



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

SECOND SECTION

CASE OF LÉGER v. FRANCE

(Application no. 19324/02)

JUDGMENT

STRASBOURG

11 April 2006

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
30/03/2009**

This judgment may be subject to editorial revision.

In the case of Léger v. France,

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

Mr A.B. BAKA, *President*,

Mr J.-P. COSTA,

Mr R. TÜRMESEN,

Mr K. JUNGWIERT,

Mr M. UGREKHEDIDZE,

Mrs A. MULARONI,

Mrs E. FURA-SANDSTRÖM, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 21 March 2006,

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

PROCEDURE

1. The case originated in an application (no. 19324/00) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a French national, Mr Lucien Léger (“the applicant”), on 6 May 2002.

2. The applicant, who had been granted legal aid, was represented by Mr J.-J. de Felice, a lawyer practising in Paris. The French Government (“the Government”) were represented by their Agent, Mrs E. Belliard, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that his continued detention as a result of his life sentence – which in practice amounted to a whole-life term – was arbitrary, in breach of Article 5 § 1 (a) of the Convention, and constituted inhuman and degrading treatment within the meaning of Article 3.

4. The application was allocated to the Second 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. In a decision of 21 September 2004 the Chamber declared the application partly admissible.

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 26 April 2005 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr J.-L. FLORENT, Deputy Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Mr G. DUTERTRE, *magistrat*, on secondment to the Human Rights
Section, Legal Affairs Department, Ministry of Foreign Affairs, *Counsel*;
Mr F. AMEGADJIE, *rédacteur*, European and International Affairs
Department, Ministry of Justice,
Mr M. BARATE, Head of the Security Section, Prison Service,
Ministry of Justice,
Mr R. DUBANT, Head of the Sentence Enforcement and Pardons
Office, Criminal Affairs and Pardons Department,
Ministry of Justice, *Advisers*;

(b) *for the applicant*

Mr J.-J. DE FELICE, *Counsel*.

The Court heard addresses by Mr de Felice and Mr Florent, and their replies to questions put to them by its members.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1937 and lives in Landas.

A. The applicant's conviction in 1966

8. In July 1964 the applicant was prosecuted for the abduction and murder of Luc Taron, an 11-year-old boy, on 26 and 27 May 1964.

9. On 5 July 1964, while in police custody, the applicant signed a confession which he stood by for the first ten months of the investigation. Later that day he was placed in pre-trial detention. The investigating judge questioned him on several occasions about the reasons for his conduct, which was inconsistent with his confession, but the applicant refused to offer an explanation.

10. On 21 December 1964 a panel of experts in neuropsychiatry submitted a report. The experts submitted that the applicant had not been suffering from mental illness at the time of the events and contended that the physiological and psychological abnormalities observed, coupled with

the applicant's alleged memory loss at the time of the killing, "[made] it impossible to rule out the presence of an epileptic symptom with a twilight state and dimming of consciousness". They concluded that the applicant was "dangerous" and "liable to a criminal penalty" and that "the organic disorders observed would be amenable to palliative treatment alone and dictate[d] that his social rehabilitation [could] be envisaged only with the utmost caution".

11. A second report was submitted on 30 April 1965. It concluded that the applicant was "not mentally ill and should not be admitted to a psychiatric hospital. He is fit to stand trial. He must answer for his actions in court. He is a danger to public safety."

12. On 11 June 1965 the applicant retracted his confession but refused to expand on his muddled and limited explanations. He has protested his innocence ever since.

13. In a judgment of 7 May 1966 the Seine-et-Oise Assize Court found the applicant guilty of abduction and subsequent murder, with mitigating circumstances. The Assize Court held that the offence should not be classified as premeditated murder (*assassinat*). Although the prosecution had not sought a specific penalty, the applicant was sentenced to life imprisonment, but no minimum term was set (see paragraph 34 below). After the verdict had been read out by the President of the Assize Court, the applicant protested that there had been a miscarriage of justice and gave the name of a person who, according to him, was guilty. An appeal on points of law by the civil party was dismissed on 29 November 1966.

14. The applicant's wife died in unexplained circumstances in January 1970, after she had written to tell him that she knew he was innocent and that she had received death threats from one of the two real culprits.

15. On 17 June 1971 the applicant, through his lawyer, who had nevertheless entered a guilty plea on his behalf, lodged an initial application for a retrial, which was apparently not examined.

16. On 6 September 1974 the applicant's lawyer lodged a second application for a retrial with the Minister of Justice. The application gave rise to an investigation, the findings of which were due to be disclosed to the lawyer. However, the lawyer died before the report was submitted and the findings of the investigation were never forwarded to the applicant. Several months later, the applicant was notified orally that the application had been dismissed.

B. Applications for release from 1979 to 2000

17. On 5 July 1979, on the expiry of a "probationary period" of 15 years (see paragraph 39 below), the applicant became eligible for release.

18. The applicant applied for release on licence on several occasions. In 1984 he received the support of the President of the Ligue des droits de

l'Homme (Human Rights League). The civil party subsequently issued death threats against the applicant in the event of his release from prison.

19. His applications for release on licence were transmitted in 1985, 1988, 1990, 1991, 1992, 1993, 1994, 1995 and 1997 to the Minister of Justice, who at the time was empowered to deal with such matters, and were refused, in many cases for his own safety despite “evidence supporting them”, as Mr Toubon, the Minister of Justice from 1995 to 1997, explained in a press article published on 8 June 2000.

20. The applicant also made several applications for a presidential pardon. Some of them did not receive a reply. The last one, submitted in 1998, was refused after an expert medical assessment had concluded that the applicant’s state of health was compatible with detention.

21. On 18 March 1999 a lawyer belonging to the Lille Bar applied for the applicant’s release on licence. The sentence enforcement board gave a positive opinion, but consideration of the application was adjourned pending the submission of a fresh expert report.

22. On 4 October 1999 the experts submitted their report, which read:

“... Previous expert reports

Among the documents consulted, we have considered in particular the expert reports by the following psychiatrists:

Dr Behague, Dr Cenac and Dr Dublineau, of 21 December 1964;

Dr Petit-Dutaillis, Dr Heuyer and Dr Roumajon, of 5 April 1965;

Dr Follin and Dr Roumajon, of 13 December 1984;

Dr Bornstein, of 24 November 1989;

Dr Cayet, of 13 May 1997 ...

Observations

We have studied the committal order by the Indictment Division and a number of expert reports. In their report dated 13 December 1984 Dr Roumajon and Dr Follin observed in Lucien Léger a mental distortion of reality bordering on the process of paranoia. They noted his pride, his taste for publicity and his need for a sense of self-worth. They referred to the substantial administrative file on Lucien Léger, whose time in custodial establishments had been highly eventful. The two experts emphasised that Lucien Léger was very keen to publish his version of events. This, they concluded, was likely to cause a quite considerable scandal. His release risked causing a significant disturbance to public order, and they believed that it could give rise to fears of a publicity stunt.

Dr Boissenin, who had been unable to examine Lucien Léger as the latter had refused, expressed the view in his report of 18 May 1985 based on the file that the prospect of release was risky.

On 13 May 1997 Dr Denis Cayet noted in his report that Lucien Léger's intellectual faculties had remained intact. He observed that, despite a fairly warm appearance, there were still paranoid character traits centred on distrust, a suspicious and quibbling temperament, a general impression of persecution, difficulty in being self-critical, an underlying inflexibility and an inflated opinion of himself, accompanied by a latent sense of manipulation and provocation. Dr Denis Cayet concluded from this that Lucien Léger had scarcely changed since the assessment by Dr Follin and Dr Roumajon, finding him to be just as combative, prone to look for hidden meaning, and seemingly determined to assert in future, by any possible means, what he considered to be his justification and the expression of the truth.

In Dr Cayet's opinion, the question of release was very difficult to assess, in view of the disturbance to public order and the media attention that were likely to ensue.

During our examinations, Lucien Léger developed good relations with us. The general impression that emerged seems more balanced than that observed by the previous experts.

One expression struck us in particular: *'I have continued to develop a structure while in prison.'* That does indeed seem to be the case, but it is impossible to assess whether, as things stand, Lucien Léger would be able to maintain this relative stabilisation on being released, if such a decision were taken.

Lucien Léger appeared to us to be well informed about the current situation. He demonstrated great skill in pleading his own case, without, moreover, displaying excessive passion or exerting pressure on his interlocutors, so much so that questions may be raised as to the intensity of his current desire to be released. In any event, after thirty-five years of imprisonment, such ambivalence is not surprising. The idea of coming out of a system that is organised, restrictive and frustrating yet reassuring by its very monotony, with particular features such as a certain degree of respect on the part of most of the supervising staff, will undoubtedly cause him to wonder, quite naturally, about life as a free man, a life to which he is no longer accustomed: management of time and space, access to treatment, professional responsibility, social skills ...

The version of events he submitted to the three experts is consistent with what he has written and with the version he gave to the previous succession of experts. It is not for us to pass judgment on its credibility. Is it a mythomaniac fabrication? What portion of truth is there in his current version of events? Is it quite simply a defence mechanism? Is it basically a defensive structure verging on the delusional? All these aspects, indeed, may well be interlinked.

In any event, a certain progression can be seen from these various documents. In simplified form, it may be broken down into three phases:

At first, Lucien Léger appeared to have a highly disordered personality, being prone to mythomaniac fabrication and a somewhat naive boastfulness.

Next came the phase of multiple complaints and a defensive organisation bordering on paranoia.

Currently there seems to be evidence of a relative softening of his character armour, although it is impossible to judge the impact of ‘*protection afforded by prison*’ and his reaction on experiencing the ‘*void of release*’.

Our overall impression is therefore more qualified.

To sum up, [the applicant] was imprisoned at the age of 27. At the time he appeared to have a disordered personality ... Thirty-five years later, most of his life has been spent in prison. ... Admittedly, a few paranoid personality traits may still be observed, but they are relatively well suppressed. Such traits essentially seem to be a form of character defence against accusations, a psychological survival response in order to ... ‘avoid losing a grip on reality’. He does not show any signs of systematic misjudgment, general over-simplification, deep suspicion, or a sense of current persecution ... at least, as soon as discussion moves away from the case in question. ...

As further evidence against the presence of genuine paranoia, it is noticeable that he has maintained a certain sense of humour, a responsiveness to his surroundings and a degree of nuance.”

The report concluded:

“This assessment therefore focuses entirely on aspects of his personality from a strictly psychiatric and forensic standpoint. And from that standpoint, there do not currently seem to be any formal obstacles to his release.”

The report also stated that the previous experts had already found that there did not appear to be a risk of a further offence involving a child and that only the risk of a surge of paranoia and protest had held them back.

“That eventuality cannot be totally ruled out, although a number of clinical factors suggest that there has been a relaxation of his reactive faculties. In the event of his release on licence, which is not precluded by the findings of the clinical examination, it is ultimately the continuity, consistency and solidity of the reference points with which he is provided that should prevent a reaction of psychological destabilisation after such a lengthy period of incarceration. It would be helpful for him, at least initially, to receive support through psychological counselling.”

The experts reported that the applicant was envisaging receiving such counselling “to reassure everyone and myself, and in case I get depressed”.

