



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

THIRD SECTION

CASE OF BENJAMIN & WILSON v. THE UNITED KINGDOM

(Application no. 28212/95)

JUDGMENT

STRASBOURG

26 September 2002

FINAL

26/12/2002

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

In the case of Benjamin & Wilson v. the United Kingdom,

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

Mr I. CABRAL BARRETO, *President*,

Mr L. CAFLISCH,

Mr R. TÜRMEŖ,

Mr B. ZUPANČIČ,

Mrs H.S. GREVE,

Mr K. TRAJA, *judges*,

Sir Scott BAKER, *ad hoc judge*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 5 September 2002,

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

PROCEDURE

1. The case originated in an application (no. 28212/95) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two United Kingdom nationals, Patrick Benjamin and Hueth Wilson, on 3 August 1995.

2. The applicants, who had been granted legal aid, were represented before the Court by Ms L. Scott-Moncrieff, a lawyer practising in London. The United Kingdom Government (“the Government”) were represented by their Agent, Mr Huw Llewellyn of the Foreign and Commonwealth Office, London.

3. The applicants, who were detained in hospital following sentence by courts to terms of discretionary life imprisonment, alleged that they had not had available to them a procedure by which they could challenge the lawfulness of their continued detention, invoking Article 5 § 4 of the Convention.

4. The application was declared admissible by the Commission on 23 October 1997 and transmitted to the Court on 1 November 1998 in accordance with Article 5 § 3, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court. Sir Nicolas Bratza, the judge elected in respect of the United Kingdom, withdrew from sitting in

the case (Rule 28). The Government accordingly appointed Sir Scott Baker to sit as an *ad hoc* judge in his place (Article 27 § 2 of the Convention and Rule 29 § 1).

6. The applicants and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The first applicant

8. The first applicant, Mr Patrick Benjamin, was sentenced to life imprisonment for rape in 1983. His tariff period (the minimum period of detention satisfying the requirements of retribution and deterrence) was set at six years and expired in April 1989. His time in prison was characterised by periods of thought disorder, delusions and behavioural problems and the Secretary of State decided that he was in need of care and treatment in a secure hospital. In August 1989, he was made the subject of a transfer direction and a restriction order under, respectively, sections 47 and 49 of the Mental Health Act 1983 (the 1983 Act) and transferred to Broadmoor Special Hospital.

9. In October 1993, the Secretary of State decided, following consultation with the trial judge and the Lord Chief Justice, that the first applicant should be regarded as a “technical lifer” (that is a person who was suffering from a mental disorder which influenced him to a significant extent at the time of the offence although the court had not made a hospital order on sentencing).

10. In April 1994, the first applicant was transferred to Bracton Clinic Regional Secure Unit. On 1 July 1996, his case for discharge was considered by the Mental Health Review Tribunal which found that it was not satisfied that the first applicant did not any longer require treatment in a hospital for mental illness.

11. When his case was reviewed most recently, on 9 January 2001, the MHR Tribunal recommended his discharge. The Secretary of State accepted the recommendation and the first applicant was discharged.

B. The second applicant

12. The second applicant, Mr Hueth Wilson, was sentenced to life imprisonment for buggery of a young girl in 1977. The court had before it psychiatric evidence to the effect that he suffered from mental illness. Expert psychiatric evidence recommended that he should be made subject to a hospital order coupled with a restriction order without limit of time under sections 37 and 41 of the Mental Health Act 1959. Due to an absence of any beds in hospitals providing the level of security that the trial judge considered necessary, the judge felt unable to make the orders and passed, instead, a discretionary life sentence. The judge commented that the second applicant could later be transferred to hospital if his condition required it. His tariff period was set at eight years and expired in 1984.

13. In August 1977, the second applicant was transferred to hospital under the Mental Health Act 1959 (later replaced by the 1983 Act). In November 1977, the applicant returned to prison and there were several other transfers to and from hospital in subsequent years. In October 1992, the second applicant was transferred to Rampton Special Hospital under sections 47 and 49 of the 1983 Act. In June 1993, following consultation with the trial judge and the Lord Chief Justice, the Secretary of State decided that the second applicant should be regarded as a “technical lifer”.

14. On 6 July 1996 the MHR Tribunal considered the second applicant's case for discharge and found that they were not satisfied that he no longer required treatment in hospital for mental illness. His case was reviewed most recently on 13 June 2000 when the Tribunal again did not recommend discharge.

