AS TO THE ADMISSIBILITY OF

Application No. 17821/91
by James KAY
against the United Kingdom

The European Commission of Human Rights sitting in private on 7 July 1993, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
F. ERMACORA
G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI
B. CONFORTI

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 14 December 1990 by James KAY against the United Kingdom and registered on 20 February 1991 under file No. 17821/91;

Having regard to:

- reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 31 October 1991 and the observations in reply submitted by the applicant on 31 March 1992;

- the pre-hearing briefs submitted by the Government on 18 June 1993 and by the applicant on 23 June 1993;

- the oral hearing on 7 July 1993;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1945 and is at present detained in Broadmoor Special Hospital, Crowthorne, Berkshire (hereafter referred to as Broadmoor) under sections 37 and 41 of the Mental Health Act 1983 (the 1983 Act).

The applicant is represented before the Commission by Messrs. Irwin Mitchell & Co., solicitors, Sheffield.

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

A. The particular circumstances of the case

In November 1970 the applicant killed the 12 year old daughter of a neighbour. The condition of the child's body indicated that she had been raped, asphyxiated, cut with a sharp instrument and bitten.

On 5 January 1971 the applicant pleaded guilty at Liverpool Crown Court to a charge of manslaughter on grounds of diminished responsibility. This plea was accepted and the applicant was made the subject of a Hospital Order and a Restriction Order without limit of time under sections 60 and 65 of the Mental Health Act 1959 (now replaced by sections 37 and 41 of the 1983 Act). Medical evidence before Liverpool Crown Court was that the applicant was suffering from a psychopathic disorder. In addition, the Court was aware that the applicant had a number of previous convictions including three for sexual offences. In July 1962 the applicant had been convicted of assaulting a girl under the age of 13 and been fined £15. In December 1963 he had been convicted of having sexual intercourse with a girl whose age was between 13 and 15 and he had been conditionally discharged. Finally, in January 1966 he had been convicted of rape and sentenced to 3 years' imprisonment.

After his conviction the applicant was sent to Broadmoor where he remained until November 1981 when he was transferred to Park Lane Hospital.

In March 1985 he sought discharge from hospital by means of an application to a Mental Health Review Tribunal as he was entitled to do under section 70 of the 1983 Act. The Secretary of State expressed serious reservations about the medical evidence presented on the applicant's behalf. The Tribunal found, however, that there was no evidence that the applicant was then suffering from any mental disorder. However, it took the view that it was appropriate for the applicant to remain liable to be recalled to hospital for further treatment. Therefore the Tribunal was obliged, under section 73 (2) of the Act, to order that the applicant be conditionally discharged from hospital. It made the relevant order on 19 March 1985.

The conditions of discharge related to residence, probation and medical supervision. The applicant left hospital on 9 April 1985. Whilst subject to conditional discharge the applicant was convicted on 14 April 1986 at Lancaster Crown Court of two offences, one of assault occasioning actual bodily harm, the other of unlawful wounding. The offences were committed on 20 and 21 October 1985 respectively and the victims were both young women.

In the absence of a medical recommendation for a hospital order under section 37 (2) of the 1983 Act, the applicant was not returned to hospital but was sentenced to 3 years' imprisonment for each offence, running consecutively. Leading counsel appearing on behalf of the applicant gave the following explanation to the Court for the absence of such a recommendation :

> "There is no medical recommendation because as your Honour will know such a recommendation is only available if there is treatment available and a place available for treatment and such treatment is regarded as being likely to be successful. I have a medical report which indicates that this man suffers from a severe personality disorder which is thought to be unbreakable at the moment, although we know the speed at which medical

science advances these days."

While in prison the applicant retained his status as a person conditionally discharged from hospital. On 30 June 1986 he applied for his case to be considered again by a Mental Health Review Tribunal. He sought his absolute discharge from hospital on the basis that he was not suffering from any mental disorder. The Tribunal, which considered his case on 18 December 1986, refused to grant an absolute discharge even though there was no medical evidence before it that the applicant was then suffering from any psychopathic disorder. The Tribunal refused such a discharge since it continued to take the view that it was appropriate for the applicant to remain liable to be recalled to hospital for further treatment. In the light of the applicant's imprisonment the Tribunal ordered that the conditions of his discharge be suspended until the day of his release from prison.

