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

FOURTH SECTION

CASE OF KOLANIS v. THE UNITED KINGDOM

(Application no. 517/02)

JUDGMENT

STRASBOURG

21 June 2005

FINAL

21/09/2005

In the case of Kolanis 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. PAVLOVSCHI,
Mr J. BORREGO BORREGO,
Mr J. ŠIKUTA, *judges*,
and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having deliberated in private on 31 May 2005,

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

PROCEDURE

1. The case originated in an application (no. 517/02) 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 a United Kingdom national, Ms Maria Kolanis ("the applicant"), on 6 December 2001.

2. The applicant was represented by Bishop & Light, solicitors practising in Hove. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, of the Foreign and Commonwealth Office.3. The applicant alleged that her continued detention after the Mental Health Review Tribunal had directed her release subject to conditions was no longer justified and was without appropriate procedural safeguards. She relied on Article 5 §§ 1, 4 and 5, and Article 13 of the Convention.

4. The application was allocated to the Fourth 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.

5. By a decision of 4 May 2004, the Chamber declared the application admissible.

6. The applicant 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*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1972 and lives in London.

8. On 2 February 1998 the applicant was convicted of causing grievous bodily harm with intent. She was found to be suffering from a mental illness. She was detained in hospital pursuant to sections 37 and 41 of the Mental Health Act 1983 ("the 1983 Act"). She applied to a Mental Health Review Tribunal ("MHRT") for her discharge from detention in hospital.

1. The first review by a Mental Health Review Tribunal

9. On 24 May 1999 the MHRT first considered her application. It adjourned in order, *inter alia*, to obtain a psychiatric report from a Dr Hamilton which was to address the eligibility of the applicant for a conditional discharge from hospital.

10. On 16 August 1999 the MHRT resumed its hearing of the applicant's application. It had before it the report of Dr Hamilton, which expressed the view that the applicant was not ready for discharge. Furthermore, the psychiatrist in charge of the applicant's care, Dr O'Grady, and a social worker gave evidence to the MHRT stating that they were opposed to the applicant's discharge. They proposed that the applicant should instead be transferred to hostel-type accommodation, under the care of a supervising consultant psychiatrist.

11. The MHRT nevertheless concluded that the applicant should be conditionally discharged. The conditions were that the applicant should reside at the home of her parents, that she should cooperate with supervision by a social worker and a forensic consultant psychiatrist, and that she should comply with such treatment as might be prescribed for her.

12. In coming to its decision, the MHRT answered the three questions below as follows:

A. Is the Tribunal satisfied that the patient is not now suffering from mental illness, psychopathic disorder, severe mental impairment, or mental impairment or from any of those forms of disorder of a nature or degree which makes it appropriate for the patient to be liable to be detained in a hospital for medical treatment?	YES
B. Is the Tribunal satisfied that it is not necessary for the health or safety of the patient or for the protection of other persons that the patient should receive such treatment?	YES
C. Is the Tribunal satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment?	NO

The MHRT expressed the following as a part of its reasoning:

> "The Tribunal is satisfied ... that the patient is now suffering from mental illness, namely schizophrenia, the symptoms of which are being fully controlled by medication and that she needs ongoing treatment and medication in order to control her illness.
>
> The patient ... has been symptom-free for at least the last 8 to 12 months.
>
> ...
>
> ... in view of the possibility of a relapse, she should remain liable to be recalled to hospital for further treatment."

13. The MHRT deferred the discharge of the applicant until satisfactory arrangements had been made to meet the conditions it had imposed.

2. Attempts to fulfil the conditions imposed by the MHRT

14. On 30 September 1999 the psychiatrist responsible for supervising the applicant in the community, Dr Kennedy, saw her with two members of his team. He concluded that he was not prepared to supervise her if she were at home but only if she were in supported accommodation. He described his consultation with the applicant in a letter to Dr O'Grady, dated 6 October 1999, in which he wrote, *inter alia*:

> "I made it clear that I would not consider it safe to supervise [the applicant] if she were to go straight home to the care of her parents, as there are important areas of her treatment in which she has not yet made sufficient progress for anyone to be confident that she would not relapse and reoffend while there."

15. Dr Kennedy made clear that he was in no doubt that the next stage in the applicant's treatment, rehabilitation and risk management should take place near her family, but in a medium-security unit or at a registered mental nursing home. Alternatively, he suggested asking one of his colleagues, or one of the general psychiatrists at St Anne's Hospital, whether they would be willing to supervise the applicant on conditional discharge to her parents' home.

16. On 11 October 1999 Dr O'Grady wrote to the MHRT. He stated that the purpose of his letter was to give the MHRT advance notice that his team was unable to meet the conditions set by the tribunal for the conditional discharge of the applicant. He explained that both Dr Hamilton and Dr Kennedy were agreed that it would be difficult to manage her should she be discharged directly to her parents' home. He continued:

> "In the circumstances, I believe it is highly unlikely that there will be another forensic psychiatrist willing to provide the supervision that is necessary to meet the conditions of the tribunal ... We continue to hold the view that it is not in her best interests to be discharged directly to her family but [that she] should go through a further period of rehabilitation in the community to prepare her fully for community living."

17. On 19 October 1999 Dr O'Grady again wrote to the MHRT informing it that he would write to the other consultant forensic psychiatrists in the North London Forensic Service ("the NLFS") to enquire whether they would be prepared to supervise the applicant under the conditions laid down by the tribunal. As it transpired, none of those psychiatrists was prepared to do so.

18. On 15 November 1999 the health authority responsible for the area in which the applicant lived ("the health authority") requested the director of the NLFS to approach forensic colleagues working in the private sector to establish whether they might be willing to offer supervision.

19. On 2 December 1999 the NLFS informed the health authority that the applicant's new responsible medical officer, Dr Duffield, was not satisfied that the applicant should return home. However, he had agreed to approach all local catchment area forensic consultant psychiatrists to determine whether they would be willing to provide after-care supervision for the applicant were she to be discharged to her parents' home.

20. On 15 December 1999 the NLFS wrote to the health authority to confirm that no consultant forensic psychiatrist from the NLFS was willing to supervise the applicant in the community. Furthermore, it stated that it was not aware of any individual or organisation that would be suitably equipped to undertake such a task in the community. The letter noted that most private independent sector providers concentrated on acute and in-patient care only.

