



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

FOURTH SECTION

CASE OF ALLEN v. THE UNITED KINGDOM

(Application no. 18837/06)

JUDGMENT

STRASBOURG

30 March 2010

FINAL

30/06/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Allen v. the United Kingdom,

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

Lech Garlicki, *President*,

Nicolas Bratza,

Giovanni Bonello,

Ljiljana Mijović,

David Thór Björgvinsson,

Ledi Bianku,

Mihai Poalelungi, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 9 March 2010,

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

PROCEDURE

1. The case originated in an application (no. 18837/06) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a British national, Ms Susan Anne Allen (“the applicant”), on 2 May 2006.

2. The applicant, who had been granted legal aid, was represented by Mr D. Taylor, a lawyer practising in Liverpool. The United Kingdom Government (“the Government”) were represented by their Agent, Ms E. Willmott, of the Foreign and Commonwealth Office, London.

3. The applicant alleged that the fact that she was not allowed to attend the hearing of the prosecution's appeal against her being granted bail had breached her rights under Article 5 §§ 3 and 4 and Article 6 of the Convention.

4. On 14 May 2008 the President of the Chamber decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1970 and lives in Liverpool.

1. The applicant's initial granting of bail

6. On 6 October 2005 the applicant was charged with two offences of conspiracy to supply Class A drugs.

7. On 7 October 2005 the applicant was produced at Liverpool City Magistrates' Court. Following a contested bail application she was granted bail by the Deputy District Judge.

2. The prosecution's appeal against the applicant being granted bail

8. The prosecution gave notice that it wished to appeal against the grant of bail and the applicant remained in detention. The appeal hearing was to take place at Liverpool Crown Court on 11 October 2005 and the applicant's solicitors arranged with the Prison Service for her to be present at the court building.

9. The prosecution's appeal came before Judge Globe on 11 October 2005. At the start of the hearing, counsel for the applicant requested that the judge exercise his discretion to allow the applicant to be present while the appeal was heard. It was contended on the applicant's behalf that she had been led to believe that she would be released following the grant of bail at the magistrates' court and that she had not properly understood the implications of the prosecution's appeal. Counsel for the applicant asserted that if she were present she would see that her case was being dealt with fairly and he further clarified that the basis for his application was "common humanity" and "not technical". Judge Globe declined the request, reasoning that the applicant could be given a full report of what had happened from her counsel. Moreover, her attendance would be undesirable as one of the applicant's co-accused had not been present at the hearing of the appeal against the grant of bail to him, and it would therefore be unfair to treat the applicant more favourably.

10. When the applicant later arrived in the court building, her counsel again requested that she be allowed to attend the hearing in person. He emphasised that this was a re-hearing and rather unusual as it was the prosecution which had sought to appeal the Deputy District Judge's ruling on bail. As the applicant was already present in the building, her production would cause little inconvenience. Judge Globe again refused, this time explaining that if he allowed the applicant to be present it would set a precedent for any defendant in custody wishing to attend an appeal against bail in the future.

11. The applicant's counsel submitted to the judge:

"You have considerable experience of looking at people and taking into account their demeanour. This woman is, on the defence case, a respectable woman of good background and a vulnerable person. I would like you to see her, frankly, because you will be able to tell and see that she does not fall into a category of so many of those

who appear before you ... I was able to address the learned District Judge on precisely those terms. I believe that it had some impact on his decision to grant bail because he was able to see her and make an assessment of that person. She is here and you could make that assessment if she was brought up before you.”

12. In refusing the applicant permission to attend, Judge Globe stated:

“I am not going to alter my view in relation to [the applicant] being present during the hearing. I will listen to your submissions. If there is anything during your submissions that causes me to hear evidence from her or to have to do something different to what I am doing at the moment in relation to the hearing of the matter, I will reconsider it at that stage.”

13. At a later stage of the hearing, Judge Globe remarked:

“... [W]hat beyond what you have been able to describe to me are you suggesting that I should gain from bringing her up from the cells into the dock at the moment? What do you want me to do if I were to ask her to come up into the dock, just look at her? Does that add anything to anything that you are suggesting? I have a very clear picture of the sort of person who is going to walk into the dock. No doubt she is going to be very worried. It must be a very intimidating experience for anybody of no previous convictions who has recently been taken into custody, to be brought into a court as large as this. I can imagine full well what is going to happen when she walks in. But given the fact that I can imagine that, and I have seen it happen many times, what else am I going to notice?”