In consequence, the applicant would, on the day of his release from prison, revert to the status of a person conditionally discharged from hospital. He would, under section 42 (3) of the 1983 Act, be liable to be recalled to hospital by a warrant issued by the Home Secretary. The applicant unsuccessfully challenged the 1986 decision of the Tribunal by way of judicial review.

The applicant remained in prison at Albany on the Isle of Wight. His earliest release date was 24 October 1989. On 4 August 1989 the applicant's solicitor wrote to the Home Office stating that the applicant was seeking reassurance that the Home Secretary would not exercise the power of recall. However, on 1 September 1989 the Home Secretary issued a warrant of recall stating that as soon as the applicant was released from prison he should be taken to and detained at Broadmoor Special Hospital, a secure establishment. In a letter addressed to the applicant at Albany prison dated 1 September 1989 the Home Secretary gave his reasons for this decision. He said that in the light of the offences of which the applicant was convicted in April 1986, he was not satisfied that the applicant no longer presented a serious risk to public safety. The Secretary of State continued to have grave misgivings about the applicant's motivation for the 1970 offence. He was particularly concerned by a report that he had asked Dr. Loucas, a consultant forensic scientist at Broadmoor, to prepare in December 1986. Without interviewing the applicant and on the basis of the case papers, Dr. Loucas wrote that, "All reports stating 'not psychopathic' appear to be based on the uncritical acceptance of

Mr. Kay's explanations for his offences (contradictory and deliberately misleading) without reference to his personal history ...". Section 75 (1) (a) of the 1983 Act obliges the Home Secretary, when issuing a warrant of recall under section 42 (3), to refer the case within one month to a Mental Health Review Tribunal which has the responsibility of deciding whether the subject should be detained or discharged conditionally or absolutely. The Home Secretary advised the applicant that his case would indeed be referred to a Mental Health Review Tribunal.

The applicant promptly sought judicial review of the Home Secretary's decision in order to quash the Home Secretary's warrant of recall on the ground that it was issued unlawfully.

The applicant's application for judicial review was heard first by Mr. Justice McCullough, who gave judgment refusing the applicant relief on 23 October 1989, the day before the applicant was due to be released from prison. The applicant was subsequently transferred on 24 October from Albany prison to Broadmoor Special Hospital, where he remains in detention. On the same day the Secretary of State referred the case to a Mental Health Review Tribunal. The applicant also applied to the Tribunal.

The Tribunal was ready to sit on 22 March 1990, but at the

request of the applicant's solicitors the hearing date was postponed until June 1990. This second hearing date was again postponed due to a request from the applicant's solicitors. The Home Secretary obtained a medical report on the applicant after he was transferred from Albany to Broadmoor. That report was prepared by a clinical psychiatrist, Dr. Enda Dooley and was dated 24 November 1989. Dr. Dooley concluded that the applicant was suffering from a psychopathic disorder.

The applicant entered an appeal against the refusal of relief on judicial review by Mr. Justice McCullough. The Court of Appeal rejected the appeal on 3 July 1990. Leave to appeal to the House of Lords was refused by the Court of Appeal. The applicant was discouraged from applying to the House of Lords for leave to appeal because of an earlier refusal of such leave in his first judicial review proceedings. Further he was advised by counsel that, in the light of the decision of the Court of Appeal, English courts could provide him with no other remedy.

The Mental Health Review Tribunal heard the applicant's case on 25 and 26 November 1991. No fresh evidence was placed before the Tribunal on behalf of the applicant, who by then had withdrawn his application to the Tribunal, leaving the Secretary of State's referral. He declined to attend the hearing, but was represented by his solicitor and counsel. The Tribunal directed that the applicant should not be discharged from hospital because, following medical evidence submitted by a Dr. Ferris, it was not satisfied that the applicant "is not suffering from a continuing psychopathic disorder of such a nature or degree as to make it appropriate for him to be liable to be detained in hospital for medical treatment and that there is reason to believe, taking into account particularly the 1985 assaults, that it is necessary for the protection of others that he receive such treatment".