21. On 17 December 1999 Dr Duffield wrote to the MHRT to advise it that its conditions had not been complied with so far, and the reasons therefor.

22. In December 1999 and January 2000 the health authority wrote to the clinical directors of the forensic psychiatry services in London, Hertfordshire and Essex, identifying nine units in addition to the NLFS. They were asked to discuss the case urgently with their consultant colleagues to establish whether any of them was prepared to assess the applicant with a view to becoming her supervising consultant forensic psychiatrist under the terms laid down by the MHRT. None was willing or able to assist.

23. The health authority subsequently wrote to both national and private institutions in Cambridgeshire and Northamptonshire with the same request. Once again, no one was prepared to comply with the conditions set by the MHRT.

24. The health authority concluded that there were no further steps that it could take.

25. On 3 March 2000 Dr Kennedy wrote to the Home Office, advising it of his opinion that the conditions imposed by the MHRT were impossible to meet. He therefore requested the Home Secretary to consider exercising his

powers under section 71(1) of the 1983 Act to refer the applicant to an MHRT. The Home Secretary complied with that request on 17 March 2000.

3. The applicant's application to the High Court for judicial review

26. On 3 December 1999 the applicant issued proceedings for judicial review of the decision of the health authority not to provide her with psychiatric supervision in the community in implementation of the conditions imposed by the MHRT, which was preventing her discharge from hospital. She sought, *inter alia*, the quashing of that decision and/or an order to compel the health authority to provide her with the psychiatric treatment necessary to implement the conditions imposed by the MHRT.

27. On 18 January 2000 the High Court granted the applicant permission to apply for judicial review. The Secretary of State for Health declined to intervene in the proceedings, but made the following observations:

> "The Mental Health Act provides an established legislative framework in this and similar cases designed to safeguard the interests of patients. As part of this scheme Responsible Medical Officers are accountable in a way which clearly does not permit them to effectively deny the determinations of properly constituted Mental Health Review Tribunals ... It is a matter for the Tribunal whether they decide to order a conditional discharge against the advice of the [Responsible Medical Officer]."

28. On 9 June 2000 the High Court judge (Mr Justice Burton) heard the applicant's substantive application for judicial review. The applicant argued that she was entitled to be discharged from hospital; that the health authority was in breach of its duty under section 117 of the 1983 Act for failing to provide her with the necessary services to comply with the conditions of the MHRT; and that the failure to comply with those conditions within a reasonable period of time was in breach of Article 5 of the Convention.

29. The judge rejected the applicant's application. He held that, under section 117 of the 1983 Act, the health authority was not under an absolute duty to implement the conditions of the MHRT, but only a duty to take all reasonable steps to attempt to satisfy those conditions. The judge further held that, on the facts, the health authority had complied with that duty. He further rejected the applicant's suggestion that any of the psychiatric consultants had "thwarted" the conclusions of the MHRT, holding that doctors were both entitled and obliged to exercise their own professional judgment.

4. The second review by a Mental Health Review Tribunal

30. On 24 August 2000, following the reference by the Home Secretary on 17 March 2000 (see paragraph 25 above), a differently constituted MHRT considered the applicant's case afresh. It concluded that the applicant should be conditionally discharged. The conditions were that the applicant should reside in accommodation approved by her responsible medical officer, that she accept to be supervised and take the medication

prescribed by the latter, and that she accept to be supervised by her social supervisor.

31. The MHRT gave the same answers as the first MHRT to the questions set out in paragraph 12 above. It also deferred the discharge of the applicant until satisfactory arrangements had been made to meet the conditions it had imposed. It further expressed the following as part of its reasoning:

> "... we consider that it is appropriate that [the applicant] should remain liable to recall to hospital. The critical issue, we feel, is that Miss Kolanis's current good mental health is dependent, in our view, upon her continuing to receive her medication.
>
> Our hope and expectation is that the condition as to residence which we have imposed will be capable of being complied with within a relatively short period. We consider that, bearing in mind that Miss Kolanis had a legitimate expectation a year ago of being released into the community almost at once, her [Responsible Medical Officer] and the other responsible authorities should treat the finding of suitable accommodation for her as urgent. Having seen Miss Kolanis, it is clear to us that she is a very personable woman and we find it difficult to conceive of any responsible body having any legitimate objection to accommodating her."

32. On 23 December 2000 the applicant was conditionally discharged from hospital to a resettlement project hostel in London.

5. The applicant's appeal

33. Subsequently, the Court of Appeal granted the applicant permission to appeal against the judgment of the High Court of 9 June 2000 in her judicial review proceedings. It recognised that, in the light of the applicant's conditional discharge, which had occurred subsequent to the judgment of the High Court, the issues raised on appeal were, in one sense, academic. However, permission to appeal was granted as a result of the importance of the issues raised.

34. On 21 February 2001 the Court of Appeal dismissed the applicant's appeal. It agreed with the interpretation of section 117 of the 1983 Act that had been the basis of the decision of the High Court judge (see paragraph 29 above).

35. In paragraph 16 of his judgment, Lord Phillips set out the effect of an earlier judgment of the House of Lords in *R. v. Oxford Regional Mental Health Review Tribunal, ex parte Secretary of State for the Home Department* [1987] 3 All England Law Reports 8 ("*Oxford*") as follows:

> "Should, for any reason, it prove impossible to implement the conditions specified by a Tribunal, that Tribunal could not consider whether to impose alternative conditions or even to direct discharge of the patient without conditions. In such circumstances the patient would remain detained unless and until a fresh reference was made to a Tribunal. The patient was not entitled himself to initiate a reference for twelve months. The Secretary of State was under no similar restriction, but in practice a considerable length of time would be likely to elapse before the matter came back

before the Tribunal pursuant to a reference by the Secretary of State. The implications of this state of affairs were considered by the European Court of Human Rights in *Johnson v. the United Kingdom* ...”

