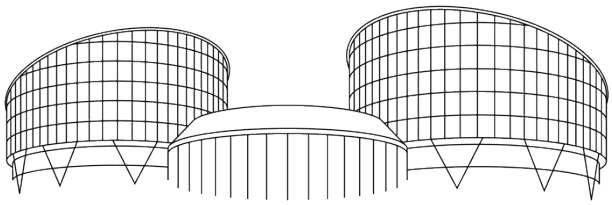

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KEVIN O'DOWD v. THE UNITED KINGDOM

(Application no. 7390/07)

JUDGMENT

STRASBOURG

21 September 2010

FINAL

21/02/2011

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

In the case of Kevin O'Dowd 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 31 August 2010,

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

PROCEDURE

1. The case originated in an application (no. 7390/07) 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, Mr Kevin Kenneth O'Dowd ("the applicant"), on 24 January 2007.

2. The applicant was represented by Clarke Kiernan, a firm of solicitors based in Tonbridge. The United Kingdom Government ("the Government") were represented by their Agent, Ms H. Upton, of the Foreign and Commonwealth Office.

3. The applicant alleged that his pre-trial detention was unlawful under Article 5 § 3 of the Convention alone and taken together with Article 14.

4. On 16 April 2009 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 § 1).

5. The applicant requested an oral hearing but the Chamber decided not to hold a hearing in the case.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1946 and lives in London.

7. On 6 December 2001, the applicant was arrested, interviewed and charged with rape, false imprisonment and indecent assault. It was alleged that over a period of days in mid-September 2000, the applicant had raped a woman in her flat, imprisoned her in his car and then indecently assaulted her in his flat. Nine months later, the complainant gave birth to a baby boy and four months after that, in October 2001, she made her first complaint to the police.

8. On 7 December 2001, the applicant's case was sent for trial at the Central Criminal Court pursuant to section 51 of the Crime and Disorder Act 1998.

9. On 17 December 2001, the applicant made an application for bail. As he had served 14 years' imprisonment in respect of a previous conviction for rape and an offence of violence in 1989, under section 25 of the Criminal Justice and Public Order Act 1994 as amended ("the 1994 Act") bail could only be granted if the judge was satisfied that there were "exceptional circumstances" which justified the grant of bail. The judge was not so satisfied and bail was refused.

10. On 28 January 2002, the applicant pleaded not guilty to all charges and a trial date was fixed for 8 April 2002. A further bail application was refused.

11. On 22 March 2002, the applicant dispensed with the services of his solicitors and counsel and served his own defence statement. The judge did not alter the trial date but gave the applicant time to reconsider his position. On 3 April 2002, the applicant indicated that he would like to have the services of his former legal team and the judge reinstated the representation order. As valuable time had been lost, the trial date was vacated and rearranged for 6 June 2002. A further bail application was refused.

12. At the end of May 2002, the applicant again dispensed with the services of his lawyers. When the case was called on 6 June 2002, however, he was represented by leading and junior counsel. After a midday adjournment, the applicant once again dispensed with the services of his lawyers. The next day, he asked for his legal team to be reinstated and this was done. Defence counsel then indicated that as there had been a delay in disclosure, an application to stay the proceedings would be made. It was agreed to hear the application the next day.

13. Under the Prosecution of Offences (Custody Time Limits) Regulations 1987 ("the 1987 Regulations") as amended, the maximum period of custody between the sending for trial and the start of the trial (taken to be the date on which the jury is sworn in) in a case such as the applicant's was 182 days. That period was due to expire at midnight on 7 June 2002. The prosecution accordingly applied to extend the custody time limit. Under section 22(3) of the Prosecution of Offences Act 1985 ("the 1985 Act"), a request for extension of the custody time limit must be refused where the court is not satisfied that the prosecution has acted with

all due diligence. The application made by the prosecution in the applicant's case was refused because the court was not satisfied that the prosecution had acted with all due diligence and expedition in relation to disclosure.

14. However, under the 1987 Regulations, the right to bail upon expiry of the custody time limit was subject to section 25 of the 1994 Act (see paragraph 45 below). Accordingly, on 7 June 2002, a further application for bail was refused by Judge Norris in the Crown Court because he was not satisfied that "exceptional circumstances" justifying the grant of bail existed.

15. On 8 June 2002, the defence requested access to hospital and telephone records for the first time. As a result, the case was removed from the court agenda and relisted for mention on 21 June 2002. On that date, the trial was re-fixed for 4 November 2002 and a further application for bail was refused.

16. On 20 August 2002, an application for bail was made in the High Court and was refused on the basis that no exceptional circumstances existed.

17. On 10 October 2002, the case came before Woolwich Crown Court for the consideration of two preliminary matters of law. The applicant once again dispensed with the services of his lawyers and the representation order was revoked. As a result, it was not possible to deal with the issues of law, which were accordingly held over for consideration on the first day of trial.

18. On 4 November 2002, the trial began. The applicant was acting in person but counsel had been appointed by the court to cross-examine the complainant. Issues arose regarding discovery, abuse of process, admissibility of photographs and the use of screens. The applicant from time to time absented himself from the court room.

19. On 6 November 2002 the court began to swear in the jury. However, one member of the panel had been at school with the applicant and another, who was related to the applicant, made an observation in public which made it necessary to release the entire panel. The applicant then applied for and was granted legal representation. On 15 November 2002, the applicant's case was transferred to Harrow Crown Court as he was too well-known in the Woolwich area.