C. Domestic proceedings concerning the applicants' status

15. By decisions of the Secretary of State for the Home Department communicated to the applicants in October and November 1992, the Secretary of State refused to certify the applicants as eligible for review by the discretionary lifer panels empowered by section 34 of the Criminal Justice Act 1991 to order their release on licence. Leave to apply for judicial review of the decisions was granted on 17 May 1993.

16. On 22 October 1993 the High Court, granting the application, made a declaration that the Secretary of State's policy not to certify discretionary life prisoners under paragraph 9 of Schedule 12 to the Criminal Justice Act 1991 (“the 1991 Act”) on the ground that they had been transferred to hospital under the 1983 Act was unlawful ([1994] Q.B. 378).

17. On appeal, on 19 July 1994, the Court of Appeal reversed the High Court's decision in part. It considered that, although the applicants were existing life prisoners within the meaning of the paragraph 9 of Schedule 12, their discharge nevertheless remained subject to the procedure

laid down in section 50 of the 1983 Act. The rights to a hearing under the 1991 Act were conferred only on persons who were solely subject to that Act, and not on those who were mental patients ([1995] Q.B. 43).

18. The applicants were informed by letter of 18 May 1995 that the House of Lords had refused leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Transfer and restriction directions on prisoners under the Mental Health Act 1983

19. Under section 47 of the Mental Health Act 1983 (“the 1983 Act”), the Secretary of State may transfer a person serving a sentence of imprisonment to hospital if he is satisfied that the person is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment, and that the mental disorder is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment, and, in the case of psychopathic disorder or mental impairment, that such treatment is likely to alleviate or prevent a deterioration of the condition. A transfer under section 47 of the 1983 Act is called a “transfer direction”, and has the same effect as if a hospital order had been made under section 37 (1) of the 1983 Act (that is, where a court convicts a person and, instead of sentencing him, orders his detention in hospital).

20. At the same time as making a transfer direction, the Secretary of State may also make a “restriction direction” under section 49 of the 1983 Act. A restriction direction has the same effect as a restriction order made by a court under section 41 of the 1983 Act on conviction, save that because the person was not given a hospital order by the court, the Secretary of State must consent to his discharge from hospital, as well as to the granting of leave of absence or transfer to another hospital.

21. A transferred life prisoner subject to restriction directions can be discharged from hospital in three possible ways. Each can be initiated only by the Secretary of State.

(1) Section 42 (2) of the 1983 Act gives the Secretary of State power, if he thinks fit, by warrant to discharge the patient either absolutely or subject to conditions.

(2) Section 50 of the 1983 Act provides that where the Secretary of State is notified by the responsible medical officer, and other registered practitioner or a Mental Health Review Tribunal that the person no longer requires treatment in hospital for mental disorder, or that no effective treatment for the disorder can be given in the hospital, the Secretary of State may remit the person to a prison or to a different institution, or he may

exercise any power of releasing or discharging him which would have been exercisable if he had been so remitted.

(3) Under Section 74 of the 1983 Act,

“(1) Where an application to a Mental Health Review Tribunal is made by a restricted patient who is subject to a restriction direction, or where the case of such a patient is referred to such a tribunal, the tribunal -

(a) shall notify the Secretary of State whether, in their opinion, the patient would, if subject to a restriction order, be entitled to be absolutely or conditionally discharged under Section 73 ...; and

(b) if they notify him that the patient would be entitled to be conditionally discharged, may recommend that in the event of his not being discharged under this section he should continue to be detained in hospital.

(2) If in the case of a patient not falling within subsection (4) below-

(a) the tribunal notify the Secretary of State that the patient would be entitled to be absolutely or conditionally discharged; and

(b) within the period of 90 days beginning with the date of that notification the Secretary of State gives notice to the tribunal that the patient may be so discharged,

the tribunal shall direct the absolute or, as the case may be, the conditional discharge of the patient.

...

(4) If, in the case of a patient who is subject to a transfer direction under Section 48 above, the tribunal notify the Secretary of State that the patient would be entitled to be absolutely or conditionally discharged, the Secretary of State shall, unless the tribunal have made a recommendation under subsection (1)(b) above, by warrant direct that the patient be remitted to a prison or other institution in which he might have been detained if he had not been removed to hospital, there to be dealt with as if he had not been so removed.”

