COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 8225/78

Leonard John ASHINGDANE

against

UNITED KINGDOM

Report of the Commission

(Adopted on 12 May 1983)

STRASBOURG

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights and of the procedure before the Commission.

A. The substance of the application

2. The application concerns the prolonged detention of the applicant in Broadmoor special hospital as of 1 March 1979 after he had been found fit for transfer to an ordinary mental hospital at Oakwood, Kent and the applicant's attempts to challenge the lawfulness of the authorities' refusal to transfer him. The transfer was made impossible by the refusal of the nurses' trade union to accept patients, like the applicant held under Section 65 of the Mental Health Act 1959, on transfer from Broadmoor to ordinary mental hospitals, which the nurses claimed had not the resources for dealing with such patients.

3. The applicant instituted proceedings against the Department of Health and Social Security, the Kent Area Health Authority and the secretaries of the two union branches at Oakwood hospital in respect of an alleged breach of statutory duty under the National Health Services Act 1977 to provide appropriate hospital accommodation. But he was prevented from pursuing the merits of his case against the health authorities, according to a Court of Appeal judgment on 18 February 1980, by virtue of Section 141 of the Mental Health Act 1959. This section requires that prior High Court leave be sought in respect of proceedings against persons purporting to act in accordance with the 1959 Act, such leave being refused unless there is a substantial case of bad faith or an absence of reasonable care to be answered. The applicant did not apply for such leave as the Court of Appeal had also held that the health authorities had acted within the scope of the 1959 Act and he was not alleging bad faith or a lack of reasonable care. However the proceedings against the union officials were not affected by Section 141 of the 1959 Act, their industrial action falling outside the scope of that Act, and that case was ultimately settled. The applicant was admitted to Oakwood Hospital on 1 October 1980.

4. The applicant complained to the Commission of his prolonged detention in Broadmoor Hospital and of the dismissal, under Section 141 of the Mental Health Act 1959, of the action he brought against the local health authority and the Department of Health and Social Security. He invoked Art 5 of the Convention, claiming that he was unlawfully detained, not being a person of unsound mind whose compulsory detention in such conditions was necessary under Art 5 (1), and alleging that he had no remedy under Art 5 (4) by which the lawfulness of this detention could be determined. He also complained of a denial of access to court, in the determination of his civil rights, in breach of Art 6 (1) of the Convention.

B. Proceedings before the Commission

5. The application was lodged with the Commission on 26 October 1977 and registered on 26 April 1978. On 7 October 1980 the Commission decided, in accordance with Rule 42 (2)(b) of its Rules of Procedure, to bring the application to the notice of the respondent Government and to invite them to submit written observations on its admissibility and merits.

6. The Government's observations were submitted on 11 February 1981 and the applicant's observations in reply were submitted on 7 May 1981. On 24 June 1981 the Government submitted supplementary observations on admissibility. On 16 July 1981 the Commission decided, in accordance with Rule 42 (3)(b) of the Rules of Procedure, to invite the parties to make further submissions at a hearing on the admissibility and merits of the application.

7. The hearing was held on 5 February 1982. The applicant was represented by Mr J. MacDonald QC, Mr O. Thorold, counsel, and Mr S. Grosz, solicitor (Messrs Bindman & Partners). The respondent Government were represented by Mrs A. Glover, Agent, Foreign and Commonwealth Office, Mr M. Baker, counsel, Dr E. Udwin, Superintendant of Broadmoor Hospital, Mr T. Ewington and Mr H. Roberts, both of the Department of Health and Social Security.

8. Following the hearing the Commission declared the application admissible (1). It also decided to invite the parties to submit further written observations on the merits of the case, in accordance with Rule 45 (2) and (3) of its Rules of Procedure. The applicant submitted observations on 20 August 1982; the Government submitted their observations on 28 September 1982.

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(1) See Decision on Admissibility, Appendix II.

9. After declaring the case admissible, the Commission, acting in accordance with Art 28 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

10. The present Report has been drawn up by the Commission in pursuance of Art 31 of the Convention and after deliberations and votes in plenary session the following members being present:

MM. C.A. Nørgaard, President
J.A. Frowein
F. Ermacora
E. Busuttil
T. Opsahl
G. Jörundsson
B. Kiernan
M. Melchior
J. Sampaio
A.S. Gözübüyük
A. Weitzel
J.C. Soyer
H.C. Schermers

11. The text of the Report was adopted by the Commission on 12 May 1983 and is now transmitted to the Committee of Ministers in accordance with Art 31 (2) of the Convention.

12. A friendly settlement of the case not having been reached, the purpose of the present Report, pursuant to Art 31 of the Convention, is accordingly:

1) to establish the facts; and

2) to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

13. Annexed to this Report, following the Commission's opinion in the case, is the dissenting opinion of Mr Sampaio joined by MM Melchior and Weitzel. A schedule setting out the history of proceedings before the Commission is attached hereto as Appendix I and the Commission's Decison on the Admissibility of the application forms Appendix II.

14. The full text of the pleadings of the parties, together with the documents lodged as exhibits, are held in the archives of the Commission and are available to the Committee of Ministers, if required.

II. ESTABLISHMENT OF THE FACTS

15. The facts of the case are set out in the Commission's Decision on Admissibility of 5 February 1982 (Appendix II to the present Report, pp 27 - 46) but, for the convenience of the reader, are substantially reproduced below. In general, save as otherwise indicated, the relevant law and practice and the particular facts of the case are not in dispute between the parties.

A. The relevant domestic law and practice

16. The legislation relevant to the case is the Mental Health Act 1959 (hereafter referred to as the 1959 Act). Section 60 (1) of the 1959 Act empowers criminal courts to order the medical treatment of a convicted person rather than his punishment. The courts may make a "hospital order" requiring the person's compulsory admission to and detention in a mental hospital, subject to certain conditions particularly with regard to medical evidence. The courts may also order that special restrictions be imposed for a limited period or indefinitely (Section 65 of the 1959 Act). An order under Section 65 vests the responsibility for the control of the patient in the Home Secretary. It is he who decides on the patient's transfer or discharge, whether conditional or absolute (Section 66 of the 1959 Act). Periodic review of the patient's case may be made by a Mental Health Review Tribunal which at the material time advised the Home Secretary on the suitability of further detention and treatment. Measures are soon to be implemented whereby Tribunals will have an independent, decision-making role in this respect.

