



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

COURT (PLENARY)

**CASE OF THYNNE, WILSON AND GUNNELL v. THE UNITED
KINGDOM**

(Application no. 11787/85; 11978/86; 12009/86)

JUDGMENT

STRASBOURG

25 October 1990

In the case of Thynne, Wilson and Gunnell*,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 51 of the Rules of Court** and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr J. PINHEIRO FARINHA,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr S.K. MARTENS,
Mr R. PEKKANEN,
Mr A. LOIZOU,
Mr J.M. MORENILLA RODRIGUEZ,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 29 June and 27 September 1990,

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

PROCEDURE

1. The case was brought before the Court by the European Commission of Human Rights ("the Commission") on 12 October 1989, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental

* The case is numbered 23/1989/183/241-243. 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.

** The amendments to the Rules of Court which entered into force on 1 April 1989 are applicable to this case.

Freedoms ("the Convention"). It originated in three applications (nos. 11787/85, 11978/86 and 12009/86) against the United Kingdom lodged with the Commission under Article 25 (art. 25) on 3 June 1985 by Michael Keith Thynne, on 1 September 1985 by Mr Benjamin Wilson and on 24 April 1985 by Mr Edward James Gunnell, who are all three British citizens.

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 jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision from the Court 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) and also, in the case of Mr Wilson, Article 5 para. 5 (art. 5-5) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Sir Vincent Evans, 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 25 November 1989, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr F. Gölcüklü, Mr C. Russo, Mr R. Bernhardt, Mr N. Valticos and Mr I. Foighel (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the Delegate of the Commission and the representatives of the applicants on the need for a written procedure (Rule 37 para. 1). Thereafter, in accordance with the orders and directions of the President, the following documents were lodged at the registry:

- on 2 March 1990, the memorial of the Government; - on 5 March 1990, the memorial of the applicant Thynne; - on 27 March 1990, the memorial of the applicants Wilson and Gunnell; - on 19 April 1990, all the written and oral pleadings submitted to the Commission; - on 6 June 1990, the further memorial of the applicants Wilson and Gunnell.

The Secretary to the Commission subsequently informed the Registrar that the Delegate would submit his observations at the hearing.

5. After consulting, through the Registrar, those who would be appearing before the Court, the President directed on 8 January 1990 that the oral proceedings should open on 25 June 1990 (Rule 38).

6. Following deliberations held on 25 June 1990, shortly before the hearing, the Chamber, by unanimous decision, relinquished jurisdiction in favour of the plenary Court (Rule 51).

7. The hearing took place in public at the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr M. C. WOOD, Legal Counsellor,
Foreign and Commonwealth Office, *Agent,*

Mr A. MOSES, QC,

Mr D. PANNICK, Barrister-at-law, *Counsel,*

Mr A. INGLESE, Home Office,

Mrs V. HARRIS, Home Office,

Miss F. MILLER, Home Office, *Advisers;*

- for the Commission

Mr Gaukur JÖRUNDSSON, *Delegate;*

- for the applicants

Mr P. ASHMAN, Legal Officer of JUSTICE

(British section of the International Commission of
Jurists),

Mr E. FITZGERALD, Barrister-at-law, *Counsel,*

Mr J. WADHAM, Legal Officer

of the National Council for Civil Liberties, Solicitor.

The Court heard addresses by Mr Moses for the Government, by Mr Gaukur Jörundsson for the Commission, by Mr Ashman for the applicant Thynne and by Mr Fitzgerald for the applicants Gunnell and Wilson. During the hearing, the Government and the applicants provided, either orally or in writing, replies to questions put by the Court and by three of its members individually.

8. On different dates between 2 July and 17 August 1990, various documents were lodged with the registry, including the applicants' further particulars of costs and the Government's comments thereon.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

A. Mr Thynne

9. The first applicant, Mr Michael Keith Thynne, is a British citizen, born in 1951.

10. On 27 October 1975 he pleaded guilty at the Central Criminal Court, London, to rape and buggery. On 24 November 1975 he was sentenced by the Recorder to life imprisonment on each count.

11. On 7 August 1975, within 36 hours of his release from prison, the applicant had gained entrance to a flat under the pretence that he was a policeman investigating a burglary that had just taken place there. The flat was occupied at the time by a 45-year-old woman whom he threatened to kill with a knife if she made a noise. He told her to take her clothes off and then raped and buggered her as well as inflicting some minor puncture wounds with a pair of scissors he had found in the flat.

12. The applicant had a long criminal record, having served various sentences of imprisonment for theft and burglary. In view of the nature of his personality disorder - described by a psychiatrist as "a severe psychopathic character disorder" - the Recorder considered both a hospital order and a long determinate sentence to be inappropriate. An indeterminate life sentence was imposed to enable the Home Secretary to release Mr Thynne once his condition had sufficiently improved for it to be reasonably safe to do so. The Recorder stated as follows:

"But for the psychiatric reports that I have seen I would impose on you a very long prison sentence. As it is, I am going to sentence you to life on each count in order that those in a position to observe any improvement in your personality disorder, those capable of carrying out any operative treatment which may [be] seen to be necessary, with your consent, on your frontal lobe, may judge the time when it is reasonably safe that you should be free."

13. The applicant applied to a single judge for leave to appeal to the Court of Appeal (Criminal Division) against the life sentences on the ground that they were manifestly excessive and wrong in principle as they resulted in custody for a longer time than the appropriate determinate sentence. His application was refused and so he renewed it to the full court.

Refusing leave to appeal on 22 March 1976, the court stated as follows:

"Without going into any more detail as to the offences, it is quite clear and indeed is accepted ... on the applicant's behalf, that this was a very serious and violent attack upon this lady which involved not merely violence but the indecency and indignities to which she was subjected.

...

Life sentences are imposed in circumstances where the offence is so grave that even if there is little risk of repetition it merits such a severe, condign sentence and life sentences are also imposed where the public require protection and must have protection even though the gravity of the offence may not be so serious because there is a very real risk of repetition.

This case falls within neither of those categories which express extreme situations but undoubtedly the offences here were very grave indeed and undoubtedly, in the light of the medical reports on this man, the Court cannot be sure by any means that he

would, in society, not give way to outbursts of this nature which would very seriously affect other persons.

In those circumstances the balancing exercise that the Court has to do is indeed a difficult one when presented with facts of this nature. We do not see the life sentence in this case as necessarily involving detention in custodial conditions for a very long period of time. It depends upon the regime to which he is subjected and the treatment that he can get. If a determinate sentence were to be substituted, then the Court would have to pass such a sentence as would ensure that he was kept in custody for a very long time indeed and, on the facts of this case as we see it, it will mean that probably the Court would err on the side of passing a sentence so long that it would result in his remaining in custody for a longer time than he probably will remain under a life sentence."

14. In May 1977 Mr Thynne was accepted for treatment at Grendon Underwood, a psychiatric prison. However, he decided not to accept the place offered as, in the light of medical evidence that he was not amenable to surgery or psychiatric treatment, he was told that he would not automatically be given early release.

15. Following representations made on the applicant's behalf, his case was referred to the Joint Parole Board-Home Office Committee. In August 1980 the Committee recommended that it should be referred to the Local Review Committee in September 1981 by which time he would have been detained for six years. The Local Review Committee decided not to recommend release.

