



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

FOURTH SECTION

CASE OF LLOYD AND OTHERS v. THE UNITED KINGDOM

(Applications nos. 29798/96, 30395/96, 34327/96, 34341/96, 35445/97, 36267/97, 36367/97, 37551/97, 37706/97, 38261/97, 39378/98, 41590/98, 41593/98, 42040/98, 42097/98, 45420/99, 45844/99, 46326/99, 47144/99, 53062/99, 53111/99, 54969/00, 54973/00, 54997/00, 55046/00, 55068/00, 55071/00, 56109/00, 56231/00, 56232/00, 56233/00, 56429/00, 56441/00, 2460/03, 2482/03, 2483/03, 2484/03 and 2490/03)

JUDGMENT

STRASBOURG

1 March 2005

FINAL

06/07/2005

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 Lloyd and Others v. the United Kingdom,

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

Mr J. CASADEVALL, *President*,
Sir Nicolas BRATZA,
Mr M. PELLONPÄÄ,
Mr R. MARUSTE,
Mr S. PAVLOVSKI,
Mr L. GARLICKI,
Mr J. BORRERO BORRERO, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 21 October 2003 and on 1 February 2005,

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

PROCEDURE

1. The case concerned thirty eight applications (nos. 29798/96 and others set out in annex) 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 Mr Raymond Lloyd and thirty seven other applicants ("the applicants"), who are United Kingdom nationals, on various dates from 6 November 1995 to 7 July 1999 respectively.

2. The applicants, some of whom had been granted legal aid, were represented as follows: *Raymond Lloyd* (29798/96) was represented by Chamberlins Solicitors, lawyers practising in Hertfordshire; *Wood* (30395/96) by Mr C. McKay, a lawyer practising in Grimsby; *Robert Waller* (34327/96) by Mr T. Humpage, a lawyer practising in Ipswich; *G.M.* (34341/96) by Ms G. Christie, a lawyer practising in County Durham; and the remaining applicants by Dicksons HMB Solicitors, lawyers practising in Stoke-on-Trent. The United Kingdom Government ("the Government") were represented by their Agent, Ms Emily Willmott of the Foreign and Commonwealth Office, London.

3. The applicants alleged that their detention ordered by the magistrates for failure to pay local taxes or court-imposed fines was unlawful contrary to Article 5 § 1 of the Convention and that they had not been entitled to compensation under domestic law contrary to Article 5 § 5 of the Convention. The applicants further complained under Article 6 §§ 1 and

3(c) that they were not offered legal representation and were not represented at the hearing at which they were sentenced to a term of imprisonment.

4. The applications were transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The applications were 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.

6. On 1 November 2001, these cases were assigned to the newly composed Fourth Section (Rule 52 § 1).

7. By a decision of 21 October 2003, the Court declared admissible the claims under Article 5 of twenty seven of the applicants and the claims under Article 6 of thirty four of the applicants. The remainder of the claims of the applicants were declared inadmissible.

8. 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 § 3 *in fine*). On 1 November 2004 these cases were assigned to the newly composed Fourth Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASES

9. Each applicant failed to pay sums due in respect of either local taxes (community charge, council tax or non-domestic rates) or court-imposed fines. In respect of the failure to pay local taxes, the magistrates' court had in each case determined that the applicant was liable to pay (issuing a "liability order"); in fines cases, the magistrates' court had imposed the fine as the sentence following a criminal conviction.

10. Each applicant fell into arrears with the payments due from them. These cases involve the enforcement proceedings in respect of their arrears in the magistrates' court. Each applicant appeared before the court, following the issuing of an application for their committal to prison as a result of their failure to pay the sums due. At that hearing the magistrates found that the non-payment was due to the applicant's wilful refusal or culpable neglect. As a result each applicant was sentenced to a period of imprisonment. The sentence was either imposed immediately (*G.M.*, 34341/96) or was suspended on terms that the applicant make periodic payments towards the outstanding sum. In the latter circumstances, when

the applicant failed to comply with the terms imposed, a further hearing was held in the magistrates' court at which the suspended term of imprisonment was activated. Each applicant spent a period of time in prison. Legal aid (free legal representation where the applicant did not have sufficient means to pay for it) was not available for these enforcement proceedings prior to 1 June 1997 and none of the applicants was legally represented at the hearings in front of the magistrates.

11. Following their imprisonment, an application was made on behalf of each applicant, by way of either judicial review or case stated, which resulted in the High Court quashing the orders made by the magistrates. The majority of the applicants were released from prison on bail at the time of making their applications to the High Court. In three cases the orders of the magistrates were quashed in a judgment of the High Court. In the remaining cases the orders were quashed following the High Court's approval of a consent order agreed between the applicants and the magistrates who had sentenced them.

12. With one exception (*Christison*, 56429/00), the Court has set out the relevant facts pertaining to each applicant in the table which appears at the end of the decision on admissibility (*Lloyd and Others v. the United Kingdom*, no. 29798/96 and others, decision of 21 October 2003). That table sets out the following information in respect of each applicant: their name and application number; whether their case involved non-payment of community charge ("CC"), council tax ("CT"), non-domestic rates ("NDR") or fines ("F") and the number of days which they spent in prison; whether their proceedings in the magistrates' court took place before or after legal aid became available on 1 June 1997; and the grounds upon which the High Court quashed the orders of the magistrates. Additional relevant factual information appears in this column of the table where appropriate.

13. Where the orders of the magistrates were quashed following a judgment, the Court has indicated that fact in the table and quoted from the relevant part of the judgment. Where the orders of the magistrates were quashed by means of a consent order, the Court has set out the terms of the consent order in full. In such cases, where the terms agreed contain obvious mistakes or misquotations from domestic case-law, the Court has inserted corrections in square brackets. However, where it is not obvious what the relevant correction should be, the Court has simply left the order in its original form.

14. Throughout the text of this judgment, where there is a reference to a specific applicant, the Court has set out the surname of the applicant followed by their application number in brackets. The words "justices" and "magistrates" are synonymous in domestic law.

15. For reasons of space, the Court sets out the facts of the *Christison* (56429/00) application below.

Allison CHRISTISON (56429/00)

16. This applicant's application for judicial review was determined by the judgment of Mr Justice Collins in *R. v. Doncaster Justices ex parte Christison and Jack* (13 May 1999). It is clear from that judgment that the applicant was summoned to court as a result of her failure to pay council tax. On 21 January 1998, the justices, having neither received any evidence about, nor asked any questions about, the financial outgoings of the applicant, found her to have culpably neglected to pay the council tax and made an order imposing 28 days' imprisonment suspended on payment of 8 pounds sterling (GBP) per month.

17. The applicant did not make the payments in compliance with the magistrates' order of 21 January 1998. She was therefore summoned to appear on 1 June 1998 for the magistrates' court to determine whether the warrant of committal should be issued. The justices were told by the prosecutor that the applicant had been served with the notice of the hearing three weeks prior to the hearing. They proceeded in her absence and issued the committal warrant. She spent a total of two days in prison.

18. The order of 21 January 1998 was quashed by Mr Justice Collins on the following ground:

“[N]o proper means enquiry was carried out ... The Justices accept that there was no proper means enquiry and, therefore, the order is going to be quashed. ...

... Justices probably carry out means enquiries every day. They must know, and if they do not, their clerks should advise them, what ought to be asked and what information ought to be obtained. They failed to do that in [this] case.”

19. The order of 1 June 1998 was quashed by Mr Justice Collins for the following reasons:

“... Anyway, the applicant did not pay as she should have done and she also was summoned to appear on 1st June. ... [the bailiffs] had served three weeks or so before. Although the evidence of that has now been produced ... it is somewhat unsatisfactory because the bailiff's handwritten note does not make it clear whom they actually served. I am prepared (because it does not make any difference to the outcome) to assume that she was served, and the Justices again were told, although no evidence was produced, that bailiffs has served her some three weeks before ...

The time has come to try to make it abundantly clear to Justices that, in the view of this court, it is difficult to conceive that there will be circumstances which justify the making of a committal order when the defendant fails to appear before the court. It means that the Justices are unable to ascertain whether there are, in truth, reasons why payment has not been made which might excuse such payment, and furthermore, reasons why in an individual case it would be wrong to send the person immediately to prison. Alternatively, it might be proper to reduce the period of imprisonment that is considered appropriate, if any is considered appropriate. It may transpire that by the time that the question of implementing the suspended committal order is considered, the circumstances of the defendant have changed. Whereas before she might have been able to pay perhaps, through illness or whatever reason, by now she cannot. Thus, it would be wrong to commit her. Committal, I must re-emphasise, can only

occur if the Justices are satisfied that there is a continuing wilful refusal or culpable neglect.

The Justices have a perfectly sensible and powerful weapon available to them to deal with cases where a defendant does not attend, and that is a Warrant Not Backed for Bail. That is the means by which a person can be brought before the court and made to explain why he or she has not paid. Then the Justices will have the proper information before them to enable them to decide whether the committal is indeed correct. I cannot emphasise strongly enough my view that Justices should not, unless there are very exceptional circumstances (such as positive evidence that a defendant is refusing to attend and has expressed an unwillingness to comply with the court order) commit to prison in the absence of a defendant. ...

It is true that in these cases, the Justices were told that service had been effected, but service some three weeks before is nothing to the point. Much can happen in that time ... Furthermore, there was no evidence put before the Justices to support the contention that service had been effected, and for my part I do not think it right, when someone's liberty is at stake, for Justices to rely upon the word of the prosecutor unsupported by any evidence.

A civil court which commits for contempt, which may be contempt occasioned by failure to comply with a court order, requires proof of service and that is usually done by a bailiff or whoever, indicating that service has been effected. It seems to me that it is quite wrong that Justices should put up with a lesser standard than that."

20. Mr Justice Collins also awarded costs against the justices on the following basis:

"It is unusual for costs to be awarded against Justices who do not attend applications against them for judicial review. The principle which is applied has recently been referred to by Latham J in *R. v. Newcastle-upon-Tyne Justices ex parte Devine* (1998) RA 97. At page 104 of the report, the learned judge refers to a decision of the Divisional Court, *R. v. York City Justices ex parte Farmery* 153 JP 257, the head note of which reads:

'... the court would be guided by the principles set out in *R. v. Willesden Justices, ex parte Roberts* (1960) 124 JP 336 wherein it was decided respectively: (i) that costs would only be awarded against Justices in the rarest of circumstances when they have done something which calls for strong disapproval; and (ii) that it was the practice not to grant costs against Justices merely because they have made a mistake in law, but only if they have acted perversely or with some disregard for the elementary principles which every court ought to obey, and even then only if it was a flagrant instance.' ...

... In [this] case the committal took place in the absence of the defendant.

This court has made it clear that Justices must be satisfied, at the very least, that there has been proper service, and, as I have said, I find it very difficult to conceive of circumstances which would justify a committal in the absence of a defendant. Thus it seems to me that the conduct of these Justices can properly be said to fall within the description that I have set out and which is referred to in the *Newcastle* case by Latham J."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Appeal from a decision of a magistrates' court by way of case stated

21. By virtue of section 111 of the Magistrates' Courts Act 1980 a party to proceedings before a magistrates' court may "question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved ...". This is known as the "case stated" procedure.

22. Under section 113 of the 1980 Act, magistrates may grant bail to a party who applies to them to state a case; but if they refuse to do so, in cases categorised as "civil" under the domestic law, the High Court has no jurisdiction to grant bail until it is seized of some substantive proceedings to which the grant of bail can be ancillary.

B. Judicial review

23. According to Halsbury's Laws of England, Fourth Edition, Volume 1(1) at paragraph 59:

"Judicial review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties ...

Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself ...

The duty of the court is to confine itself to the question of legality. Its concern is with whether a decision making authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal could have reached or abused its powers."

C. The distinction between an act of a magistrates' court which is merely wrong in law and one which is so wrong as to be in excess of jurisdiction

24. The principles underlying the domestic law as set out under this heading are largely as previously stated in the case-law of the Convention organs, in particular in the judgments of the Court in the cases of *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 738 ("*Benham*"), and *Perks and Others v. the United*

Kingdom, no. 25277/94 and Others, 12 October 1999 (“*Perks*”), as confirmed in *Lloyd and Others v. the United Kingdom*, no. 29798/96 and others, decision on admissibility of 21 October 2003.

25. In English law, orders of a magistrates’ court which are in excess of jurisdiction are void from the outset, whereas orders made within jurisdiction remain valid until set aside by a superior court. It is only in respect of the former type of error that a court can be held civilly liable in damages (under section 108 of the Courts and Legal Services Act 1990, which replaced section 45 of the Justices of the Peace Act 1979 – see below).

26. The appropriate test for whether an order of a magistrates’ court is void for lack of jurisdiction is that set out by the House of Lords in *McC. v. Mullan* [1984] 3 All England Reports 908. In that case magistrates had made an order sending a 14-year-old boy to a training school after a hearing at which he was not legally represented, had not applied for legal aid and had not been informed of his right so to do. The order was quashed on judicial review on the ground that, by virtue of Article 15(1) of the Treatment of Offenders (Northern Ireland) Order 1976, magistrates were not permitted to pass a custodial sentence for the first time on a juvenile who was not legally represented, unless he had applied for legal aid and had been refused on grounds of means or had been informed of his right to apply for it but had refused or neglected to do so.

27. The boy then applied for damages for false imprisonment against the magistrates. Since the case was decided prior to the enactment of the Courts and Legal Services Act 1990 and at a time when magistrates were liable in damages for false imprisonment if they acted in excess of jurisdiction, the House of Lords was required to decide the jurisdictional question. Indeed, Lord Templeman in his judgment stated as follows:

“The question to be determined on this appeal is whether the magistrates acted within their jurisdiction or without jurisdiction.”

28. In addressing that question, Lord Bridge specifically referred to the case of *Anisminic Ltd. v. the Foreign Compensation Commission* [1969] 2 Appeal Cases 147 (HL) and stated as follows:

“I do not believe that the novel test of excess of jurisdiction which emerges from the *Anisminic* case, ... however valuable it may be in ensuring that the supervisory jurisdiction of the superior courts over inferior tribunals is effective to secure compliance with the law and is not lightly to be ousted by statute, has any application whatever to the construction of s[ection] 15 of the 1964 Northern Ireland Act or s[ection] 45 of the 1979 [Justices of the Peace] Act.”

29. In the judgment of the House of Lords, it was held that a magistrates’ court acted in excess of jurisdiction in three circumstances only: (1) if it acted without having jurisdiction over the cause, (2) if it exercised its powers in a procedural manner that involved a gross and obvious irregularity, or (3) if it made an order that had no proper foundation

in law because of a failure to observe a statutory condition precedent. The instant case fell within the third limb of the rule: the magistrates were liable in damages because they had not observed the requirements of Article 15(1) of the 1976 Order. As such, they had failed to fulfil the statutory condition precedent to the imposition of the sentence of detention.