20. On 5 December 2002, the case came before Harrow Crown Court. The court indicated that it was prepared to hear the case in January 2003 but the applicant declined this date on the ground that it was unsuitable. The judge subsequently fixed the trial to begin on 2 June 2003 in order to accommodate the needs of the defence regarding preparation and availability of counsel. Outline submissions as to the grant of bail were made and discussion was adjourned until 9 December 2002 in order for skeleton arguments to be prepared in writing.

21. A further application for bail was heard on 9 December 2002. The applicant's counsel made extensive submissions in support of the

application, with particular reference to the Court's judgment in *Caballero v. the United Kingdom* [GC], no. 32819/96, ECHR 2000-II. She argued that once the time limit under the 1987 Regulations had expired and was not extended, a defendant should be admitted to bail. Accordingly, in her submission, the applicant had been unlawfully detained since 7 June 2002.

22. Judge Sanders disagreed. He considered, first, that the words "subject to Section 25" in the 1987 Regulations meant "unless this is a case where Section 25 applies". He found that section 25 clearly did apply in the applicant's case and continued:

> "... it is lamentable that the prosecution have been shown to be wanting as far as the custody time limits were concerned and indeed had it also been shown that they were deliberately defalcating [sic] on their duty and relying on Section 25 as a stop gap, believing that they could still persuade the Judge to keep [the applicant] in custody come what may, that might in itself and in certain circumstances amount to exceptional circumstances for reconsidering his bail position.
>
> But I am not satisfied from the chronology and the history of this trial that that is at all the case. I am satisfied however that no exceptional circumstances did arise at the time that that application was made; that the regulations on custody time limits do not out-weigh the serious considerations of Section 25 and that I consider that it is a completely separate consideration and that I have separate jurisdiction to deal with it and so notwithstanding that the custody time limits did expire and that he might have been entitled to his release in any other case, that is not the case here and so he must, unless I am persuaded otherwise on a straightforward application regarding Section 25, then he must find himself bound by Section 25."

23. Judge Sanders recalled that he had recently been persuaded to grant a "very long adjournment" to June 2003, at the request of the applicant. He indicated that he was of the view that defendants should not be detained for excessively long periods of time before their trials took place, but noted:

> "On the other hand, everything that was done by me on his behalf was for the defendant's assistance because it was explained that he yet needed to get his independent DNA; that there were papers missing that have not been properly served upon his defence team and thirdly, since counsel have built up a rapport with the defendant and counsel who have been briefed fairly late in this matter ... had herself commitments that precluded her from safely being able to undertake this work until June."

24. He added:

> "If your client, by my ruling on the bail matter and Section 25, feels aggrieved then I would take up [counsel for the prosecution's] suggestion and bring the case forward come what may ..."

25. He continued:

> "...two things strike me of interest. Bearing in mind the sad chronology I also note that the defendant at the outset had suggested that this was a fabricated tissue of lies by the complainant for motives that he would explain to the jury in due course.

> A lot of the disclosure arose because of that and he was offered the opportunity to have his own independent DNA as far back as last June, an offer that he never took up ... he then spoke in open court ... of automatism, which again left one ... curious as to know whether there was a need for DNA and whether he was denying intercourse took place, which of course to an alleged victim of rape is an important issue, which of course she is entitled to be aware of in order that she does not have to go through the ordeal of being accused of being sexually promiscuous or a liar and such things, and we still do not know the answer to that.
>
> So what is going on? You have come up with another DNA application."

26. Counsel for the applicant responded that she did not have full instructions and could therefore not speak on behalf of the applicant. The judge again reiterated that the trial date for the applicant might need to be reconsidered, a matter on which the applicant's counsel undertook to seek instructions. The judge expressly pointed out that the effect of his ruling on section 25 was that, if the applicant persisted with his request for a June 2003 trial, he would have to remain in custody for another six months.

27. The applicant's counsel appeared before the judge later that day to confirm that the applicant was content that his trial be held on 2 June 2003, notwithstanding the section 25 ruling.

28. On 30 January 2003, the applicant issued a claim for judicial review of the court's decision of 9 December 2002 to refuse him bail, arguing that his continued detention following the expiry of the custody time limits was in breach of Article 5 § 3 of the Convention. The matter was considered on the papers on 6 February 2003. It was referred for an oral hearing and permission was granted on 26 February 2003. On 20 March 2003, solicitors acting for the applicant indicated that he would also apply for a writ of *habeas corpus* contending that since the expiration of the custody time limit on 7 June 2002 his custody had been illegal.

29. On 16 April 2003, the applicant's applications for *habeas corpus* and judicial review of the decision refusing bail were rejected by the Divisional Court. In dismissing the argument of the defence that the amendments to section 25 to allow the grant of bail in "exceptional circumstances" were insufficient to restore the judicial control required under the Convention, Kennedy LJ held (at paragraph 28) that:

> "... there is nothing offensive or contrary to Convention law about Parliament reminding the courts of the risks normally attendant upon the grant of bail to those to whom section 25 applies. A reminder can properly be given by creating a statutory presumption against the grant of bail, but if judicial control is to be effective courts must be left free to examine all the relevant circumstances and, in an appropriate case, to override the presumption."