16. On 1 May 1982 the applicant absconded from an open prison and committed further offences. He was arrested on 26 July 1982 and was subsequently sentenced to six months' imprisonment on charges of theft, unlawful possession of drugs and criminal damage. The sentence was to run concurrently with the existing life sentence.

17. On 22 October 1982 the Parole Board recommended that his case again be referred to the Local Review Committee nine months after his arrival at Maidstone Prison. On 16 March 1983, however, he escaped when he was visiting his mother who was gravely ill. He was recaptured two days later and the date of referral to the Local Review Committee was put back to June 1984. In June 1983 he was transferred to Blundestone Prison where he was examined by the prison department psychiatrist who found no evidence of mental illness and saw no need for psychiatric treatment. The Local Review Committee did not recommend release.

18. In January 1985 Ministers accepted that the punitive element of his sentence (the "tariff"- see paragraphs 52 and 53 below) had been satisfied and that risk was the sole remaining consideration in his continued detention.

19. In July 1985 the applicant's case was referred to the Parole Board which recommended a further review two years later. In July 1987 the Local Review Committee again recommended that he remain in custody, but in May 1989 it recommended his release. However, following its further

consideration of his case in December 1989, the Parole Board again recommended that he remain in custody with no release date but that there should be a further review one year after his transfer to an open prison.

B. Mr Wilson

20. The second applicant, Mr Benjamin Wilson, is a British citizen, born in 1916.

21. On 17 May 1972 he pleaded guilty at the Central Criminal Court, London, *inter alia*, to one count of buggery, two counts of attempted buggery and seven counts of indecent assault on boys under 16. He had a very long history of sexual offences and was sentenced to life imprisonment for the offence of buggery and seven years on each of the other nine counts, to be served concurrently.

22. In passing sentence the Judge said:

"I entirely accept that, to a large extent, you cannot help yourself. To that extent, your moral guilt is the less, but I have two duties to perform. One is a duty to find the correct sentence as far as you are concerned, having regard to your make-up, your physical and mental make-up. The other duty I have, and in the circumstances of the case I think it is the more important: I have a duty to the public, and in particular, to the young public, to protect them from people like you who, for one reason or another, can't control themselves.

I hope that, in the course of time a method of treatment for your particular freakish affliction can be found. I think it will be in the best interest of society generally, and yourself in particular, if some form of treatment for you could be found. What I am going to do in your case may sound harsh from your point of view, but it will be explained to you, no doubt, by your counsel hereafter, that it may in fact hold out more hope to you than if I merely went up to perhaps 4, 5 or 6 years, or even 7 years in a particular case.

The sentence of the court is that so far as the count of buggery is concerned, that is the eighth count on the indictment, you will go to prison for life. So far as the counts of attempted buggery and indecent assault are concerned, you will go to prison for a period of 7 years. All these sentences to be concurrent. Now I am sure that your counsel will have a word with you hereafter and will indicate what the situation is with regard to a life sentence, but as I say, I think my main duty in this particular case is to protect the public and the young public, in the light of what I have heard occurred in your case. I only hope that, in due course, some form of treatment, perhaps that to which the doctor refers in the medical report which I have seen, may help you."

23. In October 1972 the applicant's application to a single judge for leave to appeal to the Court of Appeal (Criminal Division) was refused. Having renewed his application to the full court, he abandoned it in June 1973, a few days before it was to have been heard. In July 1976 he applied to the Court of Appeal to have his notice of abandonment set aside as a nullity. On 26 November 1976, the Court of Appeal turned down his

application, but did give some consideration to the merits of the substantive appeal. In the words of Lord Justice Shaw:

"... the applicant has not established a situation in which this Court could properly allow him to withdraw the notice of abandonment. The Court has thought it right to go to some extent into the history of the matter in order to establish that even if such a withdrawal were permitted, it could not possibly be of advantage to the applicant, if we were to substitute for the life sentence a very long sentence that really would not be distinguishable from a life sentence. But if he wishes to take advantage of it, build himself up and strengthen his own character, he has far better prospects under an indeterminate sentence than under a long determinate sentence."

24. The applicant's case was first referred to the Joint Parole Board-Home Office Committee after three years of his sentence and they recommended that his case be reviewed by the Local Review Committee after seven years of his sentence had been served.

Accordingly, in 1979, the Local Review Committee heard his case and referred it to the Parole Board, who, on 11 December 1981, recommended his release into a controlled protective environment with psychiatric supervision not later than December 1982. On 14 September 1982, pursuant to the Secretary of State's authorisation of 3 September 1982, the applicant was released on licence on condition that he:

- (i) live at a probation hostel;
- (ii) co-operate with his probation officer;
- (iii) attend appointments with his supervising consultant psychiatrist and take any prescribed treatment; and
- (iv) refrain from any activity involving young boys without the permission of his probation officer.

25. On 11 February 1983, five months after his release on licence, the Parole Board recommended his recall and on 14 February 1983 the Secretary of State revoked his licence. The applicant on his return to prison was informed that he had been recalled because his conduct had given cause for concern and he had failed to co-operate with his supervising officer. The applicant exercised his right to make written representations against his recall, but on 16 September 1983, after referral by the Secretary of State, the Parole Board declined to change the decision.

26. On 6 April 1984 the applicant commenced judicial review proceedings to have this decision quashed on the ground that he had not been provided with adequate details of the reason for his recall as required by section 62(3) of the Criminal Justice Act 1967 and that he had accordingly been unable to make effective representations.

27. The Home Office conceded the inadequacy of the reasons given and provided a one page statement on 5 October 1984, which included the allegations that:

- (i) the applicant had sought to get himself evicted from the probation hostel by refusing to pay his rent, by other residents of his offences and thus

risking attack from them and by leaving a schoolboy's cap in the sitting-room of the hostel as a warning that he intended to re-offend;

(ii) the applicant had protested against the probation officer's refusal to allow him to take part in activities at the local sports centre;

(iii) the applicant had shown an interest in watching boys play football and his psychiatrist suspected that he was exploring ways of contacting boys again.

28. The Home Office then agreed to allow the applicant the opportunity to make further representations to the Parole Board, which he did, denying the allegations made against him. On 7 November 1984 his solicitors requested disclosure of a number of reports which were before the Parole Board when it made its decision.

29. On 20 March 1985 the Divisional Court considered the applicant's case. The court quashed the Parole Board's decision of 16 September 1983 (see paragraph 25 above) on the ground that it was flawed by a procedural impropriety, in that the applicant had not been given sufficient reasons to enable him to make proper representations.

30. By letter of 20 March 1985 the applicant's lawyer requested disclosure of the probation report which alleged non-cooperation and asked for his client to be given an oral hearing with legal representation. However, the Parole Board did not answer this request and after a meeting on 22 March 1985 maintained the decision not to release Mr Wilson.

31. In December 1986 the Local Review Committee reconsidered the applicant's case but made no recommendation to release him.

32. In June 1987 the Parole Board recommended that his case should be referred to the Local Review Committee in two years' time. Accordingly, in June 1989, the Local Review Committee re-examined the applicant's case but did not recommend release. In October 1989 the case was considered by the Parole Board which recommended a further review in two years' time, with the proviso that should his health deteriorate to such an extent that he was no longer considered to be a risk, the case should be reviewed at an earlier date. The Secretary of State accepted this recommendation. The next review date is October 1991.

