CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 63356/00
by William Samuel KERR
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 23 September 2003 as a Chamber composed of:

Mr M. PELLONPÄÄ, *President*,
Sir Nicolas BRATZA,
Mrs V. STRÁŽNICKÁ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 17 November 2000,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr William Samuel Kerr, is a United Kingdom national, who was born on 8 October 1925 and lives in York. He was represented before the Court by Mr R. Manning, a lawyer practising in Leeds.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant is a retired psychiatrist. He is in poor health and, in particular, suffers from an organic brain disease. He is currently receiving a range of medication but his health is deteriorating.

On 21 August 1997, the applicant, then aged 71, was arrested by the police on suspicion of having committed sexual offences against a number of females who had been under his care as psychiatric patients for the period between 1968 and 1988. He was interviewed thereafter by the police on a number of occasions, in the presence of his legal representative. Insofar as he was able to recall the time in question, the applicant denied the allegations. He was subsequently charged with four counts of rape and fifteen counts of indecent assault. He appeared before an examining magistrate on 16 September 1999. It was decided that there was sufficient evidence for the case to be committed to the Crown Court at Leeds, despite efforts from the applicant's legal representatives, who adduced evidence to support their view that the applicant was unfit to plead.

The applicant's representative asked the Attorney General to enter a *nolle prosequi* on the grounds of the applicant's health. This was refused on 6 December 1999.

On 17 April 2000, the applicant appeared before a judge, Mr Justice Hooper, and a jury at Leeds Crown Court. He was found by the jury to be "under disability", pursuant to section 4(5) of the Criminal Procedure (Insanity) Act 1964 ("the 1964 Act").

The applicant's legal representatives made submissions to the effect that the procedure under section 4A of the 1964 Act, (to determine whether the applicant "did the act or made the omission charged against him as the offence"), should be stayed as an abuse of process. Their argument was based *inter alia* on the premise that the applicant posed no threat to the public and therefore a prosecution served no useful purpose given his state of health.

On 12 June 2000, Mr Justice Hooper ruled that the public interest in having the matters in question fully investigated was paramount given the serious nature of the charges. He stated that this was the case, even though an absolute discharge would be appropriate and that such scenarios were what the section 4A procedure was intended for.

The hearing of the section 4A procedure began on 27 November 2000, with a new judge, Judge Myerson, and a new jury. The procedure, following the decision on 30 March 2000 by the House of Lords in *R. v. Antoine*, would only have regard to the *actus reus* of the offences in question and not the *mens rea*.

On 2 October 2000, the Human Rights Act 1998 had come into force. The applicant's representatives invoked Article 6 §§ 1, 2 and 3 of the Convention, arguing *inter alia* that the applicant had a right to participate in the hearing, something the judge acknowledged he would be unable to do.

On 30 October 2000, Judge Myerson ruled that the section 4A hearing did not amount to an investigation of a criminal charge and that Article 6 §§ 2 and (3) (d) did not apply to the procedure. He concluded that the procedure as a whole was compatible with the Convention and hence the Human Rights Act.

The substantive section 4A hearing began on 27 November 2000, with the judge summing up on 13 December 2000. He repeatedly pointed out that the proceedings were not a trial in the ordinary sense.

On 18 December 2000, the jury found that the applicant "did the act" of indecent assault alleged in Count 19 of the indictment. They found that he had not done the act alleged in Counts 2, 6, 11, 13, 15 and 17 and were unable to "make a determination" for Counts 1, 3, 4, 5, 7, 8, 9, 10, 12, 14, 16 and 18.

The judge ordered an absolute discharge under section 5(2)(b)(iii) of the 1964 Act and confirmed that the applicant was required to comply with the notification requirements of the Sex Offenders Act 1997.