30. During the course of his judgment, Lord Bridge commented on the jurisdiction of magistrates in conducting a criminal trial:

“... once justices have duly entered upon a summary trial of a matter within their jurisdiction, only something quite exceptional occurring in the course of their proceeding to a determination can oust their jurisdiction ... [A]n error (whether of law or fact) in deciding a collateral issue on which jurisdiction depends will not do so. Nor will the absence of any evidence to support a conviction ...”

31. Lord Bridge also said the following in relation to the second situation set out above in which a magistrates’ court acted in excess of jurisdiction:

“Justices would, of course, be acting ‘without jurisdiction or in excess of jurisdiction’ within the meaning of s[ection] 15 if, in the course of hearing a case within their jurisdiction, they were guilty of some gross and obvious irregularity of procedure, as for example if one justice absented himself for part of the hearing and relied on another to tell him what had happened during his absence, or of the rules of natural justice, as for example if the justices refused to allow the defendant to give evidence. But I would leave for determination if and when they arise other more subtle cases one might imagine in which it could successfully be contended in judicial review proceedings that a conviction was vitiated on some narrow technical ground involving a procedural irregularity or even a breach of the rules of natural justice. Such convictions, if followed by a potential trespass to person or goods, would not, in my opinion, necessarily expose the justices to liability in damages.”

32. The final limb of the rule formulated by the House of Lords in *McC. v. Mullan* (that is, that magistrates exceed their jurisdiction when they make an order which has no foundation in law because of a failure to observe a statutory condition precedent) was applied by the Queen’s Bench Division and the Court of Appeal in *R. v. Manchester City Magistrates’ Court, ex parte Davies* [1988] 1 W.L.R. 667 and [1989] 1 All England Reports 90, a case concerning rates (a local tax which was the predecessor to the community charge). Mr Justice Simon Brown considered that the justice’s plain failure to address themselves to the question whether or not the applicant’s failure was due to culpable neglect was not a gross and obvious irregularity but a failure to satisfy the statutory condition.

33. In that case, the plaintiff had been unable to pay all of the rates for which he became liable in December 1984, and in January 1986 he failed to follow his accountant’s advice to close his business and elect bankruptcy. Applying legislation similar to regulation 41 of the Community Charge Regulations (for which, see below), the magistrates found that his failure to follow the accountant’s advice constituted culpable neglect and they committed him to prison. On appeal from the judgment of Mr Justice Simon

Brown, the Court of Appeal held that no causal connection had been established between the failure to follow the advice in 1986 and the failure to pay the rates in 1984; and that the magistrates had not properly entered into the inquiry as to whether the failure to pay was due to culpable neglect, which was required by the legislation as a statutory condition precedent to the exercise by the justices of their power to issue a warrant of commitment. They were therefore acting in excess of jurisdiction and were liable in damages.

34. The three Appeal Court judges expressed their findings in slightly different terms. Lord Justice O'Connor observed that "they never carried out the inquiry required [by the law]". Lord Justice Neill found that "some inquiry about the applicant's finances was made", but that "a clear and crucial distinction can be drawn between the inquiry required by the statute and the inquiry which was in fact carried out. The justices never examined the question whether *failure to pay* was due to culpable neglect ... In my judgment, the statutory inquiry was not held in the present case". He explained that the making of an enquiry was a statutory condition precedent to the issue of a warrant of commitment: "In other words, if the justices failed to hold any inquiry at all as required by the section they would have no jurisdiction to issue a warrant." Sir Roger Ormrod (who dissented from the majority decision) said: "... it is quite clear that the justices carried out an inquiry into means carefully and in detail ... It is equally plain that they misdirected themselves completely ... They ... failed to realise that the question they had to decide was whether the applicant's failure to pay his rates was '*due* either to his wilful refusal or to his culpable neglect'".

D. Statutory provisions

(1) Provisions concerning enforcement of payment of the community charge, council tax and non-domestic rates

35. The relevant subordinate legislation is the Community Charge (Administration and Enforcement) Regulations 1989 (Statutory Instrument 1989/438) ("the 1989 Regulations").

36. The relevant provisions of regulation 29 ("application for a liability order") are as follows:

"(1) If an amount which has fallen due ... is wholly or partly unpaid the charging authority may ... apply to a magistrates' court for an order against the person by whom it is payable.

...

(5) The court shall make the order if it is satisfied that the sum has become payable by the defendant and has not been paid."

37. Regulation 39(1) provides for the seizure and sale of a debtor's property ("levying of distress"):

"Where a liability order has been made the authority which applied for the order may levy the appropriate amount by distress and sale of goods of the debtor against whom the order was made."

38. Regulation 41 is concerned with the committal to prison of a debtor, and provides, so far as is relevant:

"(1) Where a charging authority has sought to levy an amount by distress under regulation 39, the debtor is an individual, and it appears to the authority that no (or insufficient) goods of the debtor can be found on which to levy the amount, the authority may apply to a magistrates' court for the issue of a warrant committing the debtor to prison.

(2) On such application being made the court shall (in the debtor's presence) inquire as to his means and inquire whether the failure to pay which led to the liability order concerned being made against him was due to his wilful refusal or culpable neglect.

(3) If (and only if) the court is of the opinion that his failure was due to his wilful refusal or culpable neglect it may if it thinks fit -

(a) issue a warrant of commitment against the debtor, or

(b) fix a term of imprisonment and postpone the issue of the warrant until such time and on such conditions (if any) as the court thinks just.

...

(7) The order in the warrant shall be that the debtor be imprisoned for a time specified in the warrant which shall not exceed 3 months, unless the amount stated in the warrant is sooner paid"

39. Regulation 42 makes further provision in respect of committal to prison. It provides, in relevant part, as follows:

"(2) Where an application under regulation 41 has been made, and after the making of the inquiries mentioned in paragraph (2) of that regulation no warrant is issued or term of imprisonment fixed, the court may remit all or part of the appropriate amount mentioned in regulation 39(2) with respect to which the application related.

(3) Where an application under regulation 41 has been made but no warrant is issued or term of imprisonment fixed, the application may be renewed (except so far as regards any sum remitted under paragraph (2)) on the ground that the circumstances of the debtor have changed."

40. Regulations 47 and 48 of the Council Tax (Administration and Enforcement) Regulations 1992 (Statutory Instrument 1992/613) and regulations 16 and 17 of the Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989 (Statutory Instrument 1989/1058), which concern the commitment to prison of a person for failure

to pay council tax and non-domestic rates respectively, are in similar terms to regulations 41 and 42 of the 1989 Regulations.

(2) Provisions concerning enforcement of payment of fines

41. Sections 77(2) and 82 of the Magistrates' Courts Act 1980 read, in relevant part, as follows:

“77. Postponement of issue of warrant.

(2) Where a magistrates' court has power to issue a warrant of commitment under this Part of this Act, it may, if it thinks it expedient to do so, fix a term of imprisonment ... and postpone the issue of the warrant until such time and on such conditions, if any, as the court thinks just.”

“82. Restriction on power to impose imprisonment for default

(3) Where on the occasion of the offender's conviction a magistrates' court does not issue a warrant of commitment for a default in paying any ... sum [adjudged to be paid following conviction] ... or fix a term of imprisonment under ... section 77(2) which is to be served by him in the event of any such default, it shall not thereafter issue a warrant of commitment for any such default or for want of sufficient distress to satisfy such a sum unless - (...)

(b) The court has since the conviction inquired into his means in his presence on at least one occasion.

(4) Where a magistrates' court is required by subsection (3) above to inquire into a person's means, the court may not on the occasion of the inquiry or at any time thereafter issue a warrant of commitment for a default in paying any such sum unless -

(...)

(b) The court

(i) is satisfied that the default is due to the offender's wilful refusal or culpable neglect; and

(ii) has considered or tried all other methods of enforcing payment of the sum and it appears to the court that they are inappropriate or unsuccessful.”

42. Section 82(4A) lists the methods of enforcing payment that are mentioned in the above-cited subsection 82(4)(b)(ii). One such method that is listed in section 82(4A) is the imposition of a 'fines supervision order' under section 88 of the Magistrates' Courts Act. Section 82 continues:

“(5) After the occasion of an offender's conviction by a magistrates' court, the court shall not, unless -

(a) the court has previously fixed a term of imprisonment under section 77(2) above which is to be served by the offender in the event of a default in paying a sum adjudged to be paid by the conviction;

...

issue a warrant of commitment for a default in paying the sum or fix such a term except at a hearing at which the offender is present.

(5A) A magistrates' court may not issue a warrant of commitment under subsection (5) above at a hearing at which the offender is not present unless the clerk of the court has first served on the offender a notice in writing stating that the court intends to hold a hearing to consider whether to issue such a warrant and giving the reason why the court so intends. ...

...

(5F) A notice under subsection (5A) above to be served on any person shall be deemed to be served on that person if it is sent by registered post or the recorded delivery service addressed to him at his last known address, notwithstanding that the notice is returned as undelivered or is for any other reason not received by that person.

(6) Where a magistrates' court issues a warrant of commitment on the ground that one of the conditions mentioned in subsection (1) or (4) above is satisfied, it shall state that fact, specifying the ground, in the warrant."

(3) Restrictions on imposing custodial sentences on persons under the age of 21

43. Part I of the Criminal Justice Act 1982 sets out provisions in relation to the custody and detention of persons under 21 years of age. Section 1 reads, in relevant part, as follows:

"1. General restriction on custodial sentences

...

(5) No court shall commit a person under 21 years of age to be detained under section 9 below [Detention of persons aged 18-20 for default or contempt] unless it is of the opinion that no other method of dealing with him is appropriate; (...)

(5A) Where a magistrates' court commits a person under 21 years of age to be detained under section 9 below, it shall -

(a) state in open court the reason for its opinion that no other method of dealing with him is appropriate; and

(b) cause that reason to be specified in the warrant of commitment and to be entered in the register."

44. Section 3 of the Criminal Justice Act 1982 reads, in relevant part, as follows:

"3. Restriction on imposing custodial sentences on persons under 21 not legally represented.

(1) A magistrates' court on summary conviction or the Crown Court on committal for sentence or on conviction on indictment shall not –

(a) pass a sentence of detention in a young offender institution ...

...

in respect of or on a person who is not legally represented in that court, unless either –

(i) he applied for legal aid and the application was refused on the ground that it did not appear his means were such that he required assistance; or

(ii) having been informed of his right to apply for legal aid and had the opportunity to do so, he refused or failed to apply.”

45. Regulation 42(7) of the 1989 Regulations states that the above sections of the Criminal Justice Act 1982 apply to proceedings under regulation 41 of the 1989 Regulations.

E. Case-law

46. Among the further case-law referred to in the judgments and consent orders of the High Court, and/or referred to by the parties in their submissions, was the following:

(1) The inquiry into the debtor's means and circumstances

(a) General

47. In *R. v. Hyndburn Justices ex parte Derrick Long* (18 October 1993), Mr Justice Schiemann stated as follows in a case concerning the non-payment of the community charge:

“ ... It is important when dealing with the liberty of citizens only to set in train the process of imprisonment when all the requirements imposed by law have been carefully considered. It is important to note that, in this field as in the case of suspended sentences of imprisonment imposed pursuant to the criminal law, the same degree of care must be exercised in the case of a suspended penalty as in the case of an immediate penalty.”

(b) Failure to hold a proper means inquiry

48. In *R. v. Woking Justices ex parte Johnstone* [1942] 2 King's Bench 248, the Divisional Court, in examining legislation in similar terms to the 1989 Regulations, emphasised that, in order to commit to prison, the justices, following their inquiry, had to be of the opinion that the failure to pay was due either to wilful refusal or culpable neglect.

49. In *R. v. Stafford Justices ex parte Shaun Thomas Johnson* (16 March 1995) Mr Justice Laws stated as follows:

“... The means inquiry required by regulation 41(2) is of great importance because without it the Justices plainly cannot properly arrive at a conclusion as to whether the failure to pay had been due to the debtor’s wilful refusal or culpable neglect. A means inquiry, thus, is at the centre of the enforcement procedure which is laid down by these Regulations. These Justices did not, in truth, embark upon a proper means inquiry at all. It follows that their order committing the applicant to prison is entirely vitiated.”

50. In *Meara v. DPP* (25 November 1998), a case involving the non-payment of fines, Lord Justice Rose stated that:

“... an essential prerequisite to a finding of culpable neglect must be the holding of a full means inquiry”.

51. In *R. (on the application of Davies) v. Hereford Justices* (4 March 2004), the judge noted that although the means enquiry was inadequate it was miles away from being arguable that the magistrates’ consideration was “so outrageous as to amount to a conduct outwith their jurisdiction”.

(c) Failure to examine each liability order separately

52. In *R. v. Leeds Justices ex parte Kennett* [1996] Rating and Valuation Reporter (“RVR”) 53, an order committing the applicant to prison for non-payment of community charge following the issue of three liability orders in respect of non-payment for the years 1990-91, 1991-92 and 1992-93 was quashed as a full means inquiry in respect of each liability order had not been made under regulation 41(2) of the 1989 Regulations. Mr Justice Owen stated as follows during the course of his judgment:

“It is apparent from the wording of the Regulations that each liability order is to be considered separately and in respect of each liability order there has to be, as I see it, a decision as to whether there was wilful refusal or culpable neglect shown.”

53. The above conclusion was followed by Mr Justice Dyson in *R. v. Durham City Justices ex parte Fleming* [1997] RVR 244 at 246; by Mr Justice Keene in *R. v. Gloucestershire Justices ex parte Daldry* [2001] RVR 242 at 243; and by Mr Justice Gage in *R. v. Sheffield Justices ex parte Broadhurst* [2001] RVR 245 at 246.

(d) The burden of proof

54. In *R. v. South Tyneside Justices ex parte Stuart Daniel Martin* (31 July 1995), Mr Justice Sedley stated the following in respect of the burden of proof:

“... It is necessary in my judgment for Justices to be satisfied not merely on the balance of probability but so that they are sure, following a proper means inquiry, that the debtor’s failure to pay has been due to his or her wilful refusal or culpable neglect to pay, before they can issue a warrant of commitment or fix a term of imprisonment and postpone the issue of the warrant. ...

If I am wrong in this, and if the proper standard is a civil standard, what is at stake for the individual makes it inescapable that only the highest standard of probability is commensurate with the exercise of the power of committal or of fixing a term of imprisonment.

The Justices, on advice, applied neither such standard.

In my judgment a bare balance of probability is not a sufficient standard and their decisions of 6th April 1993 and 27th July 1993 to fix terms of imprisonment and postpone the issue of warrants of committal on grounds of culpable neglect cannot therefore stand.”

55. Mr Justice Sedley concluded as follows:

“... To be open to criticism for the disposal of slender resources is one thing; to be guilty of culpable neglect in the disposal of them is another.