14. The applicant's counsel replied that he had withdrawn his application for her to attend. Judge Globe invited him to make any last submissions about what might be gained by seeing the applicant in person. Counsel answered with:

“...looking at the demeanour of the person, that is all. There is something to do with that assessment which is better if one looks at the person and sees them looking across the court looking back at you. But you have in detail, as you have pointed out, a thorough description of her and if that suffices I am not going to seek to persuade you to go further.”

15. Judge Globe proceeded with the hearing in the applicant's absence. He decided to allow the prosecution appeal and refuse bail, on the grounds that the applicant's brother, one of the co-accused, was at liberty, possibly overseas, and that there was a risk that she would abscond and join him or provide him with information about the prosecution case which would obstruct the course of justice.

3. *The applicant's first application for permission to apply for judicial review*

16. The applicant applied for permission to apply for judicial review of the decision not to allow her to attend the hearing on the ground that her rights under the Convention had been breached.

17. On 9 November 2005 Mr Justice Sullivan refused the application for permission to apply for judicial review. He first observed that the applicant

was challenging Judge Globe's decision not to allow her to attend the prosecution appeal, and that she did not contend that the ultimate decision to refuse her bail was unreasonable. Mr Justice Sullivan further noted that though Rule 19.17 (4) of the Criminal Procedure Rules (see paragraph 22 below) was not referred to during the hearing before Judge Globe, it was Convention compliant because a person was entitled to be present if, in an exceptional case, the interests of justice so required. The applicant's grounds for applying for permission to seek judicial review did not explain why hers was an exceptional case or why the interests of justice required her attendance whilst she was legally represented.

18. Mr Justice Sullivan took into account Judge Globe's clear indication that he would be prepared to reconsider his view and allow the applicant to be present if there was anything that would require him to hear evidence from her in person. However, counsel representing the applicant had not been able to identify what would be gained by producing the applicant.

4. The applicant's renewed application for permission to apply for judicial review

19. On 7 December 2005 Mr Justice Gibbs refused the applicant's renewed application for permission to bring judicial review proceedings. The applicant's counsel attended and argued that the decision to refuse her admission to the hearing of the prosecution's appeal had breached her rights under Article 5 § 3, or alternatively, Article 5 § 4 of the Convention. It was asserted that the production of the applicant before the Deputy District Judge did not fulfil the requirements of Article 5 § 3 because the judge was not a judge authorised by law to exercise judicial power, as his decision was subject to immediate appeal and was never put into effect.

20. In giving judgment, Mr Justice Gibbs took into account a transcript of the proceedings before Judge Globe. Although Rule 19.17 (4) had not been expressly cited to Judge Globe, the latter's approach to the application made to him had been entirely consistent with that rule. The general principle underlying Rule 19.17 (4) was that an applicant should not generally be entitled to be present at the hearing of a prosecution appeal. The first exception to that proposition had not been fulfilled as the applicant was not acting in person. Therefore the judge would have to take the view that the case was of an exceptional nature and/or that the interests of justice required the applicant to be present. Judge Globe, in considering the matter, undoubtedly had the interests of justice in mind. He had referred to the position of the co-defendant and had made an enquiry as to whether there was any particular reason to believe that injustice would occur, having regard to the fact that an explanation could be given to the applicant immediately afterwards as to the judge's decision and his reasons for it.

Judge Globe had also, notably, left open the possibility of altering his decision if, for example, it became apparent that oral evidence might be required from the applicant in support of her application.

21. Mr Justice Gibbs found that the Deputy District Judge was authorised to exercise judicial power as required by Article 5 § 3 of the Convention and clearly had exercised it, even though his decision was subject to immediate appeal and was not put into effect pending appeal. As concerned the applicant's complaints under Article 5 § 4, the legal framework covering applications for bail, including appeals, did in Mr Justice Gibbs view enable her to take proceedings whereby the lawfulness of her detention could be decided speedily by a court as required by that article. There was, in his judgment, nothing even arguably to be found in the wording of Article 5 § 4 which entitled an applicant to be present at such proceedings in all instances. Where prosecution appeals against refusal of bail were concerned, Rule 19.17 (4) provided a Convention compatible procedure to ensure that no injustice was caused to an applicant in cases in which he or she was not permitted to be present.

II. RELEVANT DOMESTIC LAW AND PRACTICE

22. Rule 19.17(4) of the Criminal Procedure Rules SI 2005/384 (“the Criminal Procedure Rules”) provides as follows:

“The person concerned [when the prosecution appeal against a decision to grant bail] shall not be entitled to be present at the hearing of the appeal unless he is acting in person or, in any other case of an exceptional nature, a judge of the Crown Court is of the opinion that the interests of justice require him to be present and gives him leave to be so.”