The applicant lodged an application for leave to appeal to the Court of Appeal on the grounds, *inter alia*, that Mr Justice Hooper had been wrong in law in not finding the section 4A proceedings to be an abuse of process and that Judge Myerson was incorrect in rejecting the arguments under Article 6 §§ 1, 2 and 3 of the Convention. Accordingly, he argued that the proceedings were incompatible with the Human Rights Act 1998. The application was heard together with a similar application for leave by one M. and a substantive appeal lodged by one H. (see below).

On 5 October 2001, the Court of Appeal refused the applicant's application for leave to appeal. It found the section 4A hearing compatible with the Convention, holding that while the procedure looked at the facts that might constitute a criminal offence, it did not determine a criminal charge and that, although it could lead to a deprivation of liberty by hospitalisation, it did not lead to what could be construed as a criminal penalty nor to a finding of "guilty" or "not guilty". The Court of Appeal further held that, even if Article 6 applied, it had not been infringed. A trial in civil or criminal proceedings, where disadvantages suffered by persons under a disability had been minimised even if not totally removed, could be "fair".

The court noted that the procedure under section 4A of the 1964 Act had been inserted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and had been introduced in response to the case of a woman who had confessed to a murder. She was found unfit to plead and detained without there being any investigation of the facts in a hearing. It later transpired that she had not committed the murder. The Court of Appeal concluded that sections 4 and 4A of the 1964 Act constituted a fair procedure, providing for investigation of the facts on behalf of a disabled person, so far as possible. It fairly balanced the public interest in both ascertaining whether acts had been committed and in identifying and treating, or otherwise dealing with, persons who had committed the acts, and the interests of those persons.

The applicant had no right of petition to the House of Lords, having been refused leave to appeal to the Court of Appeal.

B. Relevant domestic law and practice

1. The Criminal Procedure (Insanity) Act 1964

A jury cannot make a determination that a defendant is unfit to be tried "except on the written or oral evidence of two or more registered medical practitioners" (section 4(6) of the 1964 Act). The test for the jury is whether the defendant is able to plead to the indictment, whether the defendant is of sufficient intellect to comprehend the course of the proceedings of the trial, so as to make a proper defence, to challenge a juror to whom he might wish to object, and to understand the details of the evidence (*R. v. Pritchard* [1836] 7 C. & P. 303).

On a finding of unfitness to plead "the trial shall not proceed" (section 4A(2)), and a further jury must be empanelled to determine "whether they are satisfied, as respects the count or each of the counts on which the accused was to be tried, that he did the act or made the omission charged against him as the offence" (section 4A(2)). If they are so satisfied, then "they shall make a finding that the accused did the act or made the omission charged against him" (section 4A(3)). If they are not so satisfied "they shall return a verdict of acquittal as if on the count in question the trial had proceeded to a conclusion" (section 4A(4)).

The burden of proof is on the prosecution and in order to prove that the defendant was guilty of doing the act charged, the prosecution must prove their case beyond reasonable doubt. A finding under this procedure is not a finding of guilt (*R. v. Southwark Crown Court ex parte Koncar* [1998] 1 Cr.App.R. 321, DC).

Following a finding that the defendant did the act or made the omission charged against him, the court shall either:

(a) make an order that the accused be admitted to such hospital as may be specified by the Secretary of State, or

(b) where it has power to do so, make one of the following orders as it thinks most suitable in all the circumstances of the case, namely

(i) a guardianship order;

(ii) a supervision and treatment order; or

(iii) an order for his absolute discharge (section 5(2)).

2. R. v. H. ([2003] UKHL 1) and R. v. Antoine ([2001] 1 AC 340)

In the case of *H.* (whose appeal to the Court of Appeal was heard with the applicant's application), permission to appeal was granted by the House of Lords itself, the Court of Appeal having certified as a point of law of general public importance the question whether the procedure defined by section 4A of the 1964 Act was compatible with an accused person's rights arising under Article 6 §§ 1, 2 and 3 (d) of the Convention.