17. Section 3 of the National Health Service Act 1977 imposes upon the Secretary of State for Social Services a general duty to provide hospital accommodation in England, to such extent as he considers necessary to meet all reasonable requirements. Section 4 of that Act requires the provision and maintenance of special secure hospitals for patients under the 1959 Act who have dangerous, violent or criminal propensities.

18. The transfer of patients to different hospitals is the responsibility of the hospital managers, the Secretary of State for Social Services in the case of a special hospital, and is subject to the Home Secretary's consent in the case of restricted patients (Section 60/65 patients).

19. At the material time, patients like the applicant could be transferred from Broadmoor under Section 41 of the 1959 Act in conjunction with Regulation 13 of the Mental Health (Hospital and Guardianship) Regulations 1960. The Secretary of State for Social Services could authorise such transfer (with the consent of the Home Secretary) only if he were satisfied that arrangements had been made for a patient's admission to the hospital of transfer within a period of 28 days. There is another power, in Section 99 of the 1959 Act, under which he could direct the patient's transfer without being satisfied that such arrangements had been made.

20. The final legislative provision relevant to this case is Section 141 of the 1959 Act which provides that,

> "(1) No persons shall be liable, on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings to which he would have been liable apart from this section in respect of any act purporting to be done in pursuance of this Act or any regulations or rules thereunder, or in pursuance of anything done in, the discharge of functions conferred by any other enactment on the Authority having jurisdiction under part VIII of this Act, unless the act was done in bad faith or without reasonable care.
>
> (2) No civil or criminal proceedings shall be brought against any person in any Court in respect of any such act without the leave of the High Court, and the High Court shall not give leave under this Section unless satisfied that there is substantial ground for the contention that the person to be proceeded against has acted in bad faith or without reasonable care."

21. Since the introduction of the present application the Government have undertaken a review of mental health legislation and the Mental Health (Amendment) Bill was put before Parliament which, after parliamentary discussion, now proposes to exclude the Secretary of State and health authorities from the immunity conferred by Section 141.

22. Clause 57 of the Bill printed on 29 June 1982 reads as follows:

"57 (1) Section 141 of the principal Act (protection for acts done in pursuance of that Act) shall be amended as follows.

(2) For subsection (2) there shall be substituted '(2) No civil proceedings shall be brought against any person in any court in respect of any such act without the leave of the High Court; and no criminal proceedings shall be brought against any person in any court in respect of any such act except by or with the consent of the Director of Public Prosecutions.'

(3) In subsection (3) for the words 'any provision of this Act' there shall be substituted the words 'any other provision of this Act'.

(4) After subsection (3) there shall be inserted - '3(A) This section does not apply to proceedings against the Secretary of State or against a health authority within the meaning of the National Health Service Act 1977'."

B. The particular facts of the application

23. The applicant is a United Kingdom citizen, born in 1929, normally resident in Rochester and currently detained in Oakwood Hospital Kent.

24. On 23 November 1970 the applicant was convicted at Rochester Intermediate Quarter Sessions of dangerous driving and unlawful possession of firearms. The court made a hospital order under Section 60 of the 1959 Act together with an order under Section 65 restricting his discharge without limit of time.

25. The applicant was (after a short period of detention in prison) initially detained at the local psychiatric hospital, Oakwood, where he had been detained for some four months the previous year under Section 60 of the 1959 Act following another conviction.

26. In April 1971 the applicant was transferred to Broadmoor, a special hospital for those requiring treatment under conditions of special security on account of their dangerous, violent or criminal propensities.

27. In the period from April 1971 to October 1978 the applicant's case was considered on four occasions by a Mental Health Review Tribunal, which advised on each occasion that the applicant was not ready to be discharged or transferred. The Home Secretary accepted their advice. Periodic reports were also sent by his responsible medical officer to the Secretary of State for Social Services. It appears that at his own request he was also examined, on at least two occasions during this period, by independent doctors.

28. The medical reports submitted to the Commission indicate that the reason for his initial and continued detention was that he was diagnosed as suffering from paranoid schizophrenia, that his condition in Broadmoor was controlled by medication and supervision and that it was considered that if he were released he would be dangerous.

29. On 31 October 1978 Dr Maguire, of Broadmoor Hospital, reported that the applicant no longer posed "the threat he previously did" and that he might be properly treated in an open hospital. He therefore recommended his transfer to Oakwood Hospital. The applicant was examined by a Dr Sherry of Oakwood Hospital who agreed with the diagnosis of paranoid schizophrenia, said that the applicant was not as dangerous as he had been and accepted that he should be tried in an ordinary mental hospital.

30. In December 1978 the Secretary of State for Social Services agreed with Dr Maguire's recommendation. On 1 March 1979 the Home Secretary indicated he would be prepared to consent to the applicant's transfer to a local psychiatric hospital, provided that a suitable vacancy could be found. The applicant would still be subject to the restrictions set out in Section 65 of the 1959 Act.

31. However the Kent Area Health Authority, the local authority responsible for Oakwood Hospital, refused to admit the applicant to Oakwood and the Secretary of State for Social Services refused to direct his transfer to Oakwood. The reason for these refusals was that the two branches of the trade union of the nursing staff at Oakwood (the Confederation of Health Service Employees - COHSE) were operating a ban on the admission of patients subject to Section 65 restriction orders.

32. According to the Government, the Secretary of State for Social Services was advised by the Health Authority that to admit the applicant without the agreement of the nursing staff would be likely to result in a withdrawal of labour which could endanger the health and well-being of other patients and would not be in the applicant's interests. They further advised that such action would prejudice the prospects of obtaining agreement of the staff to the lifting of the ban and that to admit the applicant to another hospital might not only result in industrial action at that hospital, but would be likely to worsen industrial relations at Oakwood itself.

