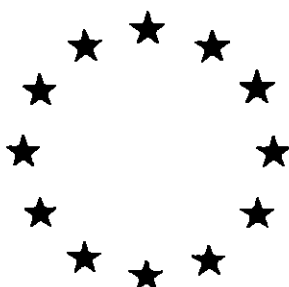


COUNCIL
OF EUROPE



CONSEIL
DE L'EUROPE

En Anglais

EUROPEAN COMMISSION
OF HUMAN RIGHTS

Application No. 6998/75

**X.
against
UNITED KINGDOM**

Report of the Commission

(Adopted on 16 July 1980)

STRASBOURG

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION (§§ 1 - 19)	1 - 4
The substance of the applicant's complaints (§§ 3 - 4)	1
Proceedings before the Commission (§§ 5 - 14)	1 - 3
The present Report (§§ 15 - 19)	3 - 4
II. ESTABLISHMENT OF THE FACTS (§§ 20 - 40)	5 - 10
A. The relevant domestic law relating to the the detention of persons of unsound mind (§§ 21 - 27)	5 - 7
B. The circumstances of the case (§§ 28 - 40) ...	7 - 10
III. SUBMISSIONS OF THE PARTIES (§§ 41 - 71)	11 - 17
A. Submissions of the applicant (§§ 41 - 56)	11 - 14
As to Art. 5 (1)(a) (§ 41)	11
As to Art. 5 (1)(e) (§§ 42 - 46)	11 - 12
As to Art. 5 (2) (§§ 47 - 51)	12 - 13
As to Art. 5 (4) (§§ 52 - 56)	13 - 14
B. Submissions of the Government (§§ 57 - 71) ...	14 - 17
As to Art. 5 (1)(a) (§58)	14
As to Art. 5 (1)(e) (§§ 59 - 63)	14 - 15
As to Art. 5 (2) (§§ 64 - 66)	15 - 16
As to Art. 5 (4) (§§ 67 - 71)	16 - 17

IV.	OPINION OF THE COMMISSION (§§ 72 - 140)	18 - 32
	A. Introduction (§72)	18
	B. As regards Art. 5 (1) of the Convention (§§ 73 - 99)	19 - 24
	1. As to Art. 5 (1)(a) (§§ 76 - 84)	19 - 21
	2. As to Art. 5 (1)(e) (§§ 85 - 97)	21 - 23
	3. Conclusion (§§ 98 - 99)	24
	C. As regards Art. 5 (2) of the Convention (§§ 100 - 113)	24 - 26
	1. Applicability (§§ 101 - 108)	24 - 26
	2. Compliance (§§ 109 - 111)	26
	3. Conclusion (§§ 112 - 113)	26
	D. As regards Art. 5 (4) of the Convention (§§ 114 - 140)	27 - 32
	1. Applicability to the applicant's recall (§§ 116 - 124)	27 - 29
	2. Compliance with Art. 5 (4) on recall (§§ 125 - 138)	29 - 32
	a) The scope of the judicial deter- mination of "lawfulness" within the meaning of Art. 5 (4) (§§ 125 - 133) ..	29 - 31
	b) The scope of the judicial review in Habeas Corpus Proceedings (§§ 134 - 137)	31
	c) Mental Health Review Tribunal (\$ 138)	32
	3. Conclusion (§§ 139 - 140)	32
	Dissenting opinion of Mr Opsahl	33

APPENDIX I	- History of Proceedings	34 - 39
APPENDIX II	- Partial and Final Decisions of the Commission as to Admissibility ...	40 - 59
APPENDIX III	- Friendly Settlement	Separate document

I. INTRODUCTION

1. The following is an outline of the case as it has been submitted by the parties to the European Commission of Human Rights.

2. The applicant, X, was a United Kingdom citizen, born in 1934. He died in 1979. At the time of lodging his application he was detained in Broadmoor Hospital, a special secure mental hospital for the criminally insane.