On 30 January 2003 Lord Bingham of Cornhill, in giving the leading judgment, endorsed the views expressed in the case of *R. v. Antoine* by Lord Hutton, who said:

> "The purpose of section 4A, in my opinion, is to strike a fair balance between the need to protect a defendant who has, in fact, done nothing wrong and is unfit to plead at his trial and the need to protect the public from a defendant who has committed an injurious act which would constitute a crime if done with the requisite *mens rea*. The need to protect the public is particularly important where the act done has been one which caused death or physical injury to another person and there is a risk that the defendant may carry out a similar act in the future. I consider that the section strikes this balance by distinguishing between a person who has not carried out the *actus reus* of the crime charged against him and a person who has carried out an act (or has made an omission) which would constitute a crime if done (or made) with the requisite *mens rea*."

Referring to the *Engel v. the Netherlands* case (judgment of 8 June 1976, Series A no. 22) in considering whether the section 4A procedure fell within the scope of Article 6 of the Convention, Lord Bingham went on to hold, *inter alia*:

> "16. It is first necessary to know how the issue is classified in domestic law. This test is far from decisive and rightly so, since the Convention seeks the achievement of broadly equivalent standards among the member states of the Council of Europe and such aim would be defeated if domestic rules were determinative. But this is the starting point, and it is clear that the domestic law of England and Wales does not treat the section 4A procedure as involving the determination of a criminal charge. When a finding of unfitness is made it is provided that the trial (meaning the criminal trial) 'shall not proceed or further proceed'. Section 4A(2) is expressed in terms which make it clear that the task of the jury is not that carried out by a jury in a criminal trial: ... the jury have the power to acquit but they have none to convict. The jury take an oath different from that in a criminal trial. There can be no verdict of guilty. There can be no punishment. In a case such as the present, as the legislation has been amended to make clear, an order of absolute discharge may be made in the absence of any conviction and without consideration of the expediency of punishment. It is true that

by virtue of section 1(4)b of the Rehabilitation of Offenders Act 1974 references in that Act to a conviction are expressed to include reference to a finding that a person has done the act or made the omission charged, but this was an Act designed to promote the rehabilitation of offenders by enabling them to live down past convictions and the obvious purpose of this provision was to give persons subject to adverse findings under section 4A the benefit of that protection. It is also true that a person found to have done the act or made the omission charged is subject, by virtue of section 1(1)b of the Sex Offenders Act 1997, to the notification requirements of that Act. But I regard it as clear, as a matter of domestic law, that this provision is designed to protect the public and not to punish the subject of the order. The non-punitive nature of the order was recognised by the Commission in *Ibbotson v. the United Kingdom* (1998) 27 EHRR CD 332. ...

17. The second *Engel* test, and that on which the appellant's argument depended, directed attention to the very nature of the offence. ...

18. It would be highly anomalous if section 4A, introduced by amendment for the protection of those unable through mental unfitness to defend themselves at trial, were itself to be held incompatible with the Convention. It is very much in the interest of such persons that the basic facts relied on against them (shorn of issues concerning consent) should be formally and publicly investigated in open court with counsel appointed to represent the interests of the person accused so far as possible in the circumstances. The position of accused persons would certainly not be improved if section 4A were abrogated. In my opinion, however, the argument is plainly bad in law. Whether one views the matter through domestic or European spectacles, the answer is the same: the purpose and function of the section 4A procedure is not to decide whether the accused person committed a criminal offence. The procedure can result in a final acquittal, but it cannot result in a conviction and it cannot result in punishment. Even an adverse finding may lead, as here, to an absolute discharge. But if an adverse finding leads to the making of a hospital order, there is no bar to a full criminal trial if the accused person recovers, an obviously objectionable outcome if the person has already been convicted. ...

19. ... [As regarded the third *Engel* test] Mr Smith for the appellant accepted that he could not rely on this test, because he accepted that the orders which the court could make on a finding by the jury adverse to the accused under section 4A were none of them punitive. But the fact that the procedure cannot culminate in any penalty is not neutral. The House was referred to no case in which the European Court has held a proceeding to be criminal even though an adverse outcome for the defendant cannot result in any penalty. It is, indeed, difficult if not impossible to conceive of a criminal proceeding which cannot in any circumstances culminate in the imposition of any penalty, since it is the purpose of the criminal law to proscribe, and by punishing to deter, conduct regarded as sufficiently damaging to the interests of society to merit the imposition of penal sanctions."