23. On 7 February 2000 the judge responsible for the execution of sentences gave the following opinion:

“Mr Léger is supported by the Bernhard family, who have regularly come to see him in the visiting room for about twenty years. Mr and Mrs Bernhard have offered to provide [the applicant] with accommodation. They have already welcomed other people in difficulty into their family. In addition, Mr Bernhard runs a company called ‘Le pain de nos ancêtres’. He will employ the prisoner to carry out administrative duties. [The applicant] will not be able to submit any other plans in view of his age (63) and his isolated family situation (as a widower with no children). The assessment recently conducted by a panel of psychiatric experts concludes that his personality has mellowed and that he has maintained his intellectual faculties and his grasp of reality. There does not appear to be any risk of his committing a further criminal offence involving a child. The findings of the clinical examination do not stand in the way of his release on licence. The solidity of the reference points with which he has been

provided should prevent a reaction of psychological destabilisation after such a lengthy period of incarceration. It would be helpful for him initially to receive support through psychological counselling, according to the experts.

I am forwarding the file on [the applicant] because I consider that after almost 35 years in prison it is appropriate to review of his situation and thus assess the purpose of his sentence. Releasing him on licence would enable him to undergo compulsory medical and psychological treatment and to regain his liberty within a clearly defined framework, unlike an individual pardon.”

Following the reform of the post-sentencing system, including the procedure for granting release on licence to long-term prisoners, pursuant to the Law of 15 June 2000, the Minister of Justice refused the application for the applicant’s release and referred his case to the newly established courts.

C. The applicant’s subsequent applications and his release on licence in 2005

24. On 16 January 2001 the applicant availed himself of this new judicial procedure. In his application he again stated that friends of his would provide him with accommodation in an outbuilding at their home and with employment in their bakery on his release.

25. On 5 February 2001 the sentence enforcement board issued a unanimous opinion in favour of his release on licence. The applicant’s resettlement and probation officer also expressed an opinion strongly in favour of the application.

26. At the hearing in the Douai Regional Parole Court the advocate-general submitted that the applicant’s application should be refused in view of his “lack of reform” in relation to the acts that had led to his conviction.

27. In a decision of 6 July 2001 the Regional Parole Court, observing that the applicant denied having committed the offence of which he had been convicted, refused his application on the following grounds:

“The extremely serious offence which [the applicant] denies having committed was punished by a sentence of life imprisonment.

The psychiatric experts who examined [the applicant] (in 1965, 1984, 1989 and most recently 1999) could not rule out his potential dangerousness and the risk of his reoffending, the only means of averting such risks being through psychotherapeutic counselling or support, which by its very nature requires acceptance by the subject.

[The applicant’s] position in relation to the offence committed and to the assessment which psychiatrists may make of a person’s mental state rules out any counselling of that kind and precludes a finding that he is making ‘serious efforts to readjust to society’ ... in spite of a coherent resettlement plan in terms of accommodation and employment.”

28. Contending that that decision had required a confession as a new condition for release, the applicant appealed to the National Parole Court.

His lawyer observed that the applicant was assured of work and accommodation on his release and that the most recent psychiatric report submitted by a panel of experts on 4 October 1999 had concluded that nothing stood in the way of his release on licence as there no longer appeared to be any risk of his reoffending. Relying on Article 3 of the Convention, the applicant's lawyer argued that making his client's release conditional on a confession was tantamount to a slow death sentence.

29. On 12 November 2001 the applicant's friends attested that their offer of accommodation and employment, which they had repeatedly made over a period of seventeen years, was still valid although their bakery was currently being sold to a private company founded by their children (a separate business registered at their home address).

30. In a judgment of 23 November 2001 the National Parole Court upheld the decision of 6 July 2001 in the following terms:

"... the offers of employment and accommodation referred to by the offender in support of his application as evidence of a social resettlement plan are closely interlinked and are currently in doubt as a result of the bankruptcy order against the person who made the offers. Furthermore, the paranoid tendencies still noted by the most recent expert would require psychological counselling, which the prisoner does not envisage undergoing."

31. Following a proposal to commute the applicant's sentence, a fresh psychiatric report on him was completed in May 2004. It concluded:

"... In our view there has been no particularly perceptible change in the offender's mental state since the psychiatric assessments carried out in 1999. The character and personality traits observed do not make it possible to conclude with absolute certainty that he will not pose a significant danger in the community, in the psychiatric sense of the term.

The forecast cannot be anything but reserved ... as to his ability to readjust. Prospects of change are barely perceptible, seeing that he is increasingly occupied with disparaging the experts' methods rather than providing evidence to address the question of his plans for the future."

32. On 25 January 2005 the applicant lodged a further application for release on licence with the Arras Post-sentencing Court (*tribunal de l'application des peines*). The prison authorities recommended applying a probationary semi-custodial regime. The public prosecutor was opposed to the applicant's release on licence, contending that such a measure would entail a dual risk for society, that of reoffending and that of psychological decompensation.

33. In a judgment of 1 July 2005, which was upheld on 31 August 2005 by the Post-sentencing Division of the Douai Court of Appeal, the applicant was released on licence with effect from 3 October 2005 until 2 October 2015, on which date the monitoring and supervision arrangements would expire. In addition to the standard requirements which the applicant was to observe (place of residence, contact with the judge responsible for execution

of sentences and Prison Service social workers, permission for travel), particular obligations were imposed on him: to submit to medical examinations, treatment or care, including in a hospital environment, and to refrain from contacting the victim's mother, from distributing any publication or audiovisual work produced or co-produced by himself relating, in whole or in part, to the offence committed, and from making any public comment on the offence. The courts held that the applicant now satisfied the conditions laid down in Article 729 of the CCP and based their decision on three considerations. Firstly, he had a coherent plan in terms of both accommodation (long-standing friends who had already assisted a number of people in difficulty) and voluntary work for the Red Cross, such arrangements being stable and long-term. Furthermore, with regard to his attitude towards the victims, the courts pointed out that the applicant had not made the slightest gesture to them and took refuge behind his alleged innocence, but added: "It nevertheless appears that Mr Léger's conduct does not, after 41 years of imprisonment, represent an obstacle to his release on licence as it might have done in the past." Lastly, with regard to the prevention of further offences, they noted that the risk of his reoffending was limited ("a zero risk of reoffending is so rare") and that the recent expert reports were generally in favour of his release on licence. The first-instance court concluded as follows:

"There is no evidence to suggest that a more positive development may be expected in Mr Léger's case, and there is cause to fear that even if his personality may have 'mellowed' according to the experts' findings in 1999, it will not truly change. Accordingly, refusing his application for release on licence would amount to his virtually permanent exclusion from society, which does not seem justified in view of his resettlement plan and the limited nature of the risk of his reoffending."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Life sentences

34. Under the legislation in force on the date of the applicant's conviction, murder carried the death penalty if it was preceded, accompanied or followed by another serious crime, and was punishable by life imprisonment in all other cases. The death penalty was abolished on 9 October 1981. At the time of the applicant's conviction life sentences were irreducible; the possibility of parole after a specified minimum term was introduced in a law of 22 November 1978. Article 132-23 of the Criminal Code currently provides for a minimum term of eighteen years in the case of life imprisonment. The term may be increased to a maximum of twenty-two years by a special decision of the Assize Court. Under the Law of 1 February 1994, it is now possible to set a minimum term of up to thirty

years, or a whole-life term, where a life sentence is imposed for a certain category of offences, namely the murder, whether premeditated or not, of a minor under fifteen years of age preceded or accompanied by rape, torture or acts of barbarity (Articles 221-3 and 221-4 of the Criminal Code).

B. Parole in France

1. Development of the parole system

35. Parole is the longest established means of relaxing the conditions of sentences. It was introduced by the Law of 14 August 1885. The Law initially entrusted decisions on parole to the Minister for the Interior and subsequently, in 1911, to the Minister of Justice, when the latter was assigned responsibility for the Prison Service. The provisions of the 1885 Law were incorporated into the 1958 Code of Criminal Procedure. The Laws of 17 July 1970 and 29 December 1972 removed the requirement of good conduct in prison, making “serious evidence of readjusting to society” the criterion for release on licence, and empowered the judge responsible for the execution of sentences to decide whether to grant a licence to prisoners serving sentences not exceeding three years (this power was extended to sentences not exceeding five years by the Law of 4 January 1993).

In the late 1990s the prison authorities were faced with a worrying decline in the number of licences granted, particularly in the case of longer sentences. The powers vested in the Minister of Justice were also strongly contested. In 1999 the Minister of Justice decided to appoint a commission to make proposals for revitalising the parole system. In February 2000 the Study Commission on Parole, chaired by Mr D. Farge, a judge of the Court of Cassation, submitted its report.

36. Law no. 2000-516 of 15 June 2000 on reinforcing the presumption of innocence and victims’ rights included many of the proposals made in the report. It made radical changes to the laws on parole by removing the Minister’s powers and replacing them with an adversarial judicial procedure, and by broadening the conditions for release on licence.

37. The Law of 9 March 2004 on adapting the justice system to trends in crime (which came into force on 1 January 2005) completed the process of transferring post-sentencing powers to the judicial system by establishing the post-sentencing courts as ordinary courts. It lays down provisions on post-sentencing measures based on the principle of adapting sentences to the individual (Article 707 of the Code of Criminal Procedure (CCP)):

“... The execution of sentences shall encourage the integration or reintegration of convicted persons into society and the prevention of recidivism, while respecting the interests of society and the rights of victims. To that end, sentences may be adjusted during the course of their execution to take into account changes in the convicted person’s personality and circumstances. The adaptation of sentences to the individual

must, wherever possible, allow the gradual return of offenders to liberty and ensure that they are not released without any form of judicial supervision.”

2. The post-sentencing courts

38. Prior to the Law of 15 June 2000 the competent authority was either the judge responsible for the execution of sentences or the Minister of Justice. In both cases the proceedings did not observe the adversarial principle or due process. Since that date, applications for release on licence falling outside the sphere of competence of the judge responsible for the execution of sentences (persons sentenced to more than ten years’ imprisonment with more than three years remaining to be served) have been examined by judicial bodies: at first instance, the regional parole courts, instituted by the above-mentioned Law (see paragraph 27 above) and subsequently replaced by the post-sentencing courts pursuant to the Law of 9 January 2004 (see paragraph 32 above), and, on appeal, the National Parole Court (see paragraph 28 above), now replaced by the Post-sentencing Division of the Court of Appeal (see paragraph 33 above). Since 1 January 2005, cases have been referred to these courts on an application by the convicted person or on the recommendation of the public prosecutor (Article 712-7 of the CCP). The post-sentencing court gives judgment after obtaining the opinion of a Prison Service representative, following adversarial proceedings in which it hears the public prosecutor’s submissions and the observations of the convicted person and, where appropriate, his or her lawyer (*ibid.*). An appeal against the post-sentencing court’s judgment may be lodged within a ten-day period (Article 712-11 of the CCP). The Post-sentencing Division of the Court of Appeal comprises, in addition to the president and two other judges, an official from an association for the resettlement of offenders and an official from a victim-support association (Article 712-13 of the CCP). An appeal on points of law may be lodged within five days after the judgment of the appellate division has been served (Article 712-15 of the CCP).

3. Conditions for release on licence

39. As regards temporal conditions, Article 729 § 3 of the CCP provides that life prisoners may not apply to be released on licence until a probationary period has elapsed (fifteen years before the Law of 9 January 2004 and eighteen years since). Whereas it was previously impossible to apply for release on licence before the minimum term in relation to the sentence had expired, there is now an exception to this rule: the Law of 9 January 2004 entitles prisoners to ask for the conditions of their sentence to be relaxed even where a minimum term has been set (Articles 720-4 to 720-5 of the CCP) if they have shown “serious evidence of readjusting to society”. Lastly, Article 730 of the CCP provides that the situation of

convicted persons is reviewed at least once a year if they satisfy the conditions laid down in Article 729 of the CCP.