30. Kennedy LJ considered the Convention authorities and accepted (at paragraph 32) that section 25 would not be compatible with the Convention if "exceptional circumstances" were too narrowly construed or if the court set too high a threshold at which it would be prepared to

conclude that "exceptional circumstances" existed. In considering the application of section 25 in practice, Kennedy LJ explained that:

> "[Section 25] establishes a norm. The norm is that those to whom it applies if granted bail are so likely to fail to surrender to custody, or offend, or interfere with witnesses or otherwise obstruct the course of justice that bail should not be granted. If in fact, taking into account all the circumstances relating to a particular alleged offence and offender he does not create an unacceptable risk of that kind he is an exception to the norm, and in accordance with his individual right to liberty he should be granted bail."

31. As regards the expiration of the custody time limit, Kennedy LJ considered that the custody time limits set out in national law and the "reasonable time" requirement under Article 5 § 3 of the Convention were not one and the same. Accordingly, in assessing whether the prosecution had acted with "special diligence" as required by the Convention, the finding of the lower court that it was not satisfied that the prosecution had acted with all due diligence as required by section 22(3) of the 1985 Act (see paragraph 46 below) was not decisive. Although Kennedy LJ accepted that in a case where the prosecution had not demonstrated all due diligence, a court may well conclude that it had not displayed the necessary "special diligence" required under Article 5 § 3, he considered that this was not the case here.

32. Finally, in respect of the applicant's argument under Article 14 of the Convention that section 25 operated in a discriminatory manner, Kennedy LJ considered that the applicant was not in a situation analogous to a person charged with a serious offence because he also had a previous conviction for a serious offence which was relevant to the risk attendant on a grant of bail. He further found that the distinction made was justified, was based on relevant factors, pursued a legitimate objective and was proportionate.

33. In conclusion, he stressed the importance of setting out reasons for refusing bail in order to show that careful and appropriate consideration had been given to the question whether exceptional circumstances exist.

34. Hooper J agreed with Kennedy LJ in all respects, save that unlike Kennedy LJ he considered that section 25 did impose the burden on the defendant to show "exceptional circumstances" which, in light of Convention case-law, was inconsistent with Article 5 § 3. Accordingly, he considered that section 25 should be read down in accordance with the obligation in section 3 of the Human Rights Act 1998 to impose merely an evidential burden on the applicant to point to or produce material which supports the existence of "exceptional circumstances", thereby ensuring compliance with the demands of Article 5 § 3.

35. The applicant appealed to the House of Lords, arguing that once the custody time limit had expired there was, by virtue of the expiry of the time limit itself, a breach of Article 5 § 3 by his continued detention under section 25; and, in the alternative, that the effect of section 25 was to place a

burden on the applicant to establish exceptional circumstances required for the grant of bail, which was a breach of the applicant's Convention rights.

36. In the meantime, the applicant's trial commenced on 1 September 2003. However, on 25 September 2003, the prosecution was permanently stayed as an abuse of process, for reasons which are unclear, and the applicant was released from custody.

37. The House of Lords handed down its judgment in the judicial review and *habeas corpus* proceedings on 26 July 2006. Delivering the leading judgment, Lord Brown of Eaton-under-Heywood considered that an approach under section 25 which required the applicant to provide good and sufficient reason for bail would be "irreconcilable with the Strasbourg case law" (at paragraph 27). However, as regards the operation of section 25 in practice, he continued (at paragraphs 34-34):

> "Importantly, however, both members of the [divisional] court decided that section 25(1) (subject only to its effect in cases where the custody time limit has expired, the important second issue yet to be addressed) has no substantive effect upon the way in which bail applications by section 25 defendants would in any event fall to be determined under the Bail Act. It serves merely to 'remind' the courts of the risks normally posed by those to whom section 25 applies and 'will merely assist the court to adopt a proper approach' in relation to bail in their cases. In my judgment they were right in that conclusion and it seems to me unsurprising that the Scots, placed in a similar position by the *Caballero* judgment, decided against introducing an 'exceptional circumstances' test, believing that it would 'add nothing to a clear common law position in Scotland' ...
>
> Whether or not, strictly speaking, section 25 needs to be read down to achieve the agreed result is a question of little moment. I myself, however, have a mild preference for Hooper J's approach. Like him I read the section as placing a burden on the section 25 defendant. He has to rebut a presumption and if he fails to do so is to be denied bail. True it is, as [counsel for the defendant] himself accepted, that in the vast majority of cases the court will reach a clear view one way or the other whether the conditions for withholding bail specified by Schedule 1 to the Bail Act are satisfied. But just occasionally the court will be left unsure as to whether the defendant should be released on bail—the only situation in which the burden of proof assumes any relevance—and in my judgment bail would then have to be granted. That must be the default position. Section 25 should in my judgment be read down to make that plain."

