



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

FOURTH SECTION

CASE OF WHITFIELD AND OTHERS v. THE UNITED KINGDOM
(Applications nos. 46387/99, 48906/99, 57410/00 and 57419/00)

JUDGMENT

STRASBOURG

12 April 2005

FINAL

12/07/2005

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 Whitfield 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 J. BORRERO BORRERO,

Mr J. ŠIKUTA, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 22 March 2005,

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

PROCEDURE

1. The case originated in four applications (nos. 46387/99, 48906/99, 57410/00 and 57419/00) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by nationals of the United Kingdom, Messrs S. Whitfield, R. Pewter, J. Gaskin and J. Clarke ("the applicants") on 25 February and 21 June 1999 and on 19 May 2000 (latter two applications), respectively.

2. The applicants were represented by the following lawyers: Mr J. Atkins (practising in Devon), Mr S. Creighton (practising in London), Mr S. Purchas (practising in Leeds) and Mr P. Mahy (practising in Sheffield). The United Kingdom Government ("the Government") were represented by their Agents, Ms R. Mandal and Mr J. Grainger, both of the Foreign and Commonwealth Office.

3. On 3 May 2001, 3 July 2001 (two cases) and on 10 October 2000, respectively, the Court communicated to the Government the applicants' complaints under Article 6 of the Convention concerning their prison adjudication proceedings. Under the provisions of Article 29 § 3 of the Convention, it subsequently decided to examine the merits of the applications at the same time as their admissibility.

4. The fourth applicant, Mr Clarke, died in or around June 2003. His fiancée, Ms A. Unwin, has continued the application.

THE FACTS

5. The first applicant was born in 1968 and is currently in prison in the Isle of Wight, the second was born in 1961 and lives in London and the

third was born in 1980 and lives in Leeds. The fourth applicant was born in 1976.

I. THE CIRCUMSTANCES OF THE CASES

A. Mr Whitfield

6. On 15 March 1996 the applicant was sentenced to nine years' imprisonment following a conviction for causing grievous bodily harm.

7. It was later alleged that on 5 June 1998, as he was being transferred to HMP Parkhurst, a fight broke out during which he "headbutted" one of the prison officers. On 6 June 1998 he was charged with assault contrary to Rule 47(1) of the Prison Rules 1964.

8. The adjudication hearing before the governor commenced on 22 June and continued on 23 June 1998 when a letter was received from the applicant's solicitor requesting that he be legally represented at the hearing. The governor adjourned the hearing until 14 July 1998 to consider the request. On 7 July 1998 legal aid was granted by the Legal Aid Board for representation prior to and at the adjudication hearing.

9. On 8 July 1998 the applicant orally outlined to the governor why he needed legal representation but the governor rejected the request:

"I have considered the case for legal [representation]. I do not feel there is an issue of seriousness or potential penalty. You are able to conduct your defence. You have access to check original with the prisoners you may call as witness. I do not consider you have been unfairly treated in comparison with the other prisoner so charged. No points of law are in question".

10. By letter of 28 July 1998 the applicant's solicitors asked the governor to reconsider. By letter of 30 July 1998 the prison service responded explaining that in considering requests for representation governors did not need to be sure beyond reasonable doubt that representation was not needed before rejecting a request but were required to take account of the six criteria set out in the "Tarrant principles" (*R. v. Secretary of State for the Home Department ex parte Tarrant* [1984] *QB* 251).

11. The adjudication hearing resumed on 25 September 1998. The applicant again requested legal representation for the hearing without success. The governor found the applicant guilty (adding "whether your actions were deliberate or reckless, although you have not advanced that as a defence") and sentenced him to 21 "additional days" pursuant to Rule 50 (1) (f) of the Prison Rules 1964.

12. On 5 November 1998 his solicitors appealed to the Secretary of State referring to the imminent incorporation into domestic law of Article 6 of the Convention and to the failure to grant legal representation for the hearing. By letter dated 10 December 1998 the Secretary of State rejected the appeal

stating that the adjudication had been thoroughly reviewed, that the hearing had been fairly conducted and that the findings should be upheld.