C. Mr Gunnell

33. The third applicant, Mr Edward James Gunnell, is a British citizen, born in 1930.

34. On 15 December 1965, he was convicted at the Central Criminal Court, London, *inter alia*, of four offences of rape and two offences of attempted rape. He was sentenced to life imprisonment on each of the four counts of rape. On the two counts of attempted rape he was sentenced to seven years' imprisonment, such sentences to run concurrently with each other and with the life sentences.

35. A pattern was discernible in a number of those offences. In four of them he entered houses, by some plausible excuse, where his victims, housewives and an au pair girl, were alone and by force - in one instance at knife-point - or by the threat of force had sexual intercourse with them.

36. According to uncontradicted medical evidence, the applicant was suffering from a "mental disorder" within the meaning of that term in the Mental Health Act 1959 (namely psychopathy) and needed constant care and treatment in a maximum security medical setting. Nevertheless the sentencing judge concluded that, because of the gravity of the offences, punishment had to be an element in this case, and that punishment could only be achieved by imprisonment. On passing sentence, the trial judge, Mr Justice Roskill, stated as follows:

"... These must be amongst the worst cases of rape or attempted rape ever to come before a court in this country. But though I accept you have spent much of your early life in mental institutions, and I accept certain evidence I have heard this morning that you are suffering from psychopathic disorder, the evidence leaves no doubt and can leave no doubt in anybody's mind, that you did know what you were doing and you were well aware of the wickedness of what you had done.

I have listened with great attention to the medical evidence which I have had the opportunity of hearing this morning, and I have endeavoured to give all the weight to it that I properly can. It has been urged upon me that I should deal with you by making a hospital order and sending you to Rampton, where you will be kept in secure conditions and receive any treatment which you may require. In many cases it is clearly right for a court in discharging its responsibilities to have regard solely or mainly to the needs of the offender, but the present case in my view is one of such magnitude that I cannot only have regard to such needs. It is true, to send you to Rampton would involve you being kept under secure conditions and to that extent would keep the public from you. But there are other matters which I must take into account in the public interest, not the least of which is to make it clear that crimes of this kind committed against ordinary housewives in their ordinary homes doing their every day business while their men-folk are away at work are such as must, when brought home to a particular offender, be dealt with in such a way as to make plain that the law is concerned and ever will be concerned to protect people who suffer as you caused these women to suffer by these quite appalling sexual attacks that you made upon them. Punishment must be an element in this case, and that punishment can only be achieved by imprisonment. Imprisonment will afford security to the public from you, and the Home Secretary has ample power if and when the need for treatment arises, to transfer you to any institution where such treatment can be received.

In my judgment there is only one sentence which is appropriate in this case, and I will deal with count 3 first. Upon count 3 the sentence of the Court is that you be imprisoned for the term of your natural life. There will be corresponding life-sentences on counts 4, 5 and 7, upon which you stand convicted of rape."

37. On 22 June 1966 the Court of Appeal (Criminal Division) refused the applicant leave to appeal.

In the course of his judgment the Lord Chief Justice Parker said:

"It is a shocking case and there is no conceivable ground upon which he could succeed in his application for leave to appeal against conviction. Indeed, all he says is that he would like to call three of the women complainants to challenge their evidence all over again. This court refuses the extension of time in which to apply for leave to appeal against conviction.

In regard to the application for leave to appeal against sentence in regard to the rapes and attempted rapes, the applicant is thirty-five and, though he has committed offences before, none of them have been offences of violence or of a sexual nature, but he has a long mental history. As long ago as 1946 he was committed to Manor Hospital, Epsom, from which he escaped eighteen times. In 1950 he was admitted to Farmfield Hospital, Horley. He absconded three times. In 1951 he was transferred to Rampton Hospital where he made no attempts to escape, possibly knowing that it is difficult to do so. In 1959, however, he was released on licence from Rampton and in 1960 he was discharged from the operation of the Mental Deficiency Act 1959.

There was evidence, indeed it was uncontradicted, from the doctors that the applicant could be made the subject of a hospital order under the Mental Health Act 1959, in that he was a psychopath who needed constant care and treatment in a medical setting of maximum security such as Rampton and such a vacancy was then available. The learned judge refused to take that course and the ground of appeal here is that he was wrong in principle, when two doctors certified that the applicant was a fit subject for a hospital order and that treatment was warranted, not sending him to hospital but sending him to prison ...

This court would like it to be known that they agree with every word that the learned judge there said, indeed in an earlier case of *Morris* (1961) 2 QB 237, it was pointed out that there may be cases where although a court has powers to make a hospital order, yet where a punishment is required it would be right to send the offender to prison, it being recognised that the Home Secretary has ample powers under section 72 of the Mental Health Act 1959 to cause him to be treated in hospital when the need arises.

This court would like to add one further reason justifying the judge's order in the present case. The applicant is obviously a dangerous psychopath. It is clear unless he is kept in circumstances of strict security he is liable to be a menace to the public. True, Rampton is said to be a secure hospital, but it does not mean that he would not get away from there. More important, it has to be observed that this dangerous psychopath has already been released on licence from Rampton. Bearing the interests of the public in mind, this court thinks it far safer that he should be kept in prison for as long as is necessary rather than he should be left to be dealt with as a hospital might deal with him, on a doctor and patient relationship under which it might be considered safe for him to be free, whereas from the public angle he remains a menace.

This court is quite satisfied that the sentence was right and the application is refused."

38. In December 1980 the applicant's case was reviewed by the Parole Board in accordance with the provisions of Part III of the Criminal Justice Act 1967. They recommended his release in 15 months' time, subject to his continued good conduct, the satisfactory completion of periods in open conditions and on the pre-release employment scheme, and suitable

resettlement arrangements being made. After consulting the judiciary in accordance with section 61(1) of the 1967 Act (see paragraph 56 below), the Home Secretary accepted the Board's recommendation and the applicant was given a provisional release date of 4 March 1982.

39. In March 1982 the applicant was released on licence on condition that he:

- (i) co-operate with his supervisory probation officer;
- (ii) attend Dr Field's Clinic at St Leonard's Hospital, London N1 for such care and treatment as recommended;
- (iii) continue to take hormonal drug treatment, in tablet form, to control his sexual libido.

40. The applicant was given no reason to believe that he had failed to keep the terms of his licence in any significant way. However, two incidents occurred in January and February 1983 which led to the revocation of the applicant's licence and his recall to prison.

41. The first incident was in January 1983 when he was stopped by a police officer and questioned about a woman's complaint to the police that he had been in her back garden looking through her rear window. The applicant maintained that his intentions were completely innocent and that he was merely signalling to the lady he had seen in the house that he would like a glass of water with which to take his hormone tablets, which she duly got for him while he waited at the door. It was never alleged that the applicant had done anything to this woman, but it was later to be alleged that he had acted "suspiciously". On being told by the applicant that he had spent seventeen years in prison for rape, the police officer took him to the police station for questioning, but his release was authorised by a senior officer as there was no evidence of any crime having been committed.

42. The second incident was in February 1983 when the applicant was again stopped and questioned by the police following information that they had received from Finchley Road Police Station that he had been seen watching a woman cleaning her car and had then been found in her back garden. He was subsequently arrested some distance away and taken into custody by the same police officer who had arrested him in January. After some eight hours of detention, the Secretary of State revoked the applicant's life licence under section 62 (2) of the 1967 Act because of the similarities between the applicant's current behaviour and the circumstances in which the original offences were committed. He was taken to Pentonville Prison where, on arrival, he was told by an Assistant Governor that he would go before a reception board. When he did he was told that he had been recalled because his licence had been revoked and that he would be seen by another Assistant Governor and a member of the Local Review Committee and told the reasons for his recall when papers had been received from the Home Office.