38. As to the lawfulness of the applicant's continued detention after the expiry of the custody time limit, Lord Brown reviewed the facts of the case, noting that the applicant had a previous conviction for rape; indeed, he had 30 previous convictions for a wide variety of offences. He also observed that the applicant had dispensed with his lawyers and had them reinstated on no fewer than four occasions, two of which had caused delay. A further five months' delay was caused by the applicant's decision to reject the offer of a January 2003 trial date in favour of a date in June 2003, to suit his counsel's convenience. Lord Brown noted that it was unclear, in the absence of a transcript of the court's decision of 7 June 2002 or any further information on the subject, why the lower court was not satisfied that the prosecution

had acted with all due diligence and expedition in relation to disclosure. However, he concluded that even where there was a lack of due diligence under domestic law, this was not in itself sufficient to establish the lack of "special diligence" required for a breach of Article 5 § 3. Lord Brown concluded (at paragraph 63) that:

> "By the very nature of things, the Strasbourg Court will be looking at the case in a different way from the domestic court, in particular from a longer and wider perspective. Strasbourg will have the whole picture before it and will take an overall view as to whether the reasonable time guarantee has been exceeded. *Grisez* illustrates the point well: the ultimate question addressed by the court was whether 'the total length of the detention pending trial appear[ed] excessive'. So too in *Contrada*: the court took account of the trial court's post-delay offer to increase the rate of the hearings (akin perhaps to the offer of a January 2003 trial date in the present case, similarly declined). The domestic court, by contrast, is inevitably having to decide a much narrower question and within a shorter time-frame. And it is doing so within the strict confines of section 22(3) which, despite the marked similarity between its language and that used in Strasbourg, in fact imposes a more rigid formula for the extension of custody time limits than Strasbourg does with regard to the reasonable time guarantee under article 5(3). For my part I would not expect there to be many cases where, as here, bail is refused notwithstanding the court's refusal to extend the custody time limit. But I conclude that there is no necessary inconsistency between the two and that Article 5(3) is not necessarily breached. Nor, in my judgment, is there any other reason for thinking that this appellant was wrongly refused bail: on the contrary, the case for his continued detention in custody appears to have been a strong one."

39. The House of Lords found no violation of Article 5 § 3 and unanimously rejected the applicant's appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Trial on indictment

40. Section 51 of the Crime and Disorder Act 1998 provides that where an adult appears before a magistrates' court charged with an offence triable only on indictment, the court shall send him forthwith to the Crown Court for trial for that offence.

2. Bail

41. The Bail Act 1976 ("the 1976 Act") regulates the grant of bail. Section 4 provides that defendants:

> "shall be granted bail except as provided for in Schedule 1 to this Act."

42. Schedule 1 of the 1976 Act provides, under paragraph 2, that:

"The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would—

(a) fail to surrender to custody, or

(b) commit an offence while on bail, or

(c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person."

43. Paragraph 9 of the Schedule provides that:

"In taking the decisions required by paragraph 2 ... the court shall have regard to such of the following considerations as appear to it to be relevant, that is to say—

(a) the nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it),

(b) the character, antecedents, associations and community ties of the defendant,

(c) the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings,

(d) ... the strength of the evidence of his having committed the offence or having defaulted,

as well as to any others which appear to be relevant."

44. Section 4(8) of the 1976 Act provides that the right to bail under section 4 is subject to section 25 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act").

45. The 1994 Act makes specific provision for bail in a case where a suspect is charged with a serious offence and has previously been convicted and imprisoned for a serious offence. Section 25 provides:

"(1) A person who in any proceedings has been charged with or convicted of an offence to which this section applies in circumstances to which it applies shall be granted bail in those proceedings only if the court or, as the case may be, the constable considering the grant of bail is satisfied that there are exceptional circumstances which justify it.

(2) This section applies, subject to subsection (3) below, to the following offences, that is to say–

(a) murder;

(b) attempted murder;

(c) manslaughter;

(d) rape under the law of Scotland or Northern Ireland;

(e) an offence under section 1 of the Sexual Offences Act 1956 (rape);

(f) an offence under section 1 of the Sexual Offences Act 2003 (rape);

(g) an offence under section 2 of that Act (assault by penetration);

...

(3) This section applies to a person charged with or convicted of any such offence only if he has been previously convicted by or before a court in any part of the United Kingdom of any such offence or of culpable homicide and, in the case of a previous conviction of manslaughter or of culpable homicide, if he was then sentenced to imprisonment ..."

3. Custody time limits

46. The Prosecution of Offences Act 1985 allows the Secretary of State, under section 22(1), to make regulations setting custody time limits. Section 22 also provides the appropriate court with the power to extend the time limit in a given case:

"(3) The appropriate court may, at any time before the expiry of a time limit imposed by the regulations, extend, or further extend, that limit; but the court shall not do so unless it is satisfied–

(a) that the need for the extension is due to–

(i) the illness or absence of the accused, a necessary witness, a judge or a magistrate;

(ii) a postponement which is occasioned by the ordering by the court of separate trials in the case of two or more accused or two or more offences; or

(iii) some other good and sufficient cause; and

(b) that the prosecution has acted with all due diligence and expedition.

47. The Prosecution of Offences (Custody Time Limits) Regulations 1987 as amended set out the custody time limits applicable. Regulation 5(6B) provides that where an accused is sent for trial under section 51 of the Crime and Disorder Act 1998, the maximum period of custody between the accused being sent to the Crown Court for an offence and the start of the trial shall be 182 days. Under section 22(11A) of the 1985 Act, the start of a trial on indictment shall be taken to occur when a jury is sworn in.

48. Under Regulation 6 of the 1987 Regulations, upon the expiry of the custody time limit, an accused in custody must be granted bail, subject to section 25 of the 1994 Act:

"(6) The Crown Court, on being notified that an accused who is in custody pending trial there has the benefit of a custody time limit under Regulation 5 above and that the time limit is about to expire, shall, subject to section 25 of the Criminal Justice and Public Order Act 1994 (exclusion of bail in cases of homicide and rape), grant him

bail in accordance with the Bail Act 1976, as from the expiry of the time limit, subject to a duty to appear before the Crown Court for trial."