22. Section 73 of the 1983 Act (which relates to restricted patients under section 41 of the 1983 Act) provides that the tribunal must direct conditional discharge if they are satisfied that he is not suffering from mental illness or disorder of a type which makes it appropriate for the person to be detained in a hospital for medical treatment, or that it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment, and they believe that it is appropriate for the patient to remain liable to be recalled to hospital for further treatment.

23. In 1985, the Home Secretary announced that life sentence prisoners who had been transferred to hospital would normally be discharged under section 50 of the 1983 Act rather than sections 42 (2) or 74 (2). This enables release on life licence with life-long control rather than the possibility of

eventual absolute discharge by the Secretary of State. The policy was found to be lawful in the case of *R. v. Secretary of State for the Home Department ex parte Stroud* (16 July 1992).

B. Discretionary life prisoners

24. Section 34 of the Criminal Justice Act 1991 provides that where a discretionary life prisoner has served his tariff (that is, the “punishment” part of his sentence), and the Parole Board is satisfied that it is no longer necessary for the protection of the public that he should be detained and has directed his release, it is the duty of the Secretary of State to release him. Under Paragraph 9 of Schedule 12, which is a transitional provision to the 1991 Act, the Secretary of State can apply the provisions of section 34 to discretionary life prisoners who were sentenced before section 34 of the 1991 Act came into force on 10 October 1992 by issuing a certificate that, if the 1991 Act had been in force when the person was sentenced, section 34 would have been applied.

C. The Human Rights Act 1998

25. On 2 October 2000 the Human Rights Act came into force in England and Wales. Section 6 provides as relevant:

“(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Sub-section (1) does not apply to an act if –

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect to in a way which is compatible with Convention rights, the authority was acting so as to give effect to or enforce those provisions.”

THE LAW

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

26. The applicants complained that they did not have a review of their continued detention in hospital as required by Article 5 § 4 of the Convention. The relevant provisions of Article 5 are as follows:

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

(a) the lawful detention of a person after conviction by a competent court;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

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

A. The arguments of the parties

1. *The applicants*

27. The applicants submitted that as they should never have been sent to prison but should have been sent to hospital, their detention fell to be justified under Article 5 § 1(e) of the Convention and they were entitled under Article 5 § 4 to a review by a body empowered to examine the lawfulness of their detention and to direct their release into the community if they were no longer detainable on grounds of mental disorder.

28. The system to which they were subject as “technical lifers”, whereby the Tribunal could only make recommendations for release, did not satisfy the requirements of Article 5 § 4. The fact that, as claimed by the Government, a recommendation would as a matter of policy be accepted by the Secretary of State was not a sufficient guarantee. Such policies could be changed, and it was extremely doubtful that the Secretary of State could administratively bind himself (referring to *R. v. North East Devon Health Authority ex parte Coughlan* [2002] 2 WLR 622). The Secretary of State was left with sole power to determine not only whether to grant release but also when to do it and on what conditions.

29. The applicants accepted that under section 6(1) of the Human Rights Act 1998 the Secretary of State was bound as a matter of law to follow the recommendation for discharge of any tribunals that might review the applicants' detention. However it remained the case that the Secretary of State was free to resile from the policy of identifying certain life sentence prisoners as “technical lifers” or of treating the applicants as such. Insofar therefore as the applicants did not have a right in law to an Article 5 § 4 compliant review but only one that was granted administratively, there was an ongoing violation of Article 5 § 4.

2. *The Government*

30. The Government submitted that there had been no breach of Article 5 § 4 as the applicants were legally entitled to release when and if the MHR Tribunal so recommended. They were entitled to have the merits of their continuing detention considered by the Tribunal, which had the power to recommend release and was independent. While it had no power to order release, this was a matter of form not substance as in the case of technical lifers such as the applicants the practice and policy of the Secretary of State was to follow the recommendation of the Tribunal under section 74 of the 1983 Act in relation to discharge. They argued that compliance with Article 5 § 4 could be achieved by administrative practice and policy, citing the cases of *Leander v. Sweden* (judgment of 26 March 1987, Series A no. 116, § 51) and *Silver and Others v. the United Kingdom* (judgment of 25 March 1983, Series A no. 61, §§ 88-89).

31. Furthermore, the applicants were legally protected as it would be unlawful for the Secretary of State not to comply with his own policy, which created legitimate expectations. They had not suggested that the Tribunal had made any recommendation which the Secretary of State had refused to accept. In particular, since the Human Rights Act 1998, he would not be entitled to change his policy on “technical lifers” without complying with Convention rights and so a remedy would be available under section 6(1) of the Act.