In my judgment the first fixing of the term of imprisonment and the postponement of the warrant were done after a means inquiry too perfunctory to constitute compliance with Regulation 41(2). The fixing of a separate term of imprisonment and the postponement of the warrant in July 1993, although it followed a much fuller inquiry, was again carried out on the basis of data which were not capable by themselves of founding a finding of culpable neglect to pay, whether on the lower standard of proof that was applied or on the higher standard which, as I have held, ought to have been applied.

Accordingly the applicant succeeds in his application to quash both decisions of the Justices”.

56. In the case of *R. v. Mid Herts Justices ex parte Cox* (19 October 1995) Mr Justice Laws expressly agreed with what Mr Justice Sedley had said in relation to the burden of proof in the above *Martin* case.

(2) *The consideration of alternatives to imprisonment*

(a) **Failure to pay local taxes**

57. In *R. v. the Alfreton Magistrates ex parte Darren Gratton* (25 November 1993) the magistrates had come to the conclusion that they could not consider attaching the applicant’s liability to pay his community charge to his income support as a viable alternative to prison. Mr Justice MacPherson held that, in so concluding, the magistrates were “plainly wrong” and that, as such, there was a “fundamental flaw” in the case. In considering whether to order costs against the magistrates, he concluded:

“I am wholly unable to find that there has been any perverse or outrageous conduct of any kind in this case. These are tricky cases. The law has been evolving in the last year or so.”

58. He continued:

“... Community charge liability should only be visited with prison (if I may use that shorthand expression) if there is no other way in which the money can be extracted.

Prison is not to be used as a big stick or primarily as punishment but as a means of extracting the liability.”

59. Mr Justice MacPherson stated that there may also have been a flaw in the case because the applicant was under 21 years of age at the time at which he was sentenced and the magistrates did not fulfil their requirement publicly to state that there was no alternative but prison in this case. However, he regarded it as unnecessary to conclude the case on that ground in the light of his earlier finding.

60. Lord Justice Kennedy stated in *R. v. Wolverhampton Magistrates’ Court, ex parte Mould* [1992] RA 309:

“... the power to commit to prison which is to be found in reg. 41 is plainly intended to be used as a weapon to extract payment rather than to punish ...

... in the circumstances it might have been appropriate for the magistrate before making his order to ask the charging authority’s representatives if any thought had been given to the possibility of an application to the Secretary of State [for deductions from income support]. I appreciate that ... a charging authority is not bound to take that course before seeking an order under reg. 41, but it would be relevant to the exercise of the magistrates’ discretion to know if the possibility of [deductions] had at least been considered.”

61. In *R. v. Newcastle-under-Lyme Justices, ex parte Massey* [1995] 1 All ER 120, Lord Justice Rose stated:

“A failure by justices to consider all possible alternative methods of enforcing payment before issuing a warrant for commitment might render their decision unreasonable in the Wednesbury sense ...”

62. In the unreported case of *R. v. Middleton Magistrates ex parte Phillips* (29 October 1993) Mr Justice Potts stated:

“[A] court which finds a debtor guilty of wilful refusal to pay the relevant sum has a discretion. The court is not required to commit such a debtor to a term of imprisonment ... Before committing a debtor to prison, it is incumbent upon justices to consider all available alternatives to effect recovery of the sum due ...

It does not follow that, because the applicant had wilfully refused to pay the relevant sum, there was no alternative other than an immediate sentence of imprisonment. Regulation 41(3)(b) makes that plain ... The applicant had stated that she could pay off the arrears at £3 per week. This was a relevant factor for the justices’ consideration in the exercise of the discretion conferred, in particular by Regulation 41(3)(b) ...

In my view the approach of the justices and the decision to commit this applicant to prison was in the circumstances fundamentally flawed.”

(b) Failure to pay fines

63. *R. v. Norwich Magistrates’ Court ex parte Lilly* [1987] 151 JP 689 concerned an applicant who was committed to prison after having failed to pay two court-imposed fines. The Divisional Court held that a magistrates’

court having inquired into an offender's means under section 82(3)(b) of the Magistrates' Courts Act 1980 and satisfied itself that the default in payment was due to his wilful refusal or culpable neglect, was under a duty imposed by section 82(4)(b)(ii) to consider or try all other methods of enforcing payment before issuing a warrant of commitment. In the current case, it held that, on the evidence available, that duty had not been fulfilled and accordingly the application was granted and the two committal warrants were quashed.

64. During the course of his judgment, Mr Justice Farquharson stated as follows in relation to section 82(4)(b)(ii):

"... The words of the subsection are peremptory. There is no discretion in the court, they have either to consider or try all the other methods of enforcing payment."

65. He continued:

"... It needs to be emphasised that the proceedings which were taking place on September 9 before the Norwich Justices were not proceedings intended to punish the applicant. He had already been before the court for the offences that he had committed and the Justices on those occasions had decided that a fine was an appropriate sentence to pass. When the time came for enforcement, therefore, it was necessary for the Justices to go through the judicial exercise of seeing if there was any other method of enforcing payment of the fine, short of committing the applicant to prison, and that necessarily included a procedure whereby he was examined as to what property or other earnings or income he might have. It is not to be assumed merely on their experience of other cases by the Justices that the proceeding is a formality or unnecessary."

(c) Persons under the age of 21

66. In *R. v. Newcastle Justices ex parte John Ashley* (12 October 1993), the fact that the applicant was under 21 at the time of his committal in respect of failure to pay community charge was accepted by the court to be the "major point" in the case. Mr Justice Laws, in quashing the committal order, concluded that the justices' decision to commit had been unlawful in that they had failed to have regard to their statutory responsibilities in the case under regulation 42(7) of the 1989 Regulations and Part I of the Criminal Justice Act 1982. He noted that the power to imprison a person under the age of 21 was only to be exercised if the court was of the opinion that no other method of dealing with him was appropriate and that it was the duty of the court, if of that opinion, to state in open court why the court believed that to be the case. He further noted that the magistrates had failed to state in open court why they believed that no alternative to imprisonment was available, that there was no evidence to show that the magistrates in fact felt that no other method was appropriate, or the reasons why they might so have felt; and that it was quite clear that alternatives to imprisonment had been available to them. During the course of his judgment, Mr Justice Laws stated that the complaint made in respect of the

decision to commit “went to an important aspect of the magistrates’ court’s jurisdiction under regulation 41 [of the 1989 Regulations]”.

67. In *R. v. Oldham Justices and Another ex parte Cawley* [1997] Queen’s Bench 1, each of three applicants, who were under 21 years of age, had defaulted in paying fines arising from summary criminal convictions and had been committed to prison. In each case the warrant of commitment was defective in failing to comply with the duty imposed by section 88(5) of the Magistrates’ Courts Act 1980 to describe the justices’ grounds for not placing an applicant of less than 21 years of age under supervision; and in failing to state the reason why no other method of dealing with such an applicant other than imprisonment was appropriate, contrary to section 1(5A) of the Criminal Justice Act 1982. In the first two cases, the warrants also failed to specify upon what ground they were issued, contrary to section 82(6) of the Magistrates’ Courts Act 1980 (which applied to both young and adult offenders). The Divisional Court held that a warrant of commitment which was defective for failure to comply with the requirements of sections 82(6) or 88(5) of the Magistrates’ Courts Act 1980, or section 1(5A) of the Criminal Justice Act 1982, was not void, and detention under it was not unlawful, unless and until the warrant was quashed.

(3) The nature of, and absence from, the hearing at which the warrant of commitment is issued

68. The cases below concern the situation where the applicant was present at the hearing inquiring into his means and circumstances and fixing a postponed sentence of imprisonment, but was absent from the subsequent hearing at which the warrant of commitment was issued (*i.e.* ordered to take effect, resulting in the immediate imposition of the previously postponed order of imprisonment).

69. In *R. v. Northampton Magistrates’ Court ex parte Newell* [1992] RA 283 the Court of Appeal had to determine whether the magistrates were entitled under regulation 41 of the 1989 Regulations to issue a warrant of commitment against a charge payer who was absent from the final hearing at which the warrant was issued.

70. At first instance [1992] RA 190, 207, Mr Justice Henry held as follows:

“The power to issue a warrant arises after the court has inquired in the debtor’s presence into whether his failure to pay which led to the liability order being made was due to his wilful refusal or culpable neglect *and* has found that it was. But they need not exercise that power immediately. They can, as here, fix the term of imprisonment and postpone the issue of the warrant on conditions. Section 12 [of the Interpretation Act 1978] then would entitle them to exercise that power (already vested in them) ‘from time to time as the occasion requires’ unless the contrary intention appears. The occasion certainly does not require a repeat of the [regulation] 41(2) inquiry. That is water under the bridge. The occasion does require application by

the local authority, proper notice of that application to the defaulter to give him a fair opportunity to put his case as to why the warrant should not issue, followed by proof of a breach and notice and proper consideration of any relevant material put forward by the defaulter. That is all the occasion requires, and no contrary intention appears in the regulations.

Therefore it seems to me ... that natural justice requires notification to the applicant of that hearing.”

71. The above conclusion was approved by the Master of the Rolls, Lord Donaldson, in the Court of Appeal.

72. Lord Justice Scott concluded as follows:

“In this context, it goes without saying that it would be essential in, I would think, every case that the debtor be given proper notice of the time and place of the proposed application. If that were not done, the hearing would, I think, be fatally flawed. It is to be expected that, if the debtor were not present, the magistrates would not proceed with the hearing unless satisfied that proper notice of it had been given to the debtor. But if a debtor, having received proper notice, chooses not to attend the hearing, that is his affair, and for the magistrates to proceed in his absence cannot, in my opinion, possibly be represented as being in breach of the requirements of fairness or of natural justice.”

73. In *R. v. Faversham and Sittingbourne Magistrates' Court ex parte Ursell* [1992] RA 99, Mr Justice Schiemann stated as follows in considering both the nature of the hearing at which the warrant of commitment was issued and the significance of the applicant not having notice of it:

“The magistrates in the present case appear to have accepted that a second hearing was necessary before the warrant of commitment was issued. They were right to do so. They did not apparently, however, consider that it was necessary for the debtor to have notice of the date and time of such a hearing. They clearly thought that she would have nothing new to say. They might well be right, but she is entitled, in my judgment, to be told of the date and time of the hearing as a matter of natural justice. The hearing affects her. It is held in public. She should have the right to be there. I do not, however, accept Mr Emmerson’s submission that the hearing cannot proceed if she chooses not to attend.

The question arises: on what matter is a debtor entitled to address a court at such a hearing? Clearly she is entitled to put the authority to proof of non-payment. Further, in my judgment a debtor is entitled to draw the court’s attention to any change of circumstances since the decision to fix a term of imprisonment which renders it inexpedient for the warrant of commitment to issue. There must, in my judgment, be an inherent power in the court to vary its own order in a case where, since the decision was made, the debtor has become incapable of earning, for instance by reason of an accident.”

74. In *R. v. Hyndburn Justices ex parte Woolaghan* (2 December 1994), Mr Justice Jowitt held that, in the absence of sufficient proof of service of notice of the hearing at which the warrant of commitment was issued, the applicant was entitled to succeed on his application for judicial review. Mr Justice Jowitt stated as follows:

“The difficulty, though, for the magistrates is, that when there is no appearance before them, they really have no way of telling whether this may be one of those, no doubt, not over frequent cases in which a letter has miscarried for one reason or another, perhaps because it has not been delivered or because the charge payer is absent for a continuing period from home, or because, in premises with a number of separate occupiers, a letter has got into the wrong hands. It seems, therefore, to follow that where there has been service by ordinary post, careful consideration would have to be given to the particular circumstances of the charge payer, before, if ever, concluding that the notice must have come into his hands.”

75. In *R. v. Newcastle-upon-Tyne Justices ex parte Devine* [1998] RA 97, in which notice of the final hearing had been sent by the magistrates’ court to the applicant’s last known address, but was never received by the applicant as he had moved address and therefore did not appear at the hearing, Mr Justice Latham quoted the above-cited passage of Mr Justice Jowitt in *Woolaghan* and stated that the magistrates in the present case did not appear to have heeded it. This was notwithstanding that they had previously consented to an order being quashed because they had failed to carry out the appropriate inquiry to make sure that the notice of the final hearing must have come into the charge payer’s hands. Mr Justice Latham referred to the fact that the magistrates knew that the applicant was intermittently unwell and therefore should also have enquired to ensure that the applicant was not suffering from one of his periodic illnesses at the time of the hearing. In all the circumstances he concluded that “the magistrates were quite wrong to issue a warrant of committal in his absence” and that their decision to do so was “vitiated”.

76. In deciding to award costs against the justices, Mr Justice Latham cited and applied what he had said in a previous case in which magistrates had on two separate occasions fallen into the identical error of failing to make appropriate inquiry as to whether or not notice of the final hearing had been received by the applicant:

“That seems to me to be behaviour which calls for strong disapproval, and because the principle which has apparently been ignored is one which involves the elementary step of ensuring that the person who is liable to lose his liberty has had an opportunity of knowing that the court was considering that particular course on that particular day, it is also a disregard for an elementary principle which every court ought to obey.”

77. In *R. v. Doncaster Justices ex parte Hannan* (16 July 1998) (a case concerning the non-payment of a court-imposed fine, unlike the previous cases in this section which all concerned the non-payment of community charge), Lord Justice Rose in the Divisional Court held as follows:

“[Counsel for the applicant] submits that to issue the Warrant for Commitment, with the knowledge which the Justices had [that she had not received notice of the hearing because that notice had been returned to the Justices marked “address inaccessible” was an act of judicial impropriety and one which can properly be characterised as] being perverse in that no reasonable bench of Justices would so have acted. ...

...

... I am entirely satisfied that the submissions of [counsel for the applicant] advanced to this court are well-founded. This case illustrates how unwise it may be for Justices to make an order committing someone to prison when they do not know, because that person is not before them and because that person does not know of the date of the hearing, what the up-to-date circumstances are. It seems to me that, knowing that the applicant had not been served with notice of the proceedings, the Justices ought, much more prudently, to have adjourned the question of whether or not a Warrant of Commitment should be issued until such time as she had been served with notice of the proceedings.

... I am satisfied that, in issuing the warrant in the circumstances in which they did, the Justices did act perversely ...”

78. The case of *R. v. Doncaster Justices ex parte Christison and Jack* (13 May 1999), set out above under the heading “The circumstances of the cases”, is also relevant in this context.

(4) Awards of costs against the justices by the High Court

79. The applicable principles are set out in the above-cited *ex parte Christison and Jack* case (set out above under the heading “The circumstances of the cases”).