49. In *R (Quereshi and Others) v Leeds Crown Court* [1999] EWHC Admin 454, the High Court considered the scope for extending custody time limits. Lord Bingham CJ noted:

"14. ... The court made plain in *ex parte McDonald*, as indeed is plain on the face of the statute, that when seeking an extension or a further extension of a custody time limit the Crown must show that there is good and sufficient [cause] for making the extension and that it has acted with all due expedition. What, however, was not made plain in *ex parte McDonald* (because the question did not arise) is that these two provisions are in my judgment linked. It is not in doubt that the Crown must show proper grounds for keeping a defendant in prison awaiting trial for a period longer than the statutory maximum. But the Crown must also show that such an extension is not sought because it has shown insufficient vigour in preparing the case for trial. Put crudely, the prosecution cannot prepare for trial in a dilatory and negligent manner and then come to the court to seek an extension of the custody time limit because the prosecution is not ready for trial. Nor, if the effect of its dilatoriness is to put the defence in a position where the defence is not ready for the trial can the Crown seek an extension and show that it has acted with all due expedition. It is in the ordinary way the business of the prosecution to be ready. If therefore the Crown is seeking an extension of the time limit it must show that the need for the extension does not arise from lack of due expedition or due diligence on its part. It seems clear to me, however, that the requirement of due expedition or due diligence or both is not a disciplinary provision. It is not there to punish prosecutors for administrative lapses; it is there to protect defendants by ensuring that they are kept in prison awaiting trial no longer than is justifiable. That is why due expedition is called for. The court is not in my view obliged to refuse the extension of a custody time limit because the prosecution is shown to have been guilty of avoidable delay where that delay has had no effect whatever on the ability of the prosecution and the defence to be ready for trial on a predetermined trial date."

4. "reading down" under the Human Rights Act 1998

50. Section 3(1) of the Human Rights Act provides that, so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

51. The applicant complained that following the court's refusal to extend the custody time limit on 7 June 2002 on the ground that it was not satisfied

that the prosecution had acted with all due diligence, his detention was unlawful under Article 5 § 3 of the Convention, which reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

52. The Government contested that argument.

A. Admissibility

53. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

a. The applicant

54. The applicant accepted that his detention prior to 7 June 2002 fell within the respondent State's margin of appreciation. His complaint related to the period after 7 June 2002, at which point, he contended, the finding that the prosecution authorities had failed to act with the requisite diligence entitled him to release pending trial. In the applicant's view, at this point, the balancing exercise between the public interest in continued detention and the presumption of innocence tipped in favour of the latter. He did not dispute that the charges against him were serious, but argued that there were a number of flaws in the prosecution case including the delay in the making of the complaint to the police and inconsistent telephone record data. He further emphasised that he had no previous convictions for failing to surrender, for interfering with witnesses or for otherwise obstructing the course of justice and that his previous convictions did not support the conclusion that he was likely to commit further offences while on bail.

55. The applicant contended that the requirement in section 22(3) of the 1985 Act (see paragraph 46 above) that the prosecution conduct itself with "all due diligence" amounted to the same requirement as "special diligence" in the context of Article 5 § 3. He recalled the need to interpret the provisions of the Convention in a manner which was practical and effective and not theoretical or illusory. It was open to Judge Norris, on 7 June 2002, to find that there had been prosecutorial delay but that this had not impacted on the ability to try the applicant within a reasonable time. The applicant pointed out that under the applicable domestic law at the time, it was clear

that not every finding of a lack of diligence would result in the domestic courts refusing to extend the custody time limits (citing *R (Quereshi and Others)* – see paragraph 49 above). He submitted that in that case, Lord Bingham CJ's reference to the requirement for due diligence operating as a protection for defendants by ensuring that they were not kept in custody pending trial for longer than was justifiable was identical to the requirement in Article 5 § 3 that a defendant is entitled to trial within a reasonable time or release pending trial. The applicant argued that this must have been the approach adopted by Judge Norris on 7 June 2002 and that his refusal to extend the custody time limits must therefore have been due to his conclusion that the lack of due diligence by the prosecution had adversely impacted upon the possibility of his trial taking place within a reasonable time.

56. The applicant further argued that Article 5 § 3 should be interpreted as conferring specific minimum guarantees, capable of being invoked in the domestic courts. In this context, he noted that it was of little practical consequence to an individual detained contrary to Article 5 § 3 against whom the proceedings are ultimately stayed as an abuse of process that he might eventually gain financial compensation for excessive pre-trial detention. He further pointed out that, as he had not been convicted of the offence with which he was originally charged, this was not a case where his pre-trial detention could be deducted from the sentence eventually imposed. He considered that the wording of Article 5 § 3 was mandatory and referred to the liberty of the individual pending trial, and not to the ability of an individual to obtain compensation for excessive pre-trial detention.

57. It was further of relevance to note that, had the applicant not had a previous conviction, he would have been entitled to automatic release upon the expiry of the custody time limit. In this context, he emphasised that his previous conviction was imposed in respect of events which took place in 1988 and he concluded that the list of "relevant" previous convictions in section 25 was arbitrary.

58. The applicant further contested that his case was not a marginal one as regards the burden of proof and argued that the views expressed by Lord Brown on the matter (see paragraph 37 above) were without the benefit of arguments regarding the applicant's bail situation and the specific weaknesses of the prosecution case.