23. Section 1 (1) of the Bail (Amendment) Act 1993 (“the 1993 Act”) grants the prosecution the right to appeal to the Crown Court against a decision by magistrates to grant bail in cases concerning particularly serious charges or convictions. Section 1 (3) of the 1993 Act provides that such an appeal may only be made where, prior to the grant of bail, the prosecution has made representations that bail should not be allowed. The appeal itself is by way of a re-hearing of the application for bail and the judge hearing the appeal may remand the accused person in custody or grant bail subject to such conditions as he thinks fit (section 1 (9) of the 1993 Act).

24. Section 1 (4) of the 1993 Act requires that the prosecution give oral notice of its intention to appeal to the court which has granted bail. This must be done at the conclusion of the proceedings in which bail has been granted and before the release from custody of the person concerned. Section 1 (5) gives the prosecution two hours within which to serve written notice of appeal upon both the court which has granted bail and the defendant. If it fails to do so, the appeal is deemed to be disposed of (section 1 (7)). Section 1 (6) of the 1993 Act states that upon receipt of the

prosecution's oral notice of appeal against the decision to grant bail, the magistrates' court shall remand the person concerned in custody, until the appeal is determined. Once the proper notice has been given, section 1 (8) of the 1993 Act provides that the hearing of the appeal must commence within two working days of the first instance proceedings at which oral notice of appeal is given.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 5 §§ 3 AND 4 AND ARTICLE 6 § 1 OF THE CONVENTION

25. The applicant complained that the Deputy District Judge did not meet the requirements of Article 5 § 3 of the Convention as he was not able to give a binding ruling on bail, as the prosecution were entitled to appeal against his decision. She also complained that the fact that she was not permitted to attend the hearing of the prosecution's appeal against bail breached her rights under Article 5 § 4 of the Convention. She further complained that the refusal in question gave rise to a violation of her rights under Article 6 § 1 of the Convention.

Article 5 §§ 3 and 4 of the Convention provides as follows:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

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

Article 6 § 1 of the Convention, as relevant, provides:

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

26. The Government contested that argument.

A. Admissibility

27. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. *The refusal to allow the applicant to attend the prosecution's appeal against bail*

28. The applicant asserted that her being refused permission to attend the prosecution's appeal breached her rights under Article 5 § 4 of the Convention. She further maintained that her inability to attend the hearing in person constituted a breach of her rights under Article 6 § 1 of the Convention.

29. The Court considers that the applicant's complaint under Article 6 should be examined under Article 5 § 4 of the Convention, it being the *lex specialis* in the matter (see, *mutatis mutandis*, *Alp and Others v. Turkey*, (dec.), nos. 34396/05, 8753/06, 25853/06, 37432/06, 37435/06, 2873/07, 24664/07 and 44938/08, 9 June 2009).

a) The parties' arguments

i) The applicant

30. The applicant maintained that Article 5 § 4 of the Convention entitled her to be present when the prosecution's appeal against the decision to grant her bail was considered.

31. She stressed that a lengthy period of detention was in issue, as her trial was on serious charges and would be likely to take a long time. Consequently, the procedure adopted when reviewing her entitlement to bail had to be similar to that applied during a criminal trial in order to comply with Article 5 § 4 of the Convention.

32. The applicant further asserted that Judge Globe had erred in the exercise of his discretion under Rule 19.17 (4) of the Criminal Procedure Rules. The interests of justice required that she, in the circumstances, attend the hearing as she had been granted bail previously and had a legitimate interest in understanding why Judge Globe allowed the prosecution appeal. Moreover, she was present at the Crown Court when the appeal was being heard and there was no practical reason why she should not have been allowed to be present.

33. The applicant finally contended that the basis for her detention was first reviewed at the Crown Court during the consideration of the prosecution's appeal against bail. As the reasons for her detention had not been reviewed before, it was more likely that she would hear things in the course of the hearing that she might wish to address through her representative. Furthermore, the assessment of her character had been a key issue during the appeal hearing, as the judge had been required to consider whether she would comply with the restrictions placed upon her by the bail conditions.

ii) The Government

34. Since the prosecution's appeal against the grant of bail was a re-hearing of the issues which had been determined by the Deputy District Judge, the Government accepted that the procedural requirements of Article 5 § 4 applied in full to the hearing before Judge Globe. The Government submitted that both the hearing before the Deputy District Judge and Judge Globe had met the requirements of Article 5 § 4 of the Convention.

35. It was well-established that the requirements of Article 5 § 4 were not the same as those under Article 6 of the Convention, regardless of the length of pre-trial detention that might ensue. The difference between the stringency of the procedural requirements under Articles 5 § 4 and Article 6 of the Convention reflected the different purposes of the two provisions. Rather than guaranteeing that the merits of the case against a defendant receive a "fair and public hearing," Article 5 § 4 was intended simply to ensure that a review could properly establish whether detention was lawful rather than arbitrary.