At the time at which the facts in the present case arose, no separate relief was available to the applicant under the Human Rights Act 1998 (which incorporated the Convention directly into domestic law). Nevertheless, Lord Phillips proceeded on the basis that, where there was no conflict with precedent, the correct approach had always been to interpret legislation in a manner that was consistent with the Convention. He therefore addressed the human rights issues in the case as follows:

“32. Does the legislative scheme, as interpreted in [*Oxford*], violate the right to liberty conferred by Article 5 of the [Convention]? In considering this question it is necessary to distinguish between two different situations. The first is a case, such as the present, where the Tribunal concludes that the patient is mentally ill and requires treatment, but that under appropriate conditions such treatment can be provided in the community. The second is where, as in the case of *Johnson*, the Tribunal finds that the patient is no longer suffering from mental illness, is not in need of treatment but needs to be discharged into a controlled environment in order to reduce the stress involved, to make sure that the patient is indeed free of the illness and to reduce the risk that the illness may recur.

33. Where (i) a patient is suffering from mental illness and (ii) treatment of that illness is necessary in the interests of the patient's own health or for the protection of others and (iii) it proves impossible or impractical to arrange for the patient to receive the necessary treatment in the community, it seems to me that the three criteria identified by the European Court in *Winterwerp* are made out. Whether or not it is necessary to detain a patient in hospital for treatment may well depend upon the level of facilities available for treatment within the community. Neither Article 5 nor Strasbourg jurisprudence lays down any criteria as to the extent to which member States must provide facilities for the care of those of unsound mind in the community, thereby avoiding the necessity for them to be detained for treatment in hospital.

34. If a health authority is unable, despite the exercise of all reasonable endeavours, to procure for a patient the level of care and treatment in the community that a Tribunal considers to be a prerequisite to the discharge of the patient from hospital, I do not consider that the continued detention of the patient in hospital will violate the right to liberty conferred by Article 5.

35. Very different considerations apply to a factual situation such as that considered by the Strasbourg Court in *Johnson*. Where a patient has been cured of mental illness, he is no longer of unsound mind and the exception to the right to liberty provided for by Article 5 § 1 (e) does not apply. In *Johnson* the Court has recognised that, in such circumstances, it may nonetheless be legitimate to make discharge of the patient conditional rather than absolute and to defer, to some extent, the discharge to which the patient is entitled. The deferral must, however, be proportionate to its object and cannot become indefinite. The decision in *Johnson* suggests that the statutory regime as interpreted in [*Oxford*], may not be consistent with Article 5. If the Tribunal imposes a condition which proves impossible of performance, too lengthy a period may elapse before the position is reconsidered as a result of a subsequent referral.

36. The solution to the problem is not to interpret section 117 in such a way as to impose on health authorities an absolute obligation to satisfy conditions imposed by Tribunals. I do not consider it appropriate in this case to attempt to provide a definitive answer to the problem. I would simply observe that the solution may well involve reconsidering the decision of the House of Lords in [*Oxford*]. ...”

36. During the course of his judgment, Lord Justice Buxton opined as follows:

“39. The effect of Article 5 § 4 of the [Convention] is to entitle a person in the situation of [the applicant] to have the lawfulness of her detention decided by a body, within the system of the State that is detaining her, that has appropriate court-like characteristics. In the case of the United Kingdom, that court-like function is performed by the Mental Health Review Tribunal (MHRT). One necessary characteristic of such a body, if it is to meet the requirements of Article 5 § 4, is that its orders should be effective in securing the release of persons whose detention it rules to be unlawful: see ... *X v. the United Kingdom*[judgment of 5 November 1981, Series A no. 46] ...

40. In the present case, the MHRT concluded that the detention of [the applicant] would be unlawful once the conditions upon which her release was contingent were put in place. Those conditions, in particular, included cooperation by [the applicant] with supervision by a forensic consultant psychiatrist; and therefore, by necessary implication, provision of such supervision by the appropriate organ of the State. If that order were to be effective, as Article 5 § 4 requires, such supervision had to be provided.

41. *Johnson* ..., paragraphs 66 and 67, seems to me to make clear, in accordance with that requirement of effectiveness, that a breach of Article 5 § 1 is committed by the State if, once the MHRT has determined that a patient should be released, it imposes conditions to facilitate that release that in the event are not fulfilled, at least if the non-fulfilment can be attributed to another organ of the State.

42. In applying that part of the Court's jurisprudence, I would not make the distinction drawn by [Lord Phillips], in paragraph 32 of his judgment, and based on the approach of the Strasbourg Court in *Winterwerp*, between cases where the MHRT concludes that the patient is mentally ill, but can be treated in the community, and cases (such as *Johnson* itself) where the MHRT finds that the patient is no longer suffering from mental illness but nonetheless needs to be released into a controlled environment. In the latter case, the justification for the placing of continued restrictions on the subject relates, and can only relate, to the history of mental illness and, as in *Johnson*, to the prospect of recurrence. In both cases, there is continued detention; the role of the MHRT in both cases is to exercise the court-like functions required by Article 5 § 4, and under the jurisprudence of Article 5 § 4 the national authorities are equally bound to respect and act on the determination of the MHRT in either case.

43. There is also a practical difficulty in applying the *Winterwerp* criterion of whether the mental disorder is 'of a kind or degree warranting compulsory confinement' to decisions that were not taken with that formulation expressly in mind. In [the applicant's] case, the MHRT answered 'Yes' to the question: 'Is the Tribunal satisfied that the patient is not now suffering from mental illness ... of a nature or degree which makes it appropriate for the patient to be liable to be detained in a

hospital for medical treatment?', but in their extended reasoning made it clear that any discharge must be subject to the provision of continuing treatment. That is not a clear-cut decision of the type that *Winterwerp* seems to assume.

44. However that may be, under the [Convention] jurisprudence ... once the MHRT made a decision as to [the applicant's] release that was contingent on the provision of forensic psychiatric supervision, it became the responsibility of the State to provide that supervision. Otherwise, if nothing was done, the situation would arise that was identified in paragraph 67 of the judgment in *Johnson*, of indefinite deferral of the release that had been ordered by the MHRT. That deferral would arguably entail a breach of the [Convention]. The issue would depend on whether, once the MHRT had determined that her condition could and should be treated in the community, she was, in terms of the analysis in *Winterwerp*, suffering from a mental disorder of a kind or degree warranting compulsory confinement. I have already indicated the difficulty of this question. We received no submissions upon it, the argument being concentrated in another direction, and I certainly do not decide the issue here.