13. The applicant was granted legal aid to obtain counsel's opinion on the lawfulness of the governor's decision of 8 July 1998. Counsel advised on 11 January 1999 that the applicant had no realistic prospects of success given the *Hone and McCartan* case (*Hone and McCartan v. Maze Prison Board of Visitors* [1998] 1 All ER 381). As to whether the governor's exercise of discretion was unreasonable, the "Tarrant criteria", the "relatively minor nature of the offence" and the capacity of the applicant, meant that the prospects of passing the "high hurdle of irrationality" on judicial review were remote.

B. Mr Pewter

14. In December 1987 the applicant was sentenced to seventeen years' imprisonment for armed robbery and making threats to kill.

15. Following a fire in his cell, on 15 November 1998 he was charged with intentionally endangering the health or personal safety of others by his conduct, or of being reckless as to whether such health or safety was endangered, contrary to rule 49 of the Prison Rules 1964. He appeared at an adjudication hearing before the governor on 16 November 1998. He pleaded not guilty and the hearing was adjourned.

16. On 24 November 1998 a solicitor submitted a written request to the governor to represent the applicant at the adjudication hearing.

17. On 16 December 1998 the adjudication reconvened. The applicant made written representations in which he admitted telling a prison officer that he had caused the fire by throwing a lighted taper on the bed. However, he explained that that was untrue and that he believed his cell had been deliberately set on fire by other prisoners who thought that he was an informant. He had not explained this to the prison officers at the time as he was in the presence of other prisoners and he feared reprisals. He consistently maintained throughout the hearing that he had not started the fire. He cross-examined various witnesses called by the governor. The hearing continued the following day when he formally applied for legal representation for the remainder of the hearing, on the grounds that there were a large number of witnesses to be called, that the charge was a serious one and that it was difficult to be his own representative given the issue about his false admission. The governor refused his request taking the view that the offence was not sufficiently serious to warrant legal representation and that the applicant had demonstrated that he was capable of presenting his own defence. The hearing was adjourned until 22 December 1998 to enable a particular prison officer to be called.

18. On 22 December 1998 the applicant was due for early release from custody pursuant to the provisions of the Criminal Justice Act 1991. On the morning of that day he fell down a flight of stairs and was injured. He was

treated for head and back pain by a doctor at a hospital. Once informed of developments, the applicant's solicitor submitted orally to the governor that, given the applicant's injury, the interests of natural justice required the charge to be dismissed and the applicant to be released. Further written representations were also made: due to the nature of the injuries and the medication received, it was unreasonable for the applicant to represent himself and the charge should be dismissed and that the solicitor should be informed should the proceedings continue so that he could make further representations. These written representations were not seen by the governor until after the adjudication hearing. The applicant returned to prison after his treatment and was certified by the prison doctor as fit for adjudication. The adjudication recommenced that day (22 December 1998) and the applicant was accompanied at the hearing by a medical officer. While prison staff maintained that he was alert and able to conduct his defence (even asking for the hearing to commence), the applicant stated that he felt so dizzy and ill that he could not concentrate and was incapable of asking questions or putting forward his case. The same day he was found guilty as charged and was sentenced to 35 additional days' detention to commence on that day.

19. The applicant applied to the Secretary of State to review the hearing. He maintained that he had been unable to conduct his defence properly because of the medication and that the governor erred in refusing legal representation given the seriousness of the charge. The Secretary of State upheld the finding and punishment. An application for leave to apply for judicial review was lodged, leave was granted, the High Court hearing took place on 18 January 1999 but the substantive application for judicial review was dismissed.

20. The applicant was released on 26 January 1999.

C. Mr Gaskin

21. On 31 March 1999 the applicant was sentenced to 23 months' imprisonment following conviction for violent disorder, affray, criminal damage and breach of a supervision order. He was detained at a young offenders' institution in Doncaster.

22. On 5 April 1999 he was charged with assaulting (punch in the face) another inmate (H) contrary to Rule 50(1) of the Young Offender Institution Rules 1988. The applicant claimed that he asked to see a solicitor but was told that he was not allowed to do so. He then pleaded guilty to the charge. On 6 April 1999 the deputy controller of the prison commenced the adjudication of the charge. However, once it became apparent that H's jaw had been broken, the adjudication was adjourned and the charge was referred to the police for investigation.

