. The second Parole Board review took place in 1990. A Home Office summary of the review, disclosed later to the applicant, stated:

"The Local Review Committee recommended that Mr Hussain should be given a provisional release date ... The Board did not recommend Mr Hussain's release, but recommended his transfer to open conditions with a further review to commence eighteen months thereafter. However, the Secretary of State rejected the Board's recommendation and directed that he should move to another category C prison with a further review to commence in October 1992."

Again the applicant did not see any of the reports on him and was afforded no hearing before the Parole Board. He was given no reasons for the decisions taken.

15. In the third review in December 1992, the Parole Board recommended that the applicant be transferred to open conditions with a further review in six months' time. However, the Secretary of State, in exercise of his statutory powers (see paragraph 29 below), rejected this recommendation, directing that the applicant remain in close conditions

with a further review to commence in March 1995. The applicant was only informed in March 1993 that his release had not been recommended and about the date of his next review.

16. In June 1993, Mr Hussain applied for judicial review (see paragraph 39 below) in respect of the decision communicated in March 1993 on the basis that he had not been shown the reports on him placed before the Board. He relied on the case of Prem Singh (see paragraph 24 below) as establishing that persons detained during Her Majesty's pleasure had a right at common law to disclosure of reports.

17. On 13 October 1993, the Parole Board gave the High Court an undertaking to reconsider the applicant's case immediately and to disclose their case file to him so that he could make informed representations. The applicant withdrew his application for judicial review.

18. At his most recent review in January 1994, the applicant was shown the reports on him that were before the Parole Board but he was not given an opportunity to appear in person before the Board. Following this review, the Secretary of State accepted the Parole Board's recommendation to transfer the applicant to open-prison conditions, which transfer took place in February 1994. The Parole Board will again consider the applicant's case in February 1996.

19. The applicant has been detained for over seventeen years.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### **A. Categorisation of detention in the case of murderers**

20. A person who unlawfully kills another with intent to kill or cause grievous bodily harm is guilty of murder. English law imposes a mandatory sentence for the offence of murder: "detention during Her Majesty's pleasure" if the offender is under the age of 18 (section 53 (1) of the Children and Young Persons Act 1933 (as amended) - see paragraph 23 below); "custody for life" if the offender is between 18 and 20 years old (section 8 (1) of the Criminal Justice Act 1982); and "life imprisonment" for an offender aged 21 or over (section 1 (1) of the Murder (Abolition of Death Penalty) Act 1965).

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 (for example manslaughter, rape, robbery). The principles underlying the passing 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 that danger will subside.

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

### **B. Detention during Her Majesty's pleasure**

21. The notion of detention during Her Majesty's pleasure has its origins in statutory form in an Act of 1800 for "the safe custody of insane persons charged with offences" (Criminal Lunatics Act), which 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 shall be known" and described their custody as being "during His [Majesty's] pleasure".

22. In 1908, detention during His Majesty's pleasure was introduced in respect of offenders aged between 10 and 16. It was extended to cover those under the age of 18 at the time of conviction (1933) and further extended to cover persons under the age of 18 at the time when the offence was committed (1948).

23. The provision in force at present is section 53 (1) of the Children and Young Persons Act 1933 (as amended) ("the 1933 Act") 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 detained in such a place and under such conditions as the Secretary of State may direct."

24. In the case of *R. v. Secretary of State for the Home Department, ex parte Prem Singh* (20 April 1993, unreported) Lord Justice Evans 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 it 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'... 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."

(transcript, pp. 24C-25B)

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

The Parole Board has changed its policy accordingly.

25. However, in a statement in Parliament made on 27 July 1993 (see paragraph 32 below), the Secretary of State, Mr Michael Howard, explained that he included in the category of "mandatory life sentence prisoners" those

"persons who are, or will be, detained during Her Majesty's pleasure under section 53 (1) of the Children and Young Persons Act 1933 ..."