33. The Department of Health and Social Security had questioned Broadmoor in the meantime on the need to continue the Section 65 restrictions in the applicant's case. On 19 February 1979 the applicant's responsible medical officer reported that in his view the restrictions should not be lifted until the applicant had "demonstrated stability and indeed improvement in the open conditions of a conventional psychiatric hospital, over a reasonable period of time".

34. No suitable accommodation could be found for the applicant at any hospital other than Oakwood and he therefore remained at Broadmoor.

35. The applicant's case was again considered by a Mental Health Review Tribunal on 23 August 1979. The Tribunal advised that it was essential for the applicant's well-being that he should remain under direct supervision to ensure that he continued to take his medication, but agreed that his condition was sufficiently improved to warrant transfer to a local hospital. On 17 September 1979 the Home Secretary reaffirmed his agreement in principle to the applicant's transfer.

36. In the meantime, having obtained legal aid, the applicant instituted High Court proceedings in August 1979 against (1) the Department of Health and Social Security, (2) the Kent Area Health Authority and (3) and (4) the secretaries of the two union branches at Oakwood, to challenge the legality of his continued detention at Broadmoor. He initially claimed:

i. a declaration that the Department were under a duty to provide him hospital accommodation at Oakwood or some other appropriate local hospital;

ii. declarations that the Department and Local Health Authority were ultra vires in refusing to admit him or consider his admission to Oakwood because of the union's ban;

iii. a declaration that the union branch secretaries and members were acting unlawfully in causing the Department and local Health Authority to act in breach of their statutory duty;

iv. an injunction restraining the branch secretaries and members from so acting.

37. The original statement of claim was amended in March 1980 to include an allegation that the union members were acting unlawfully in threatening to walk out of the hospital if the applicant was brought there and to include claims for injunctions and damages in respect of such conduct.

38. On 13 December 1979 the union branch secretaries applied for an order staying all proceedings against them on the ground that the applicant had not sought or obtained leave to bring proceedings under Section 141 of the 1959 Act and, alternatively, that such leave would not have been granted if sought.

39. On 21 December 1979, Mr Justice Dillon ordered the stay of proceedings against the union secretaries for want of leave under Section 141. He observed that there was no allegation in the pleadings that any of the defendants had acted "in bad faith or without reasonable care". The only question therefore was whether the proceedings were brought in respect of acts "purporting to be done in pursuance of" the 1959 Act. He referred to the reasons given by the union for their action. These were, in substance, that the members considered that, owing to lack of adequate resources, they could not provide sufficient treatment, rehabilitation and security for Section 65 patients in the open environment at Oakwood. The judge held that the union was acting for the protection of patients in the hospital and was involved in the whole process of consultation and decision-making at the hospital. It was therefore protected by Section 141.

40. The Department of Health and Social Security and the Area Health Authority then sought orders staying the proceedings against them on the same grounds. Such orders were granted by Mr Justice Foster on 15 January 1980. He rejected a submission that these defendants had waived any defence under Section 141, and on the question of substance followed the reasoning of Mr Justice Dillon, observing that whether he was right or wrong in relation to the union secretaries, the Department and Area Authority appeared to fall squarely within Section 141.

41. The applicant appealed against both orders. On 18 February 1980 the Court of Appeal unanimously (a) dismissed the appeal against the order of Mr Justice Foster relative to the Department and Health Authority and (b) allowed the appeal against the order of Mr Justice Dillon relative to the union secretaries.

42. The relevant statutory provisions and the arguments of the parties were reviewed by Lord Justice Bridge, who delivered the first judgment.

43. The case of the Department of Health and Social Security was that a decision as to transfer (whether positive or negative) was an act done in purported pursuance of the 1959 Act and regulations thereunder and thus fell within the ambit of Section 141 (1). The Secretary of State had decided that such transfer would be impracticable. His good faith was not challenged and the action against the Department was thus barred under Section 141.

44. The case for the Area Health Authority was that their decision as to admission to Oakwood was taken for purposes ancillary to the functions of the Secretary of State under the 1959 Act and the Regulations. Its good faith was not challenged and it was taken in purported pursuance of the statute.

45. The applicant argued that by submitting to union pressure, the Secretary of State and the Health Authority had in effect abdicated their functions and thus frustrated the policy and objects of the 1959 Act. He argued that anything which did that could not be an act purporting to be done in pursuance of a statute.

46. Lord Justice Bridge held inter alia that where a statutory authority was acting in good faith in what it believed to be the proper manner of discharging its statutory responsibilities, "the fact that it is subsequently held to have been acting in a way which contravenes the statute to the point of frustrating its policy and objects, cannot lead to the conclusion that the original acts in good faith were not in purported pursuance of the Act". He agreed with Mr Justice Dillon that Section 141 (1) of the 1959 Act propounded a subjective not an objective test. "If a person is acting honestly with the intention of performing, in the best way he knows how, the statutory functions or duties which are cast upon him, then it seems to me he is acting in purported pursuance of the statute." Although the applicant alleged a breach of statutory duty under Section 3 of the National Health Service Act 1977 to provide hospital accommodation to meet all reasonable requirements, the essential act out of which liability was said to arise was the refusal of transfer, which fell within the protection of Section 141.

47. Lord Justice Bridge also dealt with an argument advanced on behalf of the applicant to the effect that the Department and Health Authority had waived any immunity they might have had under Section 141. Referring to the decision of the House of Lords in Pountney v Griffiths (1976) AC 314 he held that "Section 141 does not create a personal immunity which is capable of being waived but imposes a fetter on the Court's jurisdiction which is not so capable".

48. For these reasons Lord Justice Bridge was in favour of dismissing the appeal against the order of Mr Justice Foster staying the proceedings against the Department and Health Authority. Lords Justice Cumming Bruce and Brightman agreed with his reasons.