23. On 9 April 1999 the applicant's solicitors wrote to the controller requesting confirmation that the applicant could be legally represented at any adjudication. On 12 April 1999 the controller responded stating that the

adjudication had been adjourned as the charge had been referred to the police. He also noted that the applicant had not requested legal advice or representation at the hearing, had pleaded guilty to the charge and had apologised for the injuries caused. On 19 April 1999 the controller wrote to the applicant's solicitors, stating that:

"I write to advise that the victim of the alleged assault will not co-operate with the police investigation and wishes for the matter to be dealt with internally.

In view of the foregoing it is our intention to complete the hearing forthwith. As your client pleaded guilty at the initial hearing I am not prepared to allow him to be legally represented. I have applied the '*Tarrant*' criteria and am satisfied that he can adequately conduct his own defence and, if necessary, mitigate his actions."

24. On 21 April 1999 the applicant's solicitors asked the controller to reconsider his refusal of legal representation: since the applicant had instructed them that it was self-defence, his guilty plea was not satisfactory. The applicant submitted that his solicitor had also advised that that defence was potentially a good one. By letter of 21 April 1999 the controller rejected their request: the applicant could claim self-defence at the hearing and that claim would be examined on adjudication.

25. On 23 April 1999 he was refused leave by the High Court to seek judicial review of the controller's decision of 21 April 1999: there was no arguable case that the controller had failed to exercise his discretion in accordance with the above-noted *Tarrant* criteria. On 26 May 1999 the applicant's renewed application for leave to seek judicial review to the Court of Appeal was refused. It was considered a simple case in which the applicant had sworn an affidavit setting out his account of the incident including a passage which claimed self-defence and the adjudicator would have to decide whether he believed the applicant or H. The Convention case-law opened to the Court (*Campbell and Fell v. the United Kingdom* judgment of 28 June 1984, Series A no. 80, *Benham v. the United Kingdom* judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, and *Findlay v. the United Kingdom* judgment of 25 February 1997, *Reports* 1997-I) did not establish an inflexible rule that legal representation should be accorded in every case or even a looser rule that it should be generally accorded. It was held that there was no need for legal representation and that there was no identifiable legal error in the controller's refusal.

26. On 1 June 1999 the adjudication hearing took place. The applicant was found guilty as charged. He was awarded 35 additional days' imprisonment and he was to be excluded from associated work for 14 days. Fourteen days of canteen privileges together with associated dining and recreation privileges were also forfeited.

D. Mr Clarke

27. On 22 July 1999 the applicant was sentenced to four months' imprisonment for motoring offences. His ordinary release date would have been 18 September 1999.

28. On 6 September 1999 he was charged with a breach of prison discipline contrary to paragraph 51(16) of the Prison Rules 1999, it being alleged that he had thrown burning material from a cell window. The hearing was adjourned to allow it to be heard by the deputy governor.

29. On 13 September 1999, upon his return from annual leave, the applicant's solicitor received a letter from the applicant denying the charges and requesting urgent assistance. The solicitor sent a facsimile to the governor at 9.30 a.m. on 13 September 1999 requesting an adjournment to enable him to take urgent instructions and provide legal advice. The hearing resumed on 14 September 1999 when the deputy governor refused an adjournment. It is recorded on the applicant's "Record of Hearing and Adjudication" that the deputy governor stated the following:

"I have a letter from your solicitor requesting that you be allowed legal advice. I have considered your request and refuse it on the following grounds.

1. No points of law are likely to arise.
2. You can present your own case.
3. Although the charge is serious it does not require a solicitor to mitigate it.
4. There are no procedural difficulties.
5. There is a need for reasonable speed. There has already been a delay."

The deputy governor found the applicant guilty as charged and awarded 18 additional days' imprisonment.

30. An application for leave to apply for judicial review was made arguing that the imprisonment was based upon a punishment, the legality of which was seriously flawed both on grounds of irrationality and procedural unfairness. On 21 September 1999 Mr. Justice Moses granted leave but refused bail. On 23 September 1999 the Secretary of State quashed the punishment in the following terms:

"The adjudication detailed above has been reviewed and it has now been decided that the finding of guilt should be quashed on the grounds that the adjudicator should have offered Mr. Clarke a limited opportunity to consult with his solicitors. Although Mr. Clarke did not apply for legal advice or assistance at the original hearing on 6 September he should have been given the opportunity to discuss matters with his solicitor, possibly by telephone to arrange for a meeting the next day, and given a deadline for obtaining the advice he sought. A time limit could have been set to ensure that the prisoner did not delay the hearing unnecessarily. In view of the urgency of this case, please arrange for Mr. Clarke to be released immediately as this decision means that he is serving added days now."