F. *R. v. the Governor of Brockhill Prison, ex parte Evans* (No. 2)

80. In *R. v. the Governor of Brockhill Prison, ex parte Evans* (No. 2) [2000] 4 All England Reports 15, the House of Lords held that where the executive had detained a person unlawfully, that person was entitled to recover compensation for the tort of false imprisonment. In that case, the responsibility for calculating the date on which the respondent was to be released from prison lay with the Governor of the prison. He had calculated her date of release to be 18 November 1996. However, accepting her arguments on judicial review, the Divisional Court held that the release date should actually have been 17 September 1996. On appeal to the House of Lords, the Governor accepted that the respondent’s continued detention after 17 September 1996 had therefore been unlawful. Nevertheless, he contended that he could not be liable for false imprisonment since he had complied with the law as it was understood at the time of his decision. The House of Lords held that the tort of false imprisonment was one of strict liability and that its consequences could not be escaped even by showing that the Governor had acted in accordance with the view of the law which at the time was accepted by the court to be correct. There was no lawful justification for the action of the Governor, as the responsibility for calculating the release date lay with him, and not with the order of the court that sentenced the respondent to prison. The respondent was therefore entitled to compensation as it was agreed that her detention after 17 September 1996 was unlawful.

81. During the course of his judgment, Lord Hope stated that, as he had decided in her favour on other grounds, it was not necessary for the respondent to rely on her additional argument that the position of the Governor had been contrary to Article 5 of the Convention. However, he stated that as the issues that had arisen in the case had raised a novel point of law of some difficulty, it was of interest to see whether the provisions of Article 5 of the Convention supported the conclusion which he had determined to represent the present state of the domestic law. In the course of this consideration, Lord Hope stated the following:

“The jurisprudence of the European Court of Human Rights indicates that there are various aspects to Art. 5(1) which must be satisfied in order to show that the detention is lawful for the purposes of that Article. The first question is whether the detention is lawful under domestic law. Any detention which is unlawful in domestic law will automatically be unlawful under Art. 5(1). It will thus give rise to an enforceable right to compensation under Art. 5(5), the provisions of which are not discretionary but mandatory.”

82. A little later in his judgment, Lord Hope continued:

“The question whether detention is or is not lawful under domestic law for the purposes of the Convention is a matter which the jurisprudence of the Strasbourg Court has left for decision by the domestic courts. The Divisional Court held that the respondent was entitled to release on 17 September 1996. It must follow that under domestic law her continued detention after that date was unlawful. This would indicate that there was a contravention of Art. 5(1).”

83. During the course of his judgment, Lord Hobhouse considered the arguments that the Solicitor General had presented on behalf of the Governor of the prison, and concluded as follows:

“The argument of the Solicitor General persistently confused a valid order for detention which is subsequently set aside with a valid order which is misinterpreted; it also confused a valid order which has not yet been set aside with an order which was never valid. These distinctions are basic to any legal system. An appeal against a conviction or sentence may lead to the conviction being quashed or the sentence being set aside or varied. But up to that time there were lawful orders of the sentencing court which were orders which had to be obeyed. ...

...

The basic distinction between an *ex facie* invalid order and an order *prima facie* valid but which is liable to be set aside is also to be found in the Convention case-law as illustrated by *Benham v. the United Kingdom* (1996) 22 EHRR 293. The Commission had categorised the relevant order as coming into the former category and therefore held that there had been a breach of Art. 5; the Court disagreed, categorising the order for detention as *prima facie* valid, and held that there had been no breach of that Article. The Commission and the Court applied the same criteria in considering whether the detention had been lawful under the domestic law. Paragraph 42 of the judgment (at 320) relied on by the Solicitor General does not support his argument:

‘A period of detention will in principle be lawful if it is carried out pursuant to a court order. A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention. For this reason, the Strasbourg organs have consistently refused to uphold applications from persons convicted of criminal offences who complain that their convictions or sentences were found by the appellate courts to have been based on errors of facts or law.’

In the present case there was an order; it was never set aside nor did it have to be. The illegality arose because it did not authorise the detention which took place. The order was not obeyed.”

G. The immunity of magistrates from civil proceedings

84. Magistrates enjoy a statutory immunity from civil liability in certain circumstances. Before the coming into force of section 108 of the Courts and Legal Services Act 1990 on 1 January 1991, this immunity was provided for by sections 44 and 45 of the Justices of the Peace Act 1979. In brief, a magistrate was liable in damages for acts done by him in his official capacity if it could be proved either (1) that the act was done maliciously and without reasonable and probable cause, or (2) that it was performed outside or in excess of jurisdiction.

85. The position under section 108 of the Courts and Legal Services Act 1990 is now that an action lies against a magistrate only if it can be proved that he acted both in bad faith and in excess of jurisdiction.

H. Legal aid

86. Prior to 1 June 1997 neither the civil nor the criminal legal aid scheme provided for full representation before the magistrates in committal proceedings relating to the non-payment of a fine, community charge, council tax or non-domestic rates. The “Green Form” legal aid scheme provided two hours of help from a solicitor, and could include preparation for a court case, but did not provide for representation. The assistance by way of a representation scheme (“ABWOR”) enabled the court, in limited circumstances, to appoint a solicitor who happened to be within the court precincts to represent a party who would not otherwise be represented. The appointment might be made either of the court’s own motion or on application by a solicitor. The court was under no obligation to advise a party of the possibility of such an appointment. The Duty Solicitor scheme, which provided representation for the accused in criminal cases before magistrates, did not extend to the proceedings with which this decision is concerned.

87. Following the Court’s judgment in *Benham*, which found a breach of Article 6 §§ 1 and 3(c) of the Convention in respect of the applicant’s

complaint of a lack of legal representation, the United Kingdom enacted regulation 3(2) of the Legal Advice and Assistance (Scope) (Amendment) Regulations 1997 (S.I. 1997, No. 997). Under that provision, with effect from 1 June 1997, any person whose financial resources are such as to make him eligible is entitled to assistance by way of representation in proceedings before a magistrates' court in which he is likely to be "at risk of a term of imprisonment being fixed in his case (whether at the hearing for which ABWOR is granted or subsequently)" as a result of his failure to pay any sum which he has been ordered to pay.

THE LAW

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

88. The Court declared admissible the complaints of twenty-seven of the applicants that their detention was unlawful and contrary to Article 5 § 1 of the Convention which reads, in so far as relevant:

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

...

(b) The lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;"

A. The parties' submissions

1. *The applicants*

(a) *Raymond LLOYD (29798/96)*

89. The applicant submitted that he had been committed to prison without the magistrates being satisfied that he had received proper notice of the hearing. To commit any person to prison following a hearing of which it was not clear that he had received notice was so obviously unlawful as not to warrant argument. It was in effect a condition precedent. Furthermore, as it was a matter of natural justice that the debtor be told of the date and time of the hearing, it would be extraordinary for it to be argued that the

imprisonment of an individual in such circumstances could be “in accordance with a procedure prescribed by law”.

(b) The remaining applicants

90. Composite submissions were made on behalf of the remaining applicants, in respect of whom it was submitted as follows:

(i) The grounds upon which the High Court quashed the decisions of the magistrates

91. The applicants submitted that the grounds upon which the High Court made a determination in a particular case were not determinative as to the totality of the unlawfulness in that case. Referring to the domestic case of *R. v. Nottingham Justices ex parte Hollingsworth* (4 June 1997), the applicants pointed out that the discretionary powers of the High Court could not be used solely for the purposes of facilitating a collateral application for just satisfaction under the Convention. They contended that where a matter had been resolved by other means, no further cause of action lay before the High Court in order to determine whether the initial decision of the tribunal to detain the applicant was lawful or otherwise.

92. It was irrelevant in certain cases that the High Court substituted a lesser term of imprisonment for that imposed. This did not show that the warrants were inside the magistrates’ jurisdiction but reflected the concern of the courts to protect the applicants from future enforcement proceedings so that they should not again be liable for detention for the debts owed. Nor could the Government discount, or now go behind, the consent orders as evidence that the magistrates had acted outside their jurisdiction. The statement of grounds were wholly relevant and stood as evidence as to what did or did not take place at the hearings concerning the applicants’ committal to prison.

(ii) Failure to undertake an appropriate means inquiry

93. The applicants stated that the Government had accepted that the magistrates had acted outside their jurisdiction and duly agreed settlements in the cases of *S.D. v. the United Kingdom* (no. 25283/94), *Poole v. the United Kingdom* (no. 28190/95) and *Johnson v. the United Kingdom* (no. 28455/95). They referred to the requirements of regulation 41(2) of the 1989 Regulations and to section 82(4) of the Magistrates’ Courts Act 1980 and submitted that the requirements for an appropriate inquiry in relation to a finding of wilful refusal and/or culpable neglect had been well established in a number of domestic cases: a perfunctory enquiry equated to no enquiry at all or disclosed a “gross and obvious irregularity”. They cited *R. v. Manchester City Magistrates’ Court ex parte Davies*, *R. v. Stafford Justices ex parte Johnson*, *R. v. South Tyneside Justices ex parte Martin*, *R. v. Woking Justices ex parte Johnstone* and *DPP v. Meara* (see Relevant

Domestic Law and Practice above). A failure to undertake an appropriate inquiry, or to follow the conditions precedent set out in the above statutory provisions, would accordingly render the determination of the magistrates outside their jurisdiction and therefore in breach of Article 5 § 1. The applicants further referred to *R. v. Leeds City Justices ex parte Kennett* (paragraph 52 above) as showing that it was a condition precedent for the magistrates to inquire into the circumstances of an applicant at the time at which each liability order was made.

94. The applicants submitted that in each of the following cases the magistrates failed to make appropriate inquiry into the applicants' means and circumstances and/or that the finding that the applicants had wilfully refused or culpably neglected to pay was unsustainable. They contended that the determination in each case was in breach of Article 5 § 1 and that none of the following applications could be distinguished from the above-cited cases of *S.D., Poole and Johnson: Kershaw-Field* (36367/97), *Kane* (37706/97), *Hagyard* (39378/98), *Garnham* (41593/98), *Sheppard* (45420/99), *Swaine* (45844/99), *Jones* (46326/99), *Lisa Watts* (2490/03), *Jason Taylor* (56231/00), *Reilly* (56232/00) and *Christison* (56429/00).

(iii) *Other unlawful committals*

95. The applicants submitted that the High Court had in a number of cases quashed determinations of the magistrates on the grounds that they had acted unlawfully in committing the applicant to prison (i) in their absence and (ii) when there had been alternative methods of enforcement available to them, contrary to the requirements of Part I of the Criminal Justice Act 1982. As to the former, even where it was not a statutory condition precedent, it was a failure to abide by the rules of natural justice and to take essential steps to prevent arbitrary detention, without which the order would be "fatally flawed". Although they had not given details of the steps taken to notify them of the hearings, they submitted that the statements of grounds for the consent orders were sufficient to show that they did not receive proper notice. As to the latter, the courts had emphasised that imprisonment must be a last resort; therefore failure to give proper consideration to alternatives had to be a "gross and obvious irregularity".

96. They also submitted, as regards the cases where the magistrates failed to ensure that applicants under 21 were legally represented, that it was overly technical to interpret section 3 of the Criminal Justice Act 1982 as applying only to convictions but not to the committals of individuals under 21. The purpose of the provision (that young persons be represented before being subject to detention) was clear, the magistrates considered that they were bound and the High Court accepted the terms of the consent orders.

97. The applicants presented their arguments in tabular form. They submitted that the table showed cases in which findings or uncontested submissions had either been accepted, or not refuted, by the High Court.

They contended that in those circumstances the decision to commit the applicant to prison should be considered to be contrary to Article 5 § 1. The Court has reproduced the applicants' tabular submissions below. The footnotes represent the applicants' explanations of the abbreviated submissions made in the table.

Name (application no.)	CC or F ⁱ	Inadequate Means Inquiry	Committal in absence	Alternative enforcement
Kershaw-Field (36367/97)	CC	Yes - Martin	Yes	N/k
Barker (37551/97)	CC	N/k	Yes - Woolaghan	N/k
Kane (37706/97)	CC	Yes - Martin	Yes - Woolaghan	N/a ⁱⁱ
Massey (38261/97)	CC	N/k	Yes - Woolaghan	N/a
Hagyard (39378/98)	CC	Yes - Martin	Yes - Woolaghan	N/k
Garnham (41593/98)	CC	Yes - Kennett, Martin	Yes	N/k
Ellis (42040/98)	F	N/k	Yes - Recorded delivery letter returned ⁱⁱⁱ	Yes - U 21 ^{iv}
Sheppard (45420/99)	CC	Yes - Kennett, Martin	Yes	N/k
Swaine (45844/99)	F	Yes	No	Yes
Mason (47144/99)	F	N/k	Yes – Hannan	N/k
Jones (46326/99)	CC	Yes - Martin	Yes - Woolaghan	N/k
Tracey Watts (53062/99)	F	N/k	Yes – Hannan	N/k
Lisa Watts (2490/03)	F	Yes - Cox	Yes – Hannan	Yes
Middleton (2483/03)	F	N/k	Yes	Yes - Lilly
Shelley (2484/03)	F	N/k	Yes	Yes - Lilly
Pitt (53111/99)	F	N/k	Yes	Yes - Lilly
Fletcher (2482/03)	F	N/k	No	Yes - Lilly
Watson (54997/00)	F	N/k	No	Yes - Lilly
Armstrong (55046/00)	F	N/k	Yes	Yes - Lilly
Jackson (55068/00)	F	N/k	Yes - Hannan	N/k
G. Taylor (55071/00)	F	N/k	Yes	Yes - Lilly
Donald (56109/00)	F	N/a	Yes - Hannan	N/a
Jason Taylor (56231/00)	F	Yes - Johnson	Yes	N/k
Reilly (56232/00)	CC	Yes - Martin	Yes - Christison & Jack	N/a
Christison (56429/00)	CC	Yes	Yes - Hannan	N/a
Wilson (56441/00)	F	N/k	Yes - Hannan	N/k

ⁱ This column sets out whether the arrears arose in relation to community charge (“C”) or fines (“F”) cases.

ⁱⁱ The applicant was not required to pursue this ground of challenge, the magistrates’ decision having been quashed on an alternative ground.

ⁱⁱⁱ The High Court had made a specific finding that the magistrates’ decision to commit the applicant to prison in his absence was unlawful in part because of their imputed knowledge that the applicant had not received notice of the hearing.

^{iv} The magistrates had failed to fulfil the requirements of Part I of the Criminal Justice Act.

2. *The Government*

98. The Government submitted that there was no indication, whether in the orders of the High Court or elsewhere, that the magistrates had failed to observe an express statutory condition precedent or made any other error such as to render their decision to commit the applicants in excess of their jurisdiction. Therefore, there had not been any violation of Article 5 in those cases.

99. The Government disputed the applicants' contention that the present applications were indistinguishable from the decisions of the Commission in the cases of *Johnson*, *Poole* and *S.D.* (cited above). They submitted that in *S.D.* and *Johnson* the High Court had delivered judgments in which the committals to prison were held to be invalid; and that in *Poole* the consent order had in terms recited a failure to observe a statutory condition precedent.