49. As to the action against the union branch secretaries, Lord Justice Bridge held that a decision of nursing staff to ban the admission of a whole class of patients, even if taken in the best of faith, was not within the express or implied authority of nurses under the Act. Nurses did not have authority under the Act to take decisions of broad policy. The acts of the union secretaries were not therefore protected by Section 141 of the 1959 Act and the stay imposed by Mr Justice Dillon on the action against them should therefore be removed.

50. Lords Justice Cumming Bruce and Brightman agreed with this conclusion for similar reasons. Lord Justice Brightman specified that in his view "the immunity conferred by Section 141 is confined to an act done by a person to whom authority to do an act of that type is expressly or impliedly conferred by the relevant statute". Since the decision by nursing staff that Section 65 patients should not be admitted was a decision of a type which the nursing staff had no authority to take, Section 141 afforded them no protection.

51. Leave to appeal to the House of Lords was refused by the Court of Appeal. The union secretaries petitioned the House of Lords for leave to appeal and on 7 May 1980 the House of Lords refused it. The applicant was advised by leading counsel that an appeal to the House of Lords in respect of his stayed actions against the Department of Health and Social Security and the Kent Area Health Authority had little prospect of success. He submitted to the Commission that he was thus unable to pursue his action against them.

52. During the course of the proceedings referred to above, reports on the applicant's condition were made on various occasions. In particular the Department of Health and Social Security asked his responsible medical officer to comment on allegations in his statement of claim to the effect that continued detention in Broadmoor was having an adverse effect on him and that transfer was an essential step in his recovery. On 19 October 1979 the responsible medical officer reported in the following terms:

> "i. It is my opinion that transfer from Broadmoor for further treatment and rehabilitation in a local psychiatric hospital is an essential step in the Plaintiff's (ie Mr Ashingdane's) recovery.
>
> ii. The disappointment at his rejection by Oakwood Hospital has made him tense and irritable. But more seriously, one of his former delusional beliefs was to the effect that hospital authorities were persecuting him by continuing to detain him illegally. This delusion cleared when he gained some measure of insight. I fear that continued undue detention here will reactivate this to delusional intensity again and thus precipitate full scale relapse.

iii. His present mental condition remains reasonably stable and in my opinion he is suitable for transfer to Oakwood Hospital."

53. In January 1980 the applicant was again examined by Dr Sherry of Oakwood Hospital. In his report dated 10 March 1980 Dr Sherry reported that the diagnosis of paranoid schizophrenia remained unchanged. He had the impression there had been a slight deterioration in the applicant's mental condition over the last year. He expressed the following opinion as to his condition:

> "Although not overtly psychotic this man remains paranoid and I feel that his continued detention in Broadmoor is having an adverse effect on his mental health, ie it is making him even more paranoid. His drawn out involvement with the High Court can only aggravate this paranoia and further constrict his outlook."

54. Dr Sherry recommended that the applicant was not fit to return to the community but that it should be possible to manage him in an ordinary long-stay psychiatric hospital with a closed ward. It was unlikely that he would have to remain in such a closed ward for more than a year. He was satisfied that the applicant could be managed at Oakwood.

55. Until September 1980 the Area Health Authority continued to advise that they were unable to admit the applicant to Oakwood because of the ban on admission of Section 65 patients. However on 4 September 1980 they stated that an agreement had been reached enabling him to be admitted there.

56. On 15 September 1980 the applicant's Broadmoor doctor reported again that the applicant's proper rehabilitation continued to necessitate in-patient treatment due to his "lack of insight and long institutionalisation". The report stated that his continued hospitalisation is "necessary in the interests of the patient's health or safety and for the protection of other persons".

57. The Home Secretary and Secretary of State for Social Services both consented to the applicant's transfer and he was admitted to Oakwood on 1 October 1980.

III. SUBMISSIONS OF THE PARTIES

58. The principal observations of the parties are summarised in the Commission's Decision on Admissibility (Appendix II, pp 27 - 46). What follows is a brief reference to those submissions, together with a summary of the further written observations on the merits of the application dealing particularly with Section 141 of the 1959 Act (para 8 above).

A. The general position of the parties

1. The applicant

59. The applicant submitted that his condition was not such as to justify his prolonged, compulsory detention as a person "of unsound mind" under Art 5 (1)(e) of the Convention. He also suggested that his detention at Broadmoor after October 1978 was not "lawful" as it was not necessary for his treatment and even involved a recognised and serious risk of deterioration in his mental health.

60. He maintained that the proceedings he brought against the Department and the local health authority concerned both the lawfulness of his detention and his civil rights and that because the jurisdiction of the courts to determine his claims, in which he did not allege bad faith or want of reasonable care, was removed by Section 141 of the 1959 Act, his rights under Arts 5 (4) and 6 (1) of the Convention were violated.

2. The Government

61. The respondent Government contended that the applicant's detention was at all times lawful and justified by his condition of mental illness. It was therefore compatible with Art 5 (1) of the Convention. They maintained that the proceedings which he brought did not relate to the lawfulness of "detention" as such and were not therefore within the scope of Art 5 (4). Nor did they relate to his "civil rights and obligations" and were thus not within the scope of Art 6 (1) either. Alternatively, as regards Art 6 (1), if the applicant's civil rights were affected, either the decisions disputed by the applicant did not involve sufficient legal elements to activate the right of access to court, or Art 6 (1) had anyway been satisfied, the applicant having had reasonable access to court in respect of the claims he had been entitled to make. The Government stressed, however, that nothing in their submissions should be taken as demonstrating a lack of sympathy for the applicant's plight. Great regret was expressed for the unfortunate circumstances giving rise to the application.