31. The applicant was released at 17.10 hours on 23 September 1999, having served five of the additional days awarded.

32. By letter dated 26 November 1999 the Treasury Solicitor refused to admit liability in respect of the alleged unlawful imprisonment. Counsel was therefore asked to advise whether there existed any effective domestic remedy which the applicant could pursue in respect of the relevant five-day period of detention. Counsel advised that there was no such remedy: under English law a disciplinary finding was presumed to be valid and, in effect, the order for additional days' detention was valid until it was set aside.

33. On 28 January 2000 the applicant's solicitor wrote to the Treasury Solicitor pointing out that, in the light of Counsel's advice, no claim for false imprisonment or misfeasance in public office would be commenced. However, it was alleged that the deputy governor's conduct violated Article 6 of the Convention. A request was therefore made for an *ex gratia* payment to compensate the applicant for the 5 days' detention resulting from the adjudication. The Treasury Solicitor responded that the matter would be considered after the publication of the House of Lords judgment in *R. v. Governor of Brockhill Prison, ex parte Evans. No. 2* ([1999] 2 WLR 103). The Government have not submitted that any payment was made.

II. RELEVANT DOMESTIC LAW AND PRACTICE

34. The Court refers to the law and practice outlined in the case of *Ezeh and Connors v. the United Kingdom* ([GC], nos. 39665/98 and 40086/98, §§ 37-62, ECHR 2003-X).

35. A charge was, in general, drawn up by a prison officer against whom the alleged offence was committed or who witnessed or dealt with the incident during which the alleged offence took place. Such reporting officers could consult a more senior officer on what charges were to be laid against the prisoner. A charge was formally laid when form a Notice of Report was handed to the accused. A charge had to be laid as soon as possible and, save in exceptional circumstances, within 48 hours of the alleged offence being discovered.

Every charge laid against a prisoner had to be inquired into by the prison governor. The governor also determined the charge against the accused during the adjudication hearing and imposed punishments from those available to him under the prison rules.

Since the 1990s the management of certain prisons has been contracted out to private security companies. All such "contracted out" prisons have a "Controller" (a Crown employee) linking them to the Home Office and the governors are called "Directors". Adjudication hearings are conducted by the Controller rather than by the Director.

THE LAW

36. All applicants complained under Article 6 of the Convention about their adjudication proceedings, which provision reads, in so far as relevant, as follows:

“1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law

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

...

(b) to have adequate time and facilities for the preparation of his defence;

(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;

...”

Messrs Whitfield, Pewter and Gaskin challenged, under Article 6 § 1, the independence and impartiality of the adjudicating body. Mr Whitfield and Mr Gaskin also considered the proceedings to be unfair, Mr Gaskin making separate submissions in that respect. Mr Pewter further suggested that the adjudicating body was not “established by law”. The applicants also complained under Article 6 § 3 about the refusal of legal representation: three applicants invoked subparagraphs (b) and (c) and Mr Pewter invoked subparagraph (c) only.

37. Messrs Pewter and Clarke invoked Article 5 §§ 1 and 5 of the Convention which read as follows:

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

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

...

5. 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.”

Mr Pewter argued that the Governor did not constitute a “competent court” (Article 5 § 1) and sought compensation (Article 5 § 5). Mr Clarke considered it arbitrary that compensation was available under domestic law only for detention found to be unlawful *ab initio* (Article 5 § 1) and that he had no right to compensation (Article 5 § 5). Mr Clarke also invoked Article 13 in conjunction with Article 5 of the Convention.