100. The Government interpreted the applicants' reference to the domestic case of *R. v. Nottingham Justices ex parte Hollingsworth* (4 June 1997) as a suggestion that the High Court orders were silent about whether their committals were in excess of jurisdiction because it was unnecessary for the High Court to decide that question for English legal purposes. The Government acknowledged that the Court was competent to investigate whether the committals of the applicants had taken place in excess of jurisdiction, as it had done in its *Benham* and *Perks* judgments (cited above). However, the Government pointed out that in almost all of the present applications the proceedings in the High Court had been determined by a consent order. The terms of the order were usually prepared by the applicant's legal advisers and the parties were free to choose upon what basis such an order was expressed to be made. The Government therefore submitted that where the consent order did not record that the order for detention had been made "in excess of jurisdiction" or "without satisfying a statutory condition precedent" the Court could infer that no basis for such a statement was perceived at that time.

101. As regarded the particular groups of cases, the Government submitted as follows:

Group i: In so far as the cases where it was alleged that the magistrates had failed to conduct any or any proper means inquiry under rule 41(2) of the 1989 regulations, the Government submitted that magistrates who issued a warrant of commitment acted without jurisdiction if they did not carry out the necessary inquiries (*i.e.* the means inquiry and the causation inquiry) but acted within their jurisdiction if they carried them out in an inadequate way, leading to their being quashed for failure to carry out an proper inquiry. In these cases, the facts indicated that the magistrates did carry out some form of inquiry, either since evidence was heard or the terms of the consent order merely specified that the inquiry held was not adequate or proper. Furthermore in *Kane* (37706/97) and *Hagyard* (39378/98), the High Court

did not quash the terms of imprisonment. Nor did the errors made in these cases disclose “gross and obvious irregularity”.

Group ii: The Government submitted that the magistrates retained jurisdiction as long as, for persons over 21, they considered the alternatives to imprisonment listed in section 82(4A) of the Magistrates’ Court Act 1980; if they arrived at an irrational or unreasonable conclusion, that rendered the order liable to be quashed but not in excess of jurisdiction. The cases in this group did not show that the magistrates failed to consider the respective alternatives, but at most that they failed to have proper regard to those alternatives.

Group iii: The Government submitted that section 3 of the Criminal Justice Act 1982 did not apply to the issue of warrants for committal to enforce the payments of fines and magistrates were therefore not required to ensure that a fine defaulter under 21 was given the opportunity to be legally represented beforehand. In so far as the magistrates agreed to the consent orders in these cases, this was an error and there was no violation of Article 5 in the two cases concerned.

Group iv: The Government submitted that there was no statutory condition precedent requiring a debtor or fine defaulter to be present at the hearing or, in the case of non-payment of community charge, council tax or non-domestic rates, requiring that the debtor be given notice of the hearing or that the magistrates be satisfied that notice had been given. While, in the five cases of non-payment of fines, it was a condition precedent that the justices’ chief executive had served a notice in the required manner, it is not apparent from the consent orders or the applicants’ supporting documents, what steps were taken to notify the applicants of the hearing. None of the orders stated that there had been a failure to comply with section 82(5) of the Magistrates’ Courts Act 1980; instead they referred to cases unconcerned with statutory conditions precedents. In none of these cases were the magistrates guilty of a “gross and obvious irregularity”.

Groups v-vi: The Government contended that the concessions made in the consent orders in these two cases did not support a finding of lack of jurisdiction since there was no judicial determination made, the concessions were made for a particular limited purpose and the applicants had not shown that the concession was properly made. Further, in *Swaine* (45844/99) the reference to “unlawful”, which had several senses in the judicial review context, referred to the magistrates having made an error of law, not to any lack of jurisdiction.

B. The Court's assessment

1. General principles

102. The Court recalls the following general principles that were stated at paragraphs 39-44 of *Benham*, and reiterated, in large part, at paragraph 62 of *Perks*:

“39. The Court first observes that this case falls to be examined under subparagraph (b) of Article 5 para. 1, since the purpose of the detention was to secure the fulfilment of Mr Benham's obligation to pay the community charge owed by him.

40. The main issue to be determined in the present case is whether the disputed detention was 'lawful', including whether it complied with 'a procedure prescribed by law'. The Convention here essentially refers back to national law and states the obligation to conform to the substantive and procedural rules thereof, but it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness ...

41. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with.

42. A period of detention will in principle be lawful if it is carried out pursuant to a court order. A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention. For this reason, the Strasbourg organs have consistently refused to uphold applications from persons convicted of criminal offences who complain that their convictions or sentences were found by the appellate courts to have been based on errors of fact or law.

43. It was agreed by those appearing before the Court that the principles of English law which should be taken into account in this case distinguished between acts of a magistrates' court which were within its jurisdiction and those which are in excess of jurisdiction. The former were valid and effective unless or until they were overturned by a superior court, whereas the latter were null and void from the outset.

It was further submitted that the appropriate test under English law for deciding whether or not magistrates acted within their jurisdiction was that laid down by the House of Lords in *McC. v. Mullan* ... The third limb of that test was relevant to the instant case, namely that magistrates exceeded their jurisdiction when they made an order which had no foundation in law because of a failure to observe a statutory condition precedent.

This limb was applied by the Court of Appeal in *Manchester City Magistrates' Court, ex parte Davies* ... In that case the appeal court found that magistrates had acted in excess of jurisdiction when they committed a man to prison for non-payment of rates without having carried out the inquiry required by law as to whether his failure to pay was due to culpable neglect.

44. In each of the two cases referred to above it was necessary for the courts to decide the jurisdictional issue, because at the relevant time damages could be awarded against magistrates who acted in excess of jurisdiction. However, section 108 of the Courts and Legal Services Act 1990 has since changed the law to provide that there is no right to damages unless magistrates acted in bad faith ... For this reason, when the Divisional Court reviewed the magistrates' order for Mr Benham's detention, there was no reason under English law for it to decide whether or not the order had been made in excess of jurisdiction."

103. The Court has considered, and rejected in its decision on admissibility of 21 October 2003, the applicants' arguments that the cases of *Benham* and *Perks* were wrongly decided on the basis that the distinction drawn between decisions to detain which were within and outside the jurisdiction of the sentencing tribunal was artificial and erroneous. It finds no basis on which to re-open this assessment.

104. It examines below, in light of those principles, the circumstances of each application.

2. Application to the present cases

(i) The magistrates failed to conduct any or any proper means inquiry under regulation 41(2) of the 1989 Regulations

Kane (37706/97), *Hagyard* (39378/98), *Garnham* (41593/98), *Sheppard* (45420/99), *Jones* (46326/99), *Jason Taylor* (56231/00), *Christison* (56429/00)

105. The Court recalls that the express words of regulation 41(2) of the 1989 Regulations require a magistrates' court to inquire into an applicant's means in his presence and to inquire whether the failure to pay which led to the liability order concerned being made against him was due to his wilful refusal or culpable neglect. The regulation 41(2) inquiry was held to be a statutory condition precedent to the exercise by the magistrates of their power to issue a warrant of commitment in the domestic case of *ex parte Davies* (paragraphs 32-34 above); its status as an express condition precedent to the magistrates' jurisdiction was also confirmed in the judgment of the Court in *Perks* (§ 41).

106. The orders of the magistrates in all bar one (*Christison*, 56429/00) of this group of applications were quashed following a consent order agreed between the applicant and the magistrates. The consent orders quote directly the central passage from the domestic case of *ex parte Johnson* that, where there had not been a proper means inquiry at all, the order committing the applicant to prison was held to be "entirely vitiated" (paragraph 49 above). The quotation further confirms that the means inquiry required by regulation 41(2) was at the centre of the enforcement procedure which was laid down by the 1989 Regulations, and that, without it, the magistrates plainly could

not properly arrive at a conclusion as to whether the failure to pay had been due to the applicant's wilful refusal or culpable neglect. The Court recalls that the *ex parte Johnson* case was subsequently considered by the Commission, which unanimously concluded that it could be said, with the practically possible degree of certainty, that the magistrates had acted in excess of jurisdiction in the circumstances of that case and that therefore there had been a violation of Article 5 of the Convention (*Johnson v. the United Kingdom*, Commission report of 9 September 1998, §§ 41-44). The Court further notes that in the domestic case of *Meara v. DPP* (see paragraph 50 above) "the holding of a full means inquiry" was held to be an essential prerequisite to a finding of culpable neglect. The Government have not been able to point to any previous case which draws a distinction, under the applicable regulations, between the holding of no means inquiry and no proper means inquiry as being a distinction of decisive importance for the question whether or not there has been breach of a condition precedent or a lack of jurisdiction.

107. Furthermore, while it is true that there have been no judicial determinations as such that no proper means inquiry were held in these consent cases, the Court considers that the consent orders which were agreed by the parties must be regarded, for the purposes of the present applications, as equivalent to findings by the courts. It is not required for the applicants to establish that the concessions made by the magistrates were justified. In the remaining case in this group, *Christison (56429/00)*, Mr Justice Collins expressly found that no proper means enquiry had been carried out.

108. The Court therefore concludes that the lack of proper means inquiry in the present applications can only logically mean that the inquiry required by the legislation was not undertaken and therefore that the magistrates' orders must be regarded as having been made in excess of jurisdiction within the meaning of domestic law. The detention of the applicant under them was, as a result, unlawful and there has been, in this regard, a breach of Article 5 § 1 of the Convention.

(ii) The magistrates failed to have proper regard to the alternatives to imprisonment in fines cases

Swaine (45844/99), *Pitt (53111/99)*, *Fletcher (2482/03)*, *Middleton (2483/03)*, *Shelley (2484/03)*, *Watson (54997/00)*, *Armstrong (55046/00)*, *Geraldine Taylor (55071/00)*

109. The Court recalls that section 82(4)(b) of the Magistrates' Courts Act 1980 expressly prohibits a magistrates' court from issuing a warrant of commitment in cases involving non-payment of fines unless (i) it is satisfied that the default is due to the offender's wilful refusal or culpable neglect and

(ii) it has considered or tried all other methods of enforcing payment of the sum. The latter requirement was stated in *ex parte Lilly* to be “peremptory” and it was explicitly stated that there was “no discretion in the court, they have either to consider or try all the other methods of enforcing payment” (paragraph 63 above). The Court is of the view that the above factors render the consideration of alternatives to prison in fines cases a statutory condition precedent to the jurisdiction of the magistrates to issue a warrant of committal (see *mutatis mutandis*, *Perks*, § 41, where regulation 41(3) of the 1989 Regulations was an express statutory condition precedent).

110. In these cases, it was agreed between the parties in the High Court consent order that the magistrates had “failed to have proper regard to ... the alternatives [to prison] available”. Each consent order then refers to at least one of the alternatives which the magistrates are required to consider by virtue of section 82(4A) of the 1980 Act as an appropriate alternative to prison. As with a “proper” means inquiry, the Court considers that, as a matter of common sense, section 82(4) clearly requires the magistrates to have “proper” regard to the essential requirements of that section. The failure to do so rendered the order of the magistrates in excess of jurisdiction.

111. As regards persons under 21 years of age, section 1(5) of the Criminal Justice Act 1982 contains a similar provision that no court shall commit such a person to prison unless it is of the opinion that no other method of dealing with him is appropriate. This section provides an additional basis upon which to find that the magistrates’ court acted in excess of jurisdiction in failing to consider alternatives to imprisonment in those applications involving applicants who were under 21 years of age at the time of their hearings in the magistrates’ court (namely, *Swaine* 45844/99, *Watson* 54997/00 and *Geraldine Taylor* 55071/00). The Court recalls that this issue was considered by the Commission in the cases of *Redfern v. the United Kingdom* (no. 28482/94) and *Ashley v. the United Kingdom* (no. 25276/94), which were declared admissible on 10 September 1997 and later settled by the Government.

112. While the failure to consider alternatives to imprisonment in community charge cases was not found to be in excess of jurisdiction in *Perks*, the 1989 Regulations (which apply to community charge cases) do not contain any express requirement to consider alternatives to prison; and the case-law decided under the 1989 Regulations considered whether the magistrates had correctly exercised their “discretion” in committing the applicants to prison without having considered all the available alternatives (see *ex parte Mould*, *ex parte Massey* and *ex parte Phillips*, paragraphs 60-62 above). The statutory provisions, and case-law in respect of them, therefore differ significantly in community charge cases from those which apply in cases involving fines and persons under 21 years of age.

113. The Court concludes therefore in these cases that the magistrates' failure properly to consider alternatives to imprisonment took their decisions to commit outside their jurisdiction and the orders for detention were correspondingly unlawful and, accordingly, in breach of Article 5 § 1 of the Convention.

(iii) The magistrates failed to ensure that a person under 21 years of age was given the opportunity to be legally represented

Ellis (42040/98), *Jason Taylor* (56231/00)

114. The Court notes that the wording of section 3 of the Criminal Justice Act 1982 prohibits the imposition of a term of imprisonment on an offender under 21 years of age where that person was not given the opportunity to be legally represented (see paragraph 44). As pointed out by the Government, it does not apply to committal of persons for fine defaulting and the inclusion of a reference to section 3 in the consent order in *Jason Taylor* (56231/00) appears, on its face, erroneous. While the applicants' argument that the spirit of the provision is clear may be persuasive, it is not apparent that the magistrates' actions in failing to apply section 3 to these two applicants can be impugned as failing to comply with a statutory condition precedent. Doubtless all were in agreement at the consent order stage that on grounds of general procedural fairness persons of such an age should have been given the opportunity to obtain representation and thus that the warrants be quashed. It is not evident however that in the circumstances of these cases the magistrates' conduct amounted to a "gross or obvious irregularity" in the exceptional sense indicated by the case-law. The Court concludes that the detention of the applicants in these cases cannot therefore be considered on that ground as falling outside the jurisdiction of the magistrates or, therefore, in breach of Article 5 § 1 of the Convention.

(iv) The magistrates committed the applicant to prison in his or her absence without being satisfied that the applicant had received proper notice of the hearing

Lloyd (29798/96), *Kershaw-Field* (36367/97), *Barker* (37551/97), *Kane* (37706/97), *Massey* (38261/97), *Hagyard* (39378/98), *Jones* (46326/99), *Mason* (47144/99), *Lisa Watts* (2490/03), *Tracey Watts* (53062/99), *Jackson* (55068/00), *Donald* (56109/00), *Reilly* (56232/00), *Christison* (56429/00), *Wilson* (56441/00)

115. The Court recalls that this issue was declared admissible by the Commission in *Woolaghan v. the United Kingdom* (no. 28787/95, decision of 2 July 1997), which was later settled by the Government. Furthermore, it

has had careful regard to the case-law referred to in the consent orders, in the *Christison* (56429/00) application and set out in the “Relevant domestic law” part of this judgment. It notes that the judges in those cases repeatedly described the notification to the applicant of the hearing as “a matter of natural justice”, and variously described the failure to give proper notification as “perverse”, “a [flagrant] disregard for an elementary principle which every court ought to obey” and one which would render the magistrates’ order “vitiated” and the hearing “fatally flawed”. In *ex parte Hannan* the judge apparently accepted counsel’s submission that it constituted “an act of judicial impropriety” (paragraph 77 above). Its reading of the case-law as a whole leads the Court to the view that it can determine with a degree of certainty that this issue amounted to a “gross and obvious” irregularity of procedure within the meaning of the *McC v. Mullan* case (paragraph 32 above)

116. The Court notes further that failing to ensure that an applicant had proper notice of the hearing necessarily prevented that applicant from making any representations at, or in respect of, the hearing (including why the warrant should not be issued, whether in his/her absence or otherwise, and any change in circumstances since the initial hearing).