32. In any event, the Government pointed out that the Tribunal had not recommended the release of either applicant before the introduction of this application and so neither had been prejudiced by its inability to order release. Insofar as the first applicant has now been discharged from hospital, this was in accordance with the recommendation of the Tribunal. Neither could therefore claim to be a victim of any breach of the Convention.

B. The Court's assessment

33. Article 5 § 4 provides a crucial guarantee against the arbitrariness of detention, providing for detained persons to obtain a review by a court of the lawfulness of their detention both at the time of the initial deprivation of liberty and, where new issues of lawfulness are capable of arising, periodically thereafter (see, *inter alia*, *Kurt v. Turkey* judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III, § 123, and *Varbanov v. Bulgaria*, no. 31365/96, ECHR 2000-X, § 58). While the “court” referred to in this provision does not necessarily have to be a court of law of the classic kind integrated within the judicial machinery of the country, it does denote bodies which exhibit the necessary judicial procedures and safeguards appropriate to the kind of deprivation of liberty in question, including most importantly independence of the executive and of the parties

(see *De Wilde, Ooms and Versyp v. Belgium* judgment of 18 June 1971, Series A no. 12, pp. 41-42, §§ 76 and 86; *X v. the United Kingdom* judgment of 5 November 1981, Series A no. 46, p. 23, § 53, and *Weeks v. the United Kingdom* judgment of 2 March 1987, Series A no. 114, p. 30, § 61).

34. In addition, as the text makes clear, the body in question must have not merely advisory functions but must have the competence to “decide” the “lawfulness” of the detention and to order release if the detention is unlawful (see the above-mentioned *Weeks* judgment, *loc. cit.*, *Singh v. the United Kingdom* judgment of 21 February 1996, *Reports* 1996-I, § 66, *D.N. v. Switzerland*, [GC], no. 27154/95, ECHR 2001-III, § 39).

35. It is not contested in the present case that the applicants who were both detained in a hospital at the introduction of this application had the possibility of having their continued detention reviewed by the MHR Tribunal which satisfied the requirement of independence. It did not however have the power to order release.

36. The Government argued that as the Secretary of State followed a practice of following the Tribunal's recommendation this did not deprive the Tribunal's review of an effective decision-making function. While they have referred to previous cases concerning the relevance of administrative practices and policies, the Court observes that these judgments examined complaints under Article 8 of the Convention where issues arose as to whether certain measures were “in accordance with the law”. In that context, the existence of administrative practices may indeed have a bearing on the conditions of lawfulness of measures. Under Article 5 § 4 however, the plain wording of the provision refers to the decision-making power of the reviewing body. In this case, the power to order release lay with the Secretary of State, even though he may have been under some constraints of administrative law as regarded the situations in which he could or could not depart from a policy that had created legitimate expectations. The ability of an applicant to challenge a refusal by the Secretary of State to follow his previous policy in the courts would not remedy the lack of power of decision in the Tribunal. Article 5 § 4 presupposes the existence of a procedure in conformity with its provisions without the necessity to institute separate legal proceedings in order to bring it about. Similarly, although both parties appear to agree that the Secretary of State, following entry into force of the Human Rights Act 1998, would not be able lawfully to depart from the Tribunal's recommendation, this does not alter the fact that the decision to release would be taken by a member of the executive and not by the Tribunal. This is not a matter of form but impinges on the fundamental principle of separation of powers and detracts from a necessary guarantee against the possibility of abuse (see, *mutatis mutandis*, *Stafford v. the United Kingdom*, [GC] no. 46295/ 99, 28 May 2002, ECHR 2002-..., § 78).

37. Nor does the Court accept the Government's argument that the applicants cannot claim to be victims, the first applicant since he has been released when the Tribunal so recommended and the second applicant as his release has never been recommended. Both applicants, the first applicant until the date of his release in January 2001, were entitled to have a review of the lawfulness of their continued detention by a body satisfying the requirements of Article 5 § 4. As the Tribunal could not order the release of the applicants, they were not able to obtain such a review.

38. Accordingly, there has been a violation of Article 5 § 4 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. Article 41 of the Convention provides:

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

40. The applicants make no claim for damage, accepting that a finding of a violation would constitute just satisfaction in the circumstances of their case. Nor have they submitted any claims for legal costs.

In the circumstances, the Court makes no award.

FOR THESE REASONS, THE COURT UNANIMOUSLY

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

Done in English, and notified in writing on 26 September 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO
President