I. ADMISSIBILITY OF THE COMPLAINTS

38. The Government did not contest the admissibility of the applications.

39. As to the applicability of the criminal aspect of Article 6 to the impugned proceedings, the Court recalls the charges against the applicants for which the maximum penalty was 42 additional days' detention together with the awards actually imposed following adjudication (21, 35 (both Messrs Pewter and Gaskin) and 18 additional days' detention, respectively). It has noted the criteria for the assessment of the applicability of the criminal aspect of Article 6 outlined in *Engel and Others v. the Netherlands* (judgment of 8 June 1976, Series A no. 22, §§ 82-83) and the Court's recent application of those criteria to prison adjudications in the above-cited case of *Ezeh and Connors v. the United Kingdom*, at §§ 82-130). For the reasons outlined in detail in that latter judgment, the Court considers it clear that the charges against the applicants constituted criminal charges within the meaning of Article 6 of the Convention.

40. While the adjudication finding against Mr Clarke was quashed, the Court does not consider that this constitutes an acknowledgment that his adjudication was a breach of the Convention and Mr Clarke had, by then, served five of the 18 additional days awarded. The Government have not referred to any *ex gratia* payment following his request to the Treasury Solicitor in 2000. The Court considers that the applicant can still claim to be a victim of a violation of the Convention (for example, *Wassink v. the Netherlands* judgment of 27 September 1990, Series A no. 185-A, § 38).

41. The Court considers that the applicants' complaints raise questions of law which are sufficiently serious that their determination should depend on an examination of the merits and no other ground for declaring them inadmissible have been established. The Court therefore declares the complaints admissible. In accordance with its decision to apply Article 29 § 3 of the Convention (paragraph 3 above), the Court will immediately consider the merits of this complaint.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

A. Independence, impartiality and fairness (Messrs Whitfield, Pewter and Gaskin)

42. Messrs Whitfield, Pewter and Gaskin challenged, under Article 6 § 1, the independence and impartiality of the adjudicating tribunal (the governor and the controller). Mr Whitfield and Mr Gaskin also considered the proceedings to be unfair, Mr Gaskin making separate submissions in that respect. Mr Pewter suggested that that tribunal was not "established by law". The Government had no comments on these complaints.

43. The Court recalls that in order to establish whether a tribunal can be considered “independent” - notably of the executive and of the parties to the case - regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence. What is at stake is the confidence which such tribunals in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. In deciding whether there is a legitimate reason to fear that a particular court lacked independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified. It is further recalled that there are two aspects to the question of “impartiality”: the tribunal must be subjectively free of personal prejudice or bias and must also be impartial from an objective viewpoint in that it must offer sufficient guarantees to exclude any legitimate doubt in this respect. (*Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, Series A no. 43, § 55; *Campbell and Fell v. the United Kingdom*, cited above, § 78 and *Grievés v. the United Kingdom* [GC], no. 57067/00, § 69, ECHR 2003-XII).

44. The Court notes that the present applicants do not suggest that anyone involved in their adjudications was subjectively biased against him. Since the concepts of structural independence and objective impartiality are closely linked, the Court will consider them together in the present case (§ 69 of the *Grievés* judgment).

45. The Court observes that persons answerable to the Home Office (whether as prison officer, governor or controller in the applicants’ prisons) drafted and laid the charges against the applicants, investigated and prosecuted those charges and determined the applicants’ guilt or innocence together with their sentences. It cannot therefore be said that there was any structural independence between those with the prosecuting and adjudicating roles and the Government did not suggest that there was.

46. Accordingly, the Court considers it evident that the misgivings of Messrs Whitfield, Pewter and Gaskin about the independence and impartiality of their adjudications were objectively justified and, further, that their adjudications were consequently unfair (*Cooper v. the United Kingdom* [GC], no. 48843/99, §§104-105, ECHR 2003-XII, *Grievés v. the United Kingdom* [GC], no. 57067/00, § 91, ECHR 2003-XII (extracts)).

There has therefore been a violation of Article 6 § 1 of the Convention in these respects as regards Messrs Whitfield, Pewter and Gaskin. It is not therefore necessary to consider the additional fairness submissions of Mr Gaskin nor, in the Court’s view, Mr Pewter’s undeveloped submission that the adjudicating body was not “established by law”.

B. Legal representation and Article 6 § 3 (all applicants)

47. All four applicants complained under Article 6 § 3 about the refusal of legal representation, Mr Clarke also pointing to the denial of the opportunity to obtain any legal advice. The Government had no comments.