B. The relevant domestic law and practice

Hospital order

Section 37 of the Mental Health Act 1983 ("the 1983 Act") empowers a Crown Court to order a person's admission to and detention in a hospital specified in the order ("a hospital order").

The court can only make a hospital order if it is satisfied on the evidence of two registered medical practitioners that the offender is mentally disordered and that -

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

(b) the court is of the opinion ... that the most suitable method of disposing of the case is by [a hospital order].

Restriction order

Section 41 of the 1983 Act empowers a Crown Court at the same time as it makes a hospital order to make a restriction order without limit of time.

A restriction order may be made if it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm to make the order.

Application to the Mental Health Review Tribunal

Under section 70 of the 1983 Act a person who is subject to a hospital order and restriction order ("a restricted patient"), and who is detained in hospital, can apply to a Mental Health Review Tribunal ("a Tribunal") after he has been detained for six months. After he has been detained for twelve months he can re-apply annually. (Under section 71 of the 1983 Act the Secretary of State may at any time refer the case of a restricted patient to a Tribunal and must do so when his case has not been considered by a Tribunal for three years.)

Absolute discharge

Under section 73(1) of the 1983 Act, read with section 72(1), where an application is made to a Tribunal by a restricted patient who is subject to a restriction order (as opposed to a restriction direction imposed by the Secretary of State on transfer of a person from prison to hospital), or where his case is referred to the Tribunal by the Secretary of State, the Tribunal is required to direct the absolute discharge of the patient if satisfied -

(a) (i) that he is not then suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment or from any of those forms of disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment ; or

(ii) that it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment ;

AND

(b) that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment.

By virtue of section 73(3), where a patient is absolutely discharged he ceases to be liable to be detained by virtue of the hospital order and the restriction order ceases to have effect.

Conditional discharge

Under section 73(2) where the Tribunal are satisfied as to either of the matters referred to in paragraph (a) above, but not as to the matter referred to in paragraph (b) above, they are required to direct the conditional discharge of the patient. By virtue of section 73(4) a patient who has been conditionally discharged may be recalled by the Secretary of State under section 42(3) and must comply with the conditions attached to his discharge. It should be noted that, in contrast to the case of absolute discharge, a conditionally discharged patient does not cease to be liable to be detained by virtue of the relevant hospital order.

Secretary of State's power of recall

The Secretary of State has power to recall a patient who he himself has conditionally discharged (under section 42(2) of the 1983 Act) or who has been conditionally discharged by a Tribunal (under section 73(2) of the 1983 Act). This power is given by section 42(3) of the 1983 Act which says :

"The Secretary of State may at any time during the continuance in force of a restriction order in respect of a patient who has been conditionally discharged under sub-section (2) above by warrant recall the patient to such hospital as may be specified in the warrant."

Referral to a Tribunal under section 75(1) of the 1983 Act

Under section 75(1) of the 1983 Act when a restricted patient who has been conditionally discharged is subsequently recalled to hospital the Secretary of State is required, within one month of the day on which the patient returns or is returned to hospital, to refer his case to a Tribunal.

COMPLAINTS

The applicant complains of a violation of Article 5 para. 1 of the Convention by the Secretary of State's issue of a warrant of recall. He claims that he was illegally deprived of his liberty, not being a person of unsound mind within the meaning of Article 5 para. 1 (e) of the Convention at the material time.

The applicant also complains of a breach of Article 5 para. 4 of the Convention in that the lawfulness of his detention was, allegedly, not speedily decided by a court ie. the Mental Health Review Tribunal.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 14 December 1990 and registered on 20 February 1991.

After a preliminary examination of the case by the Rapporteur, the Commission considered the admissibility of the application on 2 July 1991. It decided to give notice of the application to the respondent Government and to invite the parties to submit their written observations on admissibility and merits.