The substance of the applicant's complaints

3. The applicant was committed to Broadmoor on 7 November 1968 after conviction by a criminal court and he was ordered to be detained for an indefinite period because of his mental ill-health. His condition improved and he was conditionally discharged by the Home Secretary on 19 May 1971. For no apparent reason, from the applicant's point of view, he was arrested on 5 April 1974 and returned to Broadmoor. In unsuccessful proceedings for a Writ of Habeas Corpus the official reason given for the applicant's recall was that his "condition was giving cause for concern". The applicant claimed that he was not mentally ill, that his recall was unjustified and that he had no effective way to challenge the decision, as it rested entirely with the Home Secretary.

4. The applicant complained to the Commission that his recall to Broadmoor constituted inhuman and degrading treatment contrary to Art. 3 of the Convention and an unjustified deprivation of liberty contrary to Art. 5 (1) as he was not a person of unsound mind whose detention could be authorised under Art. 5 (1) (e). He complained that he was not promptly given reasons for his arrest, contrary to Art. 5 (2), and that there did not exist a procedure by which he could have had the lawfulness of his detention decided speedily by a court, contrary to Art. 5 (4).

Proceedings before the Commission

5. The present application was lodged with the Commission on 14 July 1974 and registered on 2 May 1975.

6. On 11 March 1976 the Commission decided to declare the application inadmissible insofar as the applicant complained of a breach of Art. 3 of the Convention. It also decided, in accordance with Rule 42 para. 2 (b) of its Rules of Procedure, to communicate the application to the Government and to invite them to present their observations on the admissibility of the application in the light of Art. 5 of the Convention.

7. The Government's observations on admissibility are dated 11 May 1976. They submitted further observations on the admissibility of the application on 25 August 1976.
8. In accordance with Rule 7 of the Legal Aid Addendum of the Commission's Rules of Procedure the Acting President of the Commission, on 7 September 1976, granted the applicant legal aid.
9. The applicant's reply to the Government's observations on admissibility were forwarded to the Commission on 24 September 1976.
10. On 4 March 1977 the Commission decided, in accordance with Rule 42 (2) (b) in fine of its Rules of Procedure, to invite the parties to appear before it to present observations on the admissibility and merits of the application under Art. 5 of the Convention, together with such observations as they might have on three other related cases from mental health patients against the United Kingdom.
11. The hearing was held on 11 and 12 May 1977, and on 14 May 1977 the Commission, after deliberating, declared the application admissible as raising complex issues of law and fact under Art. 5 of the Convention which warranted an examination of the case on its merits.
12. In the process of the Commission's examination of the application on the merits, the Government, in July 1978, requested, and were accorded, the opportunity to submit written argument on the merits of the case in the light of the Commission's Report in the case of Winterwerp against the Netherlands, Application No. 6301/73, which was adopted on 15 December 1977 and proposals being considered by them for changes in the Mental Health legislation and review procedures ("Review of the Mental Health Act" 1959, Cmnd. 7320). On 25 September 1978 the Government submitted their Memorial on the merits of the case.

On 23 January 1979 the applicant's legal representative informed the Commission of the applicant's death on 17 January 1979. On 1 March 1979 the Commission decided to retain the application in view of the wishes of the applicant's next of kin to continue the case and the issues of general interest raised by the application.

The applicant's legal representatives submitted observations on the merits on 12 April 1979.
13. The applicant has been represented before the Commission by Mr. T.M. Napier, Solicitor of Messrs. Irwin Mitchell & Co., Solicitors, Sheffield, assisted by MM. L. Gostin and O. Thorold, Legal Advisers to the National Association for Mental Health (MIND).

14. The Government have been represented by Mr. D.H. Anderson and Mrs. E. Denza, as Agents, who were assisted by Mr. H. Woolf, Standing Treasury Counsel, MM. S. Ingram and H. Knorpel, Solicitors, Department of Health and Social Security, Mr. L.A. Wood, Department of Health and Social Security, Mr. T. Williams, Legal Adviser's Branch, Home Office, Mr. A. Marshall, Home Office and Dr. McGrath, head of Broadmoor Hospital.