B. Final submissions of the parties

1. The applicant

62. Although a distinction of little importance in domestic law, the applicant submitted that Section 141 of the 1959 Act is properly to be regarded as a restriction on access to court and not a modification of the substantive rights of mental health patients. The rights subsist, but are rendered incapable of direct enforcement in respect of acts falling within the scope of the provision. This view of the Section is reflected in its stated purpose which is to protect hospital staff against ill-founded or vexatious litigation (cf eg Lord Simon of Glaisdale in Pountney v Griffiths (1975) 2 All ER p 882, various Government papers on the 1959 Act, the initial conduct of the detaining authorities in the applicant's case and the amendment to Section 141 in clause 57 of the Mental Health (Amendment) Bill). Immunity from liability, rather than nullification of rights is a legislative tendency known in English law (cf eg Section 40 (1) Law of Property Act 1925 as well as diplomatic and parliamentary immunity). Thus Section 141 does not prevent the mental health patient challenging the lawfulness of his detention by way of habeas corpus proceedings and obtaining his discharge were it unlawful, but it would prevent him from securing any financial remedy. The operation of Section 141 did not extinguish the statutory duties owed to the applicant by the detaining authorities, it only rendered them incapable of enforcement.

63. Alternatively, even if Section 141 of the 1959 Act modifies substantive rights, the applicant was seeking to assert a civil right within the autonomous meaning of the Convention rather than that defined by domestic law. Moreover the proceedings which he instituted dealt in substance with the lawfulness of his continued detention at Broadmoor hospital within the meaning of Art 5 (4) and his right to compensation for unlawful detention within the meaning of Art 5 (5), the review of lawfulness covering not only the ordering but also the execution of detention. If the case had been allowed to proceed, a finding that he had been unlawfully detained at Broadmoor would not have precluded his lawful detention elsewhere and could have led to an award of damages.

2. The Government

64. The Government submitted that Section 141 (1) modifies the substantive rights of persons affected by acts falling within its scope, rather than restricting the right of access to court. However the Government agreed with the applicant that this distinction is of little importance in the context of English law.

65. The restriction of access to court rather than the modification of substantive rights is a legislative technique known to English law, eg prescription periods, such limitation periods generally having to be specifically pleaded by the defendant and may be waived, thus showing the continued existence of the right in question (Limitations Act 1980). On the other hand it is not uncommon to modify substantive rights in defining the right by reference to the remedy for its breach, the latter being restricted by immunity or privileges. Thus, for example, the jurisdictional immunities conferred by the principles of diplomatic and state immunity necessarily affect the substance of the rights of individuals.

66. Section 141 (1) of the 1959 Act and its legislative precursors since 1889 have conferred immunity from suit upon the class of person who falls within the ambit of protection. Section 141 (1) is not a procedural but a jurisdictional barrier which cannot be waived and which, accordingly, extinguishes the right of action for damages, save in cases of alleged bad faith or lack of reasonable care (cf R v Bracknell JJ Ex p Griffiths (1976) AC 314, Lord Simon at p 329).

67. The applicant claims a right to damages for an alleged breach of duty under the National Health Service Act 1977 in a refusal to provide proper hospital accommodation. Even if there were such a right, Section 141 (1) of the 1959 Act extinguishes it, save in specific circumstances. The proposed amendment to Section 141 now contained in clause 57 of the Mental Health (Amendment) Bill, if it becomes law, reinstates a right to sue the Secretary of State or Health Authority (not individual hospital staff). This is a proposed amendment of substance not procedure.

68. The applicant's domestic law proceedings did not advance the claim that the applicant had a right to damages for the tort of unlawful detention after he had been found fit for transfer from Broadmoor. The Government contended that there is no right to damages for breach of statutory duty in the circumstances of the applicant's case and that the Convention does not guarantee a right to detention in a particular mental health institution (cf Winterwerp case judgment para 51 and Capt Park v the United Kingdom 8997/80 Decision of Commission p 3).

IV. OPINION OF THE COMMISSION

A. Points at issue

69. The principal points at issue in the present case are as follows:

1. Whether the applicant was lawfully detained at Broadmoor Hospital, in accordance with Art 5 (1)(e) of the Convention between 1 March 1979 when all the health authorities had agreed that he was fit for transfer, and 1 October 1980, when he was transferred to Oakwood Hospital, Kent;

2. Whether the dismissal of the applicant's action against the Secretary of State and the Health Authority constituted a breach of the applicant's right under Art 5 (4) of the Convention to have the "lawfulness" of his detention determined by a court;

3. Whether the said dismissal of the action infringed the applicant's right under Art 6 to have a claim relating to his "civil rights" determined by a court.

B. As regards Art 5 (1) of the Convention

70. The applicant has complained that his prolonged detention in Broadmoor Hospital between 31 October 1978 and 1 October 1980 was unlawful, contrary to Art 5 (1) of the Convention. The Government replied that the applicant's detention was at all times lawful and compatible with Art 5 (1)(e) of the Convention.

71. The relevant part of Art 5 (1) provides that:

> "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 ...."

1. Compulsory detention as a person of unsound mind

72. The Commission refers to the judgment of the European Court of Human Rights in the Winterwerp case in which it analysed the lawfulness of the detention of a person of unsound mind under Art 5 (1)(e). It examined the nature of the legislative provisions in question, the conformity of the detention measure with domestic law, both procedural and substantive rules, and the purpose of the restrictions permitted by Art 5 (1)(e) in respect of the detention order and executing measures (paras 38 and 39 of the judgment of 24 October 1979, Series A N° 33). It held that,

> ".... the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'. The very nature of what has to be established before the competent national authority - that is, a true mental disorder - calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more the validity of continued confinement depends upon the persistence of such a disorder."

73. Adopting the same approach, the Commission notes that the provisions of the Mental Health Act 1959, relevant to the applicant's case, fall within the ambit of Art 5 (1)(e) and that there is no dispute between the parties that the applicant's compulsory detention was in accordance with a procedure prescribed by law. Medical opinion has throughout considered the applicant's compulsory confinement necessary due to the persistence of mental disorder, diagnosed by various doctors as paranoid schizophrenia. On this basis, the Commission is able to conclude that the applicant's mental ill-health has been established, and that he was compulsorily and justifiably detained, in accordance with domestic law, as a person of unsound mind.