59. The applicant also disputed the relevance of the judgments cited by the Government in support of their position (see paragraph 65 below), as in none of those cases was there a finding that the prosecution had failed to act with all due diligence and that this failure had adversely impacted upon the ability to ensure that the trial could commence within a reasonable time. In particular, he distinguished the case of *Wardle v. the United Kingdom* (dec.), no. 72219/01, 27 March 2003, as it had been decided domestically

prior to the clarifications provided by *R (Quereshi and Others)* (see paragraph 49 above).

60. The applicant concluded that notwithstanding the failure of the prosecution authorities to conduct the case with "special diligence", the burden was placed on him to show "exceptional circumstances" even after 7 June 2002. Relying on *Ilijkov v. Bulgaria*, no. 33977/96, § 85, 26 July 2001, he argued that this was not a legitimate approach. He argued that the Government did not contest that the prosecution had not acted with due diligence, nor did they seek to explain or detail the delay in disclosure. They had also failed to explain why those to whom section 25 applied were considered to be at a greater risk of absconding, committing further offences or otherwise obstructing the course of justice. The applicant argued that there was no rational basis for the difference in treatment.

b. The Government

61. The Government reiterated that the sole complaint made to the Court by the applicant was that his detention following the refusal to extend the custody time limits because of the prosecution's failure to demonstrate due diligence was in violation of Article 5 § 3. The applicant had not sought to argue before the domestic courts that the bail decisions had failed to take into account all the facts of his case or any other relevant considerations in refusing bail. It was therefore not open to him to seek to go behind the unappealed findings of the domestic courts that there were sufficient public interest reasons to justify his continued detention after 7 June 2002.

62. The Government argued that there was sufficient judicial control of the applicant's pre-trial detention. They distinguished the applicant's case from the cases of *Caballero v. the United Kingdom* [GC], no. 32819/96, ECHR 2000-II and *S.B.C. v. the United Kingdom*, no. 39360/98, 19 June 2001 as those cases were concerned with the previous version of section 25, which excluded the possibility of any consideration by the judge of pre-trial release. Under the amended section 25, the court had the possibility of granting bail to any defendant where it was not satisfied that the defendant would, if released on bail, fail to surrender to custody, offend, interfere with witnesses or otherwise obstruct the course of justice. The Government contrasted the case of *Ilijkov*, cited above, where the domestic courts had refused to consider relevant arguments.

63. The Government relied on the assessment by the domestic courts as to the effect of, and correct approach to the interpretation of, section 25. In particular, they emphasised Lord Brown's explanation of the burden of proof in bail applications where section 25 applies (see paragraph 37 above). In this regard, the Government disputed that the Crown Court had wrongly approached the question of the burden of proof, arguing that it was clear that as regards each bail application made by the applicant it was satisfied that, having regard in particular to the nature of the charge against

the applicant together with his previous convictions for serious offences, including rape, there were no exceptional circumstances justifying his release. Accordingly, in the Government's submission, the case was not a marginal one where the burden of proof was relied upon by the court in refusing the bail applications.

64. As to whether there were specific indications of a genuine requirement of public interest which justified the refusal to grant bail in the applicant's case, the Government responded in the affirmative. They pointed out that the applicant had been charged with very serious offences, namely rape, false imprisonment and assault, alleged to have occurred over a period of days (see paragraph 7 above). Further, the applicant had previous convictions, including for rape and for an offence of violence, and the seriousness of those offences was reflected in the fourteen year prison sentence imposed. He was now accused of another rape, alleged to have been carried out in similar circumstances, where his defence was unclear and changing. Although the applicant had originally denied having sexual intercourse with the complainant, DNA evidence obtained by the prosecution revealed that the child was his. He had announced an intention to challenge this evidence but had failed to take up the opportunity to arrange his own DNA test. At one stage he had referred to a defence of "automatism" but at the hearing of 9 December 2002, when questioned on the matter by Judge Sanders, his counsel was unable to provide any further particulars (see paragraphs 25-26above). In the Government's submission, the domestic courts had reasonably taken the view that there was a risk that the applicant would abscond, commit further offences, interfere with witnesses or otherwise obstruct the course of justice if he were released. The Government added that the applicant had not drawn attention to any competing factors in his case which could lead to the conclusion that the domestic courts had erred in their assessment of the risk and that bail should have been granted, nor had he sought to challenge their assessment in a straightforward application for release under section 25, although he was invited to do so by Judge Sanders (see paragraph 22 above).

65. As regards the question whether the domestic authorities had demonstrated "special diligence", the Government submitted that they had, and disputed in particular the applicant's assertion that the finding on 7 June 2002 that the prosecution had failed to act with all due diligence and expedition in relation to disclosure amounted to a general finding that the authorities had failed to show "special diligence" as required by Article 5 § 3. They further did not accept that it could be inferred from the refusal to extend the custody time limit that the judge had concluded that the applicant had not been, or could not be, tried within a reasonable time. They noted in particular that on 7 June 2002, the applicant had been detained for only six months and that a first trial date set for April 2002 had been vacated as a result of the applicant's conduct in dismissing and then reinstating his legal