26. In *R. v. Secretary of State for the Home Department, ex parte T. and Others* [1994] Queen's Bench 378, 390D, Lord Justice Kennedy in the Divisional Court (with whom Mr Justice Pill agreed) said:

"I see no reason to regard him as having any special status because he was sentenced to detention [during Her Majesty's pleasure] rather than to life imprisonment, despite what was said by Evans LJ when giving judgment in *Reg. v. Parole Board, ex parte Singh (Prem)* (20 April 1993, unreported). The issues in that case were very different from those with which we are concerned. If Hickey had not been sent to hospital he could hope to benefit from the provisions of section 35 (2) of the 1991 Act [on mandatory life prisoners] ... It will be recalled that in Hickey's case the offence was murder, so the sentence was mandatory not discretionary."

On appeal the Court of Appeal stated that in respect of a person sentenced to detention during Her Majesty's pleasure under section 53 (1) of the 1933 Act for the offence of murder, the relevant provisions on release were those in section 35 (2) of the Criminal Justice Act 1991 (see paragraph 29 below), and not those relating to a discretionary life prisoner (*R. v. Secretary of State for the Home Department, ex parte Hickey* [1995] 1 All England Law Reports 479, 488).

### **C. Release on licence**

27. 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 that period of imprisonment they should serve 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 ("the 1991 Act").

*1. General procedure*

28. Section 61 (1) of the Criminal Justice Act 1967 ("the 1967 Act") provided, *inter alia*, that the Secretary of State, on the recommendation of the Parole Board and after consultation with the Lord Chief Justice and the trial judge, may "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". In this respect no difference was made between discretionary and mandatory life prisoners.

29. By virtue of section 35 (2) of the 1991 Act, persons detained during Her Majesty's pleasure and those life prisoners who are not discretionary life prisoners (see paragraph 20 above), may be released on licence by the Secretary of State, if recommended to do so by the Parole Board and after consultation with the Lord Chief Justice and the trial judge. The decision on whether to release still lies, therefore, with the Secretary of State.

30. The Secretary of State also decides the length of a prisoner's tariff. Subsequently to a House of Lords judgment of 24 June 1993 (*R. v. Secretary of State for the Home Department, ex parte Doody* [1994] 1 Appeal Cases 531, 567G), the view of the trial judge is made known to the prisoner after his trial as is the opinion of the Lord Chief Justice. The prisoner is afforded the opportunity to make representations to the Secretary of State who then proceeds to fix the tariff. Where the Secretary of State decides to depart from the judicial recommendation he is obliged to give reasons. As a matter of practice the prisoner is informed of the Secretary of State's final decision.

In the second, post-punitive phase of detention the prisoner knows that "the penal consequence of his crime has been exhausted" (*ibid.*, 557A).

31. A statement of policy issued by Sir Leon Brittan, then Secretary of State for the Home Department, on 13 November 1983 indicated that release on licence following expiry of the tariff depended on whether the person was considered no longer to pose a risk to the public.

32. On 27 July 1993 the Secretary of State, Mr Michael Howard, made a statement of policy in relation to mandatory life prisoners, stating, *inter alia*, that before any such prisoner is released on licence he

"will consider not only, (a) whether the period served by the prisoner is adequate to satisfy the requirements of retribution and deterrence and, (b) whether it is safe to release the prisoner, but also (c) the public acceptability of early release. This means that I will only exercise my discretion to release if I am satisfied that to do so will not threaten the maintenance of public confidence in the system of criminal justice".

33. In a number of recent court cases involving persons detained during Her Majesty's pleasure, it has been stated that the correct test for post-tariff

detention was to be whether the offender continued to constitute a danger to the public (*R. v. Secretary of State for the Home Department, ex parte Cox*, 3 September 1991; *R. v. Secretary of State for the Home Department, ex parte Prem Singh*, 20 April 1993 - cited above at paragraph 24; *R. v. Secretary of State for the Home Department, ex parte Prem Singh (no. 2)*, 16 March 1995).