43. The applicant was subsequently transferred to Wormwood Scrubs where an Assistant Governor, very soon after his arrival, had a number of conversations with him. Mr Gunnell, according to the High Court's judgment of 2 November 1983 (see paragraph 48 below), made it abundantly plain that he fully realised that he had been brought back to prison because of the events which had taken place in January and February. He protested that he had done nothing wrong on those occasions but showed every indication that he fully realised why it was that the authorities had taken the decision which they did.

44. The applicant was interviewed on 1 March 1983 by a member of the Local Review Committee after having signed a standard form on 25 February 1983 to the effect that he wished the report from that interview to be submitted to the Parole Board as constituting his written representations, though he did in fact also himself make separate written representations.

The interviewer did not have the police reports in their full and final state, nonetheless they did contain sufficient information to acquaint him with what happened in January and February. He did not show the applicant the medical report nor the probation officer's report although the latter was discussed.

45. On 4 March 1983 the case was referred by the Secretary of State - under section 62 (4) of the 1967 Act - to the Parole Board which then took a preliminary view confirming the revocation of the applicant's licence. On 25 March the Parole Board rejected the applicant's representations but made a non-binding recommendation (see paragraph 56 below) that, subject to satisfactory resettlement arrangements being made and to continuing psychiatric supervision, he should be released in a month's time, namely on 25 April 1983.

46. In May 1983 the Secretary of State - after consultations with the Lord Chief Justice and the trial judge in accordance with section 67 (1) of the 1967 Act - did not accept the Board's recommendation, but decided that the applicant's case should be reviewed in March 1984. Mr Gunnell subsequently petitioned the Secretary of State, complaining that he had not been allowed to defend himself. The petition was rejected in a reply dated 3 August 1983. The applicant states that the reply contained the first written explanations of the reasons for his recall and the first official account in any detail of the allegations made against him.

47. On 9 August 1983 Mr Gunnell applied to the High Court for leave to move for judicial review of the decisions of the Parole Board and the Home Secretary confirming the initial revocation of the licence. He was granted leave on 18 August 1983.

At an interlocutory hearing on 10 October 1983, his applications for discovery of certain documents relating to the determination of his case by the Parole Board and Home Secretary were refused. They were again

refused at the hearing of the substantive application for judicial review which was also dismissed on 2 November 1983.

48. An appeal against this decision to the Court of Appeal was also dismissed on 30 October 1984. The applicant's case was reviewed again by the Parole Board and the Home Secretary in 1984 but he was not released. He was released on licence once more in September 1988 under the supervision of the Inner London Probation Service.

49. On 24 September 1990 the applicant pleaded guilty at the Central Criminal Court, London, to one charge of attempted rape, five charges of indecent assault and three charges of robbery. He was sentenced to life imprisonment, the life licence for his original offences having already been revoked.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Discretionary life sentences

50. A sentence of life imprisonment must be passed on any person convicted of murder - a mandatory life sentence. It may also be passed, in the exercise of the court's discretion, on persons convicted of any of the offences for which life imprisonment is provided by the relevant legislation as the maximum penalty for the offence concerned - a discretionary life sentence. There are no statutory conditions for the imposition of a discretionary life sentence other than this, but its use in practice is reserved, broadly speaking, for cases where the offence is a very grave one in itself, and it appears that the accused is a person of unstable character likely to commit such offences in the future, thus making him dangerous to the public in respect of his probable future behaviour unless there is a change in his condition (see Hodgson (1967) 52 Criminal Appeal Reports 113, Picker (1970) 54 Criminal Appeal Reports 330; Wilkinson (1983) 5 Criminal Appeal Reports (S) 105).

In his judgment in *R v. Wilkinson*, Lord Chief Justice Lane said:

"It seems to us that the sentence of life imprisonment, other than where the sentence is obligatory, is really appropriate and must only be passed in the most exceptional circumstances. With few exceptions ... it is reserved broadly speaking ... for offenders who for one reason or another cannot be dealt with under the provisions of the Mental Health Act, yet are in a mental state which makes them dangerous to the life or limb of members of the public. It is sometimes impossible to say when that danger will subside, and therefore an indeterminate sentence is required, so that the prisoner's progress may be monitored by those who have him under their supervision in prison, and so that he will be kept in custody only so long as public safety may be jeopardised by his being let loose at large."

51. The use of the discretionary life sentence is distinguished in the practice of the English courts from the use of the determinate or fixed-term sentence of imprisonment. In fixing the length of a determinate sentence the most important principle is that it should be related to the gravity of the offence. It is subject to one-third remission of sentence for good behaviour and there is the possibility of parole once a third of the sentence has been served.

52. In three recent decisions (*R v. Secretary of State for the Home Department, ex parte Handscomb and Others* (1988) 86 Criminal Appeal Reports 59; *R v. Secretary of State, ex parte Benson* (1988) and *R v. Secretary of State, ex parte Bradley* (1990) as yet unreported), the Divisional Court has recognised that a discretionary life sentence prisoner should be required to serve no longer as punishment for his offence than the "tariff". This expression denotes the period of detention considered necessary to meet the requirements of retribution and deterrence.

53. In the case of *Bradley*, Lord Justice Stuart-Smith gave the following elucidation of the nature of the discretionary life sentence:

"The rationale or justification for a discretionary life sentence must surely be this: that in exceptional cases the interests of public safety cannot be sufficiently protected by imposing a determinate sentence even to the maximum extent permissible - i.e. the tariff sentence merited in the way of punishment, uplifted to a limited extent allowed by established case-law for the protection of the public. Rather it is necessary to cater for the presently perceived risk that, upon completion of any lawful determinate sentence, the prisoner would, if freed, remain a grave danger to society. This is achieved by passing a life sentence so as to ensure that the public will be protected and the risk reassessed after the tariff period expires.

...

... the sentencing Court recognises that passing a life sentence may well cause the offender to serve longer, and sometimes substantially longer, than his just desserts. It must then not expose him to that peril unless there is compelling justification for such a course. That compelling justification is the perception of grave future risk amounting to an actual likelihood of dangerousness. But, of course, the Court's perception of that risk is inevitably imprecise. It is having to project its assessment many years forward and without the benefit of a constant process of monitoring and reporting such as will be enjoyed by the Parole Board. When at the post-tariff stage the assessment comes to be made by the Board they are thus much better placed to evaluate the true extent of the risk which will be posed by the prisoner's release."

B. Sentencing law and policy in cases of rape and buggery

54. By virtue of section 1 and schedule 2 of the Sexual Offences Act 1956, the maximum penalty for rape, and, by virtue of section 12(1) and schedule 2 of the same Act, for buggery of a boy under the age of 16, is life imprisonment.

55. According to the opinion of an expert in sentencing policy of the English courts, the practice of the Court of Appeal showed that, in the absence of evidence of mental instability and dangerousness, the sentence imposed was unlikely to exceed 10 years' imprisonment for offences of buggery and 18 years' in cases of serious rape (Affidavit of Dr D. A. Thomas sworn on 29 July 1988).