48. The Court recalls that the Convention requires that a person charged with a criminal offence who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing (the *Campbell and Fell* judgment, cited above, at § 99 and *Pakelli v. Germany*, judgment of 25 April 1983, Series A no. 64, p.15, § 31). The adjudicating body considered that legal representation for each applicant's adjudication hearing was unnecessary and, moreover, that Mr Clarke did not even need to consult his lawyer before his hearing. The Court considers the similarities between the position of the present applicants and that of Messrs *Ezeh* and *Connors* are such that it must conclude, for the reasons developed by the Chamber (at §§ 103-106 of its judgment) and confirmed by the Grand Chamber (at § 134 of its judgment), that the present applicants were denied the right to be legally represented in violation of the guarantee contained in the second limb of Article 6 § 3 (c) of the Convention.

There has therefore been a violation of that provision as regards all four applicants and it is not necessary also to examine this complaint under Article 6 § 3(b) of the Convention.

C. Summary

49. There has therefore been a violation of Article 6 § 1 as regards Messrs Whitfield, Pewter and Gaskin and of Article 6 § 3(c) as regards each applicant.

III. ALLEGED VIOLATION OF ARTICLES 5 and 13 OF THE CONVENTION

50. Messrs Pewter and Clarke also invoked Article 5 §§ 1 and 5 of the Convention. Mr Pewter argued that the Governor did not constitute a "competent court" and sought compensation in respect of the detention imposed by that tribunal. Mr Clarke considered it arbitrary that compensation was available domestically only for detention found to be unlawful *ab initio*, as opposed to lawful detention the order for which was subsequently quashed because of a procedural irregularity. Mr Clarke invoked Article 13 in conjunction with Article 5 of the Convention.

51. The Court notes that Mr Pewter's reference to the "competence" of the adjudicating body relates to the same procedural shortcomings he raised under Article 6 of the Convention. It is, however, recalled that "the question of the procedural protections to be accorded to prison adjudication proceedings is one properly considered under Article 6 and not ... under the

provisions of Article 5 of the Convention” (the above-cited *Ezeh and Connors* judgment, at §§ 124 and 125). The Court has already accepted the domestic law distinction with which Mr Clarke takes issue (*Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports* 1996-III, § 46). There has therefore been no violation of Article 5 § 1 of the Convention. Given this finding and since Article 5 § 5 guarantees an enforceable right to compensation only to those who have been the victims of detention in contravention of the provisions of Article 5, the Court also finds that Article 5 § 5 is not applicable (see, for example, the above-cited *Benham* judgment, at § 50). Finally, and as regards a right to compensation, Article 5 § 5 provides a *lex specialis* in relation to the more general requirements of Article 13 of the Convention.

52. Having regard to the above, the Court finds that there has been no violation of Article 5 §§ 1 and 5 alone or in conjunction with Article 13 of the Convention in respect of either Mr Pewter or Mr Clarke.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. Article 41 of the Convention provides:

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

A. Damage

54. All of the applicants claimed compensation (2500 pounds sterling (GBP), GBP 3500, GBP 4000 and GBP 3000, respectively) for non-pecuniary loss, contending that they had suffered a real loss of opportunity given the nature of the violations and in the light of the particular facts of their cases (*Goddi v. Italy*, judgment of 9 April 1984, Series A no. 76, § 35, *De Cubber v. Belgium* (Article 50), judgment of 14 September 1987, Series A no. 124-B, § 24 and *Delta v. France*, judgment of 19 December 1990, Series A no. 191-A, § 43).

55. In this latter respect, Mr Whitfield referred to the Governor’s reference to his not having raised a certain defence and to his inability to properly cross-examine witnesses. While he accepted that it was not possible to speculate on the outcome of his proceedings had the violations not occurred and that the relevant causal link had not been shown, he nevertheless considered that an award of non-pecuniary damages would be reasonable. Mr Pewter maintained that the facts of his case were of particular severity: it was the last day of his prison sentence; the medical advice differed as to whether he was fit for adjudication following treatment for a severe fall; the lack of independence was of acute importance given that the main evidence against him was from a prison officer; the judicial

review proceedings failed as Article 6 had not yet been incorporated into domestic law; and he could not benefit from a subsequent change in domestic practice as he served his additional days immediately. Mr Gaskin considered that a causal link could be shown between the violation and damage to him: he was 18 years of age at the time, a lawyer would have put the defence of self-defence and the alleged victim did not wish to proceed.