117. In the fines cases, *Tracey Watts* (53062/99), *Lisa Watts* (2490/03), *Jackson* (55068/00), *Donald* (56109/00) and *Wilson* (56441/00), it is accepted by the Government from the terms of section 82(5A) of the Magistrates’ Courts Act 1980 that the giving of any notice of the hearing is a statutory condition precedent. The failure to give proper notice, as indicated in the consent orders, must, in the Court’s view, be regarded as also lacking in compliance with this condition.

118. Given the terms of the consent orders, the Court does not consider that the applicants are required to show what steps were or were not taken to give them notice of the hearing.

119. In conclusion, the magistrates must be regarded as having acted in excess of jurisdiction under this head and there has been a breach of Article 5 § 1 in that regard.

(v) The parties expressly agreed on the face of the consent order that the imprisonment of the applicant was unlawful

Swaine (45844/99)

120. The Court recalls that the consent order in this case referred to unlawfulness arising from a failure to consider alternatives to imprisonment for a fine defaulter under the age of 21 and that it has found above that such procedural defect had to be regarded as an error going to the jurisdiction of the magistrates (paragraph 113 above). In the circumstances, a violation of Article 5 § 1 arises.

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

121. Article 5 § 5 of the Convention provides:

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

122. The applicants submitted that they had no opportunity under domestic law of recovering damages for their unlawful imprisonment.

123. The Government stated, that if the Court found a violation of Article 5 § 1 of the Convention, they would not, in light of the terms of domestic legislation, make any submissions on this head. They would however draw the Court’s attention that from 2 October 2000 the Human Rights Act 1998 provided to anyone imprisoned in violation of Article 5 a right to claim such compensation as the Crown would be liable to pay under Article 5 § 5 of the Convention.

124. The Court recalls that it has found above that of the twenty seven applicants whose complaints under Article 5 were declared admissible all except *Ellis* (42040/98) were detained in breach of Article 5 § 1 on one or more of the grounds relied on. It is not contested that there was no enforceable right to compensation in domestic law for that detention. There has, accordingly, been a violation of Article 5 § 5 in respect of those applicants.

125. As regards the applicant *Ellis* (42040/98) whose complaints were not found to disclose unlawful detention in the Convention sense, the Court observes that Article 5 § 5 guarantees an enforceable right to compensation only to those who have been the victims of arrest or detention in contravention of the provisions of Article 5. In view of its findings that there were no violations of Article 5 § 1 in this case, it concludes that Article 5 § 5 is not applicable (see the *Benham* judgment, cited above, § 50).

III. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 and 3 (c) OF THE CONVENTION

126. The Court declared admissible the complaints of thirty four of the applicants under Article 6 §§ 1 and 3 (c) that they were not offered legal representation and were not represented at the hearing at which they were sentenced to a term of imprisonment.

Article 6 reads, in so far as relevant, as follows:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”.

1. The parties’ submissions

1. *The applicants*

(i) *Raymond LLOYD (29798/96)*

127. The applicant maintained that he should have been entitled to legal aid and that, had he been so entitled, the outcome of the proceedings would inevitably have been different. He referred, *inter alia*, to the fact that the High Court judge stated that common sense might have suggested an adjournment, while in relation to the second hearing, as the judge was of the view that the court should not have been invited to proceed in circumstances where the warrant had been issued without there being proof of service, it was quite obvious that had he been represented his representative would have pointed out that defect to the court.

(ii) *Robert WALLER (34327/96)*

128. The applicant emphasised that he was wrongly sent to prison and that, as in *Perks*, he suffered from health problems, namely epilepsy. Had legal aid been available, his representative would inevitably have drawn the magistrates’ attention to the defects in their orders at his initial hearing; and his representative would also inevitably have drawn the attention of the magistrates to his ill-health and made representations as to why he should not have been committed to prison in his absence. In the circumstances, it was unlikely that he would have been sent to prison had free legal representation been available to him.

(iii) *G.M. (34341/96)*

129. The applicant maintained that he should have been entitled to legal representation and submitted that there was a clear causal link between its unavailability and his committal to prison. He argued that it was inconceivable that any competent solicitor would not have been aware of the many cases decided by the High Court and brought them to the attention of the magistrates. With such case-law before them, it was inconceivable that the magistrates would have made the errors set out in the consent order or committed him to prison, particularly as this was at the first hearing at which he had appeared before the court in this matter.

(iv) The remaining applicants

130. It was submitted on behalf of all of the remaining applicants that they were denied the opportunity of a fair and impartial hearing in accordance with the principles of Article 6 of the Convention.

131. Those applicants whose terms of imprisonment were fixed after 1 June 1997 maintained that their Article 6 rights were violated notwithstanding that legal aid was available for hearings where imprisonment was likely to be considered. They argued that it was at the hearing that preceded the hearing at which the committal took place that the crucial decisions were made *i.e.* where a finding of culpable neglect was made the magistrates would not revisit that finding at any subsequent hearing. It was also argued that *Massey* (38261/97), *Sheppard* (45420/99), *Tracey Watts* (53062/99), and *Reilly* (56232/00) were indistinguishable from the applicants in *Benham* and *Perks*. In all cases, they submitted that representation would have made a difference and that there was a causal link between the lack of legal aid and the committal to prison.

2. The Government

132. The Government affirmed that the considerations relevant to the present complaints under Article 6 concerning the availability of legal aid were examined by the Court in *Benham* (cited above, §§ 57-64) and in *Perks* (cited above, §§ 75-76). In the following applications (Group i) the Government accepted that the relevant magistrates' court hearing had taken place before 1 June 1997 and that there was no feature to distinguish them from the findings in *Benham* and *Perks*:

Lloyd (29798/96), *Wood* (30395/96), *Waller* (34327/96), *G.M.* (34341/96), *Sanders* (35445/97), *Hughes* (36267/97), *Kershaw-Field* (36367/97), *Barker* (37551/97), *Kane* (37706/97), *Massey* (38261/97) as concerned the first warrant of commitment, *Hagyard* (39378/98), *Crilly* (41590/98), *Garnham* (41593/98), *Hartley* (42097/98), *Swaine* (45844/99), *Slater* (2460/03), *Fletcher* (2482/03), *Middleton* (2483/03), *Shelley* (2484/03), *Lisa Watts* (2490/03), *Pitt* (53111/99), *Jelley* (54969/99), *Merry* (54973/00), *Watson* (54997/00), *Armstrong* (55046/00), *Jackson* (55068/00), *Geraldine Taylor* (55071/00), *Donald* (56109/00) and *Condon* (56233/00).

133. Referring to the fact that legal aid was made available in this type of case with effect from 1 June 1997, the Government submitted that in relation to the remaining applicants, whose hearings took place after that date, there had not been any violation of Article 6 §§ 1 and 3 (c).

Group (ii) where a term of imprisonment was fixed prior to 1 June 1997 but postponed: In respect of *Massey* (38261/97) concerning the second warrant of commitment, *Sheppard* (45420/99), *Tracey Watts* (53062/99), and *Reilly* (56232/00), the Government argued that the applicant had a right

to legal aid at the hearing at which the warrant for commitment was issued and a right to legal aid in respect of any challenge by case stated or judicial review against the decision to fix a term of imprisonment and postpone the issue of a warrant. In those circumstances, they submitted that the interests of justice did not require free legal assistance at the hearing at which the magistrates fixed the term of imprisonment and postponed the issue of the warrant.

Group (iii) where a term of imprisonment was imposed on a person under 21 years without legal representation: In respect of *Ellis* (42040/98) and *Jason Taylor* (56231/00), the Government reiterated that the relevant legislation did not require that the applicants were legally represented. In any event, there was no violation of Article 6 as in each case the hearings took place after 1 June 1997 at a time when the applicants were entitled to legal aid.

2. The Court's assessment

134. It is not in dispute that the proceedings before the magistrates fell within the scope of Article 6 §§ 1 and 3(c) of the Convention and that the applicants identified below were not given free legal representation at the hearings which decided on their committal to prison. The Court recalls that where deprivation of liberty is at stake, the interests of justice in principle call for legal representation (*e.g. Benham*, cited above, § 61). It finds as follows concerning the three types of cases in issue:

(i) *Where the proceedings as a whole took place before 1 June 1997*

Lloyd (29798/96), *Wood* (30395/96), *Waller* (34327/96), *G.M.* (34341/96), *Sanders* (35445/97), *Hughes* (36267/97), *Kershaw-Field* (36367/97), *Barker* (37551/97), *Kane* (37706/97), *Massey* (38261/97), *Hagyard* (39378/98), *Crilly* (41590/98), *Garnham* (41593/98), *Hartley* (42097/98), *Swaine* (45844/99), *Pitt* (53111/99), *Jelley* (54969/00), *Merry* (54973/00), *Watson* (54997/00), *Armstrong* (55046/00), *Jackson* (55068/00), *Geraldine Taylor* (55071/00), *Donald* (56109/00), *Condon* (56233/00), *Slater* (2460/03), *Fletcher* (2482/03), *Middleton* (2483/03), *Shelley* (2484/03), *Lisa Watts* (2490/03)

135. The Government have not contested that legal aid for free legal representation was not available for these applicants before 1 June 1997, when they introduced regulations to make provision for legal aid before a magistrates' court following *Benham* (see paragraph 87 above). Nor is it contested that what was at stake for them and the complexity of the issues before the magistrates, as in *Benham*, required that in order to receive a fair hearing these applicants ought to have benefited from free legal

representation during the proceedings before the magistrates which led to their committal to prison.

136. There has, accordingly, been a violation of Article 6 §§ 1 and 3(c) of the Convention in these cases.

(ii) *Where a term of imprisonment was fixed, albeit postponed on terms, at a hearing which took place before 1 June 1997*

Massey (38261/97), *Sheppard* (45420/99), *Tracey Watts* (53062/99), *Reilly* (56232/00)

137. In these four applications, the initial hearing at which the period of imprisonment was fixed (albeit postponed on terms) took place before legal aid was available for this type of proceeding. The hearing at which the suspended sentence was activated and the term of imprisonment actually imposed took place after 1 June 1997.

138. The Court recalls that committal to prison was the object of the application that led to each pre-1 June 1997 hearing. The “severity of the penalty risked” was the same as in *Benham* (§ 64) and *Perks* (§ 76) and it was risked at that initial hearing – indeed *G.M.* (34341/96) illustrates the point that the applicant could have been sent to prison immediately. The complex law to be applied – in particular the finding of wilful refusal or culpable neglect to which specific reference was made in *Benham* (§ 62) – was made at that initial hearing; indeed, all the legal requirements/statutory conditions precedent to the imposition of a term of imprisonment had to be fulfilled at that initial hearing. The final hearing, at which the suspended term was activated, was limited: it did not, *inter alia*, require a repeat of the regulation 41(2) inquiry (see *ex parte Newell* and *ex parte Ursell* under “Relevant domestic law” in respect of the nature of the final hearing, paragraphs 69-73 above); and, significantly, the provision that legislates for legal aid to be available in such proceedings as from 1 June 1997 applies to those likely to be “at risk of a term of imprisonment being fixed” in their cases, which was the precise situation that the applicants in these four applications faced.

139. To find otherwise would, in the view of the Court, be contrary not only to the logic of *Benham* and *Perks*, but also to the principles underlying the domestic case-law (see, for example, the quotation from *ex parte Derrick Long* set out under “Relevant domestic law”, in particular the statement that “the same degree of care must be exercised in the case of a suspended penalty as in the case of an immediate penalty”, paragraph 47 above).

140. The Court therefore concludes that there has also been a violation of Article 6 §§1 and 3 (c) in respect of these four cases.

(iii) *Where a term of imprisonment was imposed on a person under 21 years of age who was not legally represented*

Ellis (42040/98), Jason Taylor (56231/00)

141. These applicants were neither offered legal representation nor represented at their hearings. In both cases, the orders of the magistrates were quashed because the magistrates had failed to ensure that the applicant was given the opportunity to be legally represented. While the Court has found above that this failure did not constitute a breach of a condition precedent such as to bring the resulting detention outside the magistrates' jurisdiction in breach of Article 5, it notes that domestic law recognised the importance, in the context of imposing a custodial sentence on a person under 21, of informing such a person of the right to apply for legal aid and giving him the opportunity to do so (section 3(1) of the Criminal Justice Act 1982). It was agreed by the parties that the committal orders should be quashed when the magistrates did not take such precautions in these cases which concerned committal for fine defaulting.

142. The Court considers that the fact that legal aid was available in relation to these two applicants (whose hearings were after 1 June 1997) does not answer their complaint that it was not offered to them. While adults can be expected to inform themselves of the representation options available to them in advance of their hearings, such presumption cannot apply to young persons whose rights the authorities must take care are effectively protected.

143. In conclusion, there has been a violation of Article 6 §§ 1 and 3(c) in respect of these two applicants.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

144. Article 41 of the Convention provides:

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

A. Non-pecuniary damage

1. The parties' submissions

(a) The applicants

145. The applicants claimed compensation for non-pecuniary loss, not only for their loss of liberty but also for the absence of any enforceable

rights to compensation in the domestic courts and for the absence of free legal representation in the proceedings which led to their detention.

146. Even where the complaints under Article 5 had been found inadmissible, it was submitted that compensation should be paid for breaches of Article 6 as there was a causal link between the breach and the committal. At the time of the applicants' committals, the case law was so overwhelming and clear that any competent lawyer would have been able to show the Justices that it was wrong in principle to commit the applicants to prison. Representation would therefore have made a difference. Further, they pointed out that they made use of legal representation as soon as they were able and where the High Court quashed the committal orders, none of the applicants was returned to prison.

147. As regarded the level of awards, they submitted that the scales applied by national courts in detention cases were relevant as the breaches of Article 5 included the failure to provide an enforceable right to compensation before the national courts. They should be paid the compensation which should have been available but for the immunity of the magistrates under section 108 of the Courts and Legal Services Act 1990: otherwise the Government would profit from their breach. Even where the complaints under Article 5 had been declared inadmissible, the facts were so similar to domestic cases that it would unfairly prejudice the applicants to award less. These domestic scales, as represented on a graph, varied from GBP 500 for the first hour to GBP 25,000 for 42 days. In many cases there were additional aggravating features, causing distress and suffering above that ordinarily associated with imprisonment: they proposed that they fell in certain cases within the minor or moderate categories, entitling them to additional awards of between GBP 750 and GBP 10,000.