36. The general principle enshrined in Article 5 § 4 was that either the accused or their legal representative should be permitted to attend a review of detention. That had clearly been permitted in the applicant's case. The only exceptions were where the presence of the accused was necessary in order to give satisfactory information or instructions to her counsel; where there had been a significant lapse of time between detention decisions; or where there was a proposed change to the basis of detention.

37. In the applicant's case, the appeal hearing had taken place within two working days of the original bail hearing at which the applicant and her lawyers had all been present. Furthermore, the grounds on which the prosecution had sought to appeal the grant of bail were the same grounds on which they had contested the original grant of bail in the magistrates' court.

b) The Court's assessment*i) General principles*

38. The Court recalls that by virtue of Article 5 § 4, an arrested or detained person is entitled to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for the "lawfulness", in the sense of Article 5 § 1, of his or her deprivation of liberty (see *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 154-B, § 65). Although it is not always necessary that the procedure under Article 5 § 4 be attended by the same guarantees as those required under Article 6 § 1 of the Convention for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question (see *Reinprecht v. Austria*, no. 67175/01, § 31, ECHR 2005-...., with further

references). The proceedings must be adversarial and must always ensure equality of arms between the parties. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see *Trzaska v. Poland*, no. 25792/94, § 74, 11 July 2000). The possibility for a detainee to be heard either in person or through some form of representation features among the fundamental guarantees of procedure applied in matters of deprivation of liberty (see *Kampanis v. Greece*, judgment of 13 July 1995, Series A no. 318-B, § 47).

39. The Court reiterates that Article 5 § 4, in guaranteeing to persons arrested or detained a right to take proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful. Although it does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention, a State which institutes such a system must in principle accord to the detainees the same guarantees on appeal as at first instance (see *Moisyev v. Russia*, no. 62936/00 § 160, 9 October 2008; *Navarra v. France*, judgment of 23 November 1993, Series A no. 273-B, § 28 and *Toth v. Austria*, judgment of 12 December 1991, Series A no. 224, § 84).

ii) Application of principles to the instant case

40. Turning to the present case, the Court reiterates that its task is not to rule on legislation *in abstracto* and it does not therefore express a view as to the general compatibility of Rule 19.17 (4) of the Criminal Procedure Rules with the Convention (see *Reinprecht v. Austria* cited above, § 32 and *Nikolova v. Bulgaria* [GC], no. 31195/96, § 60, ECHR 1999-II). Yet it must examine whether the proceedings in the applicant's case were in conformity with Article 5 § 4 of the Convention.

41. The Court notes that the applicant initially had been granted bail at the hearing before the Deputy District Judge, which she personally attended (see paragraph 7 above). It further notes the submissions made by the applicant's counsel at the outset of the prosecution's appeal hearing that the applicant had expected to be released following the grant of bail and that she had not properly understood the implications of the prosecution's appeal (see paragraph 9 above).

42. The Court considers to be relevant the fact that the Deputy District Judge had the opportunity to see the applicant in person and make his own assessment of her before deciding to grant her bail. This was a factor emphasised by counsel for the applicant when requesting that Judge Globe use his discretion to allow the applicant to attend the hearing of the prosecution's appeal against bail.

43. Against this background, the Court recalls its earlier case-law concerning the question of whether an applicant's attendance is required for

the purposes of Article 5 § 4 of the Convention (see, among other authorities, *Mamedova v. Russia*, no. 7064/05, 1 June 2006; *Graužinis v. Lithuania*, no. 37975/97, 10 October 2000 and *Jankauskas v. Lithuania* (dec.), no. 59304/00, 16 December 2003). In these cases, as pointed out by the respondent Government, the Court identified special circumstances in which an applicant's personal attendance might be required under Article 5 § 4 of the Convention, even though he or she was legally represented. Notably however, the Court finds these cases to be distinguishable, in that they all concerned applicants' appeals against their detention on remand and not, as in the present case, a prosecution appeal against the grant of bail, without which the applicant would have been entitled to be at liberty. Indeed, in *Jankauskas*, cited above, the Court was careful to note that the domestic courts had held hearings in the presence of both the applicant and his lawyer when making orders authorising and extending the term of his detention on remand. What was at issue in that case was whether the applicant had a right to be personally present at his subsequent appeal against the order for his detention.