2. Treatment and place of detention

74. As regards the applicant's place of detention, the applicant was detained at the secure special hospital, Broadmoor, because originally he was deemed potentially dangerous. This potentiality receded with his treatment at Broadmoor; hence his transfer to a normal mental hospital, still as a patient compulsorily detained, was judged appropriate as of 1 March 1979. Thus, essentially, the applicant's complaint is not that he should have been released in March 1979, but that it was necessary for his effective treatment and an eventual early release that he be transferred to another hospital where conditions of detention were more appropriate.

75. The question arises whether Art 5 (1)(e) encompasses not only actual compulsory detention, but also the treatment of the patient, including the nature of and conditions in the detaining institution.

76. In this respect the Commission recalls its own opinion in the aforementioned Winterwerp case that,

> ".... a patient's right to medical treatment appropriate to his condition does not, as such, derive from [Art 5 (1)(e)]. It is true that compulsory admission to a psychiatric hospital should fulfil a dual function, therapeutic and social; but the Convention deals only with the social function of protection in authorising the deprivation of liberty of a person of unsound mind under certain conditions ...." (Report of the Commission of 15 December 1977, para 84, endorsed in Court judgment at para 51.)

77. The Commission reaffirms its view that, in principle, Art 5 (1)(e) is concerned with the question of the actual deprivation of liberty of mental health patients and not their treatment.

78. Other provisions of the Convention, Art 3 (the prohibition on torture, inhuman or degrading treatment, or punishment) and Art 18 (the prohibition on using permitted Convention restrictions for ulterior purposes) might be in issue were a mental health patient to be incarcerated in appalling conditions with no consideration being given to his treatment. However, this is far from being the case in the present application, particularly having regard to the Mental Health Act 1959, under which the applicant was detained, which itself implies the treatment of patients, and the constant preoccupation with the applicant's treatment and health by Broadmoor Hospital doctors and the detaining authorities. There is, therefore, no evidence suggesting a breach of these or any other provisions of the Convention.

79. The Commission acknowledges that as of 1 March 1979 the applicant should have been transferred from Broadmoor to Oakwood hospital and that there was a risk that the applicant's mental health could have deteriorated during the period of further detention at Broadmoor. However the Commission considers that it cannot be said that the applicant's treatment was, for the purposes of Art 5 (1)(e), fundamentally different in these hospitals, albeit recognising that the security conditions are different and can alter the climate of detention and rehabilitative possibilities. It was deplorable that industrial rather than therapeutic grounds prevented the applicant's transfer before 1 October 1980 and the Government, aware of the problem, expressed their regret (para 61 above).

80. Nevertheless, as the Commission has found above, the applicant's compulsory detention, as a mentally ill person, was required throughout and his treatment was not neglected. Accordingly the Commission is of the opinion that the applicant's detention constituted "the lawful detention of [a person] of unsound mind" within the meaning of Art 5 (1)(e) of the Convention.

3. Conclusion

81. The Commission concludes, by a vote of 9 against 4, that in the present case there has been no violation of Art 5 (1) of the convention.

C. As regards Art 5 (4) of the Convention

82. The applicant, relying upon the Court's judgments in the cases of Winterwerp and X (X v the United Kingdom, judgment of 5 November 1981, Series A N° 46), has alleged that he was denied the right to have the lawfulness of his prolonged detention in Broadmoor Hospital determined by a court contrary to Art 5 (4) of the Convention. The Government contended that the applicant's claim was not one of unlawful deprivation of liberty, but one of unsuitable hospital accommodation, a matter outside the scope of Art 5 (1)(e) and not requiring determination by a court under Art 5 (4) of the Convention.

83. Art 5 (4) of the Convention provides that,

> "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."

84. The Commission notes that the applicant is detained as a restricted patient under Sections 60 and 65 of the 1959 Act, as X was. In its judgment in the X case, the Court, reaffirming its finding in the Winterwerp case that patients compulsorily detained for indefinite periods are entitled to a periodic review of the lawfulness of their detention, held that English law did not provide machinery for adequate judicial review of the continuing confinement of patients such as X (paras 52, 58 and 61, judgment of 5 November 1981, Series A N° 46). The facts of the present case, in the context of the applicant's status as a restricted patient, do not detract from this conclusion. However, as the Government have pointed out, the present applicant's claim can be distinguished from that of X, who was concerned only with the question of deprivation of liberty, namely the lawfulness of renewed detention on recall to hospital. The present applicant's claim involves questions of suitable treatment and hospital accommodation.

85. The Commission has above excluded this latter element from the scope of Art 5 (1)(e) of the Convention (paras 75 - 77). The scheme of Art 5 is such that Art 5 (4) entitles the detainee to have the lawfulness of his detention tested by a court in the light of those exclusive categories of deprivation of liberty envisaged by Art 5 (1). As the applicant's claim does not concern deprivation of liberty, as such, and does not fall under Art 5 (1), it follows that it is not a claim requiring judicial determination under Art 5 (4) of the Convention.

Conclusion

86. The Commission concludes, by a vote of 9 against 4, that in the present case there has been no breach of Art 5 (4) of the Convention.

D. As regards Art 6 (1) of the Convention

87. The applicant has complained that the dismissal of his action against the Secretary of State and the Health Authority denied him the right to a fair hearing in the determination of a civil right contrary to Art 6 (1) of the Convention. It was submitted that he had been denied access to court by virtue of the operation of Section 141 of the 1959 Act. The Government replied that the applicant's claim for breach of statutory duty before the domestic courts did not involve a civil right; nor did it involve sufficient legal elements to activate the right of access to court. Alternatively, Art 6 (1) had been satisfied, the applicant having had reasonable access to court in respect of the claims he was entitled to make.

88. Art 6 (1) of the Convention provides that,

> "In the determination of his civil rights and obligations ...., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...."

1. Access to court

89. The Commission refers to the Court's judgment in the Golder case, where it held that,

> "The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Art 6 (1) must be read in the light of these principles.

Were Art 6 (1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook (Lawless judgment of 1 July 1961, Series A N° 3, p 52, and Delcourt judgment of 17 January 1970, Series A N° 11, pp 14-15).

It would be inconceivable, in the opinion of the Court, that Art 6 (1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.

36. Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Art 6 (1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Art 6 (1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (see the Wemhoff judgment of 27 June 1968, Series A N° 7, p 23, para 8), and to general principles of law." (Paras 35 and 36, judgment of 21 February 1975, Series A Vol 18.)

90. The Commission notes that the applicant sought to bring a claim in domestic courts for breach of a statutory duty to provide appropriate hospital care for his mental state of health. The claim arose out of the inability, and hence refusal, of the Secretary of State and Health Authority to transfer the applicant from a secure mental hospital to a normal one, because of industrial action by nursing staff. The applicant should, however, have sought prior leave to bring this claim, in accordance with Section 141 (2) of the Mental Health Act 1959. Nevertheless the High Court and Court of Appeal let it be understood clearly in their respective judgments of 15 January 1980 and 28 February 1980, that such leave would not have been granted as Section 141 (1) provides immunity from liability to any such proceedings for any person purporting to act in pursuance of the 1959 Act unless the

act in question was done in bad faith or without reasonable care. The applicant was not alleging that the Secretary of State and Health Authority were purporting to act outside the scope of the 1959 Act or acted in bad faith or without reasonable care.

91. Like the Court, the Commission considers that one of the principal guarantees of Art 6 (1) is to enable the individual to have access to court to determine whether he has a civil rights claim. However it is for the national courts to decide disputes as to whether the plaintiff can invoke such a right. This much the applicant was able to do, albeit unsuccessfully, for the courts decided that he would have had no claim, by virtue of Section 141 of the 1959 Act. To this extent the Commission finds that the applicant was not denied access to court.

2. Limitation of civil claims

92. The question arises, however, whether Section 141 of the 1959 Act unduly restricted the applicant's right of access to court, contrary to Art 6 (1), by an arbitrary limitation of his civil claims. In this connection, the Commission recalls its Report in the Kaplan case where it stated that "the jurisdiction of the courts cannot be removed altogether or limited beyond a a certain point" (para 162, Report of 17 July 1980). A real threat to the rule of law could emerge if a State were arbitrarily to remove the jurisdiction of civil courts to determine certain classes of civil action.

93. The Commission finds that Section 141 of the 1959 Act does extinguish certain of the possible civil claims of mental health patients and of other persons concerned with the functioning of that Act. The Commission agrees with the parties that it is immaterial whether the measure is of a substantive or procedural character. It suffices to say that Section 141 acted as an unwaivable bar, which effectively restricted the applicant's claim in tort.

94. While the concept of "civil rights and obligations" under Art 6 (1) cannot be interpreted solely by reference to the domestic law of the State concerned, national legislation and policy must be taken into account. In the present case, the Commission considers that the applicant could no longer be said to have had a claim concerning a "civil right" within the meaning of Art 6 (1) following the application of Section 141 by the High Court and Court of Appeal to the applicant's proposed litigation.

95. The Commission considers that the restrictions imposed by Section 141 are not arbitrary or unreasonable. The Commission notes that their purpose is to protect hospital staff from ill-founded or vexatious litigation. It also observes that patients and persons with related interests are protected from acts which are not authorised by the Mental Health Act 1959, and from acts of bad faith or negligence.

The 1959 Act also provides for the criminal prosecution of persons ill-treating patients. Various safeguards exist as regards the detention of restricted patients like the applicant, particularly now that effect is to be given to the Court's judgment in the X case, so that independent periodic review of the mental health and possible discharge of restricted patients will be possible. There cannot be many claims, like the applicant's, which a patient would be unable to make. Taking all these elements into account, the Commission considers that the applicant's civil claims have not been unduly restricted by Section 141 of the 1959 Act. It therefore endorses the Government's submission that the applicant had reasonable access to court in respect of the claims he was entitled to make.

96. To sum up, the Commission finds that the applicant's right of access to court was not denied him. The courts determined that he had no civil claim requiring a decision on the merits, by virtue of the operation of Section 141 of the Mental Health Act 1959. The Commission is of the opinion that the applicant's claim of a breach of statutory duty was not a civil right which he had, whose determination required a fair hearing under Art 6 (1) of the Convention.

3. Conclusion

97. The Commission concludes by a vote of 11 against 2 that in the present case there has been no breach of Art 6 (1) of the Convention.

E. Summary of conclusions

98. The following constitutes a summary of the Commission's conclusions in the present application.

1) The Commission concludes by a vote of 9 against 4 that in the present case there has been no violation of Art 5 (1) of the Convention (para 81 above).

2) The Commission concludes by a vote of 9 against 4 that in the present case there has been no breach of Art 5 (4) of the Convention (para 86 above).

3) The Commission concludes by a vote of 11 against 2 that in the present case there has been no breach of Art 6 (1) of the Convention (para 97 above).

Secretary to the Commission

(H.C. KRUGER)

President of the Commission

(C.A. NØRGAARD)

DISSENTING OPINION of Mr SAMPAIO
joined by MM MELCHIOR and WEITZEL

A. As regards the facts

1. Firstly we would recall the striking facts of the present case:

The application concerns the prolonged detention of the applicant in Broadmoor Hospital (as of 1 March 1979) after he had been found fit for transfer to an ordinary mental hospital and the applicant's attempts to challenge the lawfulness of the authorities' refusal to transfer him. This transfer only took place on 1 October 1980.

2. During the course of proceedings instituted by the applicant to challenge the legality of his continued detention at Broadmoor, the responsible medical officer reported (19 October 1979) that, in his opinion, the transfer of the applicant from Broadmoor for further treatment and rehabilitation in a local psychiatric hospital "is an essential step in the plaintiff's recovery". Again examined in January 1980 (Report of 10 March 1980), the doctor said he felt that the applicant's continued detention in Broadmoor "is having an adverse effect on his mental health, ie it is making him even more paranoid" (para 53 present Report).

3. We would only comment that the applicant's presence at Broadmoor was to treat, and eventually to cure, his suffering from paranoid schizophrenia, not to aggravate it. Section 60 (1) of the Mental Health Act empowers criminal courts to order the medical treatment of a convicted person rather than his punishment.