Dismissing *H.*'s appeal and expressing full agreement with the Court of Appeal the House of Lords concluded that the procedure under section 4A of the 1964 Act did not involve the determination of a criminal charge, but that, if properly conducted, the procedure was nevertheless fair and compatible with the rights of an accused person under Article 6 §§ 1, 2 and 3 of the Convention.

COMPLAINTS

The applicant complains under Article 6 § 1 of the Convention that he could not participate effectively in the proceedings in which he was involved owing to his disability. In particular, he was unable to challenge any of the evidence against him or give any evidence in his own defence. The applicant argues that this provision is applicable regardless of whether the section 4A hearing is regarded as "criminal" in nature or not. The applicant further states that Article 6 § 3 (d) is infringed since his disability precludes any "equality of arms".

The applicant also complains under Article 6 § 2 of the Convention. He states that section 4A proceedings are *de facto* criminal in nature and involve a determination of a criminal charge. Therefore, the applicant stated that the finding concerning Count 19 in his case, and the fact that a hearing was deemed appropriate, violated his presumption of innocence.

THE LAW

The applicant complains under Article 6 §§ 1 and 3 (d) that, due to his mental state, he was unable to participate in the proceedings before the court and under Article 6 § 2 that the finding that he had done the act in Count 19 amounted to an 'inference of guilt', thus violating his right to be presumed innocent.

Article 6 §§ 1, 2 and 3 (d) provide as relevant:

> "1. 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 ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights: ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

A. The parties' submissions

1. The Government

The Government submitted that Article 6 does not apply to the proceedings under section 4A of the 1964 Act. They relied on the findings of the House of Lords in *R. v. H.*, that the section 4A procedure did not

involve the determination of a criminal charge either in domestic law or under the Convention. Once the jury had found that the applicant was unfit to plead, he no longer faced a criminal conviction and the criminal guarantees in Article 6 ceased to apply. Neither did the proceedings involve a determination of the applicant's civil rights.

The effect of the finding that the applicant had done the act charged against him as the offence of indecent assault was that he fell to be dealt with according to section 5 of the 1964 Act. There was no verdict of guilty and none of the available orders were punitive. The requirement to comply with the provisions of the Sex Offenders Act 1997 was designed to protect the public and was not punitive in nature. The Government referred to the cases of *Ibbotson v. the United Kingdom* (no. 40146/98, Commission decision of 21 October 1998) and *Adamson v. the United Kingdom* ((dec.), no. 42293/98, 26 January 1999) in this regard.

Whilst the Government submitted that Article 6 did not apply to the proceedings under section 4A of the 1964 Act, they acknowledged that such proceedings must be conducted fairly and pointed to the safeguards which exist to protect the interests of the unfit person, *inter alia* that the proceedings are before an independent and impartial tribunal, that the unfit person is represented by counsel, that evidence may be called on his behalf and evidence called by the prosecution subjected to cross-examination, and that the burden of proof is on the prosecution to the criminal standard.

The Government submitted that even if Article 6 did apply, a modification of the rights guaranteed under Article 6 was necessary in the case of an accused found to be under a disability. In particular, such modification was a recognition of the fact that it would generally not be in his interests to participate in the proceedings if he was incapable of giving evidence, or giving it coherently. Taking account of the nature of the proceedings, which did not involve a finding of guilt, the unfit person's interests could properly be safeguarded by legal representation. In the applicant's case, the rights guaranteed by Article 6 were observed and the procedure was conducted fairly.