44. The Court considers of central importance the fact that the relevant domestic law qualifies a prosecution appeal against bail as a re-hearing of the application for bail, thereby entitling the judge hearing the appeal to remand the accused in custody or to grant bail subject to such conditions as he may deem appropriate (see paragraph 23 above). It follows that the applicant should have been afforded the same guarantees at the prosecution's appeal as at first instance. Though the Court is mindful of the inherent logistical difficulties involved in ensuring a detainee's personal attendance at a court hearing, it finds no evidence of any compelling reasons in the present case which might have rendered the applicant's presence undesirable or impracticable. To the contrary, it is accepted that the applicant's representatives had made arrangements for her to be present at the court building on the day of the prosecution appeal hearing, and that no inconvenience would have been caused in allowing her to attend.

45. It is also noteworthy that, according to the applicable domestic law, the prosecution appeal had the effect of immediately staying the applicant's grant of bail at first instance, consequently depriving the applicant of her liberty from the moment the prosecution announced their intention to appeal against the Deputy District Judge's decision (see paragraph 24 above). Furthermore, as the applicant herself asserts, a lengthy period of pre-trial detention was likely given the gravity of the charges against her (see paragraph 31 above).

46. The Court cannot but stress the importance of what was at stake for the applicant, namely her right to liberty. It recalls in this connection its judgment in the case of *Garcia Alva v. Germany*, no. 23541/94, § 39, 13 February 2001, where it stated that:

“According to the Court's case-law, it follows from the wording of Article 6 – and particularly from the autonomous meaning to be given to the notion of “criminal charge” – that this provision has some application to pre-trial proceedings (see the *Imbrioscia v. Switzerland* judgment of 24 November 1993, Series A no. 275, p. 13, § 36). It thus follows that, in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an on-going investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure.”

47. For the reasons set out above, and in light of the fundamental importance of the right to liberty in issue, the Court does not find the Government's justification for the refusal in question to be sufficient. For the Court, having regard to the particular circumstances of the applicant's case as described above, fairness required that the applicant's request to be present at the appeal be granted.

48. There has accordingly been a violation of Article 5 § 4 of the Convention.

2. The alleged failure of the Deputy District Judge to meet the requirements of Article 5 § 3 of the Convention

49. The applicant also complained that the Deputy District Judge did not meet the requirements of Article 5 § 3 of the Convention as he was unable to give a final ruling on bail. She emphasised the fact that the Deputy District Judge's decision was open to appeal by the prosecution, and that his decision would be stayed pending the outcome of such an appeal.

50. The Court recalls its judgment in *McKay v. the United Kingdom* [GC], no. 543/03, §§ 36 - 40, ECHR 2006-X. There, after a thorough examination of the relevant case-law, the Grand Chamber stated that it had found no persuasive authority for concluding that the first obligatory appearance before a judge must encompass the power to grant release on bail. Rather, it was stressed that the initial automatic review of arrest and detention “must be capable of examining lawfulness issues and whether or not there is a reasonable suspicion that the arrested person had committed an offence, in other words, that the detention falls within the permitted exception set out in Article 5 § 1 (c). When the detention does not, or is unlawful, the judicial officer must then have the power to release” (see *McKay*, cited above § 40). It further reiterates its conclusion at § 39 of *McKay* that: “Insofar as it may be suggested that the power to grant bail was a power which the magistrates had to be able to exercise on the first court appearance of the detained person after arrest, the Grand Chamber is unable to agree with this interpretation.”

51. In view of the foregoing, the Court rejects the applicant's contention that the Deputy District Judge did not “exercise judicial power,” as his decision on bail was open to appeal. To the contrary, it observes that its case-law to date has emphasised that the power of a judge or judicial officer

on initial review under Article 5 § 3 simply must be to release an individual in the event that he finds their detention unlawful or not to be based on any reasonable suspicion that they have committed an offence. The Court further notes that, as was the case in *McKay* (cited above, see §§ 49 and 50), the question of the applicant's bail was reconsidered shortly thereafter by a judicial officer who undisputedly did have the power to make a final decision in that respect.

52. There has, accordingly, been no violation of Article 5 § 3 of the Convention.

2. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. Article 41 of the Convention provides:

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

A. Damage

54. The applicant claimed compensation for the breach of her rights as the Court deemed appropriate.

55. The Court finds it reasonable to assume that the applicant suffered a certain amount of distress and frustration due to her inability to attend the hearing of the prosecution's appeal, after which she was denied bail and kept in detention. Therefore, ruling on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 1,000 for non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

56. The applicant, who was granted legal aid in connection with the proceedings before the Court, has failed to submit quantified claims in respect of costs and expenses. Thus, the Court does not make any award under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;
2. *Holds* by six votes to one that there has been a violation of Article 5 § 4 of the Convention;
3. *Holds* unanimously that there has been no violation of Article 5 § 3 of the Convention;
4. *Holds* unanimously that there is no need to examine the complaint under Article 6 of the Convention;
5. *Holds* by six votes to one
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into pounds sterling at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 30 March 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President

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

L.G.
T.L.E.