C. Criminal Justice Act 1967

56. Under section 61 of the Criminal Justice Act 1967 the Secretary of State may only release on licence a person sentenced to life imprisonment if recommended to do so by the Parole Board, and after consultation with the Lord Chief Justice of England and the trial judge if available. By virtue of section 62(1) the Secretary of State may revoke the licence of a person whose recall to prison is recommended by the Parole Board. A prisoner recalled in such circumstances is entitled to be informed of the reasons for his recall and of his right to make representations. If he makes representations the Secretary of State must refer his case to the Board. Under section 62(2) the Secretary of State may himself revoke such a licence without consulting the Parole Board if it appears expedient in the public interest to do so before such consultation is practicable; but the case of a prisoner so recalled must be referred to the Board.

If the Board recommends the immediate release on licence of a recalled prisoner whose case is referred to it under section 62, the Secretary of State is bound to give effect to the recommendation.

57. Section 59 sets out the constitution and functions of the Parole Board and of local review committees:

"(1) For the purposes of exercising the functions 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.

...

(3) It shall be the duty of the Board to advise the Secretary of State with respect to -

(a) the release on licence under section 60(1) or 61, and the recall under section 62, of this Act of persons whose cases have been referred to the Board by the Secretary of State;

(b) the conditions of such licences and the variation or cancellation of such conditions; and

(c) any other matter so referred which is connected with the release or recall of persons to whom the said section 60 or 61 applies.

(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 person 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 representation made under that section.

(6) The Secretary of State may by rules make provision -

(a) for the establishment and constitution of local review committees having the duty of reviewing at such times or in such circumstances as may be prescribed by or determined under the rules the cases of persons who are or will become eligible for release under section 60 or 61 of this Act and reporting to the Secretary of State on their suitability for release on licence; and

(b) for the interview of such persons by a member of any such committee (not being a prisoner officer);

and rules under this subsection may make different provision for different cases."

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 aftercare of discharged prisoners; and

(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, each of which in the case of life prisoners includes 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.

58. Under section 59 (6) the Secretary of State has established for every prison a Local Review Committee with the function of advising him on the suitability for release on licence of prisoners. It is the practice to obtain this assessment before referring a case to the Parole Board. Before the Local Review Committee review a case, a member of the Committee shall interview the prisoner if he is willing to be so interviewed.

D. Administrative procedures concerning the review of discretionary and mandatory life sentences

59. The review procedures applicable to all life sentences within the framework of the Criminal Justice Act 1967 have evolved in four stages:

(a) When section 61 of the Criminal Justice Act 1967 came into operation it was the practice to refer all life sentence cases to the Parole Board when the prisoner had served not longer than seven years, irrespective of whether there was any prospect of early release. In making its recommendations to the Secretary of State as to the release of a life prisoner, the Board took into account the views of the judiciary as required by section 61.

(b) In 1973 a Joint Parole Board-Home Office Committee was set up to recommend to the Home Secretary a date for the first formal review by the Local Review Committee as the first stage in a review by the Parole Board (see paragraph 57 above). They gave initial consideration to the timing of the first review usually after the prisoner had been detained for about three years, but this system became less and less effective as the Committee only recommended dates in about half the cases referred to it. Under these arrangements, the judiciary were consulted - as required by section 61 of the 1967 Act - only at the stage when release seemed a realistic possibility.

(c) In 1983, the Joint Committee was disbanded and new arrangements were made for fixing the date of the first formal review by the Local Review Committee. Under these arrangements the judiciary were consulted, usually, after a life prisoner had been detained for about three years, and asked for their views on the period necessary to meet the requirements of retribution and deterrence for the offence - the tariff period. In the light of these views the Home Secretary would decide the date of the first reference of the case to the Local Review Committee, normally set for three years before the expiry of the tariff period.

(d) On 23 July 1987, in a parliamentary written answer to the House of Commons, the Home Secretary made the following statement in response to

the Divisional Court judgment in the case of Handscomb and Others (see paragraph 52 above):

"I accept the conclusion of the Divisional Court that there are strong arguments for carrying out this consultation exercise" - with the judiciary on the question of the period necessary to meet the requirements of retribution and deterrence - "as soon as practicable following the imposition of a discretionary life sentence.

Following consultation with the Lord Chief Justice it has been agreed that the most satisfactory way of obtaining the judicial view is to ask the trial judge to write to me, through him, in every case where a discretionary life sentence is passed giving his view on the period necessary to meet the requirements of retribution and deterrence. This view will be related to the determinate sentence that would have been passed but for the element of mental instability and/or public risk which led the judge to pass a life sentence and will also take account of the notional period of the sentence which a prisoner might expect to have been remitted for good behaviour had a determinate sentence been passed. The date of the first formal review by the Parole Board machinery will then be fixed in accordance with the judicial view on the requirements of retribution and deterrence, and the review will, as before, normally take place three years before the expiry of that period. I have agreed with the Lord Chief Justice that this new procedure will be introduced with effect from 1 October 1987.

... I shall arrange for a review to be undertaken of all discretionary life sentence cases with a first formal review date of January 1988 or later. Where account has been taken of factors other than the judicial view on the requirements of retribution and deterrence in fixing the date, the date will be adjusted to bring it into line with the judicial view.

... In cases of prisoners serving life sentences for murder, where the sentence is not at the discretion of the court, the question of the notional equivalent determinate sentence does not arise. I shall continue to take into account the view of the judiciary on the requirements of retribution and deterrence in such cases as a factor amongst others (including the need to maintain public confidence in the system of justice) to be weighed in the balance in setting the first review date. I shall ensure that the timing of the first formal review in such cases is fixed in accordance with my overall policy for ensuring that the time served by prisoners serving life sentences for the worst offences of violence fully reflects public concern about violent crime.

... no life sentence prisoner will be detained for more than 17 years without a formal review of his case even where the period thought necessary to meet the requirements of retribution and deterrence exceeds 20 years.

... However, as was made clear by the Divisional Court, the release of a life sentence prisoner is solely at my discretion and it is for me to decide, after receiving the Parole Board's recommendation and after consulting the judiciary as required by section 61 (1) of the Criminal Justice Act 1967, when actual release should take place."

E. Judicial review

60. In addition to his right to make representations to the Parole Board under the provisions of the Criminal Justice Act 1967 (see paragraphs 56-59

above), a prisoner detained pursuant to a discretionary life sentence may take proceedings in the High Court to obtain the judicial review of any decision of the Parole Board or of the Home Secretary on the ground that it is tainted by illegality, irrationality or procedural impropriety (see judgment of 2 March 1987 in the Weeks case, Series A no. 114, pp. 18-19, paras. 30-31).

PROCEEDINGS BEFORE THE COMMISSION

61. Mr Thynne, Mr Wilson and Mr Gunnell lodged their applications with the Commission on 3 June 1985, 1 September 1985 and 24 April 1985 respectively. All three claimed that there was no judicial procedure available under United Kingdom law to determine the continued lawfulness of their detention or, more specifically, in the case of the second and third applicants, their re-detention following release. They all invoked Article 5 para. 4 (art. 5-4) of the Convention and the second applicant, Mr Wilson, additionally invoked Article 5 para. 5 (art. 5-5).

62. On 6 September 1988 the Commission ordered the joinder of the three applications pursuant to Rule 29 of its Rules of Procedure and declared the case admissible.