40. As regards substantive conditions, Article 729 § 1 of the CCP gives a precise indication of the criteria to be taken into account in examining an application for release on licence:

“Parole is designed to encourage the rehabilitation of convicted prisoners and prevent them from reoffending. Convicted persons serving one or more prison sentences may be granted parole if they have made serious efforts to readjust to society, particularly if they can show that they have engaged in occupational activities, or regularly attended an educational or vocational training course, or have taken part in a work experience scheme, or had a temporary contract of employment with a view to their social integration, or that their presence is essential to the life of their family, or that they have to undergo treatment, or that they have made efforts to compensate their victims.”

4. Recent statistics provided by the Government on life prisoners released on licence

41. On 31 December 2001 there were 578 prisoners serving life sentences; during that year, 48 were released on licence. In 2002, out of a total of 554 life prisoners, 40 were released on licence. In 2003 and 2004 the figures were 543 and 538 prisoners and 22 and 15 licences respectively.

5. Reports by the National Assembly and Senate commissions of inquiry

42. The relevant passages of the report by the National Assembly commission of inquiry (“France faced with its prisons”, no. 2521, 28 June 2000, p. 122) and the report by the Senate commission of inquiry on detention conditions (“Prisons: a humiliation for the Republic”, no. 449, 28 June 2000 – section on “The lack of prospects for ‘long-term’ prisoners”) read, respectively:

“The abolition of the death penalty in 1981 calls for reflection on how to punish the most heinous crimes and on expectations of prison. Depriving people of their liberty for ever means leaving them to die slowly; opposition in principle to the death penalty implies, on the contrary, that society should envisage in due course the reintegration of those who appeared to have been permanently excluded on account of the atrocity or repetition of their crimes ... Abolition of the death penalty must therefore be translated into a demanding attitude on the part of society towards the prison system. It would be deeply hypocritical to abolish the death penalty without changing conditions of detention, without envisaging reintegration into society and without also accepting the risks to society that such reintegration entails ...”

“France’s prisons house an increasing number of prisoners serving long sentences. They appear to be deprived of all prospects and, in such conditions, form a population that is extremely difficult for prison staff to manage.

The post-sentencing scheme, which is supposed to allow sentences to be adapted to the individual, seems to be experiencing difficulties in its implementation, while there has been a worrying decline in measures to relax the conditions of sentences. ... The current scarcity of such measures accounts for the difficulty in implementing a proper post-sentencing scheme. The commission of inquiry has seen in the Netherlands that offenders have genuine prospects of having their sentences relaxed after a certain period of detention; this encourages them to become fully focused on reintegration.

... While the length of detention is increasing, in particular because sentences are becoming more and more severe, measures to relax the conditions of sentences, notably release on licence, are being used only to a limited extent.

... In enacting the Law on reinforcing the presumption of innocence and victims' rights, Parliament has decided to carry out a thorough reform of the rules on granting release on licence.

The eligibility criteria for such a measure, which were considered overly restrictive, have been broadened. ... The fact remains that the prison system today appears quite helpless in dealing with long-term prisoners.”

III. RELEVANT COMPARATIVE EUROPEAN LAW AND PRACTICE

A. Instruments adopted by the Committee of Ministers of the Council of Europe

43. Matters relating to long-term imprisonment and conditional release were addressed by the Committee of Ministers as long ago as 1976, when it adopted Resolution (76) 2 on the treatment of long-term prisoners:

“... I. Recommends that the governments of the member states: ...

9. ensure that the cases of all prisoners will be examined as early as possible to determine whether or not a conditional release can be granted;

10. grant the prisoner conditional release, subject to the statutory requirements relating to time served, as soon as a favourable prognosis can be formulated; considerations of general prevention alone should not justify refusal of conditional release;

11. adapt to life sentences the same principles as apply to long-term sentences;

12. ensure that a review, as referred to in 9, of the life sentence should take place, if not done before, after eight to fourteen years of detention and be repeated at regular intervals; ...”

In its general report the sub-committee responsible for drafting the resolution stated:

“... it is inhuman to imprison a person for life without any hope of release. A crime prevention policy which accepts keeping a prisoner for life even if he is no longer a

danger to society would be compatible neither with modern principles on the treatment of prisoners during the execution of their sentence nor with the idea of the reintegration of offenders into society. Nobody should be deprived of the chance of possible release. Just how far this chance can be realised must depend on the individual prognosis.”

Beyond this aspect relating to human dignity, the Committee of Ministers pointed out in Recommendation No. R (99) 22 concerning prison overcrowding and prison population inflation that parole was one of the most effective means of reducing overcrowding.

44. Following on from Resolution (73) 5 on standard minimum rules for the treatment of prisoners, Recommendation No. R (87) 3 on the European Prison Rules takes the similar United Nations rules and adapts them for use at European level. A revised version of the rules was adopted by the Committee of Ministers on 11 January 2006 (Recommendation Rec(2006)2). Rules 102 (Objective of the regime for sentenced prisoners) and 107 (Release of sentenced prisoners) read:

“Objective of the regime for sentenced prisoners

102.1 In addition to the rules that apply to all prisoners, the regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime-free life.

102.2 Imprisonment is by the deprivation of liberty a punishment in itself and therefore the regime for sentenced prisoners shall not aggravate the suffering inherent in imprisonment.”

“Release of sentenced prisoners

107.1 Sentenced prisoners shall be assisted in good time prior to release by procedures and special programmes enabling them to make the transition from life in prison to a law-abiding life in the community.

107.2 In the case of those prisoners with longer sentences in particular, steps shall be taken to ensure a gradual return to life in free society.

107.3 This aim may be achieved by a pre-release programme in prison or by partial or conditional release under supervision combined with effective social support.

107.4 Prison authorities shall work closely with services and agencies that supervise and assist released prisoners to enable all sentenced prisoners to re-establish themselves in the community, in particular with regard to family life and employment.

107.5 Representatives of such social services or agencies shall be afforded all necessary access to the prison and to prisoners to allow them to assist with preparations for release and the planning of after-care programmes.”

45. These rules are to be read alongside Recommendation Rec(2003)22 of the Committee of Ministers to member States on conditional release (parole) (adopted on 24 September 2003 at the 853rd meeting of the Ministers’ Deputies) and Recommendation Rec(2003)23 on the

management by prison administrations of life sentence and other long-term prisoners (adopted on 9 October 2003 at the 855th meeting of the Ministers' Deputies).

B. Comparative law

46. In their presentations of Recommendations Rec(2003)22 and Rec(2003)23 at the *ad hoc* Conference of Directors of Prison Administration and Probation Service organised by the Council of Europe (Rome, 25-27 November 2004), Ms S. Snacken and Mr P. Tournier gave an overview of legislation on life imprisonment and conditional release in the member States.

47. In her presentation on life sentences Ms Snacken stated:

“A majority of Council of Europe Member States make legislative provision for life sentences. The extent to which such sentences can be, and are in fact imposed, varies. Life sentences do not necessarily imply imprisonment for the remainder of natural life. Most countries make provision for a review of life sentences with the possibility of granting release from prison. Some countries impose a very long period of mandatory detention for lifers, e.g. 30 years in Estonia, 26 years in Latvia, 25 years in Poland, Slovakia and Moldova, 20 years in the Czech Republic, Albania, Romania and Turkey, while in others release is possible after 10 years, e.g. in Belgium, or 15 years in France, Germany, Luxembourg and Switzerland ...

Probably the most wide-ranging provisions for the use of life imprisonment are to be found in England and Wales. There, a life sentence is mandatory for murder and a discretionary life imprisonment can be imposed for other serious offences against the person. With mandatory life sentences, a tariff giving the earliest date at which conditional release may be granted is set. ‘Whole life tariffs’ mean that the imprisonment cannot be exhausted during the natural life of the prisoner. This tariff can be reviewed after 25 years. In addition, since 1997, an offender found guilty for the second time of serious sexual or violent crimes automatically receives a life sentence unless there are exceptional reasons for not imposing it (automatic life sentence).

By contrast, five European countries, Croatia, Norway, Portugal, Slovenia and Spain, make no legislative provision for life imprisonment. In Croatia, the most severe sanction is a sentence from 20 to 40 years that may only be imposed exceptionally. Conditional release may be granted after one-half, exceptionally one-third, of the sentence has been served. Three persons were sentenced to exceptionally long-term imprisonment between 1998 and 2001. In Norway, the most severe sanction is a determinate sentence of imprisonment for 21 years. Conditional release is possible after 12 years has been served. In Portugal, the maximum prison sentence is for 25 years, exceptionally for 30 years. Slovenian legislation provides for a maximum of 30 years but such a sentence has never been imposed to date. Prisoners serving more than 15 years may be conditionally released after three-quarters of the sentence has been served. In Spain the maximum sentence is imprisonment for 30 years. In Iceland, the legislation provides for life sentences but no such sentence has been imposed since 1940.”

Ms Snacken observed that there had been an increase in the number of long-term prisoners – those serving sentences of five years or more, according to the definition given in Rec(2003)23 – as a result of changes in crime policies. In western Europe this increase was linked to the growing number of convicted persons and the decreasing number of prisoners being released. These phenomena were combined with tougher policies on certain crimes in respect of which conditional release was granted under very restrictive conditions (for example, sexual, violent or drug-related offences). In central and eastern Europe the considerable number of long-term and life-sentence prisoners was attributable not only to the imposition of long sentences but also to the abolition of the death penalty.

48. As regards conditional release – “one of the most effective and constructive means of preventing reoffending and promoting resettlement, providing the prisoner with planned, assisted and supervised reintegration into the community” (preamble to Rec(2003)22) – the report by Mr Tournier compared the three models in use in Europe: the discretionary system, the release system and mixed systems in relation to shorter sentences. The discretionary release system was found in most European countries applying the principle of parole, including France. The system was related to the concept of individualisation (or personalisation), since by its very nature it excluded any possibility of automatic release. Mr Tournier observed that the main drawback of the discretionary system was the lack of explicit criteria for granting conditional release, producing the following effects:

- disparities between decisions where several bodies are involved in deciding on conditional release (which is usually the case except in countries with a small number of inhabitants);

- unreliability of assessments of the likelihood of reoffending where performed without specialist scientific tools;

- uncertainty as to the date of release renders it difficult to make practical arrangements in advance;

- the above factors may undermine confidence in the system and reduce prisoners’ motivation to cooperate in observance of the conditions and requirements of supervision.”

The mandatory release system had existed in Sweden since 1998. Prisoners serving a fixed term of imprisonment had to be conditionally released after two-thirds of the sentence. The focus in this system was on personalisation of supervision (control and assistance measures) and on the conditions to be satisfied by the prisoner after release. The mandatory release system was above all intended to be *egalitarian*. According to the report, it was far from commanding unanimous approval and might be reconsidered by Parliament.

The mixed system combined the discretionary system for long sentences with the mandatory system for shorter ones. It was fundamentally *pragmatic*. An example was the system applied in England and Wales.

In any event, Recommendation Rec(2003)22 did not favour any one system over another and simply reaffirmed “the Council of Europe’s unambiguous support for the principle of conditional release – a planned, assisted and supervised reintegration in the community”.