### *2. Procedure applicable to discretionary life prisoners*

34. The 1991 Act instituted changes to the regime applying 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).

35. Pursuant to section 34 of the 1991 Act, the tariff of a discretionary life prisoner is now fixed in open court by the trial judge after conviction. After the tariff has expired, the prisoner may require the Secretary of State to refer his case to the Parole Board which has the power to order his release if it is satisfied that it is 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 is entitled to an oral hearing, to disclosure of all evidence before the panel (see paragraph 37 below) and to legal representation. There is provision enabling a prisoner to apply to call witnesses on his behalf and to cross-examine those who have written reports about him.

36. For the purposes of the 1991 Act, persons detained during Her Majesty's pleasure are not regarded as discretionary life prisoners (section 43 (2)).

## **D. Parole Board and Local Review Committees**

37. Section 59 of the 1967 Act set out the constitution and functions of the Parole Board:

"(1) For the purposes of exercising the function conferred on it by this Part of this Act as respects England and Wales there shall be a body known as the Parole Board ... consisting of a chairman and not less than four other members appointed by the Secretary of State.

...

(4) The following provisions shall have effect with respect to the proceedings of the Board on any case referred to it, that is to say

(a) the Board shall deal with the case on consideration of any documents given to it by the Secretary of State and of any reports it has called for and any information whether oral or in writing that it has obtained; and

(b) if in any particular case the Board thinks it is necessary to interview the persons to whom the case relates before reaching a decision, the Board may request one of its members to interview him and shall take into account the report of that interview by that member ...

(5) The documents to be given by the Secretary of State to the Board under the last foregoing subsection shall include

(a) where the case referred to the Board is one of release under section 60 or 61 of this Act, any written representations made by the person to whom the case relates in connection with or since his last interview in accordance with rules under the next following subsection;

(b) where the case so referred relates to a person recalled under section 62 of this Act, any written representations made under that section."

As to the constitution of the Parole Board, Schedule 2 to the 1967 Act further provides:

"1. The Parole Board shall include among its members

(a) a person who holds or has held judicial office;

(b) a registered medical practitioner who is a psychiatrist;

(c) a person appearing to the Secretary of State to have knowledge and experience of the supervision or after care of discharged prisoners;

(d) a person appearing to the Secretary of State to have made a study of the causes of delinquency or the treatment of offenders."

The Parole Board always counts among its members three High Court judges, three circuit judges and a recorder. Cases referred to the Board may be dealt with by three or more members of the Board (Parole Board Rules 1967). In practice, the Board sits in small panels, including, in the case of life prisoners, a High Court judge and a psychiatrist. The judges on the Board are appointed by the Home Secretary (section 59 (1) of the 1967 Act) after consultation with the Lord Chief Justice. With the exception of the new rules concerning discretionary life prisoners, similar provisions apply under the 1991 Act.

38. Under section 59 (6) of the 1967 Act the Secretary of State established for every prison a Local Review Committee with the function of advising him on the suitability for release on licence of prisoners. It was the practice to obtain this assessment before referring a case to the Parole Board. Before the Local Review Committee reviewed a case, a member of the committee would interview the prisoner if he was willing to be interviewed. The first review by the Local Review Committee was normally fixed to take place three years before the expiry of the tariff. Local Review Committees were abolished by the Parole Board Rules 1992. The prisoner is now interviewed by a member of the Parole Board.

### **E. Judicial review**

39. Persons serving a sentence of detention during Her Majesty's pleasure may institute proceedings in the High Court to obtain judicial review of any decision of the Parole Board or of the Secretary of State if those decisions are taken in breach of the relevant statutory requirements or if they are otherwise tainted by illegality, irrationality or procedural impropriety (*Council of Civil Service Unions v. Minister for the Civil Service* [1984] 3 All England Law Reports 935, 950-51).

### **PROCEEDINGS BEFORE THE COMMISSION**

40. Mr Hussain applied to the Commission on 31 March 1993. He relied on Article 5 para. 4 (art. 5-4) of the Convention, complaining that, under the current regulations:

- (a) he had no right to a periodic review by a court of his continued detention;
- (b) the ultimate decision as to his release lay with the executive;
- (c) he had no right to an oral hearing or to question or call witnesses;
- (d) he had no acknowledged right to see the reports before the Parole Board.