Mr Clarke considered such a causal link to be established in his case: he “was not the only inmate charged with an offence that only one person could have committed”, there was no evidence against him and that the Secretary of State had quashed the adjudication.

56. The Government considered these claims unfounded and relied on the above-cited Grand Chamber judgment in the *Ezeh and Connors* case, in which the Grand Chamber had definitively decided the matter and from which case the present applications were indistinguishable. One could not speculate as to the outcome of the applicants’ adjudications had the established violations not occurred and no causal link had been established between such violations and any damage to the applicants. They invited the Court to conclude that the finding of a violation of Article 6 constituted sufficient just satisfaction. As to Mr Pewter, in particular, the Government maintained that the timing of his adjudication was not relevant, that the circumstances of the adjudication were not aggravating factors and that the fact that the Convention had not been incorporated into domestic law at the time could not form the basis of a claim in just satisfaction.

57. The Court recalls the following extract from the Chamber judgment in the *Ezeh and Connors* case (cited above) which was confirmed by the Grand Chamber (at §140-143 of its judgment cited above):

“112. The Court reiterates that it will not speculate as to what might have occurred had there been no breach of the procedural guarantees of Article 6 of the Convention (see *Benham*, cited above, p. 758, § 68, and *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports* 1997-I, pp. 283-84, §§ 84-88), unless it finds special features in the case amounting to a ‘real loss of opportunity’ (see *Perks and Others*, cited above, §§ 80-81, and *Goddi*, cited above, pp. 13-14, § 35).

113. In *Goddi*, 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 (see paragraph 35 of that judgment). In *Perks and Others*, the Court saw no reason to disregard the Government’s concession that the situation of Mr Perks was exceptional given that the appellate 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 damage 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 and Others*, as to the outcome of their proceedings before the Magistrates’ Courts, and found that the finding of a violation constituted sufficient just satisfaction.

58. Messrs *Ezeh and Connors*' adjudications were defended and concerned the assessment of conflicting evidence and the examination of witnesses. However, the Chamber (at § 115) and Grand Chamber (at § 143) considered, despite detailed submissions by the applicants to the contrary, that there was no basis to speculate on the outcome of the adjudication proceedings had the applicants been legally represented and that there was no factor justifying a departure from the Court's approach in the *Benham* case outlined in the above extract.

59. In the cases of Messrs Whitfield, Pewter and Gaskin, the Court finds that there is similarly no basis to speculate as to the outcome of their adjudication proceedings and, in particular, finds that none of the factors outlined by those applicants could justify a departure from the Court's approach in *Benham*. The Court therefore considers that the finding of a violation of Article 6 §§ 1 and 3 (c) constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by these applicants.

60. However, as well as being denied representation during the hearing, Mr Clarke was not allowed to consult his lawyer prior thereto (paragraph 29 above) and, consequently, the domestic authorities considered that his conviction could not stand. In the particular circumstances of this concession by the domestic authorities, the Court would make an award in respect of non-pecuniary damage suffered by Mr Clarke (see the above-cited *Perks* judgment at §§ 80-81) and it awards the applicant's estate EUR 3000 in compensation for non-pecuniary damage suffered by the applicant, to be converted into pounds sterling on the date of settlement.

B. Legal costs and expenses

61. All applicants claimed reimbursement of the legal costs and expenses of their applications before the Court.

62. Mr Whitfield claimed (inclusive of VAT) GBP 2731.88 in solicitors' costs (7½ hours work at GBP 120 per hour and 9½ hours work at GBP 150 per hour) and GBP 1515.75 in Counsel's fees (11 hours at GBP 90 per hour and 2 hours at GBP 150 per hour). The Government considered the rates of the solicitors and Counsel to be excessive.

Mr Pewter noted that his case began before the *Ezeh and Connors* judgments had been delivered and thus required significant research and that his application had been pursued without counsel. He claimed (inclusive of VAT) GBP 4367.55 in solicitors' costs (essentially 13 hours work at GBP 240 per hour). That rate was an average for work carried out in 2001-2004: his solicitor had been allowed (on taxation) a rate of GBP 263 per hour for judicial review work in 2003. The Government argued that a rate of GBP 150 would be reasonable, noting that this Court was not bound by domestic scales and practices.