3. Report by the Commissioner for Human Rights

49. On 15 February 2006 the Council of Europe’s Commissioner for Human Rights made public a report (CommDH (2006)2) on the effective respect for human rights in France. Under point (d) (“Need to put in place a rehabilitation policy”) of Part IV, concerning the prison system, the Commissioner noted: “... the public authorities have the specific responsibility of looking to each new prisoner’s future by clearly defining the main function of the prison sentence and adapting it so that every means is employed to guide every new arrival towards successful rehabilitation. This means above all preventing reoffending.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 (a) OF THE CONVENTION

50. The applicant complained that his continued detention had become arbitrary. He submitted that it both infringed domestic law and no longer had a sufficient causal link with his initial conviction. Article 5 § 1 (a) 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:

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

A. The parties’ submissions

1. The applicant

51. The applicant submitted that his detention had initially been lawful but had over the course of time become arbitrary, in breach of Article 5 § 1

(a) of the Convention. He contended that his continued detention was wrongful on account of the exceptional length of the sentence he had served, dishonest on account of the reasons given to justify it, and thus arbitrary.

52. The applicant submitted that the Court's findings in the cases of *Stafford v. the United Kingdom* ([GC], no. 46295/99, § 66, ECHR 2002-IV), *Weeks v. the United Kingdom* (judgment of 2 March 1987, Series A no. 114-A) and *Wynne v. the United Kingdom* (judgment of 18 July 1994, Series A no. 294-A), concerning mandatory and discretionary life sentences in the United Kingdom, were perfectly applicable to the system employed in France.

53. He observed that in *Stafford* (cited above, § 65) the Court had pointed out that “in *Weeks* it was found that the discretionary life sentence imposed on the applicant was an indeterminate sentence expressly based on considerations of his dangerousness to society, factors which were susceptible by their very nature to change with the passage of time” and that “in *Wynne* [it] was well aware that there were similarities between the discretionary life and mandatory life sentences, in particular that both contained a punitive and a preventive element and that mandatory life prisoners did not actually spend the rest of their lives in prison” (ibid., § 67). He further noted the Court's reference to the domestic practice of setting a “tariff” to represent the element of deterrence and retribution: “... This was generally the minimum period of detention which would be served before an offender could hope to be released. It was never anticipated that prisoners serving mandatory life sentences would in fact stay in prison for life, save in exceptional cases” (ibid., § 71). Beyond the tariff, the grounds for continued detention had to be considerations of “risk” and “dangerousness” (ibid., §§ 79 and 80).

54. The applicant asserted that, as in *Stafford*, life imprisonment was an indeterminate sentence that did not mean lifelong detention. That was evidenced by the general rules governing such sentences and the possibility of fixing a minimum term, and by the purpose of sentences in domestic and European law.

As regards the first point, he noted that minimum terms had been introduced in 1978 and “whole-life terms” in 1994 (see paragraph 34 above). He accordingly pointed out that his sentence had been unlawful in that no minimum term had been fixed whereas under the new Criminal Code he would have faced a minimum term of between eighteen and twenty-two years. He observed that there was no trace in the French collective memory of anyone being detained for as long as he had been. As regards the second point, and the aim of social rehabilitation assigned to imprisonment by French legislation, he submitted that all the provisions of domestic and European law showed that beyond a punitive period, which in domestic law corresponded to the probationary period or the minimum term,

the continued detention of a life prisoner had to be justified by considerations of dangerousness and public safety, as the Court had held in its judgments cited above. That was also the intention of Article 729 of the CCP, which made a prisoner's release on licence subject to "serious evidence of readjusting to society" in its wording prior to the Law of 15 June 2000 and "serious efforts to readjust to society" in its subsequent version.

55. The applicant asserted that his continued detention was not based on considerations of dangerousness but on considerations of pure expediency and was wrongful. He complained of the "dishonesty" of the grounds given by the courts for refusing his application for release on licence in 2001 and, in particular, of the fact that his release had been conditional on a confession. Firstly, with regard to his resettlement plan, he explained that since 1987 his applications for release on licence had been accompanied by a serious, coherent and consistent plan whereby Mr and Mrs B. had offered to put him up and give him work in their company. The order for the company's compulsory liquidation a few months before the National Parole Court's decision had not called into question the value of his resettlement plan. The reform of 15 June 2000 had precisely been intended to broaden the eligibility criteria for release on licence and to allow prisoners who had not been promised employment to have the conditions of their sentence relaxed nonetheless. Secondly, with regard to his personality, the applicant disputed the objectivity of the expert reports and submitted that no expert had ever diagnosed the slightest mental disorder or recommended any psychological treatment or counselling. He asserted that the judges responsible for the execution of sentences and the sentence enforcement board had never asked for or suggested any such counselling and that his conduct, as observed by the prison staff, the resettlement and probation officers and the judges responsible for the execution of sentences, had given no cause to fear that he was dangerous. The experts, moreover, had reached a similar conclusion in 1999.

56. The applicant concluded by stating that everyone had been in favour of his release on licence and that, despite this, the judges who had first been called upon to justify his continued detention had, on the pretext of advisability or the precautionary principle, given a political decision which concealed the true grounds for extending his sentence. He accordingly inferred that his continued detention had been arbitrary and had ceased to have any causal link with his initial conviction.

2. The Government

57. As to the requirement of "lawfulness" and "compliance with domestic law" in the literal sense of the term, the Government submitted that the applicant's continued detention from 23 November 2001 had been in accordance with the procedure laid down in the Law of 15 June 2000 – in

other words, in a body of domestic legal rules that were accessible, precise and foreseeable as to their effect, in line with the Court's case-law. Those rules were, moreover, fair and adequate both procedurally (judicial body, adversarial proceedings, appeal) and substantively (the criteria were determined in such a way as to rule out the risk of arbitrariness). Lastly, as to whether the procedure prescribed by domestic law had been observed in the applicant's case (they cited *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, p. 20, § 46), the Government pointed out that the Court incorporated national legislation into all the requirements to be satisfied under Article 5, making compliance with domestic law a precondition for compliance with the Convention. As to the national courts' application of the criteria for granting release on licence (Article 729 of the CCP) in the instant case and the question of compliance with domestic law, the Government submitted detailed observations, discussing in turn each of the grounds adduced by the domestic authorities (see paragraph 61 below).

58. As to whether Mr Léger's detention satisfied the requirement of "lawfulness" and was consistent "with the aim of the restrictions permitted by Article 5", the Government observed that a person's detention could not be regarded as lawful within the meaning of Article 5 § 1 (a) unless it was "dependent on" and did not merely "follow" the finding of guilt by the criminal court (they cited *X v. the United Kingdom*, judgment of 5 November 1981, Series A no. 46). More specifically, in the case of lengthy sentences and decisions to re-detain or not to release prisoners, the causal link between such decisions and the initial judgment might eventually be broken "if a position were reached in which those decisions were based on grounds that had no connection with the objectives of the legislature and the court or on an assessment that was unreasonable in terms of those objectives" (they cited *Van Droogenbroeck v. Belgium*, judgment of 24 June 1982, Series A no. 50, pp. 21-22, § 40, and *Weeks*, cited above, p. 26, § 49).

59. The Government submitted that the applicant's sentence was indeed a "conviction" and the Assize Court a "competent court" within the meaning of Article 5 § 1 (a) of the Convention. As to the causal link between his continued detention and the conviction, they pointed out that the Constitutional Council had held that "sentences for serious crimes, other major offences and minor offences are determined ... with a view to protecting society, punishing offenders, encouraging their reform and preparing them for their possible resettlement" (decision no. 93-334 of 20 January 1994). The Seine-et-Oise Assize Court, while not sentencing the applicant to death, had indisputably imposed a penalty that, beyond the punitive element, sought to protect society in the long term. Accordingly, in emphasising both that the applicant had committed an extremely serious offence punishable by life imprisonment and on the other that "the ... experts who examined [the applicant] could not rule out his potential

dangerousness and the risk of his reoffending, the only means of averting such risks being through psychotherapeutic counselling or support, which by its very nature requires acceptance by the subject”, the Regional Parole Court had given a decision that was consistent with the aims of the legislature and the Assize Court. In referring, for its part, to the applicant’s paranoid tendencies, the National Parole Court had also indicated its attachment to the aim of protecting society.

60. In the Government’s submission, Mr Léger’s position was clearly distinguishable from the circumstances in *Stafford v. the United Kingdom*, in which the applicant, who had been convicted of murder in 1967 and subsequently released on licence, had had his licence revoked by the Secretary of State following a further conviction for forgery. As a result, Mr Stafford had remained in prison despite having served his second sentence. In the subsequent review proceedings, the Secretary of State had refused to release him, asserting that there was a risk that he might commit further non-violent imprisonable offences. The Court had found no causal connection between his possible commission of other non-violent offences and his original sentence for murder in 1967.

61. As to whether the reasons given for refusing to release the applicant on licence had been based on a “reasonable assessment” of his case in the light of the aim in question, the Government referred, firstly, to the national authorities’ margin of appreciation in such matters. They subsequently dealt in turn with each of the reasons given: the nature of the initial offence, the applicant’s psychiatric records, his lack of voluntary psychological counselling, his denials and the absence of a long-term resettlement plan.

62. The reference to the nature of the offence, no matter how long ago it had been committed, had been clearly relevant in the Government’s view. As regards the psychiatric reports, although the one issued in 1999 had concluded that there were no formal obstacles to the applicant’s release, the 1997 report had stated that “[the applicant’s] personality appears to have changed little since his initial incarceration, with paranoid traits persisting” and that “the complexity of his personality means that it cannot be ruled out that he might pose some form of danger in the community”. All the expert reports had been included in the file on the applicant and the judges dealing with his case had been required to take into account all the evidence before them, whether or not it supported his release. The Government added that even the least unfavourable reports had expressed reservations, referring to the 1999 report which had stated that the eventuality of a surge of paranoia could not be entirely excluded. In emphasising that the experts had not ruled out his potential dangerousness, the Regional Parole Court had taken note of the reservations that emerged from the various findings; it could not therefore be said to have made an unreasonable assessment in the proper sense of the term. The same was true, the Government argued, in relation to the need for psychological counselling, which the applicant had never

shown any interest in undergoing. As regards the applicant's attitude in relation to the offence, the Government disputed his argument that the courts had punished him for seeking to protest his innocence. They stressed that whether there had been a confession or a denial was not relevant as such; the important factor was what such a statement revealed about the prisoner's personality. In the case of very serious offences, denials often indicated an absence of self-analysis by the individual in relation to the acts of which he or she had been found guilty, and the significance of such a lack of self-criticism was clearly crucial in a context in which personality traits were of paramount importance. As a result, they argued, the fact that a convicted person's denials were taken into account in a decision to refuse his release on licence did not mean that the judge was punishing his failure to confess. The judge was simply drawing inferences from the person's failure to change. Prisoners were in no way prohibited from protesting their innocence and could avail themselves of a specific procedure to that end, namely an application for a retrial.

63. The Government thus concluded that in those circumstances, the decisions of 6 July and 23 November 2001 had not been based on "grounds extraneous to the objectives of the legislature" and of the Assize Court. The arguments relating to the psychiatric reports and the applicant's conduct were directly linked to his initial conviction, seeing that the serious offence of which he had been convicted had warranted attaching priority to his psychological profile and his development while in prison. Furthermore, the emphasis placed on the seriousness of the applicant's plans for employment had been justified by the need to provide him with an environment in which he would not reoffend. Such an approach reflected the concern expressed by the Assize Court, which had been anxious to protect society from potential offences by the applicant. It had also been consistent with the aims of the Law of 15 June 2000, which had not abolished life sentences but had sought to promote the social rehabilitation of prisoners, provided that they made serious efforts to readjust.