45. In raising the possibility that [the applicant's] detention became unlawful I have not overlooked [Lord Phillips's] view, set out in paragraph 33 of his judgment, that such a conclusion may be controlled or affected by the availability of treatment facilities in the particular community involved; but what matters in [Convention] terms is the ruling of the MHRT, the determining body created by Article 5 § 4. If the ruling of the MHRT is frustrated, in a case where under the [Convention] jurisprudence the subject should no longer be detained, then the subject is deprived of her Article 5 § 4 protection, as (I think it to be clear) the [Court] would have held in *Johnson* had the issue not been determined already under Article 5 § 1: see paragraphs 69-72 of the judgment.

46. I well accept that this conclusion entails a number of practical difficulties, not least that it might appear to lead to the release of a person who is or has been mentally ill without the support that the MHRT thought necessary for that release. That may appear surprising, not only in common-sense terms, but also in view of the emphasis placed in the jurisprudence of the [Convention] upon the judgment of the national authorities: see for instance the observations of the [Court] in *Luberti v. Italy* [judgment of 23 February 1984, Series A no. 75] at paragraph 27 as to the relevance in this context of the doctrine of the margin of appreciation; and the observations in paragraph 63 of the judgment in *Johnson* as to the respect to be paid to the discretionary judgment of those responsible for dealing with the mentally ill. The problem in this case arises, however, from the rigidity of the required procedure of the MHRT that is identified in paragraphs 16 and 36 of [Lord Phillips's] judgment. If the MHRT indeed had the power to review its decisions in the light of practical circumstances, as was envisaged by Woolf J in [*Oxford*], then difficulties of the present order would not arise; and provided that the national authorities made all reasonable efforts to comply with provisional decisions of the MHRT I very much doubt that any objection to such a procedure would arise under the [Convention]. That, however, is not the present state of domestic law: the decision of the MHRT being once and for all, that is the decision that Article 5 § 4 requires to be respected.

...

48. ... [the applicant] may have a complaint under Article 5 in relation to the whole circumstances that led to her continued detention: including, in particular, that the MHRT having ruled that her continued detention was not justified, the

> implementation by the State of that order in the event caused her to continue to be detained. The State is responsible for the whole of these circumstances. That, presumably, is why the State was found to be in breach in *Johnson* from the original date of the MHRT's decision: see the last sentence of paragraph 67 of the judgment. The circumstances of [the applicant's] case might, therefore, by the same token found a successful complaint in Strasbourg."

37. Lord Justice Sedley, during the course of his judgment, expressed the following view (in paragraphs 55 and 56):

> "... more than one legitimate judgment – that of the community psychiatrist as well as of the MHRT – may have to be accommodated for the purposes of Article 5 § 4, at least to the extent that the decision of the MHRT is explicitly dependent on the collaboration of the psychiatrist.
>
> ... I am rather less positive than Buxton LJ in looking to Strasbourg to afford [the applicant] a remedy that cannot be afforded here. It seems to me ... that the legislative scheme, while not always satisfactory in practice, is Convention-compliant in principle."

38. On 3 July 2001 the House of Lords refused the applicant's petition of appeal against the judgment of the Court of Appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Mental disorder

39. Section 1(2) of the Mental Health Act 1983 ("the 1983 Act") defines "mental disorder" as "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind".

B. Hospital orders

40. Section 37 of the 1983 Act empowers a court to order a person, on being convicted of a criminal offence punishable with imprisonment, to be admitted to and detained in a specified hospital ("a hospital order").

41. The court can only make a hospital order if it is satisfied on the written or oral evidence of two registered medical practitioners that the offender is suffering from mental disorder (see paragraph 39 above) and that

> "the mental disorder ... is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and, in the case of psychopathic disorder or mental impairment, that such treatment is likely to alleviate or prevent a deterioration in his condition" (section 37(2)(a)(i))

and

> "the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the

other available methods of dealing with him, that the most suitable method of disposing of the case is by means of a [hospital order]" (section 37(2)(b).

42. Under section 37(7), a hospital order must specify the form or forms of mental disorder from which the offender is suffering, as confirmed by the evidence of two practitioners.

C. Restriction orders

43. Under section 41(1) of the 1983 Act, where a hospital order is made by the Crown Court, and it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm to do so, the court may further order that the offender shall be subject to certain specified restrictions, detailed in section 41 of the Act. Such an order is called a "restriction order" and may be made either without limit of time or for the period specified in the order.

D. Applications to a Mental Health Review Tribunal

44. The purpose of an MHRT is to deal with applications and references by and in respect of patients under the provisions of the 1983 Act (section 65(1)).

45. Under section 70 of the 1983 Act, a person who is subject to a hospital order and a restriction order ("a restricted patient") may apply to an MHRT for a review of his or her detention in hospital:

(i) initially after a period of between six and twelve months' detention;

(ii) thereafter, annually.

46. Under section 71(1) of the 1983 Act, the Secretary of State may at any time refer the case of a restricted patient to an MHRT. This power is discretionary. The Secretary of State therefore cannot be compelled by a patient to exercise it.

E. Absolute discharge

47. Under section 73(1) and (2), read in conjunction with section 72(1), of the 1983 Act (as they were at the time when the facts giving rise to the applicant's case occurred, the sections having subsequently been amended), where an application was made to an MHRT by a restricted patient or where his case was referred to it by the Secretary of State, the MHRT was required to direct the absolute discharge of the patient if it was satisfied:

(a) (i) that the patient was not then suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder of a nature or degree which made it

appropriate for the patient to be liable to be detained in a hospital for medical treatment; or

(ii) that it was not necessary for the health or safety of the patient or for the protection of other persons that the patient should receive such treatment (section 73(1) of the 1983 Act); and

(b) that it was not appropriate for the patient to remain liable to be recalled to hospital for further treatment (section 73(2) of the 1983 Act).

48. Pursuant to section 73(3), upon an absolute discharge, the patient ceases to be liable to be detained by virtue of the hospital order and the restriction order ceases to have effect.