The present Report

15. The present Report was prepared by the Commission in pursuance of Art. 31 of the Convention, after deliberations and votes in plenary session, the following members being present (1):

MM. C.A. NØRGAARD, Acting President (Rules 7 and 9
of the Rules of Procedure)

J.E.S. FAWCETT
G. SPERDUTI
F. ERMACORA
E. BUSUTTIL
B. DAVER
T. OPSAHL
C.H.F. POLAK
J.A. FROWEIN
G. JÖRUNDSSON
R.J. DUPIY
G. TENEKIDES
S. TRECHSEL
B. KIERNAN
N. KLECKER
M. MELCHIOR
J.A. CARRILLO.

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(1) Mr. ERMACORA was not present during the deliberations and votes in respect of the issues concerning Art. 5 (1) and (4).

MM. FAWCETT, SPERDUTI, OPSAHL, FROWEIN, JÖRUNDSSON and TENEKIDES were absent when the final vote in respect of the issue under Art. 5 (2) was taken.

16. The text of the Report was adopted by the Commission on 16 July 1980 and is now transmitted to the Committee of Ministers in accordance with Art. 31 (2).

17. A friendly settlement of the case has not been reached and 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 their obligations under the Convention.

18. A schedule setting out the history of proceedings before the Commission and the Commission's Decision on Admissibility in the case are attached hereto as Appendices I and II. An account of the Commission's unsuccessful attempt to reach a friendly settlement has been produced as a separate document (Appendix III).

19. 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

20. The facts of the case, as they have been submitted by the parties, are not generally in dispute. They may be summarised as follows:

- A. The relevant domestic law relating to the detention of persons of unsound mind (as set out in the Government's observations on admissibility and merits)

21. The law of England and Wales relating to the detention of persons of unsound mind is contained in the Mental Health Act 1959 (1) (hereafter referred to as the Act), Part V of which deals with the compulsory detention of patients concerned in criminal proceedings.

22. Section 60 (1) of the Act deals with the powers of criminal courts to order where appropriate that a person convicted of an offence shall be dealt with by way of medical treatment rather than by way of punishment. In 1968 when the applicant was convicted, Section 60 (1) stated that where a person was convicted before a court of assize (2) of an offence other than an offence the sentence for which was fixed by law, the court might by order (hereafter referred to as a "hospital order") authorise that person's admission to and detention in a hospital to be specified in the order. The following conditions must be met before a court can make a hospital order;

(a) the court must be satisfied on the written or oral evidence of two medical practitioners having special experience in the diagnosis of treatment of mental disorders that the offender is suffering from mental illness, psychopathic disorder, subnormality or severe subnormality; and that the mental disorder is of a nature or degree which justifies the treatment of the patient in a hospital for mental treatment;

(b) the court must be of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of a hospital order.

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- (1) At present a review of the relevant provisions of the Mental Health Act 1959 is underway (see Report of the Committee on Mentally Abnormal Offenders, Cmnd. 6244, and the Government White Paper on the Review of the Mental Health Act 1959, Cmnd. 7320).
- (2) Since the Courts Act 1971 the reference is to the Crown Court.

23. Section 65 of the Act provides that where 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 to do so, the court may order that the hospital order to which the offender is subjected shall also be subject to special restrictions either without limit of time or during such period as may be specified in the order.

24. In the case of a patient so restricted the restrictions have been imposed primarily for the protection of the public and overriding responsibility for the patient's control, though not his treatment, is vested in the Home Secretary. The patient may only be granted leave of absence from the hospital under Section 39 with the consent of the Home Secretary and his leave of absence may be revoked not only by a responsible medical officer but also by the Home Secretary in an appropriate case (Section 39 (4)). He may only be transferred from one hospital to another with the Home Secretary's consent (Section 41). A patient detained under a hospital order together with a restriction order may be discharged under Section 47 only with the consent of the Home Secretary.