The applicant further complained under Article 14 (art. 14) of the Convention that he had been irrationally discriminated against on the basis of his status as a person convicted of murder.

41. The Commission declared the application (no. 21928/93) admissible on 30 June 1994. In its report of 11 October 1994 (Article 31) (art. 31), it concluded, unanimously, that there had been a violation of Article 5 para. 4 (art. 5-4) as regards the lack of review by a court of the applicant's continued detention and that it was not necessary to examine the issues under Article 14 (art. 14) of the Convention.

The full text of the Commission's opinion is reproduced as an annex to this judgment<sup>3</sup>

### **FINAL SUBMISSIONS MADE TO THE COURT**

42. At the hearing, the Agent of the Government invited the Court to conclude that, in the present case, there had been no breach of the

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<sup>3</sup> For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions - 1996), but a copy of the Commission's report is obtainable from the registry.

Convention. The applicant, for his part, asked the Court to uphold his complaints and declare that his rights under Article 5 para. 4 (art. 5-4) had been violated, both by the denial of a review by a court-like body and by the denial at any time of an oral hearing at which he could have put his case for release in person.

## AS TO THE LAW

### I. SCOPE OF THE CASE

43. In his memorial to the Court and at the hearing the applicant complained of the secretive and unfair manner in which his tariff (see paragraph 27 above) had been established.

44. The Court notes that this particular complaint was not dealt with by the Commission in its report or admissibility decision and that, as pointed out by the Delegate of the Commission, it is uncertain whether it can be regarded as falling within the compass of the case before the Court as delimited by the Commission's decision on admissibility (see, *inter alia*, the *Powell and Rayner v. the United Kingdom* judgment of 21 February 1990, Series A no. 172, p. 13, para. 29). In any event, given the fact that the applicant's punitive period has now expired, the Court does not consider it necessary to examine this complaint. The scope of the case before the Court is therefore confined to the issues under Article 5 para. 4 (art. 5-4) raised in connection with the applicant's current situation, that is post-tariff detention.

### II. ALLEGED VIOLATION OF ARTICLE 5 PARA. 4 (art. 5-4) OF THE CONVENTION

45. Mr Hussain complained that he had not been able at reasonable intervals to have the case of his continued detention during Her Majesty's pleasure (see paragraph 20 above) heard by a court. He invoked Article 5 para. 4 (art. 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."

46. The Court will first examine whether, having regard to the particular features of detention during Her Majesty's pleasure, the requirements of Article 5 para. 4 (art. 5-4) are satisfied by the original trial and appeal proceedings or, on the contrary, whether that provision (art. 5-4) confers an

additional right to challenge the lawfulness of the continued detention before a court.

**A. Whether the requisite judicial control was incorporated in the original conviction**

47. In the applicant's submission, a sentence of detention during Her Majesty's pleasure differed from the mandatory life sentence imposed on adults (see paragraph 20 above), which the Court examined in its *Wynne v. the United Kingdom* judgment of 18 July 1994 (Series A no. 294-A), in that the former is not solely based on the gravity of the offence but takes into account the age of the offender. The principle that crimes committed by young persons should not be punished as severely as the crimes of adults is, in the applicant's submission, contained in all civilised penal codes. In this respect, the purpose of a sentence of detention during Her Majesty's pleasure is not wholly punitive in character but partly punitive and partly preventive.

In support of his argument the applicant referred to the historical origins of the expression "during Her Majesty's pleasure" (the Criminal Lunatics Act 1800 and the Children's Act 1908 - see paragraphs 21 and 23 above) in which context it had a clear preventive purpose. He further referred to the wording of section 53 of the 1933 Act ("a person [under 18] ... shall not, if ... convicted of murder, be sentenced to imprisonment for life" - see paragraph 23 above) and to the indeterminacy of the very formula used in the sentence ("during Her Majesty's pleasure").