B. The Court's assessment

64. The Court reiterates that where the "lawfulness" of detention is in issue, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. This primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. In addition, any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness (see, among many other authorities, *Amuur v. France*,

judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, pp. 850-51, § 50).

65. The Court notes at the outset that in its decision of 21 September 2004 on admissibility it had regard to the fact that the applicant considered his detention to be arbitrary specifically on account of the refusal by the specialist courts dealing with post-sentencing measures (the Regional and National Parole Courts) of his application for release on licence in 2001.

66. The Court is in no doubt, and it was common ground between the parties, that the applicant was convicted in accordance with a procedure prescribed by law by a competent court within the meaning of Article 5 § 1 (a) of the Convention. He was lawfully sentenced to life imprisonment by the Assize Court in 1966 at a time when the death penalty was in force (but not imposed in his case as the Assize Court found that there were mitigating circumstances) and when it was not yet possible to set a minimum term. He was therefore detained in accordance with domestic law.

67. Nor can it be disputed that the applicant's continued detention after 23 November 2001 was in accordance with the procedure laid down in the Law of 15 June 2000. It was ordered by specialist parole courts following a procedure in which adequate judicial safeguards were in place. The criteria for taking such a decision are, moreover, laid down in Article 729 of the CCP. France's legislation on the implementation of sentences has been consistently reinforced since the above-mentioned Law was passed, and in the Court's view the quality of such legislation cannot be called into question in the light of the relevant European instruments.

68. What the applicant's complaint really concerned was the irrelevance of the reasons given for his continued detention after such a lengthy period of imprisonment, and the lack of any connection between those reasons and the punitive purpose of his initial conviction. He submitted in particular that the decisions to refuse to release him had been based on his denials and not on his "efforts to readjust to society", difficult though it was to make such efforts within the French prison system.

69. As regards the applicant's argument that the national authorities had not observed domestic law and had accordingly breached the Convention by applying an additional criterion not provided for in Article 729 of the CCP, namely his lack of reform, the Court reiterates that "in this area ... the national authorities are to be recognised as having a certain discretion since they are better placed than the international judge to evaluate the evidence in a particular case" (see *Weeks*, cited above, p. 26, § 50). The application of this criterion, which has some bearing on the development of the applicant's personality and may form part of the assessment of "serious efforts to readjust to society" as required by Article 729 of the CCP, falls within the scope of the national authorities' interpretation of that provision and cannot as such be held to infringe any rules of domestic law in the literal sense of the term. The Court will, however, return to this point in its examination of

whether the applicant's detention was consistent with the purpose of the restrictions permitted by Article 5 of the Convention.

70. In this connection, the Court observes at the outset that there is no uniform parole system in the member States of the Council of Europe. In France the parole system is referred to as discretionary since it excludes any possibility of automatic release; there is accordingly a risk that the criteria applied for granting conditional release may be somewhat vague (see paragraph 48 above). The Court notes, however, that this model does not call for particular condemnation in relation to any other (*ibid.*). It further reiterates that it has recognised the legitimate aim of a policy of progressive social reintegration of persons sentenced to imprisonment, including those convicted of violent crimes (see *Mastromatteo v. Italy* [GC], no. 37703/99, ECHR 2002-VIII). It has to be admitted in this connection that significant progress is still required in order to encourage the return of prisoners to the community through personalised assistance programmes involving supervision from the start of their detention (see paragraph 42 above).

71. Be that as it may, in assessing the arbitrariness of a person's detention, it must be ascertained whether there was a sufficient causal link with the initial conviction (see *Van Droogenbroeck*, cited above, pp. 21-22, § 40). In cases concerning the execution of sentences, and in particular decisions to re-detain and not to release, the formal legal connection between the conviction and the recall to prison is not on its own sufficient to justify detention under Article 5 § 1 (a). With the passage of time the causal link required by this provision between the decision not to release or to re-detain and the initial judgment

“... gradually becomes less strong. The link might eventually be broken if a position were reached in which those decisions were based on grounds that had no connection with the objectives of the legislature and the court or on an assessment that was unreasonable in terms of those objectives. In those circumstances, a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with Article 5.” (*ibid.*)

72. The Court reiterates that it is not its task, within the context of Article 5, to review the appropriateness of the original sentence (see *Weeks*, cited above, p. 26, § 50). It has pointed out that it does not pronounce on “the appropriate length of detention or other sentence which should be served by a person after conviction by a competent court” (see *T. v. the United Kingdom* [GC], no. 24724/94, 16 December 1999, and *V. v. the United Kingdom* [GC], no. 24888/94, ECHR 1999-IX). It has further held that “matters of appropriate sentencing largely fall outside the scope of Convention” and that it is not its role “to decide, for example, what is the appropriate term of detention applicable to a particular offence” (see *Sawoniuk v. the United Kingdom* (dec.), no. 36716/00, ECHR 2001-VI).

73. The Court observes that the applicant's life sentence has not prevented him from being released since he has now regained his “liberty”

following the adjustment of his sentence in the form of release on licence, with a view to avoiding his permanent exclusion from society (see paragraph 33 above).

74. Prior to that, in view of the extremely serious nature of his offence, the Court considers that the applicant's life sentence was not arbitrary for the purposes of Article 5 of the Convention. Firstly, unlike the position in *Stafford* (cited above), in which Mr Stafford had been released and subsequently recalled to prison after committing an offence unconnected with his initial conviction, the continued detention of the applicant in the instant case never lost its connection with the initial punitive purpose. Secondly, although the applicant's sentence did not contain a minimum term comparable to the "tariff" in the English system, representing the punitive element of the sentence, the Court observes that other factors relating to "risk" and "dangerousness" justified keeping him in detention.

75. The Court has held in connection with a life sentence that "[o]nce the punishment element of the sentence ... has been satisfied, the grounds for the continued detention ... must be considerations of risk and dangerousness" (ibid., § 80), although such considerations must be "associated with the objectives of the original sentence of murder" (ibid., § 87). In addition, the element of dangerousness is susceptible by its very nature to change with the passage of time (see *Weeks*, cited above, pp. 24-25, § 46). In the instant case the decision to release the applicant on licence in 2005 was based precisely on the fact that his conduct no longer stood in the way of his release and that the risk of his reoffending had become virtually non-existent. Previously, in 2001, the Regional Parole Court had held that "the ... experts who examined [the applicant] could not rule out his potential dangerousness and the risk of his reoffending, the only means of averting such risks being through psychotherapeutic counselling or support, which by its very nature requires acceptance by the subject", whereas the National Parole Court had found that "the paranoid tendencies still noted by the most recent expert would require psychological counselling, which the prisoner does not envisage undergoing". While it is true that such grounds place more emphasis on the applicant's moral reform than on his social rehabilitation, which is the basic consideration underlying Article 729 of the CCP as resulting from the Law of 15 June 2000, the Court observes that they are not immaterial to the question of his dangerousness, which the courts had a duty to assess.

76. The Court accordingly concludes that the grounds given were not unwarranted in view of both the initial punitive element and the persistence of factors militating against the applicant's release. Although the courts reached the opposite conclusion only in 2005, after he had been in prison for forty-one years – an exceptionally lengthy period which, as the Court acknowledges, raises serious questions about the management of life prisoners (see paragraphs 44 and 49 above) – it does not appear that the

grounds they had previously given were “unreasonable”, regard being had to their margin of appreciation under the Convention, including when they did not endorse the positive opinions of the prison authorities in 2001. One year prior to his release, in 2004, the experts were still unable to exclude with any certainty the possibility that the applicant might represent a danger in view of his character traits and personality.

77. The Court concludes that the applicant’s detention after 2001 was justified under Article 5 § 1 (a) of the Convention. There has therefore been no violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

78. The applicant submitted that his sentence had in practice amounted to an irreducible term of imprisonment constituting inhuman and degrading treatment within the meaning of Article 3 of the Convention:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. The parties’ submissions

1. *The applicant*

79. The applicant asserted that he had in practice served an irreducible life sentence, since he had not been effectively entitled to any adjustment of his sentence for forty years. As to whether his sentence was compatible with Article 3, he submitted that it was inhuman and degrading per se to keep him arbitrarily in prison when his sentence had reached a length that was unparalleled in France. Although he had not suffered any physical injury and had been treated like all the other prisoners, particularly in terms of the shortcomings, mismanagement and lack of confidentiality of the treatment provided in prison – which he acknowledged did not in itself attain the minimum level of severity to fall within the scope of Article 3 – he argued that his punishment impeded the pursuit of the main aims of that Article, namely the protection of a person’s dignity and psychological integrity. He submitted that the judicial system had trapped him in a labyrinth from which he could escape only if he waived his right to assert his innocence. That, in his view, entailed humiliation well beyond the level tolerated by Article 3. It constituted acute mental suffering designed to intimidate him or to keep him silent for ever by imposing a slow death sentence on him, as he inched towards death by being locked up for life with no hope of release.

2. *The Government*

80. The Government stated, firstly, that the sentence served by the applicant was not irreducible from a legal standpoint, since neither a minimum term nor a whole-life term had been set. Such sentencing arrangements resulted, moreover, from laws enacted after the offence which he had committed and were therefore not applicable to him. They submitted that the applicant's sentence had not been irreducible *de facto* either. They relied on the Court's decision in *Einhorn v. France* (no. 71555/01, ECHR 2001-XI), which was entirely applicable to Mr Léger's case in view of the following passage: "... the possibility of parole for prisoners serving life sentences ... is limited. It cannot be inferred from that, however, that if the applicant was sentenced to life imprisonment after a ... trial ... he would not be able to be released on parole."

81. Before the Law of 15 June 2000, although life prisoners had indeed rarely been released on licence (there had been fifteen such decisions in 2000 and thirteen in 1999), the fact remained that the possibility of having a life sentence adjusted in that way, while limited, had nonetheless been real. Since the Law had come into force, the applicant's situation had been transformed. There had been a noticeable increase in the number of long-term prisoners being released on licence: for instance, there had been thirty-three such decisions in 2001 in respect of life prisoners. Accordingly, any reference to decisions taken before the Law of 15 June 2000 was inappropriate and any argument based on the outcome of a future application to have the applicant's sentence adapted to his individual circumstances was a matter of speculation.

82. The Government further submitted that the applicant's continued detention was not contrary to Article 3 of the Convention. They pointed out that in order for a punishment to be degrading and in breach of Article 3, the humiliation or debasement involved had to attain a particular level and in any event had to be other than the usual element of humiliation inherent in any punishment (they cited *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, and *Kudła v. Poland* [GC], no. 30210/96, § 37, ECHR 2000-XI).

83. They contended that, according to the Court's case-law, Article 3 did not prohibit either prison sentences or life sentences as such (they cited *Hussain v. the United Kingdom*, judgment of 21 February 1996, *Reports* 1996-I, and *V. v. the United Kingdom* cited above, § 98). An issue could, however, potentially arise under Article 3 where, once the period corresponding to the punitive element had been served, the public-safety concerns linked to the prisoner's personality no longer dictated that detention was necessary.