25. The Home Secretary has special powers under Section 66 of the Act in connection with the discharge of patients subject to restriction orders. If he is satisfied that the restriction order is no longer required for the protection of the public he may direct that the patient shall cease to be subject to the special restrictions. (Subsection (1)). While a restriction order is in force he may, if he thinks fit, discharge a patient from hospital either absolutely or subject to conditions. Where he discharges him absolutely the restriction order ceases to have effect. (Subsection (2)). If the discharge is conditional the restriction order remains in force and the Home Secretary at any time may by warrant recall the patient to hospital (Subsection (3)). The Home Secretary may at any time refer to a Mental Health Review Tribunal for its advice the case of a patient who is for the time being subject to a restriction order. If he is requested in writing to do so by such a patient who is detained in hospital, he shall do so within two months of the receipt of the request unless during that period he discharges the patient absolutely or conditionally. Such requests may only be made at certain specified intervals. They may be made after one year from the date of the hospital order, one year after that and thereafter at 2-yearly intervals. A person who is recalled to hospital, in accordance with subsection (3), may request the Home Secretary to refer his case for an opinion to the Mental Health Review Tribunal between six months and one year after his recall (Subsection (8)).

26. Mental Health Review Tribunals, set up under Section 3 of the Act, consist of a lawyer, a psychiatrist (independent of the detaining authority who examines the patient) and a third member with suitable qualifications. Its function is to advise the Secretary of State periodically about the patient's condition. The Secretary of State carefully considers their advice, but is not bound by it. He may therefore reject the advice where medical opinion is not unequivocal, there is a conflict with other advice he has received or the interests of public safety require it. The Home Secretary has set up an Advisory Board on Restricted Patients following the Report of the Aarvold Committee (1) which considers proposals to allow restricted patients greater liberty having regard to the interests of public safety and advises the Home Secretary accordingly.

27. A person unlawfully detained may make an application to a Divisional Court of the Queen's Bench Division, or if no such court is sitting at that time, to a single judge of any division, for a Writ of Habeas Corpus. In principle the Writ's function is to require the detaining authority to bring the detainee before the court with an explanation of the grounds for detention. The court can then test the legality of the detention and direct release if found to be unlawful. The scope of this judicial review of detention seems to vary in practice (2).

B. The circumstances of the case

28. On 22 October 1968 the applicant appeared at Sheffield City Assizes and pleaded guilty to a charge of wounding with intent under Section 18 of the Offences Against the Person Act 1861. The case was heard by Sebag Shaw J. and was then adjourned for a week for medical reports. At the adjourned hearing on 7 November 1968 an order was made by the court under Section 60 of the Mental Health Act 1959, by which the applicant was ordered to be detained in Broadmoor Hospital because of his mental health. Medical opinion classed him as a "paranoid psychotic".

29. The court also made a restriction order against the applicant without limit of time in accordance with Section 65 of the Act.

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(1) Report on the Review of Procedures for the Discharge and Supervision of Psychiatric Patients Subject to Special Restrictions, Cmnd. 5191.

(2) See "Constitutional and Administrative Law" by S.A. de Smith, pp. 452-456 (3rd Edition 1977, Penguin Books Ltd.).

30. After an improvement in the applicant's condition and on recommendation of Doctor Udwin, the medical officer responsible for the applicant's treatment at Broadmoor, the Home Secretary ordered the applicant's conditional discharge in accordance with Section 66 (2) of the Act. The conditions to be observed were that he should live at a specified address with his wife, that he should be under the supervision of a probation officer and that he should attend a psychiatric out-patient clinic in Sheffield. The applicant was so released on 19 May 1971.

31. The applicant appeared adequately to adjust to normal life. He committed no criminal offence. Although he was unable to find employment immediately after his release he did settle down into regular employment eventually and until 5 April 1974 had been employed for sixteen months as a grinder at the Firth Browne Steel Works in Sheffield and, for the last two weeks prior to this date, at the British Steel Corporation's Stockbridge works near Sheffield.

32. On 5 April 1974, shortly after the applicant's return home from work, he was arrested by the police, detained overnight and the following day escorted to Broadmoor Hospital pursuant to a warrant issued by the Home Secretary ordering the applicant's recall, in accordance with Section 66 (3) of the Act. He was informed that his recall had been ordered as a result of information received from the applicant's probation officer.

33. The applicant claimed that he was not informed of the reasons for his arrest although after being interviewed by the responsible medical officers some time after the recall he inferred that it had something to do with complaints from his wife and her son. The Government stated in their observations on admissibility to the Commission that the applicant's wife had visited the probation officer on 5 April 1974 and told him that the applicant's condition was not as she had been reporting. She complained that the applicant had remained deluded and threatening, using obscene language, accusing her of loose morals and drinking quite heavily (especially on Friday nights). She said that she wanted the applicant out of the house, intended leaving him the following day but was afraid to stay in the house with him that night. The probation officer, alarmed at these disclosures, reported this to Broadmoor Hospital and the Home Secretary ordered the applicant's immediate recall.