In view of the above, the applicant concluded that a sentence of detention under section 53 was closer in its indeterminacy and preventive objectives to a discretionary life sentence, as examined by the Court in the case of *Thynne, Wilson and Gunnell* cited above than to a mandatory life sentence. As in that case, after the tariff has expired, the only legitimate basis for the applicant's continued detention would be a finding of his continued dangerousness, a characteristic susceptible to change with the passage of time (*ibid.*, p. 30, para. 76). This was particularly so in the case of offenders who could be as young as ten at the time of the commission of the offence. It follows that at that phase in the execution of his sentence, the applicant was entitled under Article 5 para. 4 (art. 5-4) to have the lawfulness of his continued detention determined by a court at reasonable intervals.

48. The Commission agreed in substance with the applicant's submissions and added that the absence of the word "life" in the sentence reinforced its indeterminate character. The Commission further noted the trial judge's comments with regard to the dangerousness of the applicant (see paragraph 8 above).

49. The Government, for their part, contended that the sentence of detention during Her Majesty's pleasure has an essentially punitive

character and is imposed automatically on all juvenile murderers on the strength of the gravity of their offence, regardless of their mental state or dangerousness. This explains why under the Criminal Justice Act 1991 the same release procedures govern both mandatory life sentences passed on adults and sentences of detention during Her Majesty's pleasure and why the same administrative policies are applied to both (see paragraphs 25 and 29 above). Furthermore, after the tariff period has elapsed, not only the prisoner's dangerousness but also the acceptability to the public of his early release must be considered with a view to maintaining public confidence in the system of criminal justice (see paragraph 32 above).

It was further contended that, apart from the fact that persons sentenced to detention during Her Majesty's pleasure would not be detained in a prison during the early stages of their detention but in a special institution for young offenders, the sentence was nothing more than the statutory equivalent for young persons of the mandatory life sentence for adults. In these circumstances, the issues in the present case were practically identical to those in the Wynne case (cited above at paragraph 47) where the Court found that the original trial and appeal proceedings satisfied the requirements of Article 5 para. 4 (art. 5-4) of the Convention.

50. The Court notes at the outset that, as has been commonly accepted, the central issue in the present case is whether detention during Her Majesty's pleasure, given its nature and purpose, should be assimilated, under the case-law on the Convention, to a mandatory sentence of life imprisonment or rather to a discretionary sentence of life imprisonment. In dealing with this issue the Court must therefore decide whether the substance of a sentence of detention under section 53 is more closely related to that at the heart of the cases of *Weeks v. the United Kingdom* (judgment of 2 March 1987, Series A no. 114) and *Thynne, Wilson and Gunnell* (cited above at paragraph 34) or to that in the more recent case of *Wynne v. the United Kingdom* (cited at paragraph 47).

51. It is true, as submitted by the Government, that a sentence of detention during Her Majesty's pleasure is mandatory: it is fixed by law and is imposed automatically in all cases where persons under the age of 18 are convicted of murder, the trial judge having no discretion. It is also the case that the 1991 Act as well as recent policy statements treat the sentence at issue in the present case in an identical manner to mandatory life sentences as regards proceedings for release on licence and recall (see paragraphs 25 and 29 above).

On the other hand, it is undisputed that, in its statutory origins, the expression "during Her Majesty's pleasure" had a clearly preventive purpose and that - unlike sentences of life custody or life imprisonment - the word "life" is not mentioned in the description of the sentence.

52. Nevertheless, important as these arguments may be for the understanding of the sentence of detention under section 53 in English law,

the decisive issue in the present context is whether the nature and, above all, the purpose of that sentence are such as to require the lawfulness of the continued detention to be examined by a court satisfying the requirements of Article 5 para. 4 (art. 5-4).

53. It is recalled that the applicant was sentenced to be detained during Her Majesty's pleasure because of his young age at the time of the commission of the offence. In the case of young persons convicted of serious crimes, the corresponding sentence undoubtedly contains a punitive element and accordingly a tariff is set to reflect the requirements of retribution and deterrence. However an indeterminate term of detention for a convicted young person, which may be as long as that person's life, can only be justified by considerations based on the need to protect the public.