2. The applicant

The applicant argued that the substance of the proceedings under section 4A of the 1964 Act did involve the determination of a criminal charge and that for all practical purposes the applicant had been found guilty of an indecent assault, without having been able to participate effectively in the proceedings which had led to that finding. His lack of effective participation meant that he had not been found guilty 'according to law' but was nevertheless stigmatised by a finding that he had committed what amounted to a criminal offence, thus violating his right to be presumed innocent. The applicant submitted that the Court of Appeal, and the House of Lords in the case of *R. v. H.*, had interpreted 'determination of a criminal charge' too

narrowly. In particular, he submitted that the fact that the proceedings were capable of terminating in a final acquittal sufficed to render them criminal in nature and that the second and third of the *Engel* criteria were alternatives, so that it was possible for the proceedings to be characterised as criminal in Convention terms even if no penalty had been imposed. The applicant relied *inter alia* on the recent Chamber judgment in *Ezeh and Connors v. the United Kingdom* (nos. 39665/98 and 40086/98, 15 July 2002, pending before the Grand Chamber) in which the Court found that prison disciplinary proceedings amounted to a determination of a criminal charge.

The fact that, for example, the prosecution opened the case by reference to the criminal charges initially faced by the applicant and that the jury delivered their findings by reference to the indictment showed that in substance the proceedings were criminal in nature. Moreover, as the offence in question was a crime of basic intent, the finding that the applicant had done the act was sufficient to establish that what he had done amounted to the commission of a criminal offence. The finding was deemed to be criminal for the purposes of the Rehabilitation of Offenders Act 1974, an Act confined in its ambit to the sphere of criminal law. Similarly, the applicability of the Sex Offenders Act 1997 was indicative of criminal proceedings, regardless of the consequences of the requirement to register. The applicant argued that the fact that the Court had held that the requirement to register was not punitive was not decisive; rather he was stigmatised by the requirement to comply with provisions in common with persons convicted of sexual offences.

The applicant asserted that Article 6 was in any event applicable, at the very least because his civil rights and obligations were determined. The right to a fair trial under Article 6 was an absolute right, even if the constituent elements which went to make up the right were capable of modification. Where a person was unable to participate in the proceedings in question such that he could not understand them, was unable to instruct his lawyers or conduct an effective examination of the witnesses, it was not possible for him to have a fair trial. It was not justifiable or proportionate for the applicant to rely on his lawyers to safeguard his interests when he was incapable of giving them instructions. Given that it was accepted that the applicant did not present a threat to the public, that his condition would not improve and that an absolute discharge was the only appropriate disposal, it was difficult to see what legitimate aim was served by pursuing the proceedings against him.

B. The Court's assessment

The Court recalls its recent decision in the case of *Antoine v. the United Kingdom* ((dec.), no. 62960/00, ECHR 2003-...), in which it found that from the time that the applicant was found by a jury to be unfit to plead the

criminal proceedings against him came to an end. The procedure under section 4A of the 1964 Act was conducted instead, in recognition of the fact that it was generally unfair to try a defendant who had been found to be incapable of effective participation in the proceedings. The Court said:

> "Pursuant to the 1964 Act, the applicant could be acquitted of the charge against him, but, following the finding of unfitness to plead, no conviction was possible. The Court considers that these proceedings did not therefore concern the determination of a criminal charge. The applicant was no longer under any threat of conviction. The applicant argued that the possibility of an acquittal brought the proceedings within the scope of Article 6, since, to that extent, a final decision could be taken regarding a criminal charge. The Court is not persuaded however that this renders the proceedings criminal for the purposes of Article 6 § 1. It may be regarded as a mechanism protecting an applicant, wrongly accused of participation in a purported offence, from the making of any preventative orders under section 5(2) of the 1964 Act. The lack of a possibility of a conviction and the absence of any punitive sanctions are more decisive."