Accordingly they made the following claims:

- *Crilly* (41590/98): the applicant, under 21, spent 15 days in prison; and for the three and a half years had suffered a form of mental illness, under medication and medical supervision: he claimed GBP 10,500.

- *Condon* (56233/00), *Geraldine Taylor* (55071/00) and *Sanders* (35445/97): they spent three days in prison and claimed GBP 4,500;

- *Merry* (54973/00): the applicant spent two days in prison, was a single parent, who was not given the chance to make arrangements for her children to be looked after; she found the experience humiliating and worried as she had never been separated from her children before; after her release, she developed psoriasis and suffered from bad nerves: GBP 4,700;

- *Hughes* (36267/97): he spent five days in prison, lost his job and found the experience distressing: GBP 5,500;

- *Reilly* (56232/00): this applicant spent one day in prison: GBP 3,400;

- *Swaine* (45844/99): the applicant, under 21, spent three days in prison and claimed GBP 4,500 plus GBP 500 for additional distress caused due to

his age and personal circumstances (his mother was ill and dependent on him);

- *Barker* (37551/97): the applicant spent 28 days in prison and lost a job offer; shortly after his release he suffered an angina attack: GBP 17,000, plus GBP 500 for additional distress from loss of the job;

- *Pitt* (53111/99): she spent four days in prison; a single mother of two young children, she had to leave them in unsatisfactory care arrangements; in prison she was noted to be suffering from high blood pressure and since her release has suffered anxiety and depression: she claimed GBP 5,000 plus GBP 1,500 for separation from her children and effect on her health;

- *Massey* (38261/97): the applicant, 60 years old, was five days in prison and claimed GBP 5,000;

- *Ellis* (42040/98): the applicant, 19 years old, spent eight days in prison; on leaving prison he was disowned by his family and suffered from depression; he claimed GBP 7,000, plus GBP 1,000 for effect on his family life and health;

- *Slater* (2460/03): the applicant, 19 years old, spent five days in prison and became depressed and suicidal when his girl friend told him that she had had an abortion because of his imprisonment; he claimed GBP 5,000 and an additional GBP 500 due to his age and personal circumstances;

- *Fletcher* (2482/03): the applicant, a single parent, spent 3 days in prison away from her children and became depressed and withdrawn afterwards; she claimed GBP 4,500 plus GBP 1,500 for separation from her children;

- *Jelley* (54969/00): the applicant, a single parent, was in prison for two days and had to leave her son aged two suffering from scarlet fever; during her detention she was assaulted and sustained a cut lip and bruised eye; on release she found that she had been evicted from her home and was homeless for several months; her son had moved to live with his father and she was denied contact and became depressed and suicidal: she claimed GBP 5,000 and an additional GBP 1,000 for effects on her health and personal circumstances;

- *Jackson* (55068/00): the applicant, a single parent, was in prison for two days and claimed GBP 4,000, plus GBP 1,000 for distress caused by separation from her child;

- *Hartley* (42907/98): the applicant was committed to prison where she spent three days; this was under two weeks after giving birth by caesarean section; while she was in prison her baby was ill with gastroenteritis; she claimed GBP 4,500, plus GBP 1,500 for suffering due to separation from her baby and detention so soon after giving birth;

- *Kershaw-Field* (3637/97): the applicant, 60 years' old, spent two days in prison; she had undergone surgery before her committal; she claimed GBP 4,500;

- *Kane* (37706/97): the applicant spent four days in prison; when she was arrested, her family had no idea where she was and in great distress had

reported her missing; she underwent a strip search, was unable to sleep and had to obtain medication on her release to calm her nerves; she claimed GBP 5,000, plus GBP 1,000 for the manner of her arrest and detention;

- *Hagyard* (39378/98), *Garnham* (41593/98), *Sheppard* (45420/99), *Tracey Watts* (53062/99), *Middleton* (2483/03), *Shelley* (2484/03), *Watson* (54997/00), *Donald* (56109/00), *Jason Taylor* (56231/00), *Christison* (56429/00), *Wilson* (56441/00): they spent two days in prison and claimed GBP 4,000 each;

- *Jones* (46326/99): the applicant spent three days in prison; she suffered from epilepsy and had two fits in prison; she claimed GBP 4,000, plus GBP 1,000 for distress due to the fits;

- *Mason* (47144/99): the applicant spent three days in prison after being taken to the police station with her six-year-old daughter; on arrival in prison she was strip searched and on her second night two of her cell mates sexually assaulted her for three to four hours; since then she had not been able to have sexual contact with anyone, suffered from anxiety attacks, had taken tranquillizers for her nerves and had a nervous breakdown some six months afterwards; nor had she been able to work since then and was now separated from her husband; she claimed GBP 4,500 plus GBP 25,000 for distress from the circumstances of her arrest and detention;

- *Lisa Watts* (2490/03): she spent seven days in prison and was unable to contact her family on arrest, causing them concern as to her whereabouts; she claimed GBP 4,000 plus GBP 250 for distress from the manner of her arrest;

- *Armstrong* (55046/00): she spent two days in prison, when her baby was two months' old and still being breastfed; this caused her severe discomfort while in prison, no pain relief was given and on her release she was unable to continue breastfeeding; she claimed GBP 4,000 plus GBP 1,000 for separation from her children, discomfort and loss of opportunity to continue breastfeeding.

The remaining applicants claimed as follows:

- *Lloyd* (29798/96): the applicant was detained for 36 days and claimed GBP 23,000;

- *Wood* (30395/96): the applicant spent seven days in prison and claimed GBP 6,500 for time spent in prison and GBP 500 for feelings of isolation and confusion due to lack of legal representation;

- *Waller* (34327/96): the applicant, suffering from *grand mal* epileptic fits and with a history of depression, suicidal tendencies and possible personality disorder, suffered a fit in prison, cutting his head and biting his tongue; he was detained 50 days and claimed GBP 28,000 plus GBP 1,500 for particular suffering arising from his physical and mental problems;

- *G.M.* (34341/96): the applicant spent 10 days in prison, at a time when his girlfriend was about to have their first child; he claimed GBP 8,000 for

the time in prison and GBP 500 for feelings of isolation and confusion due to the lack of legal representation.

(b) The Government

148. The Government noted that, save for *Mason* (47144/99) who submitted a witness statement, none of the applicants had submitted documents in support of their claims. They submitted that in any case the applicants had not established that their imprisonment was caused by the alleged violations of Articles 5 or 6 and that the Court could not speculate as to whether the applicants would have been detained if there had been no violation. They also invited the Court to follow its practice in Article 5 and 6 cases in holding that the finding of a violation constituted sufficient just satisfaction. While as in *Perks* there might, in some individual cases, be exceptional circumstances enabling a conclusion without engaging in speculation, there were no such exceptional circumstances in these cases. They also emphasised that the majority of the applicants had not paid the taxes or fines due and their failure to pay had been found to be the result of wilful refusal or culpable neglect.

149. Even assuming the Court was to find a causal link, the Government submitted that the award of damages should be made on an equitable basis and not by reference to domestic levels. It was not required by Convention case-law to apply domestic rates and findings of violations of Article 5 § 5 did not lead to an automatic award of financial compensation. The measure of domestic damages would not be tort-based as alleged but would flow from a claim for damages under the Human Rights Act 1998. They did not accept the applicants' graph of awards, considering that it was based only on two cases and did not reflect the necessary flexibility. The sums claimed were also disproportionate when compared with awards in the Court cases on Article 5.

150. As regarded additional claims for particular suffering or damage, the Government noted that two applicants who claimed to have been assaulted made no complaint at the time or even recently after the event, pointing out that if their complaints had substance they could have applied to the Criminal Injuries Compensation Board or complained to the police or prison authorities. A lack of contemporaneous complaint was also present in *Armstrong*'s complaints of lack of pain relief in prison. The Government further submitted that they were not responsible for the distress caused by actions of various of the applicants' relatives or girl friends. They also noted that calculation of the time in prison, based on the date of committal and date of release, was a method which overstated the length of detention as, for example, a person released on the second day after detention would not have been detained for 48 hours and the period of detention was unlikely to exceed 36 hours.

2. *The Court's assessment*

151. As concerns the breaches of Article 5 found above in respect of twenty-six of the applicants, the Court recalls that it found that the detention was unlawful in that the magistrates did not have jurisdiction to make the orders of committal due, *inter alia*, to a failure properly to inquire into the applicants' means, a failure to have proper regard to the alternatives to imprisonment, committing the applicant to prison in his or her absence without satisfying themselves that the applicant had received proper notice of the hearing. It is true, as pointed out by the Government, that in cases concerning procedural defects under Article 5, in particular Article 5 §§ 3 and 4, the Court has held that just satisfaction was to be awarded only in respect of damage resulting from a deprivation of liberty that the applicant would not have suffered if he or she had had the benefit of the missing guarantees (e.g. *Nikolova v. Bulgaria*, [GC] no. 31195/96, ECHR 1999-II, § 76). However where there are findings of unlawfulness in the detention itself under the first paragraph of Article 5, it may be noted that generally the Court makes an award which reflects the importance of the right to liberty which should not be removed save under the conditions provided for in domestic law and in conformity with the rule of law. As well as the length of the resulting detention, the degree of arbitrariness disclosed by the circumstances of the case may be a significant factor influencing the appropriateness of any award (e.g. *Conka and Others v. Belgium*, no. 51564/99, ECHR 2002-I; *Assanidzé v. Georgia*, no. 71503/01, ECHR 2004-II). Domestic scales of damages are not decisive, or, in all cases, relevant to applications under the Convention.

152. In the present case, making an assessment on an equitable basis, the Court considers it appropriate to make an award to the twenty six applicants for the breaches of Article 5 § 1 which occurred. Having regard to the circumstances, including the lack of substantiation or supporting documents, the Court awards:

EUR 5,000 to applicants *Kershaw-Field* (36367/97), *Hagyard* (39378/98), *Garnham* (41593/98), *Sheppard* (45420/99), *Swaine* (45844/99), *Mason* (47144/99), *Jones* (46326/99), *Tracey Watts* (53062/99), *Middleton* (2483/03), *Shelley* (2484/03), *Fletcher* (2482/03), *Watson* (54997/00), *Armstrong* (55046/00), *Jackson* (55068/00), *Geraldine Taylor* (55071/00), *Donald* (56109/00), *Jason Taylor* (56231/00), *Reilly* (56232/00), *Christison* (56429/00) and *Wilson* (56441/00);

EUR 6,000 to applicants *Kane* (37706/97), *Massey* (38261/97) and *Pitt* (53111/99);

EUR 7,000 to applicant *Lisa Watts* (2490/03);

EUR 9,000 to applicants *Lloyd* (29798/96) and *Barker* (37551/97)

153. As regards violations of Article 6, the Court's case-law indicates that it will not speculate as to what might have occurred had there been no breach of the procedural guarantees of this provision (*Benham*, § 68, and

Findlay v. the United Kingdom, judgment of 25 February 1997, *Reports* 1997-I, §§ 84-88) unless it finds special features in the case amounting to a “real loss of opportunity” (*Perks*, §§ 80-81, and *Goddi v. Italy*, judgment of 9 April 1984, Series A no. 76, § 35).

154. In the *Goddi* case, both the applicant and his representative had been prevented from attending the relevant court hearing where his sentence had been increased, and it was considered that such a loss of real opportunity warranted the award of just satisfaction (§ 35 of that judgment). In *Perks*, the Court saw no reason to disregard the Government’s concession that the situation of Mr Perks was exceptional given that the appeal court had found it unlikely that the magistrates’ court would have committed him to prison if they had known more about his health problems and personal circumstances, matters to which, the Government had also accepted, a reasonably competent solicitor would have drawn the magistrates’ court’s attention. An award for non-pecuniary loss was therefore made to Mr Perks. It is noteworthy that the Court went on to find that there was no basis to speculate, as regards the other applicants in *Perks*, as to the outcome of their proceedings before the magistrates’ courts, and found that the finding of a violation constituted sufficient just satisfaction.

155. In the present cases, the Court finds that there is similarly no basis to speculate as to the outcome of the proceedings and is unable to find any factor in the present cases which could justify a departure from the above approach. There is no finding as in the case of Mr Perks, whether in a High Court judgment or by agreement of the parties in a consent order, that it was unlikely that the magistrates would have committed the applicants to prison, as a result of having greater knowledge about their circumstances or otherwise. While the applicants argued generally that a reasonably competent solicitor would have made a difference in their cases and that the High Court, once they were represented, quashed the committal decisions, this was also the position for the other applicants in *Perks*. The Court cannot engage in speculation as to which domestic cases it was likely that the applicant’s representative would have brought to the attention of the magistrates nor what action the magistrates would have taken had they been referred to those cases. It requires a more concrete indication that the detention would not have occurred but for the lack of legal aid for representation before the magistrates. Though the applicant *Waller* (34327/96) made reference to health problems as indicating, as in *Perks*, that the magistrates would not have detained him if properly addressed by a legal representative, this element was not referred to in the consent order concerned and did not play any apparent part in the quashing of the order by the magistrates.

156. Accordingly, it considers that the finding of a violation of Article 6 § 3(c) of the Convention constitutes, in itself, sufficient just satisfaction for any non-pecuniary damage sustained by the applicants.

B. Pecuniary damage

1. The parties' submissions

(a) The applicants

Lloyd (29798/96)

157. The applicant claimed that he had suffered pecuniary damage from the alleged breaches of the Convention, as he had been due to start work on 31 January 1995 and did not resume work until his court case had concluded on 2 November 1995. The work offered to him would have been paid at GBP 205 net per week, which over the period of 10 months with deduction of income support, amounted to a loss of GBP 4,181.67.

Hughes (36267/97)

158. This applicant stated that he was working as a part-time cleaner at a wage of GBP 250 per month at the time of his committal to prison. He claimed that he lost his job as a result of being detained for five days and that it took months to obtain further employment. He claimed GBP 750 for loss of earnings.

(b) The Government

159. The Government argued that the applicants had failed to prove that they would not have been detained but for the alleged violations of the Convention. In any event, they had not produced evidence to substantiate their loss of earnings or suggested that they took any steps to prevent their imprisonment leading to the loss of their jobs. Any award made would have to take into account tax, national insurance, state benefits received and when the applicants could reasonably have been expected to find alternative employment.

2. The Court's assessment

160. As regards the applicants' claims for pecuniary loss, the Court's case-law establishes that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention found and that this may, in the appropriate case, include compensation in respect of loss of earnings (see, amongst other authorities, *Barberà, Messegue and Jabardo v. Spain* (former Article 50), judgment of 13 June 1994, Series A no. 285-C, pp. 57-58, §§ 16-20; *Cakıcı v. Turkey*, judgment of 8 July 1999, *Reports* 1999-IV, § 127).