These considerations, centred on an assessment of the young offender's character and mental state and of his or her resulting dangerousness to society, must of necessity take into account any developments in the young offender's personality and attitude as he or she grows older. A failure to have regard to the changes that inevitably occur with maturation would mean that young persons detained under section 53 would be treated as having forfeited their liberty for the rest of their lives, a situation which, as the applicant and the Delegate of the Commission pointed out, might give rise to questions under Article 3 (art. 3) of the Convention.

54. Against this background the Court concludes that the applicant's sentence, after the expiration of his tariff, is more comparable to a discretionary life sentence. This was, albeit in a different context, the view expressed by the Divisional Court in its judgment of 20 April 1993 (*R. v. Secretary of State for the Home Department, ex parte Prem Singh* - see paragraph 24 above).

The decisive ground for the applicant's continued detention was and continues to be his dangerousness to society, a characteristic susceptible to change with the passage of time. Accordingly, new issues of lawfulness may arise in the course of detention and the applicant is entitled under Article 5 para. 4 (art. 5-4) to take proceedings to have these issues decided by a court at reasonable intervals (see, *mutatis mutandis*, the above-mentioned *Thynne, Wilson and Gunnell* judgment, p. 30, para. 76).

#### **B. Whether the available remedies satisfied therequirements of Article 5 para. 4 (art. 5-4)**

55. The Government accepted that if, contrary to their submissions, Article 5 para. 4 (art. 5-4) did confer additional rights to challenge the lawfulness of the applicant's continued detention, there would have been a breach of that provision (art. 5-4) but only to the extent that the Parole Board had no general power to order the release of the applicant after the expiry of his tariff. In reply to the applicant's submission that the

importance and the nature of the issue, that is the detainee's mental state, called for an oral hearing, including the possibility of calling and questioning witnesses, the Government recalled that Article 5 para. 4 (art. 5-4) does not confer an absolute right to an adversarial procedure and that to the extent that fairness did require an oral hearing, this could be secured by bringing judicial review proceedings.

56. The Commission found that the Parole Board's lack of decision-making power meant that it could not be regarded as a body satisfying the requirements of Article 5 para. 4 (art. 5-4). As to the need for an oral hearing, the Delegate of the Commission added that judicial review "is a very uncertain remedy given the fact that express provision is made for an oral hearing in the case of discretionary life prisoners, but not in the case of persons detained during Her Majesty's pleasure".

57. The Court recalls that Article 5 para. 4 (art. 5-4) does not guarantee a right to judicial control of such scope as to empower the "court" on all aspects of the case, including questions of expediency, to substitute its own discretion for that of the decision-making authority; the review should, nevertheless, be wide enough to bear on those conditions which, according to the Convention, are essential for the lawful detention of a person subject to the special type of deprivation of liberty ordered against the applicant (see, *inter alia*, the above-mentioned Weeks judgment, p. 29, para. 59, the E. v. Norway judgment of 29 August 1990, Series A no. 181-A, p. 21, para. 50, and the above-mentioned Thynne, Wilson and Gunnell judgment, p. 30, para. 79).

58. As in Thynne, Wilson and Gunnell (p. 30, para. 80) and despite the new policy allowing persons detained under section 53 of the 1933 Act the opportunity to see the material before the Parole Board (see paragraph 24 above), the Court sees no reason to depart from its findings in the case of Weeks (cited above, pp. 29-33, paras. 60-69) that the Parole Board does not satisfy the requirements of Article 5 para. 4 (art. 5-4). Indeed, to the extent to which the Parole Board cannot order the release of a prisoner this is not contested by the Government. However, the lack of adversarial proceedings before the Parole Board also prevents it from being regarded as a court or court-like body for the purposes of Article 5 para. 4 (art. 5-4).