In its report adopted on 7 September 1989 (Article 31) (art. 31) the Commission expressed the opinion that in relation to each applicant there had been a violation of Article 5 para. 4 (art. 5-4) (by 10 votes to 2) and additionally in the case of Mr Wilson that there had been a violation of Article 5 para. 5 (art. 5-5) (by 10 votes to 2). The full text of the Commission's opinion and of the separate opinions contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

63. At the public hearing on 25 June 1990 the Government maintained in substance the concluding submissions set out in their memorial, whereby they requested the Court

"to decide and declare:

* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 190 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

(i) that there has been no breach of Article 5 para. 4 (art. 5-4) in the case of any of the applicants;

(ii) that there has been no breach of Article 5 para. 5 (art. 5-5) in the case of the second applicant."

AS TO THE LAW

I. THE ALLEGED BREACH OF ARTICLE 5 PARA. 4 (art. 5-4)

64. All three applicants complained of a violation of Article 5 para. 4 (art. 5-4) of the Convention on the ground that they were not able to have the continued lawfulness of their detention decided by a court at reasonable intervals throughout their imprisonment. The second and third applicants (Mr Wilson and Mr Gunnell) also alleged a breach of this provision in that they were unable to have the lawfulness of their re-detention decided by a court.

Article 5 para. 4 (art. 5-4) 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."

The Government maintained that this provision did not apply in the manner submitted by the applicants. The Commission found that there was a breach of Article 5 para. 4 (art. 5-4) in respect of each of them.

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

65. The applicants claimed that a discretionary life sentence is composed of a punitive element - i.e. a period of imprisonment to satisfy the needs of retribution and deterrence (the "tariff" period) - and a security element based on the need to protect the public. They maintained that they had received discretionary life sentences because, as in the Weeks case (judgment of 2 March 1987, Series A no. 114, pp. 24-25, para. 46), the courts considered them to be mentally unstable and dangerous and that such a sentence would enable the Secretary of State to monitor their progress and decide when it was safe to release them. Since these factors were susceptible to change with the passage of time a right to judicial review at reasonable intervals of the continued lawfulness of their detention was required (*ibid.*, pp. 28-29, para. 58).

66. The Government argued that the present cases did not fall into the same category as the Weeks case. In that case, as perceived by the Court, the facts relating to the offence could not be described as grave and the sole purpose of the sentence as stated by the courts was to detain the offender because he might present a danger to the public for an indeterminate period in the future. The need for punishment was not a factor in the stated purpose of the life sentence in that case. In contrast, the present applicants had committed particularly serious offences and the sentencing courts had emphasised the need for punishment.

The Government contended that in a normal discretionary life sentence no clear dividing line can be drawn by reference to the "tariff" period between the punitive and security purposes for which the sentence is imposed. In their submission there is no clearly identifiable point after which the sole justification of the sentence is protective detention.

In the first place they stated that the purpose of the tariff has been wrongly understood by both the applicants and the Commission as providing support for such a division. The "tariff" was a notional period communicated by the judges to the Secretary of State in both mandatory and discretionary life sentences to enable him to fix the first review date by the Local Review Committee. It represented the judges' views as to the minimum period of detention necessary to satisfy the requirements of retribution and deterrence. The judges' recommendation in this respect, however, was relevant only to the fixing of the date for the first review. When considering release, the Secretary of State was not bound by the judicial view on "tariff", but had to take into account a variety of factors which it was impossible to subject to finite analysis. Furthermore, the fact that the trial judge and the Lord Chief Justice were consulted a second time prior to the prisoner's release showed that consideration of the period necessary for punishment did not end at the expiry of the "tariff" period. In sum, the applicants' analysis confused the administrative procedures which governed the way the sentence is served with the nature of the sentence.

In the second place the gravity of the offences was relevant at all times throughout the sentence, especially when the Secretary of State was called on to assess the risk factor when considering release. Gravity also remained the immutable justification in a discretionary life sentence - although not the sole justification - for the continued detention or recall of the life prisoner.

67. In proceedings originating in an individual application, the Court has, without losing sight of the general context, to confine its attention as far as possible to the issues raised by the concrete case before it. Accordingly, it will limit its examination to the application of Article 5 para. 4 (art. 5-4) to the particular circumstances of the present applicants.

68. It was held in the De Wilde, Ooms and Versyp judgment of 18 June 1971 that where a sentence of imprisonment is imposed after "conviction by a competent court", the supervision required by Article 5 para. 4 (art. 5-4) is

incorporated in the decision of the court (Series A no. 12, p. 40, para. 76). In subsequent cases the Court made it clear that this finding related only to "the initial decision depriving a person of his liberty" and did not purport "to deal with an ensuing period of detention in which new issues affecting the lawfulness of the detention might arise" (see, *inter alia*, the above-mentioned Weeks judgment, Series A no. 114, p. 28, para. 56). In this connection the concept of lawfulness under Article 5 para. 4 (art. 5-4) requires that the detention be in conformity not only with domestic law but also with the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 para. 1 (art. 5-1) (*ibid.*, p. 23, para. 42, and p. 28, para. 57).

69. In cases concerning detention of persons of unsound mind under Article 5 para. 1 (e) (art. 5-1-e) where the reasons initially warranting detention may cease to exist the Court has held that "it would be contrary to the object and purpose of Article 5 (art. 5) ... to interpret paragraph 4 (art. 5-4) ... as making this category of confinement immune from subsequent review of lawfulness merely provided that the initial decision issued from a court ..." (see the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, pp. 22-23, para. 52). This interpretation of Article 5 para. 4 (art. 5-4) has also, in certain circumstances, been applied to detention "after conviction by a competent court" under Article 5 para. 1 (a) (art. 5-1-a) (see, *inter alia*, the Van Droogenbroeck judgment of 24 June 1982, Series A no. 50, pp. 23-27, paras. 44-49, the above-mentioned Weeks judgment, Series A no. 114, pp. 28-29, paras. 55-59, and the E. v. Norway judgment of 29 August 1990, Series A no. 181-A, pp. 21-22, para. 50). What is of importance in this context is the nature and purpose of the detention in question, viewed in the light of the objectives of the sentencing court, and not the category to which it belongs under Article 5 para. 1 (art. 5-1) (see the above-mentioned Van Droogenbroeck judgment, p. 24, para. 47).

70. Mr Weeks received a discretionary life sentence not because of the gravity of his offence but because of his dangerous and unstable personality and to enable the Home Secretary to monitor his progress and release him when he was no longer judged to represent a danger to the community (see Series A no. 114, especially at pp. 10-11, paras. 14-15).

The Court considered that the measure ordered against him was comparable to the measure of placement at the Government's disposal at issue in the Van Droogenbroeck case and, further, that the protective purpose underlying the life sentence, taken together with the particular circumstances of the offence for which he was convicted, placed the sentence in a special category to which Article 5 para. 4 (art. 5-4) was applicable (*ibid.*, pp. 24-25, paras. 46-47, and pp. 28-29, para. 58). It was an important feature of this category that the grounds relied on by the sentencing judges as the reason for imposing a life sentence on Mr Weeks, namely his mental instability and dangerousness, were, by their nature,

susceptible of change with the passage of time. The Court inferred from this that, if the decisions not to release or to re-detain were based on grounds inconsistent with the objectives of the sentencing court, his detention would no longer be "lawful" for the purposes of Article 5 para. 1 (a) (art. 5-1-a) and the Court concluded that Mr Weeks was entitled, by virtue of Article 5 para. 4 (art. 5-4), to have recourse to a court to decide on the lawfulness of his deprivation of liberty at the moment of any return to custody after being at liberty as well as at reasonable intervals during the course of his imprisonment (*ibid.*, p. 29, para. 58).