161. A precise calculation of the sums necessary to make complete reparation (*restitutio in integrum*) in respect of the pecuniary losses suffered

by applicants may be prevented by the inherently uncertain character of the damage flowing from the violation (*Young, James and Webster v. the United Kingdom* (former Article 50), judgment of 18 October 1982, Series A no. 55, p. 7, § 11). An award may still be made notwithstanding the large number of imponderables involved in the assessment of future losses, the matter to be determined by the Court at its discretion, having regard to what is equitable (*Lustig-Prean and Beckett v. the United Kingdom* (Article 41), judgment of 25 July 2000, §§ 22-23).

162. Applying those principles to the present case, the Court finds that in the case of *Hughes* (36267/97) where there was found to be a breach of Article 6 §§ 1 and 3(c) only, there has not been shown to be any causal link with the damage claimed. No award is made. In respect of *Lloyd*, where, additionally, there has been a finding that his detention fell outside Article 5 § 1, the applicant may claim some real loss of opportunity arising from that detention which lasted some 36 days during which the applicant could not either work or take up any opportunity to work. The Court, having regard to equitable considerations, awards the applicant *Lloyd* EUR 3,000 for that head.

C. Costs and expenses

1. *The parties' submissions*

(a) The applicants

(i) *Raymond LLOYD* (29798/96)

163. The applicant claimed GBP 1,175 inclusive of value added tax (VAT) for work done by his solicitors.

(ii) *Robert WALLER* (34327/96)

164. The applicant claimed for solicitors' costs GBP 4,698.79, and for counsel's fees GBP 1,204.37, both inclusive of VAT.

(iii) *G.M.* (34341/96)

165. The applicant claimed for solicitors' costs GBP 1,896.45, and for counsel's fees GBP 1,272.62, both inclusive of VAT.

(iv) *Wood* (30395/96)

166. The applicant claimed for solicitors' costs GBP 1,322.75, and for counsel's fees GBP 940, both inclusive of VAT.

(v) The remaining applicants

167 These applicants claimed, in respect of their solicitors' costs: *Crilly* (41590/98), GBP 1,934.25; *Merry* (54973/00), GBP 1,803.30; *Hughes* (36267/97), GBP 1,817.90; *Condon* (56233/00): GBP 2,079.75; *Reilly* (56232/00), GBP 2,021.49; *Swaine* (45844/99), GBP 1,963.35; *Barker* (37551/97), GBP 1,803.35; *Pitt* (53111/99), GBP 1,919.69; *Massey* (38261/97) GBP 2,006.91; *Ellis* (42040/98), GBP 2,137.91; *Slater* (2460/03), GBP 1,992.42; *Fletcher* (2482/03), GBP 1,977.88; *Jelley* (54969/00); GBP 1,876.04; *Jackson* (55068/00), GBP 1,817.87; *Hartley* (42097/98), GBP 1,861.52; *Kershaw-Field* (36367/97), GBP 1,817.89; *Kane* (37706/97), GBP 1,948.83; *Hagyard* (39378/98), GBP 1,846.98; *Garnham* (41593/98), GBP 1,788.78; *Sheppard* (45420/99) GBP 1,905.16; *Jones* (46326/99), GBP 1,803.36; *Mason* (47144/99), GBP 2,065.19; *Tracey Watts* (53062/99), GBP 1,817.89; *Middleton* (2483/03), GBP 1,832.42; *Shelley* (2484/03), GBP 1,817.87; *Lisa Watts* (2490/03), GBP 2,065.15; *Watson* (54997/00), GBP 1,948.78; *Armstrong* (55046/00), GBP 1,774.25; *Geraldine Taylor* (55071/00), GBP 1,788.77; *Donald* (56109/00), GBP 1,919.74; *Jason Taylor* (56231/00), GBP 1,788.78; *Christison* (56429/00), GBP 1,832.44; *Wilson* (56441/00), GBP 1,905.16; *Sanders* (35445/97), GBP 1,730.62.

168. For counsel's fees, the applicants each claimed GBP 331.01, inclusive of VAT. *Barker* (37551/97) claimed an additional GBP 638.44 in respect of counsels' fee to secure his release from prison which were not covered by legal funding, making a total in his case of GBP 969.55.

169. The applicants submitted that their claims were reasonable, their costs having been increased by the unnecessarily long and excessive submissions made by the Government. Different rates were charged for different solicitors, reflecting the fact that solicitors in England and Wales are entitled to charge different rates. Rates could also be increased depending on the seniority of the case-handler and uplifts for work were the norm for work in higher courts. They accepted that account should be taken of awards of legal aid by the Council of Europe.

(b) The Government

170. The Government submitted that costs should only be awarded to each applicant for pursuing that part of their application which was successful, noting that much of their earlier submissions concerned Article 5, including unsuccessful argument that the Court's earlier case-law was wrongly decided.

171. The Government also submitted that the sums claimed were excessive. They pointed out that the applications followed a standard form, the issues were limited and clearly defined by virtue of earlier cases and few involved preparation of statements or reports or the assembling of substantial quantities of evidence. The time claimed by the solicitors in

some cases was excessive, involving an apparent 12-13 hours of time on each case, plus an additional two hours from counsel. They also considered unjustified the 33 hours (solicitor) and 8 hours (counsel) claimed in *Waller* (34327/96) and the counsel's fees claimed in *G.M.* (34341/96). They noted a wide variation in hourly rates. Further the claims made no allowance for legal aid awarded by the Court and included uplifts of 15% to 65% and there was no explanation for the inability of *Barker* (37551/97), unlike the others, to obtain legal aid.

2. *The Court's assessment*

172. The Court recalls that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II.)

173. While the applications concerned differing factual situations and involved an analysis of considerable domestic case-law, the Court considers that the issues in the applicants' cases were very similar and submissions necessarily covered the same ground. Although the cases have taken some time to be disposed of, they did not present any particular procedural complexity, apart from their number, involving no hearing or presentation of expert or witness evidence.

174. Accordingly, the Court concludes that the legal costs and expenses for which the applicants claim reimbursement, pursuant to Article 41 of the Convention, cannot, in all cases, be considered to have been "necessarily" incurred or to be "reasonable as to quantum" (see the *Observer and Guardian v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, pp. 37-38, § 80).

175. In such circumstances, the Court makes the following awards, inclusive of VAT:

(i) *Lloyd* (29798/96): the applicant's claims are awarded in full: EUR 1,681;

(ii) *Waller* (34327/96), *G.M.* (34341/96) and *Wood* (30395/96): to each EUR 2,145 for solicitors' fees and EUR 715 for counsel's fees;

(iii) In respect of 16 applicants who received legal aid from the Council of Europe: *Crilly* (41590/98); *Condon* (56233/00); *Reilly* (56232/00); *Swaine* (45844/99); *Pitt* (53111/99); *Ellis* (42040/98); *Slater* (2460/03); *Jackson* (55068/00); *Kane* (37706/97); *Sheppard* (45420/99); *Mason* (47144/99); *Tracey Watts* (53062/99); *Lisa Watts* (2490/03); *Watson* (54997/00); *Donald* (56109/00); *Wilson* (56441/00), the Court awards each EUR 1,716 for solicitors' fees and EUR 472 for counsel's fees, less EUR 307 for legal aid;

176. In respect of *Barker* (37551/97), the Court awards EUR 1,716 for solicitors' fees and EUR 1,386 for counsel's fees.

177. In respect of the remaining 17 applicants: *Merry* (54973/00); *Hughes* (36267/97); *Massey* (38261/97); *Fletcher* (2482/03); *Jelley* (54969/00); *Hartley* (42097/98); *Kershaw-Field* (36367/97); *Hagyard* (39378/98); *Garnham* (41593/98); *Jones* (46326/99); *Middleton* (2483/03); *Shelley* (2484/03); *Armstrong* (55046/00); *Geraldine Taylor* (55071/00); *Jason Taylor* (56231/00); *Christison* (56429/00); *Sanders* (35445/97): the Court awards each applicant EUR 1,716 for solicitors' fees and EUR 472 for counsel's fees.

D. Default interest

178. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 5 § 1 of the Convention in the cases of *Lloyd* (29798/96), *Kershaw-Field* (36367/97), *Barker* (37551/97), *Kane* (37706/97), *Massey* (38261/97), *Hagyard* (39378/97), *Garnham* (41593/98), *Sheppard* (45420/99), *Swaine* (45844/99), *Mason* (47144/99), *Jones* (46326/99), *Tracey Watts* (53062/99), *Lisa Watts* (2490/03), *Middleton* (2483/03), *Shelley* (2484/03), *Pitt* (53111/99), *Fletcher* (2482/03), *Watson* (54997/00), *Armstrong* (55046/00), *Jackson* (55068/00), *Geraldine Taylor* (55071/00), *Donald* (56109/00), *Jason Taylor* (56231/00), *Reilly* (56232/00), *Christison* (56429/00) and *Wilson* (56441/00);
2. *Holds* that there has been no violation of Article 5 § 1 of the Convention in the case of *Ellis* (42040/98);
3. *Holds* that there has been a violation of Article 5 § 5 of the Convention in the cases of *Lloyd* (29798/96), *Kershaw-Field* (36367/97), *Barker* (37551/97), *Kane* (37706/97), *Massey* (38261/97), *Hagyard* (39378/97), *Garnham* (41593/98), *Sheppard* (45420/99), *Swaine* (45844/99), *Mason* (47144/99), *Jones* (46326/99), *Tracey Watts* (53062/99), *Lisa Watts* (2490/03), *Middleton* (2483/03), *Shelley* (2484/03), *Pitt* (53111/99), *Fletcher* (2482/03), *Watson* (54997/00), *Armstrong* (55046/00), *Jackson* (55068/00), *Geraldine Taylor* (55071/00), *Donald* (56109/00), *Jason Taylor* (56231/00), *Reilly* (56232/00), *Christison* (56429/00) and *Wilson* (56441/00);

4. *Holds* that there has been no violation of Article 5 § 5 of the Convention in the case of *Ellis* (42040/98);
5. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention in respect of all the applicants;
6. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants as concerns the breach of Article 6 § 3 (c);
7. *Holds*
 - (a) that in those cases where there had been a finding of a breach of Article 5 § 1 of the Convention the respondent State is to pay, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following awards to be converted into pounds sterling at the rate applicable at the date of settlement:
 - (i) EUR 3,000 (three thousand euros) to applicant *Lloyd* (29798/96) for pecuniary damage;
 - (ii) EUR 5,000 (five thousand euros) to applicants *Kershaw-Field* (36367/97), *Hagyard* (39378/97), *Garnham* (41593/98), *Sheppard* (45420/99), *Swaine* (45844/99), *Mason* (47144/99), *Jones* (46326/99), *Tracey Watts* (53062/99), *Middleton* (2483/03), *Shelley* (2484/03), *Fletcher* (2482/03), *Watson* (54997/00), *Armstrong* (55046/00), *Jackson* (55068/00), *Geraldine Taylor* (55071/00), *Donald* (56109/00), *Jason Taylor* (56231/00), *Reilly* (56232/00), *Christison* (56429/00) and *Wilson* (56441/00);
 - (iii) EUR 6,000 (six thousand euros) to applicants *Kane* (37706/97), *Massey* (38261/97) and *Pitt* (53111/99);
 - (iv) EUR 7,000 (seven thousand euros) to applicant *Lisa Watts* (2490/03);
 - (v) EUR 9,000 (nine thousand euros) to applicants *Lloyd* (29798/96) and *Barker* (37551/97) for non-pecuniary damage;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
8. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts in respect of costs and expenses to be converted into pounds sterling at the rate applicable at the date of settlement:

- (i) *Lloyd* (29798/96): EUR 1,681 (one thousand, six hundred and eighty-one euros);
- (ii) *Waller* (34327/96): EUR 2,145 (two thousand, one hundred and forty-five euros) for solicitors' fees plus EUR 715 (seven hundred and fifteen euros) for counsel's fees;
- (iii) *G.M.* (34341/96): EUR 2,145 (two thousand, one hundred and forty-five euros) for solicitors' fees plus EUR 715 (seven hundred and fifteen euros) for counsel's fees;
- (iv) *Wood* (30395/96): EUR 2,145 (two thousand, one hundred and forty-five euros) for solicitors' fees plus EUR 715 (seven hundred and fifteen euros) for counsel's fees;
- (v) *Crilly* (41590/98); *Condon* (56233/00); *Reilly* (56232/00); *Swaine* (45844/99); *Pitt* (53111/99); *Ellis* (42040/98); *Slater* (2460/03); *Jackson* (55068/00); *Kane* (37706/97); *Sheppard* (45420/99); *Mason* (47144/99); *Tracey Watts* (53062/99); *Lisa Watts* (2490/03); *Watson* (54997/00); *Donald* (56109/00); *Wilson* (56441/00): EUR 1,716 (one thousand, seven hundred and sixteen euros) for solicitors' fees and EUR 472 (four hundred and seventy-two euros) for counsel's fees, less EUR 307 (three hundred and seven euros) for legal aid, to each applicant;
- (vi) *Barker* (37551/97): EUR 1,716 (one thousand, seven hundred and sixteen euros) for solicitors' fees and EUR 1,386 (one thousand, three hundred and eighty-six euros) for counsel's fees;
- (vii) *Merry* (54973/00); *Hughes* (36267/97); *Massey* (38261/97); *Fletcher* (2482/03); *Jelley* (54969/00); *Hartley* (42097/98); *Kershaw-Field* (36367/97); *Hagyard* (39378/98); *Garnham* (41593/98); *Jones* (46326/99); *Middleton* (2483/03); *Shelley* (2484/03); *Armstrong* (55046/00); *Geraldine Taylor* (55071/00); *Jason Taylor* (56231/00); *Christison* (56429/00); *Sanders* (35445/97): EUR 1,716 (one thousand, seven hundred and sixteen euros) for solicitors' fees and EUR 472 (four hundred and seventy-two euros) for counsel's fees, to each applicant;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 1 March 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Josep CASADEVALL
President

ANNEX

List of 38 applicants in
Lloyd and others v. the United Kingdom

Lloyd (29798/96)
Wood (30395/96)
Waller (34327/96)
G.M. (34341/96)
Sanders (35445/97)
Hughes (36267/97)
Kershaw-Field (36367/97)
Barker (37551/97)
Kane (37706/97)
Massey (38261/97)
Hagyard (39378/98)
Crilly (41590/98)
Garnham (41593/98)
Ellis (42040/98)
Hartley (42097/98)
Sheppard (45420/99)
Swaine (45844/99)
Jones (46326/99)
Mason (47144/99)
Tracey Watts (53062/99)
Pitt (53111/99)
Jelley (54969/00)
Merry (54973/00)
Watson (54997/00)
Armstrong (55046/00)
Jackson (55068/00)
Geraldine Taylor (55071/00)
Donald (56109/00)
Jason Taylor (56231/00)
Reilly (56232/00)
Condon (56233/00)
Christison (56429/00)
Wilson (56441/00)
Slater (2460/03)
Fletcher (2482/03)
Middleton (2483/03)
Shelley (2484/03)
Lisa Watts (2490/03)