59. The Court recalls in this context that, in matters of such crucial importance as the deprivation of liberty and where questions arise which involve, for example, an assessment of the applicant's character or mental state, it has held that it may be essential to the fairness of the proceedings that the applicant be present at an oral hearing (see, *mutatis mutandis*, the Kremzow v. Austria judgment of 21 September 1993, Series A no. 268-B, p. 45, para. 67).

60. The Court is of the view that, in a situation such as that of the applicant, where a substantial term of imprisonment may be at stake and where characteristics pertaining to his personality and level of maturity are

of importance in deciding on his dangerousness, Article 5 para. 4 (art. 5-4) requires an oral hearing in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses.

61. It is not an answer to this requirement that the applicant might have been able to obtain an oral hearing by instituting proceedings for judicial review. In the first place, Article 5 para. 4 (art. 5-4) presupposes the existence of a procedure in conformity with its requirements without the necessity of instituting separate legal proceedings in order to bring it about. In the second place, like the Delegate of the Commission, the Court is not convinced that the applicant's possibility of obtaining an oral hearing by way of proceedings for judicial review is sufficiently certain to be regarded as satisfying the requirements of Article 5 para. 4 (art. 5-4) of the Convention.

### **C. Recapitulation**

62. In conclusion, the Court finds that there has been a violation of Article 5 para. 4 (art. 5-4) of the Convention in that the applicant, after the expiry of his tariff, was unable to bring the case of his continued detention during Her Majesty's pleasure before a court with the powers and procedural guarantees satisfying that provision (art. 5-4).

### **III. ALLEGED VIOLATION OF ARTICLE 14 (art. 14) OF THE CONVENTION**

63. Neither in his written memorial nor in his oral pleading before the Court did the applicant make any reference to his complaint under Article 14 (art. 14), which had been declared admissible by the Commission (see paragraph 41 above). In these circumstances, and since no separate issues appear to arise under that provision (art. 14), the Court sees no reason to entertain it of its own motion.

### **IV. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION**

64. Article 50 (art. 50) of the Convention 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."

The applicant's claims under this provision (art. 50) were for compensation for non-pecuniary damage and reimbursement of legal costs

and expenses referable to the proceedings before the Convention institutions.

#### **A. Non-pecuniary damage**

65. The applicant sought compensation for the slow pace at which he has progressed towards liberty over the last seventeen years and, alternatively, for the loss of an opportunity to have his case examined by a fair and independent tribunal and the prejudice, anxiety and delay that this loss has caused him. He made a claim of £50,000 on the basis that he had had to serve some five years of additional detention because of the violation of his rights under the Convention.

66. In the opinion of the Court, there is no evidence that the applicant would have regained his freedom had Article 5 para. 4 (art. 5-4) not been breached. Even assuming that he may have suffered some "anxiety", the Court shares the Government's view that, in the circumstances, the finding of a violation constitutes sufficient just satisfaction for the purposes of Article 50 (art. 50).

#### **B. Costs and expenses**

67. For the legal costs and expenses in bringing his case before the Convention institutions, the applicant claimed the sum of £32,459.58 inclusive of value added tax.

68. The Government found the sum claimed excessive.

69. In the light of the criteria emerging from its case-law, the Court holds that the applicant should be awarded the amount of £19,000 less 14,475 French francs already paid by way of legal aid in respect of fees and travel and subsistence expenses.

#### **C. Default interest**

70. 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 violation of Article 5 para. 4 (art. 5-4) of the Convention in that the applicant, after the expiry of his punitive period, was unable to bring the case of his continued detention before a court;

2. Holds that it is not necessary to examine the complaint under Article 14 (art. 14) of the Convention;
3. Holds that the present judgment constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained;
4. Holds
  - (a) that the respondent State is to pay the applicant, within three months, in respect of legal costs and expenses, £19,000 (nineteen thousand pounds sterling), less 14,475 (fourteen thousand four hundred and seventy-five) French francs already paid by way of legal aid, to be converted into pounds sterling at the rate of exchange applicable on the date of delivery of the present judgment;
  - (b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;
5. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 February 1996.

ROLV RYSSDAL  
President

HERBERT PETZOLD  
Registrar