F. Conditional discharge

49. Under section 73(2) of the 1983 Act, where an MHRT is satisfied as to either of the matters referred to in (a), but not as to the matter referred to in (b) in paragraph 47 above, it is required to direct the conditional discharge of the patient.

50. Lady Justice Butler-Sloss, giving judgment in *R. v. Merseyside Mental Health Review Tribunal, ex parte K.* [1990] 1 All England Law Reports 699-700, explained the nature of this power as follows:

> "Section 73 gives to the tribunal the power to impose a conditional discharge and retain residual control over patients not then suffering from mental disorder or not to a degree requiring continued detention in hospital. This would appear to be a provision designed both for the support of the patient in the community and the protection of the public, and it is an important discretionary power vested in an independent tribunal, one not lightly to be set aside in the absence of clear words."

51. By virtue of section 73(4) of the 1983 Act, a patient who has been conditionally discharged may be recalled by the Secretary of State. In addition, that patient must comply with the conditions attached to the discharge. In contrast to a patient who has been absolutely discharged, a conditionally discharged patient does not cease to be liable to be detained by virtue of the relevant hospital order.

52. Under section 73(7) of the 1983 Act, an MHRT can defer a direction for the conditional discharge of a restricted patient until such arrangements as appear to be necessary for the purpose of discharge have been made to its satisfaction.

53. As set out above, in the applicant's domestic case in the Court of Appeal (*R. (K.) v. Camden and Islington Health Authority* [2001] England and Wales Court of Appeal (Civil Division) 240), Lord Phillips considered the effect of the House of Lords' decision in *Oxford*. He concluded that if it proved impossible to implement the conditions specified by an MHRT, the patient would remain detained unless and until a fresh reference were made to an MHRT. The original MHRT that imposed the conditions did not have any power to reconsider its decision.

54. A patient's case can therefore only be reconsidered by a differently constituted MHRT. In those circumstances the case must be considered afresh.

55. The Secretary of State may also order a patient's conditional or absolute discharge under section 42 of the 1983 Act.

G. After-care services for patients who are discharged from hospital

56. Section 117(2) of the 1983 Act reads as follows:

> "It shall be the duty of the health authority and of the local social services authority to provide, in cooperation with relevant voluntary agencies, after-care services for any person to whom this section applies ..."

57. As set out above, the Court of Appeal in the applicant's domestic case (cited above) held that the duty imposed by section 117(2) was not absolute. It was a duty to take all reasonable steps to attempt to satisfy the conditions imposed by the MHRT.

H. Case-law subsequent to the judgment in the applicant's case

58. In *R. (I.H.) v. Secretary of State for the Home Department and Another* [2002] England and Wales Court of Appeal (Civil Division) 646, decided on 15 May 2002, the Court of Appeal considered the question of whether sections 73(2) and/or 73(7) of the 1983 Act were incompatible with Article 5 §§ 1 (e) and/or 4 of the Convention in that MHRTs lacked the power to guarantee that conditions they might attach to a deferred order for conditional discharge would be implemented within a reasonable period of time. The case, similarly to that of the applicant, involved a patient who was suffering from a mental illness, but one which was in remission. It was decided subsequently to the applicant's domestic case and was brought under the Human Rights Act 1998. It therefore took into account the judgments in the applicant's domestic proceedings, the Convention and Strasbourg jurisprudence.

59. In paragraph 53 of his judgment, Lord Phillips confirmed that the decision of the House of Lords in *Oxford* made clear that an MHRT was neither obliged nor entitled to reconsider its earlier decision in respect of a conditional discharge in order to accommodate any new facts that might cause it to alter that decision.

Lord Phillips continued, in paragraph 54:

> "... the decision in [*Oxford*] is in potential conflict with the requirements of Article5 § 4. If, having made a decision that a patient is entitled to a conditional discharge, subject to specific conditions which necessitate deferral of the discharge, the Tribunal cannot revisit its decision, the patient is liable to find himself 'in limbo' should it prove impossible to put in place the arrangements necessary to enable him to comply with the proposed conditions. That period 'in limbo' may last too long to be compatible

with Article 5 § 4 and may result in the patient being detained in violation of Article 5 § 1."

Lord Phillips therefore determined that the decision in *Oxford* needed to be reviewed in the light of the requirements of Article 5 of the Convention. He concluded, in paragraph 71:

"Tribunals should no longer proceed on the basis that they cannot reconsider a decision to direct a conditional discharge on specified conditions where, after deferral and before directing discharge, there is a material change of circumstances. ... The original decision should be treated as a provisional decision, and the Tribunal should monitor progress towards implementing it so as to ensure that the patient is not left 'in limbo' for an unreasonable length of time."

Lord Phillips then gave guidelines to MHRTs considering the discharge of a patient. The guidelines comprised specific steps that could be taken by an MHRT should problems arise with making arrangements to meet the conditions of a conditional discharge. Those steps included the possibility of deferring for a further period, varying the proposed conditions to seek to overcome the difficulties, ordering a conditional discharge without specific conditions or deciding that the patient had to remain detained in hospital for treatment. The Court of Appeal concluded (in paragraphs 96-98) that such a scheme, proposed in the light of its review of the decision of the House of Lords in *Oxford*, would be compatible with Article 5 § 1 of the Convention.

60. Following an appeal to the House of Lords, on 13 November 2003, Lord Bingham, in his judgment with which the other members of the House of Lords agreed, held:

"18. The key to a correct understanding of *Johnson* is to appreciate the nature of the case with which the Court was dealing. It was that of a patient who, from June 1989 onwards, was found not to be suffering from mental illness and whose condition did not warrant detention in hospital. The Court's reasoning is not applicable to any other case.

...