71. The Court has had regard to the reasons given by the courts for the sentences imposed on each of the applicants in the present case and the nature and purpose of the discretionary life sentence under English law.

72. Mr Thynne was found to have a personality disorder which required observation and possibly operative treatment. The sentencing judge indicated that but for the psychiatric reports he would have imposed a very long prison sentence (see paragraph 12 above). However, the Court of Appeal said that it did not "see the life sentence in this case as necessarily involving detention in custodial conditions for a very long period of time"; it added that this was a case in which the offences were very grave indeed and society needed to be protected against "outbursts of this nature which would very seriously affect other persons" (see paragraph 13 above).

Mr Wilson was also considered to be in need of treatment for his "particular freakish affliction". The sentencing judge expressed the view that he had a duty to protect the public from people like the applicant who "for one reason or another, can't control themselves" (see paragraph 22 above). The Court of Appeal stated that Mr Wilson had "far better prospects under an indeterminate sentence than under a long determinate sentence" (see paragraph 23 above).

Mr Gunnell was held to be suffering from a psychopathic disorder and could have been made the subject of a hospital order under the Mental Health Act 1959. However, both the sentencing court and the Court of Appeal were of the opinion that, in view of the gravity of his crimes, he merited punishment in a setting of strict security in order to protect the public. The trial judge, Mr Justice Roskill, stated (see paragraph 36 above):

"Imprisonment will afford security to the public from you, and the Home Secretary has ample power if and when the need for treatment arises, to transfer you to any institution where such treatment can be received."

Each of the applicants was thus sentenced to life imprisonment because, in addition to the need for punishment, he was considered by the courts to be suffering from a mental or personality disorder and to be dangerous and in need of treatment. Life imprisonment was judged to be the most appropriate sentence in the circumstances since it enabled the Secretary of State to assess their progress and to act accordingly. Thus the courts'

sentencing objectives were in that respect similar to those in *Weeks*, but also took into account the much greater gravity of the offences committed.

73. As regards the nature and purpose of the discretionary life sentence under English law, the Government's main submission was that it is impossible to disentangle the punitive and security components of such sentences. The Court is not persuaded by this argument: the discretionary life sentence has clearly developed in English law as a measure to deal with mentally unstable and dangerous offenders; numerous judicial statements have recognised the protective purpose of this form of life sentence (see, in particular, the remarks by Lord Chief Justice Lane and Lord Justice Stuart-Smith in *R v. Wilkinson* and *R v. Secretary of State, ex parte Bradley*, paragraphs 50 and 53 above). Although the dividing line may be difficult to draw in particular cases, it seems clear that the principles underlying such sentences, unlike mandatory life sentences, have developed in the sense that they are composed of a punitive element and subsequently of a security element designed to confer on the Secretary of State the responsibility for determining when the public interest permits the prisoner's release. This view is confirmed by the judicial description of the "tariff" as denoting the period of detention considered necessary to meet the requirements of retribution and deterrence (see paragraphs 52-53 above).

74. The Court accepts the Government's submissions that the "tariff" is also communicated to the Secretary of State in cases of mandatory life imprisonment; that the Secretary of State in considering release may not be bound by the intimation of the "tariff"; and that in the assessment of the risk factor in deciding on release the Secretary of State will also have regard to the gravity of the offences committed.

However, in the Court's view this does not alter the fact that the objectives of the discretionary life sentence as seen above are distinct from the punitive purposes of the mandatory life sentence and have been so described by the courts in the relevant cases (see paragraphs 50 and 53 above).

75. It is clear from the judgments of the sentencing courts that in their view the three applicants, unlike Mr *Weeks*, had committed offences of the utmost gravity meriting lengthy terms of imprisonment. Nevertheless, the Court is satisfied that in each case the punitive period of the discretionary life sentence has expired.

In the case of Mr *Thynne*, it was accepted that by the end of 1984 risk was the sole remaining consideration in his continued detention (see paragraph 18 above).

In addition to the life sentence imposed on him for the offence of buggery, Mr *Wilson* was sentenced in 1972 to seven years' imprisonment for each of the nine other counts to be served concurrently. In the circumstances of his case, it would seem reasonable to draw the conclusion that the punitive period of his life sentence had expired when he was

released in 1982 and that thereafter his re-detention pursuant to that sentence depended solely on the risk factor.

In Mr Gunnell's case too it may be taken that, notwithstanding the gravity of his offences on which the courts laid particular emphasis, the applicant had served the punitive period of his sentence by March 1982, the date fixed for his provisional release.

76. Having regard to the foregoing, the Court finds that the detention of the applicants after the expiry of the punitive periods of their life sentences is comparable to that at issue in the *Van Droogenbroeck* and *Weeks* cases: the factors of mental instability and dangerousness are susceptible to change over the passage of time and new issues of lawfulness may thus arise in the course of detention. It follows that at that phase in the execution of their sentences, the applicants were entitled under Article 5 para. 4 (art. 5-4) to take proceedings to have the lawfulness of their continued detention decided by a court at reasonable intervals and to have the lawfulness of any re-detention determined by a court.

77. The applicants and the Commission submitted that Article 5 para. 4 (art. 5-4) should be considered to apply throughout the whole of the applicants' imprisonment because of the uncertainty of the "tariff" period, which was not communicated directly to the applicants. Furthermore the applicants attached weight to the fact that the "tariff" or punitive period was not stated in open court and subject to the normal process of appeal.

The Government argued that a life prisoner should not be placed in a better position than a prisoner who received a fixed-term sentence. The length of the "tariff" can be deduced from the date when the first review is set. Article 5 para. 4 (art. 5-4) should only apply, if at all, following the expiry of the "tariff" period.

78. The Court does not consider that it is necessary to decide this question in the present case since it is clear that the punitive period of the three applicants' life sentences has expired (see paragraph 75 above). Accordingly the applicants were entitled to subsequent judicial control as guaranteed by Article 5 para. 4 (art. 5-4).

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

79. 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 these three applicants (see, *inter alia*, the above-mentioned *Weeks* judgment, Series A no. 114, p. 29, para. 59,

and the above-mentioned E v. Norway judgment, Series A no. 181-A, pp. 21-22, para. 50).

80. The Court sees no reason to depart from its finding in the Weeks judgment (pp. 29-33, paras. 60-69) that neither the Parole Board nor judicial review proceedings - no other remedy of a judicial character being available to the three applicants - satisfy the requirements of Article 5 para. 4 (art. 5-4). Indeed, this was not disputed by the Government.

C. Recapitulation

81. In conclusion, there has been a violation of Article 5 para. 4 (art. 5-4) in respect of all three applicants.

II. ALLEGED BREACH OF ARTICLE 5 PARA. 5 (art. 5-5)

82. Mr Wilson further alleged a breach of Article 5 para. 5 (art. 5-5) in that he does not have an enforceable right to compensation under the law of the United Kingdom in respect of the violation of Article 5 para. 4 (art. 5-4). Article 5 para. 5 (art. 5-5) reads:

"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."

The Government did not deny that such a violation could not give rise, either before or after the findings made by this Court in the present judgment, to an enforceable claim for compensation before the United Kingdom courts. There has therefore been a violation of paragraph 5 of Article 5 (art. 5-5) in respect of Mr Wilson (see, *mutatis mutandis*, the Brogan and Others judgment of 29 November 1988, Series A no. 145-B, p. 35, para. 67, and the Fox, Campbell and Hartley judgment of 30 August 1990, Series A no. 182, p. 21, para. 46).