team. A second trial date in June 2002 was vacated for the same reason. The finding that the prosecution had failed to act with all due diligence related to disclosure only, and no other instances of delay were found. The applicant does not allege that the prosecution caused delay after 7 June 2002 and it was clear that all such delay was caused by the conduct and the decisions of the applicant. In this regard the Government emphasised that in assessing whether there has been a breach of Article 5 § 3, this Court takes into consideration the whole period the accused has spent in detention and all the circumstances and special features of his case (citing *Punzelt v. the Czech Republic*, no. 31315/96, § 73, 25 April 2000). By contrast, in considering whether to extend the custody time limit the domestic court considers only the position at the point at which the application to extend is made. Accordingly, a failure on the part of the prosecuting authorities which has led to some element of delay in the proceedings could result in a refusal to extend the custody time limit notwithstanding the fact that, if the period of detention were examined in its entirety and all the facts of the case taken into account, there would be no violation of Article 5 § 3 (citing *Contrada v. Italy*, 24 August 1998, § 67, *Reports of Judgments and Decisions* 1998-V; *Grisez v. Belgium*, no. 35776/97, § 53, 26 September 2002; and *Wardle*, cited above).

66. The Government noted that the applicant spent a total of twenty-two months in pre-trial custody and complained only on the ground that at some point prior to 7 June 2002 the prosecution had failed to act with all due diligence as regards disclosure. They emphasised the seriousness of the charges and the issues raised in the proceedings – including the reliability of DNA evidence – and noted that the applicant had pointed to no default on the part of the authorities other than the matter of disclosure prior to June 2002. The Government further emphasised that it was apparent that the prosecution and judicial authorities had on a number of occasions sought to progress the proceedings both before and after the expiry of the time limit. It was the applicant's own conduct in dismissing his legal team on a number of occasions, in making late applications for disclosure and in refusing the court's offer of a trial in January 2003 which resulted in the extension of his detention. The Government considered that in the circumstances of the case, the authorities did not fail to act with special diligence and invited the Court to find no violation of Article 5 § 3.

67. Finally, the Government disputed that it was arbitrary to treat those who had a previous conviction for a serious offence differently as regards access to bail. They considered that the fact that the applicant had a previous conviction for a serious offence was clearly relevant to the question whether, when charged with a further serious offence, he should be granted bail. They relied in this regard on the conclusions of the Divisional Court (see paragraph 32 above), which were not appealed to the House of Lords.

2. The Court's assessment

a. General principles

68. The Court reiterates that the question whether or not a period of detention is reasonable cannot be assessed in the abstract. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 110, ECHR 2000-XI; and *Contrada*, cited above, § 54).

69. It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of the above-mentioned demand of public interest justifying a departure from the rule in Article 5 and must set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the well-documented facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (see *Kudła*, cited above, § 110; and *Contrada*, cited above, § 54).

70. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. The Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also be satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings (see *Kudła*, cited above, § 111; and *Contrada*, cited above, § 54). In assessing whether the "special diligence" requirement has been met, the Court will have regard to periods of unjustified delay, to the overall complexity of the proceedings and to any steps taken by the authorities to speed up proceedings to ensure that the overall length of detention remains "reasonable" (see, for example, *Contrada*, cited above, §§ 66-67; and *Chraidi v. Germany*, no. 65655/01, § 42-45, ECHR 2006-XII).

b. Application of the general principles to the facts of the present case

71. The Court notes that the applicant's complaint in these proceedings concerned his detention following the refusal of the Crown Court on 7 June 2002 to extend the custody time limit. He argued that the court's

finding that the prosecution authorities had not acted with "due diligence and expedition" meant that they had not displayed the "special diligence" required by the Court in the context of Article 5 § 3. He did not contest that his pre-trial detention prior to 7 June 2002 was in accordance with Article 5 § 3, nor did he complain that, before or after 7 June 2002, there were in his case no specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighed the rule of respect for individual liberty laid down in Article 5 of the Convention. Accordingly, the Court will proceed on the basis that there were sufficient reasons for the applicant's continued detention and will limit its examination to whether the national authorities displayed "special diligence" in the conduct of the proceedings.

72. The period of detention falling to be examined lasted from 7 June 2002 until 25 September 2003, the date upon which the applicant was released. The period in question thus amounted to one year, three months and eighteen days. However, the Court will also bear in mind that as at 7 June 2002, the applicant had already been in detention for a period of six months (see, *mutatis mutandis*, *Jablonski v. Poland*, no. 33492/96, § 66, 21 December 2000; *Kalashnikov v. Russia*, no. 47095/99, § 111, ECHR 2002-VI; and *Stašaitis v. Lithuania*, no. 47679/99, § 80, 21 March 2002).

73. As noted above, of particular significance in the present case is that in June 2002, the court refused to extend the custody time limit on the ground that the prosecution had failed to show due diligence and expedition as regards disclosure (see paragraphs 13 and 71 above). No further details of this failing have been provided and no subsequent failing on the part of the prosecuting authorities has been alleged by the applicant. Like the Government, the Court does not consider that "due diligence" in terms of section 22(3) of the 1985 Act (see paragraph 46 above) can be equated to "special diligence" as required by Article 5 § 3 of the Convention. Although in *R (Quereshi and Others)* (see paragraph 49 above) Lord Bingham CJ explained that there was in his view no obligation on domestic courts to refuse an extension where the prosecution was guilty of avoidable delay, provided that the delay had no effect on the ability of both parties to be ready for trial on a predetermined date, there is no evidence in the present case to suggest that the Crown Court on 7 June 2002 proceeded on the basis that the delay in disclosure by the prosecution had affected the possibility of trial within a reasonable time. It is to be noted in this regard that by the time of the court's June 2002 ruling, the trial had already been vacated twice due to the conduct of the applicant (see paragraphs 11-15 above). In particular, in finding in June 2002 that the prosecution had not acted with all due diligence, there is no evidence that the Crown Court made its assessment by reference to the need for "special diligence" under Article 5 § 3 or with regard to the criteria established in the jurisprudence of this Court. Unlike