26. I do not accept that, because the tribunal lacked the power to secure compliance with its conditions, it lacked the coercive power which is one of the essential attributes of a court. What Article 5 §§ 1 (e) and 4 require is that a person of unsound mind compulsorily detained in hospital should have access to a court with power to decide whether the detention is lawful and, if not, to order his release. This power the tribunal had. Nothing in Article 5 suggests that discharge subject to conditions is impermissible in principle, and nothing in the Convention jurisprudence suggests that the power to discharge conditionally (whether there are specific conditions or a mere liability to recall), properly used, should be viewed with disfavour. Indeed, the conditional discharge regime, properly used, is of great benefit to patients and the public, and conducive to the Convention object of restricting the curtailment of personal liberty to the maximum, because it enables tribunals to ensure that restricted patients compulsorily detained in hospital represent the hard core of those who suffer from mental illness, are a risk to themselves or others and cannot be effectively treated and supervised other than in hospital. If there is any possibility of treating and

supervising a patient in the community, the imposition of conditions permit that possibility to be explored and, it may be, tried.

27. When, following the tribunal's order of 3 February 2000, it proved impossible to secure compliance with the conditions within a matter of a few months, a violation of the appellant's Article 5 § 4 right did occur. It occurred because the tribunal, having made its order, was precluded by the authority of the *Oxford* case from reconsidering it. The result was to leave the appellant in limbo for a much longer period than was acceptable or compatible with the Convention. I would accordingly endorse the Court of Appeal's decision to set aside the *Oxford* ruling and I would adopt the ruling it gave in paragraph 71 of its judgment quoted above. Evidence before the House shows that that ruling is already yielding significant practical benefits. ...

28. There was no time between 3 February 2000 and 25 March 2002 when the appellant was, in my opinion, unlawfully detained, and there was thus no breach of Article 5 § 1 (e). There is a categorical difference, not a difference of degree, between this case and that of *Johnson*. Mr Johnson was a patient in whose case the *Winterwerp* criteria were found not to be satisfied from June 1989 onwards. While, therefore, it was reasonable to try and ease the patient's reintegration into the community by the imposition of conditions, the alternative, if those conditions proved impossible to meet, was not continued detention but discharge, either absolutely or subject only to a condition of liability to recall. His detention became unlawful shortly after June 1989 because there were, as all the doctors agreed, no grounds for continuing to detain him. The present case is quite different. There was never a medical consensus, nor did the tribunal find, that the *Winterwerp* criteria were not satisfied. The tribunal considered that the appellant could be satisfactorily treated and supervised in the community if its conditions were met, as it expected, but the alternative, if these conditions proved impossible to meet, was not discharge, either absolutely or subject only to a condition of recall, but continued detention. ...

29. The duty of the health authority, whether under section 117 of the 1983 Act or in response to the tribunal's order of 3 February 2000, was to use its best endeavours to procure compliance with the conditions laid down by the tribunal. This it did. It was not subject to an absolute obligation to procure compliance and was not at fault in failing to do so. It had no power to require any psychiatrist to act in a way which conflicted with the conscientious professional judgment of that psychiatrist. Thus the appellant can base no claim on the fact that the tribunal's conditions were not met. ...

30. I do not consider that the violation of Article 5 § 4 which I have found calls for an award of compensation since (a) the violation has been publicly acknowledged and the appellant's right thereby vindicated, (b) the law has been amended in a way which should prevent similar violations in future, and (c) the appellant has not been the victim of unlawful detention, which Article 5 is intended to avoid.

For these reasons ... I would dismiss this appeal."

THE LAW

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

61. Article 5 § 1 of the Convention provides:

> "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:
>
> ...
>
> (e) the lawful detention ... of persons of unsound mind ..."

A. The parties' submissions

1. The applicant

62. The applicant considered that she was materially in the same position as in *Johnson v. the United Kingdom* (judgment of 24 October 1997, *Reports of Judgments and Decisions* 1997-VII) in that her release had been unjustifiably delayed. She did not accept that there was a distinction between patients who were absolutely entitled to discharge and patients who the MHRT found did not require further detention in hospital for treatment as long as services were provided to them in the community. The second category should not be treated as not enjoying a right to liberty under Article 5 § 1 as they no longer suffered a mental disorder of a kind or degree warranting their compulsory confinement within the meaning of *Winterwerp v. the Netherlands* (judgment of 24 October 1979, Series A no. 33). The applicant adopted the analysis of Lord Justices Buxton and Sedley in this case in the Court of Appeal.

63. Once the MHRT had held that a patient fulfilled the criteria for discharge, then the *Winterwerp* criteria for detention were no longer fulfilled and there was a breach of Article 5 § 1 if they were detained longer than reasonably necessary after that finding. The availability of resources to enable such a patient to continue in the community without manifestation of mental disorder requiring detention would be relevant to the period of time for which his discharge might reasonably be delayed but not to the entitlement to discharge itself. Where resources were available but not deployed because of a disagreement with the decision of the tribunal, as in this case, then there would be a breach of the patient's right under Article 5 § 1 as she would be deprived of the benefit of its direction for her discharge. It was impermissible in the applicant's view for a psychiatrist or health body

to act so as to undermine the effectiveness of the determination of the MHRT as to the legality of a patient's detention.

64. The applicant disputed that a margin of appreciation applied to the statutory scheme governing the detention of mental health patients, submitting that the right concerned was one of the most fundamental and the modification necessary to remove the breach was not so great as to justify continuing deprivation of liberty of patients who no longer fulfilled the *Winterwerp* criteria. The margin might apply to the time by which services had to be put in place to enable a discharge to take effect but not to the question whether the patient was discharged at all.

2. The Government

65. The Government submitted that the three criteria set out in *Winterwerp* for the detention of a person on mental health grounds were met in the applicant's case. She was still suffering from a mental disorder, namely schizophrenia, and needed ongoing treatment and medication to control her illness. It was appropriate for her to be liable to be recalled for further treatment and that certain conditions be attached to any discharge, in particular that she should be subject to supervision by a consultant forensic psychiatrist. The tribunal's decision was that she should only be discharged if those conditions were met. The Government argued that it was wrong to assume that, when a tribunal ordered a conditional discharge, this meant that the nature of the disorder no longer warranted hospital confinement (the second *Winterwerp* criterion). They distinguished conditions precedent, namely those conditions, such as those relating to psychiatric supervision, where if the conditions were not met the patient's condition warranted continued detention, from other conditions, which although desirable were not essential to the decision to discharge or which only applied after discharge, as in *Johnson* (cited above).