84. In the instant case, the Government submitted that the applicant's detention did not infringe Article 3 on account of the seriousness of the offence of which he had been convicted and the failure to provide

guarantees from a psychological standpoint in support of his release. They added that his detention attracted the safeguards provided in Article 5 § 4. Any suffering entailed by his continued detention was merely the consequence of perfectly justified decisions by the national authorities – who were best placed to assess the applicant’s dangerousness – and did not exceed the minimum level of severity for Article 3 to apply.

85. The Government emphasised that the disappointments suffered by the applicant did not amount to a violation of Article 3. They could not be described as inhuman treatment (they cited *Kotälla v. the Netherlands*, no. 7994/77, Commission decision of 6 May 1978, Decisions and Reports 14, p. 238). Although the applicant might have cherished the hope of being released, particularly following the entry into force of the Law of 15 June 2000, the disappointment caused by the refusal of his application for release on licence could not constitute a violation of Article 3. Unless there were special circumstances attributable to the authorities, which had not been established in the instant case, the applicant’s anguish did not amount to suffering beyond the threshold required for Article 3 to apply.

86. The Government added that numerous provisions had introduced a genuine right not to die in prison. There were three different procedures in France which were designed precisely to give prisoners the chance not to have to spend the rest of their days in custody. It remained possible to obtain a presidential pardon. Furthermore, under the Law of 15 June 2000, parole could be granted on medical grounds. Lastly, the option of suspending the enforcement of a sentence on medical grounds, afforded by the Law of 4 March 2002 (Article 720-1-1 of the CCP), broadened the possibilities even further. The applicant had not been on “death row” and the Court’s approach in the *Soering v. the United Kingdom* judgment was not applicable to his case.

87. In any event, the Government submitted that a life sentence could not be treated as equivalent to the death penalty, which, precisely, the applicant had been spared. They observed that he had not been held in a *maison centrale* (prison for offenders serving long sentences) but in a *centre de détention*, where there was a more liberal regime chiefly geared towards the reintegration of prisoners into society. He had been kept in solitary confinement at his own request until 4 July 1999, when he had moved to an ordinary wing. However, since 1995, he had agreed to work in the general service, having contact with other prisoners as a result. He had been kept in an individual cell in a building that, in addition to older prisoners, housed inmates who had psychological or psychiatric problems or might be subject to severe pressure. He had paid regular visits to the library, had received medical attention for his heart problems, had been visited once a month by a couple of friends and had been free to correspond with anyone and to talk to journalists. Lastly, he had studied and had taken part in recreational activities. Accordingly, although Mr Léger had not had the life he would

have enjoyed had he been at liberty, his detention had not entailed an intellectual and social death.

88. The Government submitted in conclusion that as long as a detention complied with Article 5 § 1 (a) and was open to review in accordance with Article 5 § 4, an overall assessment under Article 3 led to the finding that life imprisonment did not upset the fair balance that had to be struck between the interests at stake: those of prisoners and those of society. States could not be required to release prisoners on the basis of Article 3 when the risk of their reoffending could not be ruled out. That had precisely been the position in the present case.

B. The Court's assessment

89. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25, p. 65, § 162).

90. The Court has previously stated that “one could have ... doubts” as to the compatibility with Article 3 of an “indeterminate sentence” imposed on a minor, if it had not been for the specific reasons advanced (see *Weeks*, cited above, pp. 25-26, § 47; *Hussain*, cited above, p. 269, § 53; *T. v. the United Kingdom*, cited above, § 99; and *V. v. the United Kingdom*, cited above, § 100). Furthermore, in the case of adults the Court has not ruled out the possibility that in special circumstances an irreducible life sentence might also raise an issue under the Convention where there is no hope of entitlement to a measure such as parole (see *Nivette v. France* (dec.), no. 44190/98, ECHR 2001-VII; *Einhorn*, cited above; *Sawoniuk*, cited above; and *Partington v. the United Kingdom* (dec.), no. 58853/00, 26 June 2003).

91. The Court reiterates that States have a duty under the Convention to take measures for the protection of the public from violent crime (see *V. v. the United Kingdom*, cited above, § 98). It therefore considers that the punitive element inherent in the tariff approach does not in itself give rise to a breach of Article 3. Subsequently, “once the punishment element of the sentence ... has been satisfied”, the grounds for the continued detention must be considerations of risk and dangerousness (see *Stafford*, cited above, § 80). In this connection, the Court has found that the applicant's detention was not arbitrary (see paragraphs 71-77 above).

92. The applicant regained his liberty after 41 years' imprisonment, an exceptionally lengthy period resulting from a sentence imposed at a time when minimum terms did not exist. However, from 1979 onwards, after he had spent fifteen years in prison, he had the opportunity to apply for release

on licence at regular intervals and had the benefit of procedural safeguards. In those circumstances, the Court considers that the applicant cannot maintain that he was deprived of all hope of obtaining an adjustment of his sentence, which was not irreducible *de jure* or *de facto*. It concludes that his continued detention as such, long though it was, did not constitute inhuman or degrading treatment.

93. While accepting that a life sentence such as the one imposed on and served by the applicant necessarily entails anxiety and uncertainty linked to prison life and, after release, to the measures of assistance and supervision and the possibility of returning to prison, the Court does not consider that in the circumstances of the present case the applicant's sentence attained the level of severity required to fall within the scope of Article 3 of the Convention. It cannot see any other circumstances, in terms of aggravation of the suffering inherent in imprisonment, to warrant the conclusion that the applicant underwent an exceptional ordeal capable of constituting treatment contrary to Article 3.

94. Accordingly, there has been no violation of that provision.

FOR THESE REASONS, THE COURT

1. *Holds* by five votes to two that there has been no violation of Article 5 § 1 (a) of the Convention;
2. *Holds* by five votes to two that there has been no violation of Article 3 of the Convention;

Done in French, and notified in writing on 11 April 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

A.B. BAKA
President

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

- (a) partly dissenting opinion of Mr Costa;
- (b) partly concurring, partly dissenting opinion of Mrs Mularoni;
- (c) dissenting opinion of Mrs Fura-Sandström.

A.B.B.
S.D.

PARTLY DISSENTING OPINION OF JUDGE COSTA

(Translation)

1. On one point the judgment does not reflect my own opinion, which I should like to set out below.

2. Let us briefly recapitulate the facts of the case, which received particularly widespread media coverage. An eleven-year-old child was abducted and was found dead in horrific circumstances in 1964. The applicant was taken into police custody and made a confession but retracted it almost a year later. The Assize Court convicted him of murder in 1964. It found that the offence could not be characterised as premeditated murder and that there were mitigating circumstances. The applicant was accordingly not sentenced to death but to life imprisonment. The law in force at the time did not provide for a minimum term that had to be served before life prisoners became eligible for parole. Lastly, since retracting his initial confession, the applicant has continually maintained his innocence. He applied for a retrial in 1971 and 1974, unsuccessfully on both occasions.

3. The applicant applied several times to be released on licence from 1979 onwards but without success. His release was not granted until 2005, by the Post-sentencing Court, whose judgment was upheld by the Post-sentencing Division of the Court of Appeal. The applicant was accordingly released on 3 October 2005, several months after the public hearing on the merits before the Court, having been imprisoned for over forty-one years.

4. The two complaints declared admissible by the Court relate to Article 5 § 1 and Article 3 of the Convention, which respectively safeguard the right to liberty and security and prohibit torture and inhuman and degrading treatment. In the present judgment the Court held that neither of these two Articles had been breached. The finding that there was no violation of Article 5 § 1 is where I disagree with the majority of my colleagues. I believe that there was a violation of that Article.

5. First of all, it is indisputable that the applicant's conviction and detention were from the outset "lawful" within the meaning of Article 5 § 1 (a). He was convicted by an assize court, whose competence and proper conduct of the proceedings have not been disputed, in a judgment that had become final, and his applications for a retrial were refused. Even though he protests his innocence, there is no cause to reverse the legal presumption of guilt attaching to *res judicata*.

6. It does not necessarily follow that the applicant's continued detention until 2005 satisfied the requirements of Article 5. For a long time the Court has held, quite logically, that a prolonged period of detention should be subject to the same requirement of lawfulness (and hence compatibility with the Convention) as the initial detention. In other words, a person who was detained lawfully can, as circumstances change over time, become a person

whose continued detention is unlawful (see, *mutatis mutandis*, in relation to a person of unsound mind, *Van Droogenbroeck v. Belgium*, judgment of 24 June 1982, Series A no. 50; see also *Weeks v. the United Kingdom*, judgment of 2 March 1987, Series A no. 114, and, more recently, the Grand Chamber's judgment in *Stafford v. the United Kingdom*, no. 46295/99, ECHR 2002-IV). Without there being any need to reclassify the complaint which the applicant brought under the first paragraph of Article 5, that paragraph should be read in the light of the fourth paragraph of the same Article, concerning a person's right to take proceedings by which the lawfulness of his detention (or continued detention) may be decided speedily by a court.

7. Before considering whether the applicant's continued detention was lawful, I need to dismiss two objections which occurred to me and caused some hesitation in my mind. Firstly, is the Court not running the risk of acting as a court of third or fourth instance if it reviews domestic judgments refusing an application for release on licence? Secondly, and more importantly, does the fact that parole is not a right allow the national authorities a discretionary power not amenable to review at European level?

8. As regards the first point, it would be tempting to reply that before the Law of 15 June 2000 came into force, the power to grant or refuse release on licence, at least for long-term prisoners, was vested in the Minister of Justice. The Court's case-law is suspicious about the exercise of such power by a member of the executive (see the Grand Chamber's judgments of 16 December 1999 in *T. and V. v. the United Kingdom* [GC], nos. 24724/94 and 24888/94, ECHR 1999-IX). But the counter-argument does not apply here because, as is pointed out in paragraph 65 of the judgment, the applicant considered his continued detention to be arbitrary specifically on account of the refusal of his application for release by the specialist courts dealing with post-sentencing measures, which were assigned jurisdiction by virtue of the Law of 15 June 2000 (amended in this respect by the Law of 9 March 2004).

The question therefore remains intact. However, I ultimately consider, for two reasons, that our Court has the right and duty to review decisions by such courts. Firstly, with regard to Article 5, which to a certain extent departs from the subsidiarity principle, the Court has always held that, since deprivation of liberty is compatible with the Convention only if it complies with domestic law, it is required to review such compliance itself without simply leaving the matter to the national courts. Secondly, the reasons given by the courts can easily become stereotyped or irrelevant and must therefore be reviewed, as in the case of continued pre-trial detention (see, for an early example, *Neumeister v. Austria*, judgment of 27 June 1968, Series A no. 8, and the subsequent settled case-law). Admittedly, the Court is even more demanding when it comes to pre-trial detention – because of the presumption of innocence – but it is becoming increasingly so in relation to

continued detention (or, indeed, decisions to re-detain), as is shown by the *Stafford* judgment cited above.