The Government submitted their observations on 31 October 1991. The applicant replied on 31 March 1992 after an extension of the time-limit.

On 15 January 1993 the Commission decided to hold an oral hearing on admissibility and merits. The parties submitted pre-hearing briefs: the Government on 18 June 1993, the applicant on 23 June 1993.

The hearing was held on 7 July 1993. The applicant was represented by Mr. O. Thorold, counsel, and Mr. C. Gillott, solicitor, Messrs. Irwin Mitchell & Co. The Government were represented by Mrs. A.F. Glover, Agent, Foreign and Commonwealth Office, Mr. M. Baker, QC, counsel, Dr. P. Mason and Mr. P.W. Otley, Department of Health, MM. H. Giles and N. Jordan, Home Office, and Dr. D. McGoldrick, Foreign and Commonwealth Office.

THE LAW

1. The applicant first complains of a violation of Article 5 para. 1 (Art. 5-1) of the Convention by virtue of the Secretary of State's warrant of recall. He claims that he was illegally deprived of his liberty because the Secretary of State was not in possession of any evidence at the material time that the applicant was a person of unsound mind, within the meaning of Article 5 para. 1 (e) (Art. 5-1-e) of the Convention, or in need of continued compulsory confinement. He submits that, on the contrary, the available evidence, in particular the 1985 and 1986 decisions of the Mental Health Review Tribunal, showed that he was not

suffering from any mental disorder. Furthermore, the Secretary of State had had considerable notice that the applicant was due for release from prison and therefore could have taken steps to procure up-

to-date medical reports beforehand.

The Government contend, inter alia, that the warrant of recall did not interfere with the applicant's rights under Article 5 para. 1 (Art. 5-1) of the Convention because he was not at liberty within the meaning of that provision. The Government state that the applicant was and continues to suffer from a psychopathic disorder and, being subject to a conditional discharge since 1985, he was liable to recall at any time, even if he had been released from prison. They affirm that it would have been impossible for a reliable report to have been made on the applicant's mental health while he was in prison because the conditions there were inappropriate and the applicant had previously been uncooperative in the preparation of such reports. Moreover, during the relevant period the applicant had been involved in unsuccessful judicial review proceedings, the outcome of which was not known to the Secretary of State until 2 August 1989, and these proceedings could have been prejudiced by earlier steps being taken by the Secretary of State.

2. The applicant also complains to the Commission of a breach of Article 5 para. 4 (Art. 5-4) of the Convention and alleges that the lawfulness of his detention at Broadmoor was not speedily decided by a court. He submits, inter alia, that the Secretary of State only has power to refer a case such as his to the Mental Health Review Tribunal from the day on which the patient returns to hospital, and no later than one month afterwards. There is usually then a six months' delay between the Secretary of State's referral and the Tribunal's hearing. Furthermore, the applicant contends that the Tribunal has not decided on the lawfulness of his detention because it does not have to find positive evidence that the patient is suffering from a mental disorder.

The Government assert that the judicial review proceedings instituted by the applicant after his recall in large part satisfied the requirements of Article 5 para. 4 (Art. 5-4) of the Convention. These proceedings, combined with the referral of the applicant's case to the Mental Health Review Tribunal on the day of the recall, complied with the requirements of this Convention provision. A certain lapse of time is necessary to enable an assessment of the patient to be made by the responsible medical officers and the Tribunal hearings are usually held within six months of referral. Whilst the Tribunal decision taken in the present case was not speedy it could have been taken earlier if the applicant had pressed the matter and had not himself caused delays in what was a complex case.

3. The relevant part of Article 5 para. 1 (Art. 5-1) of the Convention reads as follows:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> e. the lawful detention ... of persons of unsound mind ..."

Article 5 para. 4 (Art. 5-4) of the Convention provides as follows:

> "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."

The Commission considers, in the light of the parties' submissions, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an

examination of the merits of the application as a whole. The Commission concludes, therefore, that the application is not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION ADMISSIBLE
without prejudging the merits of the case.

Secretary to the Commission	President of the Commission
(H.C. KRÜGER)	(C.A. NØRGAARD)