66. The Government further submitted that there was no requirement in the Convention that authorities had to be able to enforce the terms of a conditional discharge whether by compelling a third party to act or by the provision of a particular level of resources. The way in which the authorities should deal with an "impasse" had now been considered by the Court of Appeal and House of Lords in *I.H.* (see paragraphs 58-60 above) and they had issued guidelines permitting tribunals to monitor and reconsider decisions. In the Government's view, Contracting States also had a margin of appreciation in deciding what resources to provide in order to meet various social policy objectives. There was no unrestricted obligation to provide any resources which would allow the patient to be discharged. That did not mean that the decision on detention rested solely upon economic grounds but that the provision of resources in the community had to be taken into account in deciding whether the second *Winterwerp* criterion had been met.

B. The Court's assessment

67. Detention of a person as being of unsound mind depends, in Convention terms, on the *Winterwerp* criteria, namely:

(i) the patient must be reliably shown upon objective medical expertise to be suffering from a true mental disorder;

(ii) the disorder must be of a "kind or degree" warranting compulsory confinement;

(iii) the validity of any continued detention depends upon the persistence of a true mental disorder of a kind or degree warranting compulsory detention, established upon objective medical expertise (see *Winterwerp*, cited above, pp. 17-18, § 39)

68. The applicant's argument is that the MHRT, in ordering her conditional discharge, found that she was entitled to live and be treated in the community and was therefore no longer suffering from a disorder warranting compulsory confinement. She submits that the reasoning in *Johnson* (cited above), where continued detention flowing from a delay in achieving the applicant's conditional discharge was not found to be justified under Article 5 § 1 (e), applies to her case and rendered her continued detention arbitrary and contrary to Article 5.

69. The Court observes, however, that in *Johnson* the MHRT had found that the applicant was no longer suffering from a mental disorder, no longer had the symptoms and did not require any further medication or treatment. In the present case, the domestic courts noted that the applicant was in a different situation – she still continued to suffer from schizophrenia and continued to require treatment (including medication) and medical supervision in order to control her illness.

70. The Court is therefore unable to accept the applicant's contention that the MHRT's decision that she could be discharged subject to conditions was tantamount to a finding that the second *Winterwerp* criterion was no longer fulfilled, with the result that any subsequent undue delay in release was in breach of Article 5 § 1. The formal questions answered by the MHRT are not framed in terms of the *Winterwerp* criteria but make findings relevant to the possibility of conditional, as well as absolute, discharge. As the substance of the reasoning from the MHRT showed, the discharge of the applicant was only regarded as appropriate if there was continued treatment or supervision necessary to protect her own health and the safety of the community. In the absence of that treatment, her detention continued to be necessary in line with the purpose of Article 5 § 1 (e).

71. As events in the present case showed, the treatment considered necessary for such conditional discharge may not prove available, in which circumstances there can be no question of interpreting Article 5 § 1 (e) as requiring the applicant's discharge without the conditions necessary for protecting her and the public, or as imposing an absolute obligation on the

authorities to ensure that the conditions are fulfilled. Nor is it necessary in the present case to attempt to anticipate what level of obligation could arise by way of provision of treatment in the community to ensure the due effectiveness of MHRT decisions concerning release. In the situation under consideration, a failure by the local authority to use its "best efforts" or any breach of duty by a psychiatrist in refusing care in the community would be amenable to judicial review. The Court is therefore not persuaded that local authorities or doctors could wilfully or arbitrarily block the discharge of patients into the community without proper grounds or excuse, or that this occurred in this case.

72. The Court concludes in the present case that, after the MHRT decision of 16 August 1999, the applicant continued to suffer from an illness which justified compulsory detention and that her detention fell within the exception of Article 5 § 1 (e). Nonetheless, while it is therefore not excluded that the imposition of conditions may justify a deferral of a discharge found to be appropriate or feasible in domestic-law terms, it is of paramount importance that appropriate safeguards are in place so as to ensure that any continued detention is consonant with the purpose of Article 5 § 1. Accordingly, the period of delay during which the applicant's position was "in limbo" raises issues under Article 5 § 4 which are examined below.

73. It follows that there has been no violation of Article 5 § 1 of the Convention.

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

74. Article 5 § 4 of the Convention provides:

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

A. The parties' submissions

1. The applicant

75. The applicant submitted that she had been denied a speedy review of the grounds of her detention as, once it became apparent that the conditions on discharge imposed by the MHRT would not be fulfilled, she had to wait until her next annual application, or, as happened in this case, for the Secretary of State to refer the case back to the MHRT. Her case was therefore not considered until more than one year after she had been found entitled to discharge.

76. Further, the defect in the system identified by the domestic courts in *I.H.* prevented the MHRT from reconsidering its decision in light of the psychiatrists' refusal to provide supervision to fulfil the conditions attached to the discharge. Contrary to the Government's submission, the denial of this remedy did have a practical effect on her position as, if she had been afforded the remedy now held to be open to her, she would have had her case considered by the MHRT as soon as it became apparent, at the end of September 1999 and less than two months after the MHRT's decision, that the psychiatrists responsible for providing services were unwilling to provide them. If the MHRT had had the opportunity of considering her case as soon as it was known that no psychiatric supervision would be provided on the basis of the conditions imposed, it could have varied the conditions, as it eventually did, to address the psychiatrists' reasons for declining to provide supervision much earlier than her eventual discharge date in December 2000.

2. The Government

77. The Government submitted that the scope of the tribunal's powers entirely accorded with this provision in directing that the applicant should be discharged if certain conditions were met. They acknowledged that in certain cases there might be a breach of Article 5 § 4 because the MHRT had no power to review the position of the patient if the conditions could not be met, but that incompatibility had been remedied by the Human Rights Act 1998 and the domestic courts' decisions in *I.H.*. These developments occurred after the facts in the present case, but they submitted that there was no evidence that the previous incompatibility had had an impact in practice on the applicant's rights. As regards speed, the Secretary of State was able to refer the matter back to a fresh tribunal under section 71 of the 1983 Act, and after the decision in *I.H.* the tribunal itself could consider the matter further in light of progress or otherwise in meeting the conditions. If the conditions had not been met but it appeared that the authorities had not been using their best endeavours to meet the conditions, it was open to the patient to seek judicial review of the authorities' failure to act, in which review the well-known principles of judicial review such as illegality and irrationality and the requirements of the Human Rights Act 1998 would be taken into account.