Mr Gaskin claimed (inclusive of VAT) GBP 1880.00 in solicitors' costs (comprising mainly 8½ hours at GBP 100 per hour) and GBP 793.13 in

Counsel's fees (4½ hours at GBP 100 per hour and 1½ hours at GBP 150 per hour). The Government considered these hourly rates excessive. Mr Clarke also claimed (inclusive of VAT) GBP 1131.76 as regards his solicitors' costs and GBP 484.69 as regards Counsel's fees. The Government felt unable to comment given the absence of supporting certificates.

63. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and were reasonable as to quantum (*Witold Litwa v. Poland*, no. 26629/95, § 88, ECHR 2000-III).

64. The present applications give rise to essentially the same Convention issues. While they were introduced prior to the *Ezeh and Connors* case was declared admissible (January 2001), once the Grand Chamber had delivered its judgment in that case (cited above), the admissibility and merits of the present applications were subsequently joined (paragraph 3 above). Mr Clarke did not submit any document vouching the legal costs claimed or any detail of the claimed sums: however, the sums requested were very precise and it is clear from the submission to the Court that legal work was necessarily and reasonably undertaken on Mr Clarke's behalf (*Le Petit v. the United Kingdom*, no. 33574/97, §§ 31-32, 15 June 2004).

65. Making its assessment on an equitable basis, the Court considers it reasonable to award each applicant (and in the case of Mr Clarke, his estate) 2500 euros (EUR) inclusive of VAT in legal costs and expenses, to be converted into pounds sterling on the date of settlement.

C. Default interest

66. 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. *Declares* the applications admissible;
2. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention as regards Mr Whitfield, Mr Pewter and Mr Gaskin;
3. *Holds* unanimously that there has been a violation of Article 6 § 3(c) of the Convention as regards each applicant and that it is not necessary also to examine the complaints under Article 6 § 3(b);

4. *Holds* unanimously that there has been no violation of Article 5 alone or in conjunction with Article 13 of the Convention;
5. *Holds* unanimously that these findings of violations in themselves constitute sufficient just satisfaction in respect of Mr Whitfield, Mr Pewter and Mr Gaskin;
6. *Holds* unanimously
 - (a) that 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 sums to be converted into pounds sterling on the date of settlement:
 - to Mr Clarke's estate, EUR 3000 (three thousand euros) in compensation for any non-pecuniary damage suffered; and
 - to each applicant (and in Mr Clarke's case, to his estate) EUR 2500 (two thousand five hundred euros) in respect of costs and expenses, inclusive of any VAT that may be chargeable;
 - (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;
7. *Dismisses* unanimously the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 12 April 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Josep CASADEVALL
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) separate opinion of Judge Pellonpää;
- (b) separate opinion of Judge Maruste.

J.C.M.
M.O'B.

SEPARATE OPINION OF JUDGE PELLONPÄÄ

I voted against the finding of a violation in the case of *Ezeh and Connors v. the United Kingdom* ([GC], nos. 39665/98 and 40086/98, § 34, ECHR 2003-X), explaining my reasoning in a dissenting opinion. While I have not fundamentally changed my view, I feel bound by the precedent established by that Grand Chamber judgment and therefore have voted for a violation in the present case. I also agreed that there was no violation of Article 5 of the Convention. In addition to paragraphs 50-52 of the judgment in the present case, I would refer to paragraph 122 of the above-cited *Ezeh and Connors* judgment, according to which “[t]he legal basis for detention during those additional days continued... to be the original conviction and sentence”. I take this to mean that the original conviction and sentence satisfied the requirement of Article 5(1) (a) that the deprivation of liberty results from “conviction by a competent court” and I could accept the finding of no violation of Article 5 also on this basis.

SEPARATE OPINION OF JUDGE MARUSTE

Feeling bound by the judgment of the Grand Chamber in the case of *Ezeh and Connors v. the United Kingdom* ([GC], nos. 39665/98 and 40086/98, § 34, ECHR 2003-X), I voted in favour of a violation in the present case. However, I remain in disagreement with the principal approach adopted by the Grand Chamber for the reasons set forth in the joint dissenting opinion in that case of Judge Zupančič and myself.