9. As regards the second issue, it is true that in principle parole is not a right (although questions must be asked as to whether a truly irreducible sentence, without any hope or prospects other than that of dying in prison, is not a substitute for the death penalty – which has nonetheless been abolished in almost all Contracting States pursuant to Protocol No. 6 – and fundamentally incompatible with Articles 2 and/or 3 of the Convention). However, this is in no way the approach taken by the respondent State, either in its domestic law, since parole has existed in France for well over a century, or in the practice it applied in the present case, since the applicant's applications for release on licence were always examined by the relevant authorities in turn and were refused on various grounds but never on the ground that the applicant had no such right – parole differs in this respect from the granting of a presidential pardon – or, lastly, in its written and oral submissions before the Court. Should the Court then of its own motion construct a theory to the effect that decisions on parole are both discretionary and unreviewable? I would be reluctant to do so, not only because there are already instruments laying down procedures and criteria for granting or refusing release (the fact that no such right exists means only that it will not automatically be granted to anyone who requests it, and not that it can be refused arbitrarily), but also because the right to liberty is too essential for our Court to make “real” life imprisonment an automatic and unreviewable process. I would add, lastly, that if the purpose of the legislation was to increase the role of the courts in dealing with applications for release, it would be ludicrous for the European Court of Human Rights to fly in the face of this trend by refusing to review the relevance, adequacy and lack of arbitrariness of the grounds on which the appropriate courts' decisions were based.

10. Yet in the present case it seems to me precisely – and I say this without any disrespect – that the grounds on which the courts refused the applicant's application in 2001 (see paragraphs 24-30 of the judgment) were neither very relevant nor wholly adequate and did not avert all risk of arbitrariness. I would first point out that the 1999 expert report was generally in favour of the applicant's release, that the opinion of 7 February 2000 by the judge responsible for the execution of sentences was clearly in favour, and that in February 2001 the sentence enforcement board gave a unanimous opinion in favour of granting his application for release on licence. These factors are not decisive but they are impressive.

11. However, among the grounds on which the Regional Parole Court based its decision was the fact that the applicant “denie[d] having committed” the extremely serious offence of which he had been convicted; it also mentioned his dangerousness and the risk of his reoffending, which had not been ruled out by the psychiatric experts who had examined him,

albeit “in 1965, 1984, 1989 and most recently 1999”; and lastly, it considered that he could not be said to be “making ‘serious efforts to readjust to society’ ... in spite of a coherent resettlement plan in terms of accommodation and employment”.

The National Parole Court’s decision on appeal – there being no possibility at the time of a subsequent appeal to the Court of Cassation – was based, among other things, on the fact that an order had been made for the liquidation of the assets of the person who had offered the applicant accommodation and employment (on this point, paragraph 29 of the judgment states that the applicant’s friends had attested that their offers of accommodation and employment, made repeatedly over a period of seventeen years, were valid “although their bakery was currently being sold to a private company founded by their children (a separate business registered at their home address)”).

12. If we compare all these grounds to those on which the new courts competent in such matters reached diametrically opposite conclusions four years later, we may well wonder whether they were relevant and sufficient. In particular, the fact that the applicant denied having committed the murder in no way precludes his release according to the law. Article 729 of the Code of Criminal Procedure, as in force at the time, referred only to serious efforts to readjust to society; however, the first-instance court considered that the applicant’s refusal to undergo psychological counselling invalidated any such efforts, whereas the appellate court accepted the validity of his efforts but refused to take them into account for commercial law-related reasons which were quite unjustified in the view of the people who were prepared to assist the applicant’s reintegration. Lastly, if those grounds had been reasonable in 2001, why were they dismissed in 2005? Because the applicant’s release on licence, deemed unadvisable after thirty-seven years of imprisonment, had become necessary after forty-one years, apparently without any new circumstances arising in the meantime? I must admit that I do not find that very convincing.

13. It is true, and this argument is not insignificant, that in the background there is the risk of reoffending, which does indeed appear to have been the real reason in 2001 (in this connection, the fact that the regional court relied on several expert reports, one of them dating back to 1965, scarcely seems relevant). But as was observed by the judges who allowed the applicant’s application in 2005, this risk was limited, and “a zero risk of reoffending is so rare”. In my opinion, there is unfortunately no such thing as zero risk, but if we take that approach, then we should never release prisoners on licence: life sentences would always be served for a whole-life term, and determinate sentences would always be served in full. Potential victims would perhaps be better protected (except where prisoners escaped) – but would transforming prisoners into wild beasts or human

waste not mean creating further victims and substituting vengeance for justice?

I am just asking.

PARTLY CONCURRING, PARTLY DISSENTING OPINION
OF JUDGE MULARONI

(Translation)

I agree with the conclusion of the majority that there has been no violation of Article 5 § 1 (a) of the Convention.

I consider that the parole procedure in France is discretionary in that it excludes any possibility of automatic release. In my opinion it does not entail any “right” to parole for offenders, since the judicial authorities always remain free to refuse it (see, in particular, paragraphs 40 and 48 of the judgment).

That being so, while I concur with the majority’s observation that significant progress is still required on the part of the respondent State to encourage the return of prisoners to the community through personalised assistance programmes involving supervision from the start of their detention (see paragraph 70 of the judgment), I consider that the applicant’s imprisonment may be regarded as “the lawful detention of a person after conviction by a competent court”, even after 2001.

As regards Article 3, I regret that I am unable to agree with either the reasoning or the conclusion of the majority.

The main question to be addressed is whether an irreducible life sentence may be regarded as inhuman and degrading treatment within the meaning of Article 3 of the Convention and thus raise an issue under that Article.

The Court has previously held in this connection that in special circumstances the execution of an irreducible life sentence might raise an issue under the Convention where there is no hope of entitlement to a measure such as parole (see the case-law cited in paragraph 90 of the judgment). The majority were very quick to conclude that there had been no violation of Article 3 of the Convention on the basis of this case-law. They found that no issue was raised under Article 3 in that from 1979 onwards the applicant had the opportunity to apply for release on licence at regular intervals and had the benefit of procedural safeguards (see paragraph 92 of the judgment). In the present case I consider that, while this factor may be decisive in relation to Article 5, it is not in relation to Article 3 of the Convention, in so far as the applicant complained that he “had not been effectively entitled to any adjustment of his sentence in forty years of detention”. His situation was quite different from that of the applicants mentioned in paragraph 90 of the judgment. The Court’s task here is not to consider *in abstracto* what might happen in future, but to assess *in concreto* whether the refusal to adjust the terms of the applicant’s sentence in any way after almost forty years of detention infringed Article 3 of the Convention.

I consider that the applicant's complaint should have been examined from a different perspective.

Firstly, I would observe that, in accordance with a principle acknowledged at European level and enshrined in many constitutional instruments, sentences not only have a punitive purpose but must also encourage the reform and social reintegration of those convicted. As can be seen from paragraph 47 of the judgment, there have been considerable developments over the years with regard to life sentences. Such sentences are provided for in the legislation of most Council of Europe member States but do not necessarily mean lifelong imprisonment for the convicted person. Most countries' laws provide for the possibility of applying for a review of life sentences and of granting release after a certain number of years of imprisonment. Even in France, the legislation on long-term and life imprisonment has changed significantly over the course of time (see paragraphs 34-40 of the judgment).

Secondly, since the 1970s the Council of Europe has made consistent efforts to encourage the gradual return of life prisoners to the community (see, in particular, paragraphs 43-49 of the judgment).

Thirdly, making the application of measures to adjust sentences conditional on a zero risk of reoffending would in practice mean almost never granting parole, despite the fact that it has existed in France since 1885. With regard to the intentions of the French legislature in terms of relaxing the conditions of lengthy sentences, I consider it useful and pertinent to refer to paragraph 42 of the judgment, which cites the relevant passages of the report by the National Assembly commission of inquiry (no. 2521, 28 June 2000), "France faced with its prisons", and the report by the Senate commission of inquiry on detention conditions (no. 449, 28 June 2000), "Prisons: a humiliation for the Republic".

I would also point out that the Court has recognised the legitimate aim of a policy of progressive social reintegration of persons sentenced to imprisonment, including those convicted of violent crimes (see *Mastromatteo v. Italy* [GC], no. 37703/99, § 72, ECHR 2002-VIII).

I acknowledge without hesitation that societies are entitled to protect themselves from dangerous offenders. But I would add that dangerousness is in my view the only factor that could have justified the refusal in 2001 to relax the conditions of the applicant's sentence after such a lengthy period of detention. In that connection, I agree with the national courts' observation in 2005 that "a zero risk of reoffending is so rare" (paragraph 33 of the judgment). It is very difficult for experts to conclude that there is a zero risk of reoffending, since human behaviour is sometimes unpredictable. Should the mere fact that the experts are unable to exclude with 100% certainty the risk of reoffending be sufficient to justify refusing to adjust a convicted person's sentence in any way at all after forty years of imprisonment? As the Post-sentencing Court rightly pointed out in 2005, a

refusal of the applicant's application for release on licence would have amounted to "his virtually permanent exclusion from society, which does not seem justified in view of his resettlement plan and the limited nature of the risk of his reoffending" (*ibid.*).

The Court has made clear in paragraph 65 of the judgment that its examination of the applicant's detention concerns the period from 2001 onwards. My question is therefore why the national courts reached the above conclusion, which I fully endorse, only in 2005 and not in 2001, when they had access to an expert report dating back to 1999 whose findings had been very positive towards the applicant.

After stating that "the previous experts had already found that there did not appear to be a risk of a further offence involving a child and that only the risk of a surge of paranoia and protest had held them back", the 1999 expert report concluded as follows: "This assessment therefore focuses entirely on aspects of his personality from a strictly psychiatric and forensic standpoint. And from that standpoint, there do not currently seem to be any formal obstacles to his release" (paragraph 22 of the judgment). On 7 February 2000 the judge responsible for the execution of sentences strongly recommended the applicant's release on licence (see paragraph 23 of the judgment). On 5 February 2001 the sentence enforcement board issued a unanimous opinion in his favour. The applicant's resettlement and probation officer also expressed a very positive opinion (see paragraph 25 of the judgment). However, the regional and national parole courts refused his application for release on licence in July and November 2001 respectively (see paragraphs 27-30 of the judgment).

In my view it is almost impossible to maintain that the expert report submitted in 2004 was more favourable towards the applicant than the 1999 one. In 2004 the experts were unable to "conclude with absolute certainty that he will not pose a significant danger in the community, in the psychiatric sense of the term" (paragraph 31 of the judgment). However, the applicant was released on licence with effect from 3 October 2005, subject to certain specific requirements.

While taking note of this very positive development in the applicant's situation, I consider that the refusal to relax the conditions of his sentence from 2001 until 2005 gave rise to a violation of Article 3 of the Convention.

DISSENTING OPINION OF JUDGE FURA-SANDSTRÖM

(Translation)

1. I do not share the opinion of the majority that there has been no violation of Article 5 § 1 (a) and Article 3 of the Convention. My reasons are set out below.

2. Lucien Léger had to wait forty-one years before being released on licence. Of course, he is not the only convicted person to have been detained for a lengthy period. According to recent statistics, prisoners serving life sentences in France are rarely released on licence (see paragraph 41 of the judgment). However, the question of release on licence is central to the debate on prison overcrowding, which is one of the obstacles to the proper implementation of programmes to promote reintegration and prevent reoffending. Although it is not for the Court to rule on this general problem, the matter is undoubtedly at the heart of the present case.

The only issues which the Court was called upon to address were those raised by the circumstances of the case: did Lucien Léger not satisfy the statutory requirements for being released earlier? And, taken together, do the length of his detention and the apparent unwillingness of the authorities to work towards Lucien Léger's reintegration raise an issue in themselves?