B. The Court's assessment

78. The Court observes that the decision for the applicant's conditional discharge was given on 16 August 1999 but that it was not implemented as no psychiatrist would agree to supervise her on the basis of the planned discharge to her parents' home. The matter was eventually referred back to the MHRT by the Secretary of State in the exercise of his discretion and the

review of the case took place just over a year after the initial decision, namely on 24 August 2000, when it varied that decision to provide for discharge, under medical supervision, into the more controlled environment of a hostel.

79. The issue to be determined is whether the inability of the MHRT to review of its own motion or on the application of the applicant, and therefore with due speed, the continued detention of the applicant after its decision that she was to be released on conditions complied with the requirement of Article 5 § 4 of the Convention.

80. Article 5 § 4 affords a crucial guarantee against the arbitrariness of detention, providing for detained persons to obtain a review by a court of the lawfulness of their detention not only at the time of the initial deprivation of liberty but also where new issues of lawfulness are capable of arising periodically thereafter (see, *inter alia*, *Kurt v. Turkey*, judgment of 25 May 1998, *Reports* 1998-III, p. 1185, § 123, and *Varbanov v. Bulgaria*, no. 31365/96, § 58, ECHR 2000-X). Where, as in the present case, the MHRT finds that a patient's detention in hospital is no longer necessary and that she is eligible for release on conditions, the Court considers that new issues of lawfulness may arise where detention nonetheless continues, due, for example, to difficulties in fulfilling the conditions. It follows that such patients are entitled under Article 5 § 4 to have the lawfulness of that continued detention determined by a court with requisite promptness.

81. The Court observes that, since the facts of the present application, the domestic courts have acknowledged in a similar case that there had been a breach of Article 5 § 4 and that they have overruled previous authority which was perceived to conflict with the requirements of Article 5 and given guidance as to the way in which the authorities should give effect to the legislation to avoid breaches in the future, namely by the MHRT issuing provisional decisions, monitoring progress in the implementation of conditions and varying conditions, or modifying its decision, if necessary (see paragraphs 58-60 above).

82. In the present case, however, the Court finds that for over a year the applicant was unable to have the issues arising from supervening events, as they affected her continued detention, examined by a court and that the lapse of twelve months before it was reviewed on the Secretary of State's referral cannot be regarded as sufficiently prompt to remedy this defect. There has therefore been a violation of Article 5 § 4 of the Convention.

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

83. 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."

84. The applicant submitted that the domestic courts had held that a patient in her position was not entitled to compensation from the MHRT, the detaining health authority or the authority responsible for providing services necessary for fulfilment of the conditions on the patient's discharge. Nor was the Human Rights Act 1998 in force at the relevant time.

85. The Government submitted that there had been no breach of Article 5 §§ 1 or 4 and that, therefore, no issue arose under Article 5 § 5. If the Court found in favour of the applicant, they accepted that there was no enforceable right to compensation before the entry into force of the Human Rights Act 1998.

86. In the light of its finding above of a breach of Article 5 § 4 of the Convention, and noting the Government's concession, the Court finds that there has been a violation of Article 5 § 5 in the present case.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

87. Article 13 of the Convention provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

88. The Court has found above that there have been violations of Article 5 §§ 4 and 5 of the Convention. These provisions of Article 5 being the *lex specialis* concerning complaints relating to deprivation of liberty, no separate issues arise under Article 13 in the circumstances of this case (see, for example, *Morley v. the United Kingdom* (dec.), no. 16084/03, 5 October 2004).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

89. 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

90. The applicant claimed that she had been unlawfully detained for more than sixteen months. With reference to domestic-law awards (for example, 3,000 pounds sterling (GBP) for a period of twenty-four hours), she submitted that she should be awarded a very substantial sum. She claimed GBP 25,000, referring to her anxiety and distress at the confinement, loss of self-respect, general effects of loss of liberty,

uncertainty, depression, loneliness, considerable weight gain, close proximity to mental illness and distress caused by other patients and the death of a nephew during this period, when she was unable to be with her relatives.

91. The Government submitted that the Court was not bound by domestic scales of damages and in any event pointed to a precedent in the courts in which sums of only GBP 750 to 4,000 were paid under the Human Rights Act 1998 for delays in mental health reviews (see *K.B. and Others v. Mental Health Review Tribunal* [2003] England and Wales High Court (Administrative Court) 193). They considered that a finding of a violation would constitute sufficient just satisfaction in this case, but that if the Court concluded otherwise the sum should be line with the awards in *K.B*.

92. The Court notes that it has found a procedural breach of Article 5 § 4 of the Convention above and that there has been no finding of substantive unlawfulness. It cannot be excluded on the facts of this case, however, that the applicant would have been released earlier if the procedures had conformed with Article 5 § 4 and therefore she may claim to have suffered, in that respect, a real loss of opportunity. Furthermore, it considers that the applicant must have suffered feelings of frustration, uncertainty and anxiety from the situation which cannot be compensated solely by the finding of violation. Having regard to awards made in similar cases, the Court awards, on an equitable basis, 6,000 euros (EUR).

B. Costs and expenses

93. The applicant claimed legal costs and expenses of EUR 5,341, which included EUR 1,020 for solicitors' costs and EUR 4,321 for counsels' fees, inclusive of value-added tax.

94. The Government had no comment on counsels' fees but noted that the solicitors' costs appeared to relate to sums paid by way of legal aid from the Council of Europe.

95. Taking into account the sums paid by way of legal aid from the Council of Europe, the Court awards EUR 4,656 for legal costs and expenses.

C. Default interest

96. 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 no violation of Article 5 § 1 of the Convention;

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

3. *Holds* that there has been a violation of Article 5 § 5 of the Convention;

4. *Holds* that no separate issue arises under Article 13 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the date of settlement:
      (i) EUR 6,000 (six thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 4,656 (four thousand six hundred and fifty-six euros) in respect of costs and expenses;
   (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;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 June 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise ELENS-PASSOS
Deputy Registrar

Josep CASADEVALL
President