III. APPLICATION OF ARTICLE 50 (art. 50)

83. Under Article 50 (art. 50) of the Convention,

"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 applicants' claims under this provision 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

84. The applicants sought compensation for the feelings of "helplessness and frustration", for the loss of an opportunity to win back their freedom and alternatively, for the loss of liberty after the expiry of the "tariff" period, all of which allegedly resulted from the denial to them of Article 5 para. 4 (art. 5-4) safeguards.

Mr Thynne and Mr Wilson quantified their claims at £5,000 and £45,000 respectively.

85. In the opinion of the Court, there is no evidence that the applicants would have regained their freedom had Article 5 para. 4 (art. 5-4) not been breached. Even assuming that they have suffered certain feelings of "helplessness and frustration", the Court shares the Government's view that, in the circumstances, finding a violation of Article 5 (art. 5) in each of the present cases constitutes sufficient just satisfaction for the purposes of Article 50 (art. 50).

B. Legal costs and expenses

86. For lawyers' fees and disbursements, Mr Thynne sought reimbursement of the sum of £4,500 less fees paid by way of legal aid up to the submission of his memorial to the Court and Mr Wilson and Mr Gunnell jointly sought reimbursement of the total sum of £27,278.90 inclusive of value-added tax (VAT), legal aid payments having to be taken into account.

The Government accepted that, in general, Mr Thynne's claim was reasonable. On the other hand, they considered that £16,507.40, exclusive of VAT, was a more reasonable sum than that claimed by Mr Wilson and Mr Gunnell.

87. The Court has examined the claims in the light of the criteria emerging from its case-law.

The Court holds that Mr Thynne should be awarded the amount claimed, namely £4,500 less 7,845 French francs already paid by way of legal aid in respect of fees. Mr Wilson and Mr Gunnell should be awarded jointly £18,000 less 24,849.98 French francs already paid to Mr Gunnell by way of legal aid in respect of fees and travel and subsistence expenses. Both these figures are to be increased by any value-added tax that may be chargeable.

FOR THESE REASONS, THE COURT

1. Holds by eighteen votes to one that there has been a violation of Article 5 para. 4 (art. 5-4) in the case of all three applicants;

2. Holds by eighteen votes to one that there has been a violation of Article 5 para. 5 (art. 5-5) in the case of Mr Wilson;
3. Holds unanimously that the United Kingdom is to pay to the applicants, in respect of costs and expenses, the sums resulting from the calculations to be made in accordance with paragraph 87 of the judgment;
4. Dismisses unanimously 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 25 October 1990.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the dissenting opinion of Mr Þór Vilhjálmsson is annexed to this judgment.

R. R.
M.-A. E.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

To my regret I am unable to share the opinion of other members of the Court in this case. I am of the opinion that there has been no breach of Article 5 para. 4 (art. 5-4) of the Convention as the judicial review required by this provision was incorporated in the original court decisions concerning the applicants. There is accordingly no violation of Article 5 para. 5 (art. 5-5).

1. In some earlier cases I have found that I was bound to vote in a certain way on the basis of the case-law of this Court even though I did not agree with the conclusions of the judgments it was based on. The Court is now sitting in plenary. For that reason alone I consider myself free to examine the questions before us afresh, in particular, to reiterate my dissenting opinion in the Weeks case.

Nevertheless I would like to point out that four of the cases quoted in the judgment to which this dissenting opinion is attached differ from the present case. I mention these briefly:

In the case of *X v. the United Kingdom* the applicant was convicted of wounding with intent to cause grievous bodily harm. He was not given a prison sentence. Instead the court ordered his detention under the Mental Health Act for an indefinite period. The Court found that there had been a breach of Article 5 para. 4 (art. 5-4) as the possibilities available to Mr X to have his case reviewed by a court did not satisfy the requirements of the Convention.

In the cases of *Van Droogenbroeck* and *E v. Norway* both applicants were given fixed term sentences. In the former case the applicant was put at the disposal of the Belgian Government for ten years after he had served his time in prison. In the Norwegian case the applicant was detained on the basis of authorisations found in several court decisions. The disputed detentions were in addition to prison sentences. The Court found a violation in the Belgian case but not in the Norwegian case, where it considered that the available judicial review satisfied the requirements of Article 5 para. 4 (art. 5-4).

In the Weeks case the applicant had been convicted of armed robbery and other offences and sentenced to life imprisonment. The offences were nevertheless minor ones. The applicant had, when he was 17 years old, entered a pet shop with a starting pistol loaded with blank cartridges and made off with 35 pence. In that case I found myself in a minority.

I have briefly outlined the facts in these cases in order to underline that they could not, even if I were voting as a member of a chamber of the Court, be taken to form a clear precedent for the case at hand.

2. As to the merits of the case I would like to explain my vote as follows:

All three applicants were sentenced to life imprisonment by English courts. It is clear that this did not in any way constitute a breach of the

Convention since sentencing generally falls outside its scope. If English law provided for mandatory life sentences in cases of rape or buggery, this would not give a valid ground for an application to the Convention organs.

Sentencing is a complicated process. The judgment shows that the majority of the Court has tried to limit itself to the cases in question and, in particular, to what the majority finds to be a legal distinction under English law between "punitive" and "security" periods of imprisonment where the life sentence is a discretionary one. At the same time it is stated in the judgment that the Court should not lose sight of the general context. I agree with this approach although in my view it means that thought should be given as to how the present judgment would influence the situation in other countries. I am not in a position to make a comprehensive study on this point, but I consider that the approach of the majority, which is difficult, if at all possible, to apply in the present case, would give rise to even greater difficulties if it were to be applied to sentences passed in other States. The words of the Convention do not require that our Court undertakes the difficult task of breaking up sentences passed by courts in member States into their "tariff" and "security" components. This latter part of a sentence is said to be based on grounds "susceptible of change with the passage of time". I find that it is not possible to make this distinction under the Convention.

It is also, in my opinion, relevant that the possibilities accorded to administrative authorities under national laws to shorten the time actually spent in prison is generally outside the control of our Court. The Convention has no clear rules on this point and it is, for the most part, left to the member States to regulate it. The cases of the applicants fall into this category.

All of the applicants had mental health problems. Several judgments of this Court remind us of the fact that persons with such problems can often pray the Convention in aid, but the Convention does not, in my view, entitle them to special judicial protection where, as in the circumstances of the present case, they have been convicted for criminal offences and their sentences have not expired.

As already indicated, I have come to the conclusion that there was no violation in this case because the applicants were all given life sentences following trial and conviction by a court. My conclusion is not changed because under the English system the applicants' release on licence was actually considered. The Convention does not guarantee a right to be considered for parole nor does it contain rules as to the outcome of such procedures. I am of the opinion that the rights of the applicants Mr Wilson and Mr Gunnell are not changed by the fact that they were released on licence and then re-detained on the basis of their original sentences since these sentences were still in force. It goes without saying that the fact that the third applicant, Mr Thynne, escaped twice from detention, does not change his legal situation.

Accordingly I have voted for no violation of Article 5 para. 4 (art. 5-4). I therefore find no violation of Article 5 para. 5 (art. 5-5) as claimed by the applicant Mr Wilson. I have voted on the question of Article 50 (art. 50) as is customary for judges in the minority on the merits of a case.