The applicant submits that the absence of a penalty is not conclusive, but none of the authorities on which he relies suggest that proceedings in which no penalty is, or could be imposed, could be characterised as criminal according to the *Engel* criteria. In the case of *Ezeh and Connors* (cited above, §§ 92-100), the nature and severity of the potential and actual punishment was central to the Court's finding that Article 6 was applicable to the proceedings in question. The applicant further argues that in substance the proceedings were criminal, but the Court considers that the factors on which he relies (such as the jury's decisions being given by reference to the indictment) are essentially matters of form. The real issues of substance, as the Court pointed out in *Antoine*, were the absence of the possibility of a conviction or punishment.

In the case of *Antoine*, the Court concluded that the essential purpose of the proceedings was to consider whether the applicant had committed an act the dangerousness of which would require his detention in hospital. The applicant in the present case submits that, as he presented no danger to the public, the proceedings under section 4A did not serve any legitimate purpose. However, the Court notes that protection of the public is not the only purpose of the legislation. As Lord Hutton stated in the case of *Antoine*, the legislation also exists to protect a defendant who has in fact done nothing wrong and the Court notes that the legislation was introduced in response to an injustice which occurred in the absence of any satisfactory investigation into the facts of the case. The protective aspect of the provisions is well illustrated in the present case by the fact that the jury found that the applicant had committed the act in question only in respect of one of the nineteen counts on the indictment. The Court therefore concludes that the section 4A proceedings did not involve the determination of a criminal charge and there is nothing to distinguish the applicant's case from that of the applicant in *Antoine* in that regard.

Article 6 § 1 is thus not applicable under its criminal head, nor does Article 6 § 3 apply. Furthermore, the Court does not consider that the jury's findings amounted to an 'inference of guilt', so as to bring the proceedings within the scope of Article 6 § 2 (see *Minelli v. Switzerland*, 25 March 1983, Series A no. 62; *Ringvold v. Norway*, no. 34964/97, §§ 36-39, ECHR 2003-...). The decision of the jury that the applicant had committed the act which formed the basis of Count 19 was specifically distinguished from a finding of criminal liability, as outlined above. There was no sense in which the court's reasoning suggested that the applicant was in fact 'guilty', so as to undermine the earlier discontinuance of the criminal proceedings. It follows that this part of the application is incompatible *ratione materiae* and must be rejected pursuant to Articles 35 §§ 3 and 4 of the Convention.

The applicant states in the alternative that Article 6 applies because the proceedings involved a determination of the applicant's civil rights and obligations, although he does not develop his argument. The Court notes that the applicant was absolutely discharged and finds that the applicant has not demonstrated how the proceedings involved a '*contestation*', the outcome of which was decisive for his private rights and obligations (see for example *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, § 94, *Fayed v. the United Kingdom*, judgment of 21 September 1994, Series A no. 294-B, § 56).

However, even assuming that Article 6 were to be applicable, the Court notes that the national authorities enjoy greater latitude in the implementation of measures to ensure fairness in civil than in criminal proceedings (see, for example, *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, Series A no. 274, §§ 32-33, and more recently *Suominen v. Finland*, no. 37801/97, § 33, 1 July 2003). Various safeguards operate for the protection of persons under a disability facing proceedings under section 4 and 4A of the 1964 Act, including the provision of representation by counsel and the applicability of the criminal burden and standard of proof. Such safeguards operate to ensure fairness as far as is possible for those who of necessity cannot participate effectively in the proceedings. The applicant does not suggest that an alternative procedure could have safeguarded the rights of the applicant more effectively. The implication of the applicant's argument is that it can never be possible for a person unable by reason of their disability to participate effectively in civil proceedings to have a fair hearing.

The Court notes the safeguards for the protection of those unfit to plead as outlined above, taken together with the nature of the proceedings and in particular the lack of any punitive sanctions, and concludes that even if Article 6 in its civil aspect is applicable to the procedure under section 4A of the 1964 Act, the procedure has not been shown to be unfair. It is not suggested that in the applicant's case any unfairness occurred other than that which is alleged to have flowed directly from the fact of his disability. It

follows that this aspect of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Matti PELLONPÄÄ
President