3. Before I express my opinion on these two points, I wish to emphasise that in my mind the examination of the application, as delimited in paragraph 65 of the judgment and, indeed, in accordance with the applicant's point of view, made it too easy to avoid the questions raised by the exceptional length of his detention. In particular, where Article 5 is concerned, the entire period during which the review of sentences was "non-judicial" escapes the Court's scrutiny, as does the question of the power vested in the Minister of Justice (who formerly had responsibility for decisions on parole), which is known to raise an issue under the Convention (see *Stafford v. the United Kingdom* [GC], no. 46295/99, ECHR 2002-IV) and which by its very nature excludes a number of procedural safeguards to which a convicted person should be entitled.

Article 5 § 1 (a) of the Convention

4. I do not consider it necessary to examine the question of the legality of Mr Léger's detention in the strict sense of the term. What was at stake in the present case was the "lawfulness" of his detention "after conviction by a competent court", and more specifically his continued detention after four decades of incarceration. In this connection, I find it regrettable that the majority did not place more emphasis on the autonomous meaning of the concept of detention after conviction. Looking beyond appearances, the Court has always held that the "lawfulness" required by the Convention

presupposes not only conformity with domestic law but also, as confirmed by Article 18, conformity with the purposes of the deprivation of liberty permitted by Article 5 § 1 (see *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, pp. 17-18, § 39, and *Stafford*, cited above, § 64); it is required in respect of both the ordering and the execution of the measures involving deprivation of liberty. Furthermore, in other circumstances the Court has held that the causal link between conviction and detention might be broken if a decision not to release were based on grounds that had no connection with the objectives of the legislature or the relevant court or on an assessment that was unreasonable in terms of those objectives (see paragraph 71 of the judgment). Prison sentences are intended not only to protect society and punish offenders but also to prepare them for resettlement (see the decision of the Constitutional Council cited in paragraph 59 of the judgment), and Article 729 § 1 expressly provides that parole is designed to encourage the rehabilitation of convicted prisoners. Recommendation Rec(2003)22 of the Committee of Ministers on conditional release states that “conditional release is one of the most effective and constructive means of preventing reoffending and promoting resettlement, providing the prisoner with planned, assisted and supervised reintegration into the community”. The question is therefore whether the national courts took the aim of reintegration sufficiently into account when examining Mr Léger’s application for release on licence in 2001, by which time he had been deprived of his liberty for more than thirty-five years, and if not, whether his detention became arbitrary as a result.

5. In particular, was the applicant’s reintegration impossible on account of his refusal to acknowledge his guilt? Lucien Léger objected to the fact that the courts dealing with post-sentencing measures took into account his denials of guilt. That factor is clearly apparent in the decision by the Regional Parole Court (see paragraph 27 of the judgment) and, more insidiously, in the decision on appeal (see paragraph 30). It was mentioned in conjunction with Mr Léger’s dangerousness, which was not completely ruled out, and his unwillingness to undergo psychological counselling, which was held to be the cause of this continuing risk. These two grounds made it impossible to conclude that the applicant was making “serious efforts to readjust to society” as required by Article 729 of the Code of Criminal Procedure (CCP). It is clear to me that the national authorities are better placed than an international court to assess whether this criterion is satisfied in a particular case; I shall not therefore enter into a discussion of this point. It nevertheless remains to be ascertained how Lucien Léger could have proved that he was fit to return to the community.

However, even assuming that it is acceptable that the burden of proof in such matters should rest with the convicted person himself, which implies that he has to prove that he has reformed – and in the present case there is no indication that the courts took into account the efforts made by the

applicant while in detention (Mr Léger was always described as a “model” prisoner) – what is the standard of proof required for the prisoner’s efforts to readjust to society to be deemed sufficiently serious? How can this be achieved while imprisoned? In my view it is very difficult, if not impossible.

I would observe above all in this connection that the judge responsible for the execution of sentences and the prison authorities were unanimous in concluding that there were no obstacles to the applicant’s release on licence (see paragraphs 23 and 25 of the judgment). It therefore seems to me that the reasons given by the appropriate courts to refuse his release in 2001 were irrelevant in relation to the opinions of the various representatives of the judicial, prison and welfare authorities who had been in direct contact with the applicant, yet those opinions were deliberately ignored because the applicant was still regarded as dangerous as a result of his lack of reform in relation to the offence.

Making Mr Léger’s acknowledgment of the offence a condition for his social rehabilitation is in my view problematic and outmoded in view of the purpose of custodial sentences. As soon as the punitive element of the sentence has been satisfied, the basis for the sentence has to be focused on the future, that is, on the prisoner’s return to the community. Although the applicant was convicted at a time when the system of minimum terms did not exist, I consider that the punitive element of his sentence could no longer serve as a basis for keeping him in prison.

6. Admittedly, “[a]fter the expiry of the tariff, continued detention depends on elements of dangerousness and risk associated with the objectives of the original sentence of murder” (see *Stafford*, cited above, § 87). The dangerousness element is by its very nature susceptible of change with the passage of time (see *Weeks v. the United Kingdom*, judgment of 2 March 1987, Series A no. 114, pp. 24-25, § 46). Although this criterion is not expressly laid down in Article 729 of the CCP, I agree with the majority that it was necessary to assess the applicant’s dangerousness in examining his application for release on licence (see paragraph 75 of the judgment).

However, in order to assess the risk of reoffending and the potential for social rehabilitation in a case such as that of the applicant, the authorities called on psychiatric experts. I would observe that although the experts in 1999 noted a positive development in the applicant’s personality and found that there were no longer “any formal obstacles to his release”, those appointed in 2004 considered that it could not be concluded “with absolute certainty that he [would] not pose a significant danger in the community”. In my view this subjectivity inherent in the use of expert reports entails a risk of arbitrariness. Like all human beings, experts are not unaffected by the trends and ideas current in their profession at any given time. Furthermore, psychiatry is not always an exact science; the findings of an

expert report are likely to vary depending on its author and the person making use of it.

I note above all that the 1999 report was in favour of the applicant's release in so far as "[i]t would be helpful for him, at least initially, to receive support through psychological counselling" (paragraph 22 of the judgment). One year later, the judge responsible for the execution of sentences held that the applicant's release "would enable him to undergo compulsory medical and psychological treatment and to regain his liberty within a clearly defined framework" (paragraph 23 of the judgment). Accordingly, both the experts and the judge responsible for the execution of sentences suggested that Mr Léger be given psychological help after being released. Indeed, Article 729 of the CCP provides that convicted persons may be granted parole if they can show, among other things, "that they have to undergo treatment". I find it regrettable in this connection that the domestic courts refused to release Mr Léger on licence on account of his hypothetical dangerousness, without envisaging a plan for his resettlement involving measures of assistance and supervision.

7. What remains to be examined is the final ground given by the National Parole Court, namely the applicant's lack of serious employment prospects as a result of the last-minute compulsory liquidation of the company which for the past fifteen years had been offering to employ him. I do not find this reasoning persuasive and would emphasise in this connection that the criteria for prisoners to satisfy in order to be granted parole must be realistic, and that "[t]he lack of possibilities for work on release should not constitute a ground for refusing or postponing conditional release" (Appendix to Recommendation Rec(2003)22 on conditional release, cited above, point 19).

8. Did the applicant's detention become arbitrary over the course of time? If one takes the view that life imprisonment is not justified once and for all by the initial punitive purpose, as emerges from the *Stafford* judgment, I think it did. The decision to keep Mr Léger in detention was based on his lack of reform; at the same time, it anticipated acts he might commit in the future and denied him the prospect of reintegrating into the community (without even envisaging intermediate measures such as an external placement). This latter aim does not seem to have been taken into account in the decision to keep Mr Léger in detention for so long and leads me to conclude that, by 2001 at any rate, the causal link between his conviction and his continued imprisonment had been broken.

Article 3 of the Convention

9. Although the Court observed in *Stafford* (cited above, § 71) that, under English law, it "was never anticipated that prisoners serving mandatory life sentences would in fact stay in prison for life, save in

exceptional cases”, it has never ruled on whether irreducible life sentences are compatible with Article 3. It may be argued, moreover, that in Lucien Léger’s case the sentence was not inevitably a whole-life term since the possibility of release on licence existed after a certain period.

10. The question is therefore whether, on account of its overall length, the applicant’s detention constituted inhuman treatment or punishment.

11. Taking the view that this was the case because it is inhuman to continue to detain a prisoner when his detention has become arbitrary after a certain period (since it can no longer legitimately be based on the initial punitive purpose) means finding a violation of Article 5 and going no further.

12. A violation of Article 3 will be found, however, if one takes the view that this was the case because “it is inhuman to imprison a person for life without any hope of release”, because “a crime prevention policy which accepts keeping a prisoner for life even if he is no longer a danger to society would be compatible neither with modern principles on the treatment of prisoners during the execution of their sentence nor with the idea of the reintegration of offenders into society” and because “nobody should be deprived of the chance of possible release. Just how far this chance can be realised must depend on the individual prognosis” (see paragraph 43 of the judgment).

13. In all societies, sentences serve two purposes, namely the exclusion of offenders and their reintegration into society; it is true that either one of these considerations will prevail over the other according to the dominant views of the time. Furthermore, while there is a consensus as to the inclusion of parole in the member States’ legal systems, there are divergences as to the manner of implementing it and the length of the sentence that should be served.

14. These factors are not sufficient, however, to persuade me that continued detention beyond a certain period does not raise an issue in terms of fundamental rights. I refer in this connection to the following extract from the parliamentary debates in the United Kingdom concerning the bill to abolish the death penalty in 1964, which expresses a view that I share: “generally speaking, experience shows that nine years, ten years, or thereabouts is the maximum period of confinement that normal human beings can undergo without their personality decaying, their will going, and their becoming progressively less able to re-enter society and look after themselves and become useful citizens.”

15. In Lucien Léger’s case, I consider that the persuasive force of the arguments relating to individual and general prevention and to punishment becomes weaker as time goes on. Firstly, forty-one years of deprivation of liberty is without any doubt a sufficiently serious and dissuasive punishment to satisfy the most conservative minds; secondly, I am not convinced by the assumption that an individual is as dangerous at the age of 69 as he was at

40 or 50. Nor should it be forgotten that he was applying to be released on certain conditions and that prisoners released conditionally are supervised and monitored in order to allow them to readjust to society. What strikes me in the present case is that no measures were ever taken to prepare Mr Léger for his social reintegration.

16. The time was ripe to make a step forward. The Court often repeats with regard to prisoners that their suffering must not go beyond that inevitably associated with legitimate expectations of a prison sentence (see *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002-IX). The Committee of Ministers recently stated that “[i]mprisonment is by the deprivation of liberty a punishment in itself and therefore the regime for sentenced prisoners shall not aggravate the suffering inherent in imprisonment” (see paragraph 44 of the judgment). Lifelong detention with no real possibility of release after a certain period denies human dignity and sits ill with the absolute prohibition in Article 3 of the Convention. A never-ending detention of this kind is comparable to a slow death sentence or to death row with no exit (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161).

17. The repressive climate developing today in certain countries that are the target of terrorism is leading to the imposition of harsher prison sentences and, as a corollary, to a worsening problem of prison overcrowding. The Court’s finding that there was no violation in the present case unfortunately runs the risk of vindicating this conservative trend.

I especially regret this finding as a consensus seems to be forming at European level as to the need to envisage and prepare for the resettlement of long-term prisoners; in that connection, I would refer in particular to the two recommendations cited in paragraph 45 of the judgment. The majority could – and, in my view, should – have opted for the dynamic and evolutive approach promoted by the Court’s case-law and emphasised the absolute primacy of fundamental rights by finding a violation of Article 3 of the Convention in the present case.