It was therefore for that purpose that the applicant was placed at Broadmoor Hospital. It is also clear, at least in our view, that that purpose was not respected by the responsible authorities from March 1979 until October 1980. Even taking account of the various decisions relating to the applicant's transfer (cf 1 March 1979 onwards) the fact remained that the applicant continued to be detained in Broadmoor, in spite of the detrimental and serious consequences this was having on his state of health.

In other words, the purpose of the detention, if we look at it (as it is our opinion that we must) in substantive terms, was not totally fulfilled, and we propose to develop this point further, following the approach of Mr Melchior's partly dissenting and partly separate opinion attached to the Commission's Report in the case of B against the United Kingdom, Application N° 6870/75 (pp 62 - 65).

4. Since his detention, under the domestic law, was ostensibly for treatment, it must also be noted that the applicant's complaint is not that he should have been released in March 1979, but that it was necessary for his effective treatment and eventual early release that he be transferred to another hospital where conditions of detention, and therefore the environmental conditions for his treatment, would be more appropriate. There is a significant difference in conditions of detention and atmosphere between Broadmoor and Oakwood Hospitals. In the particular circumstances of the applicant's illness, the climate of detention and rehabilitative possibilities play a leading, if not decisive, role.

B. Considerations under the Convention

1) As regards Art 5 (1)

5. It is our view that the specific ("specialis") purpose of the deprivation of liberty envisaged by Art 5 (1)(e) is two-fold: (a) the protection of society and the person of unsound mind; and (b) the rehabilitation of the patient for life in society. The question whether a person of unsound mind has a right to treatment under Art 5 (1)(e) must surely be one of degree depending on the facts of the case. Whilst a patient may not be entitled to treatment of a controversial or highly sophisticated nature, the basic requirements of his treatment cannot be wholly ignored in the face of unanimous medical opinion. The right answer must lie somewhere between these two extremes.

The substantive (and not just formal) lawfulness of the detention of a person of unsound mind is inseparable from the conditions of his treatment. Therefore the appropriate treatment, in which the appropriate hospital, together with the medical justification clearly play a major role, seems to be an important element legitimising further detention, at least in the same hospital. Significantly in the present case, we would repeat, the medical experts agreed that Broadmoor Hospital was having a detrimental effect on the applicant's health and rehabilitation as of March 1979.

Although this detrimental effect may not have been sufficient to classify the applicant's detention as "absolutely" unlawful, requiring his release, it was, at least, a clear case of "partial" unlawfulness of such a degree as to contravene the notion of lawfulness in Art 5 (4) of the Convention. To this extent speedy action was required to ensure the applicant's detention in appropriate conditions.

On the basis of these considerations, we are of the opinion that the applicant was not lawfully detained as a person of unsound mind in Broadmoor Hospital as of October 1979 and that, accordingly, there has been a breach of Art 5 (1) of the Convention in the present case.

2. As regards Art 5 (4)

6. In the framework of Art 5 (4) what has been said above has been clearly reinforced by the Commission's own jurisprudence. In its Report on the case of B v the United Kingdom (Commission's Report para 230) it confirmed its opinion (stated before in paras 131 and 132 of its Report in the case of X v the United Kingdom) that the scope of judicial review under Art 5 (4) must encompass the substantive justification for the deprivation of liberty of persons of unsound mind under Art 5 (1)(e).

We find the Commission's reasoning in para 85 of the present Report too formal and restrictive in the light not only of the specific norm encompassed in Art 5 (1)(e) of the Convention but also in the light of the shocking circumstances of the applicant's particular situation.

7. From what has been said above it follows that a claim involving, as in the present case, questions of suitable treatment and hospital accommodation involves the problem of the unlawfulness of his detention (at least as outlined in point 5 above) for which periodical judicial determination should be available. Such a judicial remedy was not available to the applicant. Therefore we consider that there has also been a breach of Art 5 (4) of the Convention in the present case.

A P P E N D I X I

HISTORY OF PROCEEDINGS

Item	Date	Note
A. Examination of admissibility		
Date of introduction of application	26 October 1977	
Date of registration	26 April 1978	
Commission's deliberations and decision to give notice of the application to the United Kingdom Government and to request the parties' observations	7 October 1980	MM. Sperduti Fawcett Nørgaard Busuttil Kellberg Daver Opsahl Polak Frowein Jörundsson Tenekides Trechsel Kiernan Klecker Melchior Sampaio
Date of Government's observations on admissibility and merits	11 February 1981	
Date of applicant's observations in reply	7 May 1981	
Date of Government's supplementary observations	24 June 1981	
Commission's deliberations and decision to hold a hearing on the admissibility and merits of the case	16 July 1981	MM. Nørgaard Sperduti Frowein Triantafyllides Busuttil Opsahl Tenekides Trechsel Kiernan Melchior Sampaio Gözübüyük Weitzel Soyer

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Item	Date	Note
Hearing on admissibility and merits	5 February 1982	MM. Nørgaard Frowein Ermacora Busuttil Opsahl Jörundsson Trechsel Kiernan Melchior Sampaio Cözübüyük Weitzel Soyer Schermers For the applicant MM. J. MacDonald O. Thorold S. Grosz For the Government Mrs A. Glover MM. M. Baker T. Ewington H. Roberts Dr E. Uddin
Commission's deliberations and decision to declare application admissible and to request parties' further observations on the merits		
Date of the applicant's further observations on the merits	20 August 1982	
Date of Government's further observations on the merits	28 September 1982	
Commission's deliberations	8 March 1983	MM. Nørgaard Frowein Ermacora Busuttil Jörundsson Tenekides Trechsel Kiernan Melchior Sampaio Weitzel Soyer Schermers

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Item	Date	Note
Commission's deliberations, final votes and adoption of Art 31 Report	12 May 1983	MM. Nørgaard Frowein Ermacora Busuttil Opsahl Jörundsson Kiernan Melchior Sampaio Gözübüyük Weitzel Soyer Schermers