CONCURRING OPINION OF JUDGE BRATZA

1. With some hesitation, I have voted in favour of finding a violation of Article 5 § 4 of the Convention in the present case.

2. The applicant was represented by counsel at the hearing before Judge Globe of the prosecution's appeal against the grant of bail. The applicant's presence in the court building had not been requested by the Crown Court itself but had been arranged directly between the applicant's solicitors and the Prison Service. When, at the start of the hearing, the applicant's counsel requested that Judge Globe should exercise his discretion to allow the applicant to be present when the appeal was heard, the request was refused, the judge finding that the case was not of "an exceptional nature" and that "the interests of justice" did not require the applicant's presence for the purposes of Rule 19.17(4) of the Criminal Procedure Rules (SI 2005/384). Judge Globe went on, however, to emphasise that, if during the submissions of the applicant's counsel something should occur which required him to hear evidence from the applicant herself or to take a different view about the need for the applicant's presence, the matter would be reconsidered at that stage. There is nothing to suggest that any new factor arose which required the applicant's presence; in particular, it is not claimed that, during the appeal hearing, any new or different ground was advanced by the prosecution for opposing the grant of bail, which had not been relied on before the Magistrates' Court.

3. Had this been a case of an applicant's appeal against the refusal of bail, I would have found no basis in the Court's case-law for holding that the applicant's rights under Article 5 § 4 had been violated. The case-law makes clear that, in order to comply with that paragraph, proceedings to extend a person's detention on remand or to review a decision ordering the person's detention or refusing bail must be adversarial in nature and must ensure equality of arms between the parties: in this regard, the Court has held that the possibility for a detainee to be heard in person or through some form of representation features among the fundamental guarantees of procedure applied in matters of deprivation of liberty (see, for example, *Kampanis v. Greece*, judgment of 13 July 1995, Series A no. 318-B, § 47). However, the Court has also held that, where an applicant is legally represented at a hearing in such proceedings, Article 5 § 4 does not additionally require the presence at the hearing of the applicant himself or herself in the absence of special reasons (*Jankauskas v. Lithuania* (dec.), no. 59304/00, 16 December 2003). Such reasons have been found to exist in cases where the hearing of the appeal took place many weeks after the original remand in custody and where the appeal court changed the original basis for the remand of the applicant, without any possibility of further appeal (*Grauzinis v. Lithuania*, no. 37975/97, 10 October 2000); where, in

seeking release from detention on remand, the applicant relied on the appalling conditions of detention, of which her counsel had no first-hand knowledge (*Mamedova v. Russia*, no. 7064/05, 1 June 2006); and where the case called for an assessment of the applicant's character or mental state (*Mamedova v. Russia*, cited above; *Duda v. Poland*, no. 67016/01, 19 December 2006).

4. No special reasons were advanced before Judge Globe for requiring the presence of the applicant at the bail appeal hearing and the application for her attendance was eventually not pursued by her counsel.

5. However, in common with the majority of the Chamber, I consider that different considerations apply in a case such as the present, where bail has been granted to an applicant at first instance, where the applicant is detained pending the determination of an appeal against the grant of bail brought by the prosecution and where the prosecution's appeal is qualified as a rehearing of the original application for bail. I consider that in these circumstances an applicant should be afforded the same guarantees under Article 5 as he or she enjoys in the original application for bail and that the presence of the applicant at the appeal hearing should be the rule rather than the exception. Since there were in the present case no practical or other obstacles to the attendance of the applicant at the appeal hearing, I consider that her rights under Article 5 § 4 were violated.

CONCURRING OPINION OF JUDGE BONELLO

1. The facts of this case appear simple and uncontested. The applicant, charged with criminal offences, had been granted bail by the Deputy District Judge. The prosecution appealed to have the benefit of bail revoked, and the Crown Court set down the discussion on the revocation of bail for hearing on 11 October 2005. The applicant's lawyer arranged with the Prison Service for the applicant to be present in court for that hearing, and she was duly conveyed to the court building on the appointed day. Counsel for the applicant asked the court for his client to be present inside the courtroom, but Judge G., presiding, relying on very clear domestic law in force (see paragraph 22 of the judgment), refused permission. After the pleadings the judge proceeded, in the enforced absence of the accused, to revoke the bail she had already been granted by the Deputy District Judge.