the approach of the domestic courts to compliance with the 1985 Act, in assessing compliance with Article 5 § 3, this Court will examine the proceedings as a whole and assess any particular periods of inactivity or delay by the authorities within the context of the overall period of pre-trial detention, with particular regard to any recognition by the authorities of the length of time already spent in detention and the need to take additional steps to bring about a more speedy trial (*Grisez*, cited above, § 53; *Contrada*, cited above, § 67; and *Pantano v. Italy*, no. 60851/00, §§ 72-74, 6 November 2003).

74. In the present case, the failure to act with all due diligence and expedition as regards disclosure occurred at some time prior to June 2002. At that point, the applicant had been in detention pending trial for six months, a period of time which is not in itself unreasonable given the seriousness of the charges. As noted above, within that six month period, the trial had twice been vacated as a result of the applicant's conduct (see paragraph 73 above).

75. The applicant does not complain about any period of delay following 7 June 2002. As to the reasonableness of the duration of the applicant's detention as a whole, the Court observes that following the hearing in June 2002 and the subsequent first request by the defence for access to telephone and hospital records (see paragraph 15 above), the trial was fixed for November 2002, some five months later. A hearing scheduled for October 2002 to consider preliminary matters of law did not take place as the applicant had once again dismissed his legal advisers (see paragraph 17 above). The trial in November 2002 subsequently had to be vacated due to difficulties with the jury (see paragraph 19 above), a matter in respect of which no blame can be attributed to either party. When the case came before a different court less than a month later, in December 2002, a trial date of January 2003 was offered to the applicant. Despite the fact that the judge made it clear that the applicant would remain in detention until trial and suggested on several occasions that the applicant consider the January trial date, the applicant insisted on postponing the trial until June 2003, some five months after the date offered, in order to ensure the availability of his preferred counsel (see paragraphs 23-27 above). It is clear that even by this stage, the applicant had failed to obtain the DNA evidence which he had previously indicated he required for his defence and had not yet clarified the nature of his defence to the charges (see paragraph 25 above). Neither the applicant nor the Government have explained why the trial in fact commenced on 1 September 2003, and not in June as previously agreed.

76. In the circumstances, the Court is satisfied that the authorities in the present case displayed special diligence in progressing the applicant's case and that any delay attributable to them did not, in the circumstances of the case, exceed what was reasonable (see *Pantano v. Italy*, cited above, § 72). In particular, the Court considers that the applicant substantially contributed

to the overall length of his pre-trial detention through his conduct of his defence and his choices regarding his legal representation. On several occasions, he dismissed his legal advisers shortly before hearings, which resulted in the hearings being postponed. In particular, his decision to refuse the January 2003 trial date had a significant impact on the duration of his detention. While the applicant was entitled to be represented by legal counsel of his own choosing and no blame can be attributed to him for insisting on the presence of his preferred counsel at trial, he must nonetheless bear the reasonable consequences of his choices on the overall length of his pre-trial detention (see, *mutatis mutandis*, *W. v. Switzerland*, 26 January 1993, § 42, Series A no. 254-A). The Court further observes that throughout this period, it was open to the applicant to make a bail application on the traditional grounds, namely to argue that the conditions for refusing bail were no longer valid in his case. Indeed, a total of six bail applications were made on this basis prior to December 2002 (see paragraphs 9-11 and 14-16 above).

77. In conclusion, the Court finds that there has been no violation of Article 5 § 3 of the Convention in the present case.

II. ALLEGED VIOLATION OF ARTICLE 5 § 3 TAKEN TOGETHER WITH ARTICLE 14 OF THE CONVENTION

78. The applicant complained under Article 5 § 3 of the Convention taken together with Article 14 that section 25 of the Criminal Justice and Public Order Act 1994 unfairly discriminated against those with previous convictions for certain offences.

79. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

80. The Court observes that section 25 applies to those with serious previous convictions for, *inter alia*, rape. In the event that a person to whom the section applies is subsequently charged with another serious offence, exceptional circumstances must exist to justify the grant of bail, even when the custody time limit has expired (see paragraphs 45 and 48 above).

81. In the present case, the applicant, who had a previous conviction for rape and violence for which he had been sentenced to fourteen years' imprisonment, was charged with a second offence of rape and indecent assault. The Court notes in particular that in the applicant's case, the previous convictions arose from an incident which was factually very similar to the alleged offences which took place in 2000 and can therefore be considered comparable both in nature and degree of seriousness to the

offences charged in 2001 (see paragraph 64 above and compare and contrast *Clooth v. Belgium*, 12 December 1991, § 40, Series A no. 225).

82. In the circumstances, the Court does not consider that the applicant can claim to be in an analogous position to a defendant charged with the same offence who does not have a previous similar offence.

83. The Court therefore concludes that the applicant's complaint under Article 5 § 3 taken together with Article 14 is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It must therefore be rejected pursuant to Article 35 § 4.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 5 § 3 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 5 § 3 of the Convention.

Done in English, and notified in writing on 21 September 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Lech Garlicki President