2. I had no difficulty in voting with the majority in favour of finding a violation of the applicant's rights enshrined in Article 5 § 4. However, I believe the reasoning adopted by the Court to be unnecessarily restrictive, and quite alarmingly so. The Court found that Judge G.'s denial of the applicant's request to be present at the hearing that would determine her provisional liberty violated the applicant's rights – but only because she had already been granted bail and now faced the danger of losing that provisional liberty. These considerations necessarily imply that in other circumstances – for example, had this been the first bail hearing, or had bail already been refused at first instance – the judge of the appeal court could legitimately have excluded the accused from the courtroom.

3. I concede I embrace far more radical views on the right of an accused person to be present during all the stages of the proceedings in which issues regarding his or her liberty are being discussed and determined, if the accused person so requires. Hard as I try, I cannot bring myself to see the presence of the accused, in proceedings which determine their rights and their liberty, as a discretionary concession that essentially depends on the court's conviviality or misanthropy, or on whether the presiding judge had started the day in a cantankerous or in an affable mood. At stake for the applicant at that hearing of 11 October were her freedom, her future, her incarceration. It strikes me as at least moderately weird that every person in the universe had a “right” to be present in the courtroom on 11 October – everybody, that is, except the person most immediately affected by the goings-on in that courtroom. Anyone can be there when imprisonment is being decided, provided it is not the person who is risking prison. Issues intimately concerning the accused are best discussed and determined behind the accused's back, where else? Now we wouldn't want any of the precious lessons from Kafka's *Trial* to go to waste, would we?

4. I am unable to look at the presence of the accused in court the way Judge G. did when addressing the applicant's counsel: “What ... are you

suggesting that I should gain from bringing her up from her cell into the dock at the moment?” (see paragraph 13 of the judgment), even if “I” presumably stands for “the administration of justice”. Whatever it stands for, surely that was the wrong test to apply. The presence of the accused in court cannot be judged exclusively by reference to its usefulness to the decision-making process, but rather by reference to the right of accused persons to follow, and, if need be, to participate in events which concern them more than they do anyone else. The functioning of the lawyer/accused tandem depends also on the ability of the accused person to give instructions to his or her lawyer in court on a continuous and impromptu basis. How else could the applicant give guidance to her lawyer on any matter which might arise, if the judge barred her by diktat from being anywhere near her lawyer?

5. By the same line of reasoning, one fails to see what the judge, or the administration of justice, may “gain” from the presence of the public in the courtroom. Yet Judge G. excluded only the accused from his presence, and showed no intolerance at all towards the presence of the public. It seems that in the UK system the idle curiosity of a spectator in the courtroom attracts a higher degree of judicial favour and protection than the legitimate concerns of a person desiring to follow what is going on with regard to his or her immediate liberty or incarceration. What was at issue in the present case was hardly what the judge stood to gain or lose, but rather whether at any stage of the criminal trial the accused, if she so desired and requested, could have rightly been prevented from attending a public hearing regarding her liberty – a hearing everyone else, except her, was entitled to attend. For my part, I believe that those accused who wish to be present when their liberty is being determined deserve not to be looked upon by the whole justice system (including the law) as unwelcome nuisances to be hustled out by the court's bouncers. And this applies independently of whether it was a first or a second hearing, or whether bail had already been granted or refused. In my view the accused's presence should, as a rule, be allowed to contaminate the chastity of abstract academia.

6. I could concede, even if with considerable hesitation, the possibility of proceedings relating solely to “routine” prolongation of detention being conducted in the absence of the accused, but always provided the incarceration had been originally decided after fully adversarial argument and if such review proceedings went hand in hand with high-grade guarantees of a fair hearing and of transparency.

7. There exist several values reflecting different interests that the law and the judiciary should attempt to mesh in a balanced manner. No doubt, throughout the whole span of criminal procedures, the interests of the administration of justice and of the community hold a pre-eminent place. But so should the interests of accused persons, not solely in undergoing a fair trial, but also in participating in and following anything that may disturb

their rights and their liberty, when their rights and their liberty are at stake. It seems to me that the domestic law, as applied by the presiding judge, kept only the first set of interests in mind, casting the second away as irrelevant: what would the judge “gain” from them?

8. It also seems to me that the restrictive reasoning relied on by the judgment of the Court, and domestic law, have stood on its head what, in the criminal process, should be the rule: the presence of the accused. I believe it to be axiomatic that the presence of the accused should be the norm, and the absence of the accused the exception. When the accused's liberty is being determined, it is not for him to prove that he is entitled to be present, but rather for the authorities to furnish compelling reasons to exclude the accused from his own courtroom. It appears that, following this judgment, the onus of proving convincingly the right to be present in proceedings relating to provisional liberty has shifted to accused persons. It is now for them to succeed in proving that there exist weighty reasons why their right to liberty should not be determined behind their backs. This, to me, pulls inside out the logic of the criminal process and is manifestly wrong.

9. In the present case, it is not as if the “justice” interests of the community conflicted with the “presence” interests of the accused. Both could have easily co-existed without getting in each other's way. It is difficult to see what the presence of the accused during the discussion about whether she deserved provisional liberty or imprisonment would have taken away from the proper administration of justice. It might not have added much, but it certainly would not have detracted anything. And, with no sacrifice at all to the due process of justice, the interests of the accused would not have been sacrificed so pointlessly.

10. My reading of the case-law of the Court quoted in paragraph 43 of the judgment is quite different from that of the respondent Government. The judgments cited indicate that at certain stages of criminal proceedings relating to Article 5 § 4, the presence of the accused may not be strictly required. “May not be strictly required” by no stretch means that it can be lawfully refused. This case-law neither adds to nor subtracts anything from the principle that if the accused is ready, willing and able to attend the hearing (the applicant in this case was physically present inside the court building), only judges who are fully paid-up members of the Star Chamber ought to be enabled by any law to slam the door in her face and lock her out of her own proceedings. That is exactly what happened in this case and, in my view, the Court should have proclaimed in the loudest terms possible that Inquisition tunes no longer score high on the charts of the judicial hit parade.

PARTLY DISSENTING OPINION OF JUDGE MIJOVIC

1. Regrettably, I am unable in the present case to agree with the majority of the Chamber that there has been a violation of Article 5 § 4 of the Convention for the following reasons.

2. The applicant complained that the fact that she was not permitted to attend the hearing of the prosecution's appeal against bail breached her rights under Article 5 § 4 of the Convention.

3. In examining whether the proceedings in this case were in conformity with Article 5 § 4 of the Convention, the majority concluded that there was “no evidence of any compelling reasons in the present case which might have rendered the applicant's presence undesirable or impracticable”.

4. For me, the question that should have been considered by the Chamber was whether the applicant needed to be personally present in order “to give satisfactory information and instructions to her counsel” (see *Mamedova v. Russia*, no 7064/05, § 91, 1 June 2006). When invited to make submissions as to why the interests of justice would require the applicant's presence, her counsel replied only by stating “looking at the demeanour of the person, that is all”, following which he informed the judge that he had withdrawn the application (see paragraphs 14 and 43 of the judgment).

5. Furthermore, it is clear from her counsel's statement that the applicant did not have any decisive or relevant information of which she alone had first-hand knowledge. Weight should also be given to the fact, relied on by the Crown Court judge, that one of the applicant's co-accused had not been present at the hearing and that it would have been unfair to have treated the applicant more favourably. Furthermore, the judge expressed his willingness to allow the applicant to attend in person should her counsel identify any cogent reason why her presence would further assist in his assessment of her character. No such reason ever emerged. Therefore, I see no reason to believe that the applicant's attendance at the appeal hearing was crucial.

6. The Crown Court judge decided to allow the prosecution appeal and refused bail on the grounds that the applicant's brother, one of the co-accused, was at liberty, possibly overseas, and that there was a risk that she would abscond and join him or provide him with information about the prosecution case and thereby obstruct the course of justice. However, the question may be asked as to whether the applicant would have complained if the judge's decision had been different, namely if she had been granted bail even without her being present at the hearing? I do not think so, and that makes the complaint look somewhat artificial and akin to a grievance about the result of the outcome of the hearing.

7. Finally, the majority considered that “fairness required that the applicant's request to be present at the appeal be granted”¹. However, I am of the opinion that the fact that she was represented at the hearing by her counsel fully satisfied “fairness requirements”. The requirements of Article 5 § 4 are not the same as those under Article 6 of the Convention and the difference reflects the different purposes of the two provisions- while “a fair and public hearing” represents the core of Article 6, the proceedings contemplated under Article 5 § 4 are intended, in my understanding, to provide a speedy determination on the lawfulness of detention. I do accept, as pointed out in the judgment, that the procedure under Article 5 § 4 must have a judicial character and must provide guarantees appropriate to the kind of deprivation of liberty in question. i.e. that the proceedings must be adversarial and ensure equality of arms between the parties. Turning to the present case, the facts show that the applicant was represented and that her counsel was given ample opportunity to make submissions on her behalf.

8. For all these reasons, I am of the opinion that in the present case there has been no violation of Article 5 § 4 of the Convention. For that reason I voted against making an award of damages to the applicant. I have voted with the majority on the other points mentioned in the operative part of the judgment (Article 5 § 3 and Article 6).

¹ See paragraph 47