34. The Government reported that the applicant was extremely resentful and disturbed by his recall and explanations given by the Broadmoor doctors were evidently not understood by reason, it was submitted, of his deluded mental condition. However neither the applicant nor his legal representatives were given this full explanation in an official manner at the material time.

35. Immediately on his recall, therefore, the applicant instructed his solicitor to apply for an emergency legal aid certificate for an application for a Writ of Habeas Corpus. The certificate was granted and the application was heard by the Divisional Court on 24 May 1974. The court adjourned the application until further information could be obtained as to the reason for the recall.

36. With this authority from the court it was possible for the applicant's lawyers to ask the Home Office to give further reasons for the applicant's renewed detention. In a letter dated 31 May 1974 from the Home Office it was stated:

"In April 1974 the supervising probation officer reported to the responsible consultant psychiatrist at Broadmoor that Mr. X's condition was giving cause for concern. In the light of the advice subsequently received from the consultant the Home Secretary considered it necessary for the protection of the public and in Mr. X's own interests that he should be recalled to hospital immediately for further observation and treatment."

37. The Home Office did not state what it was about the applicant's condition that was giving cause for concern and the probation service in Sheffield declined to give any information to the applicant's lawyers on the relevant facts that came to the notice of the probation officer.

38. On 18 June 1974 the adjourned application for a Writ of Habeas Corpus was heard in the Divisional Court consisting of James, L.J.J., Ormerod, J and Waller J. The court had before it the letter from the Home Office of 31 May 1974, letters from three of the applicant's workmates at Firth Browne stating that they found nothing unusual about his behaviour and that he was a normal workmate, and affidavits from the applicant's general practitioner, Dr. Rickards, and Professor F.A. Jenner, Consultant Psychiatrist, exhibiting recent medical reports dealing with their contacts with him between the date

of conditional discharge and date of recall. On this occasion the court rejected the application without stating full reasons. It was not made clear whether they felt that there was no jurisdiction after all or whether on the evidence before them that the recall should not be questioned. It was stated that the Probation Officer was responsible for the applicant and that it was for him to sound the alarm.

39. The applicant complained to the Commission therefore that he was returned to Broadmoor Hospital after three years of normal life without going before any legal authority or any doctor who certified that he was of unsound mind. The Habeas Corpus proceedings did not fully investigate the merits of the Secretary of State's decision but had to accept the legality of it as it was made in accordance with the provisions of the Mental Health Act 1959. These provisions gave the Home Secretary absolute discretion to recall the applicant, whether or not the conditions for release had been observed. The applicant considered that recourse to the Mental Health Review Tribunal six months after recall was of no effect as its recommendation would not bind the Home Secretary.

40. Since lodging his application with the Commission the applicant was gradually allowed weekend leave of absence from Broadmoor and later it seems that he was again conditionally discharged. He died on 17 January 1979.

III. SUBMISSIONS OF THE PARTIES

A. Submissions of the applicant

The applicant submitted that his recall to Broadmoor was in violation of Art. 5(1)(a), (1)(e), (2) and (4).

As to Article 5(1)(a)

41. The applicant stated that his detention in a mental hospital could not be considered as falling under this sub-paragraph of Art. 5 merely because he had been formally convicted of a criminal offence in 1968. Although superficial comparisons could be made between possible limitations placed on the criminally insane and a prisoner serving an indeterminate life sentence, as well as between such patients conditionally discharged and paroled prisoners, the applicant submitted that the criminal court's decision that he needed psychiatric treatment, not punishment, fundamentally changed the basis for his detention and thus obliged the mental health authorities to deal with him on this basis only. This is particularly pertinent as regards the Home Secretary's powers of recall as their exercise should be dependent only on the patient's mental condition. He concluded therefore that the original criminal court decision to commit him indefinitely to a secure mental hospital, even if it were conceded that it initially could have been deemed to be lawful detention after conviction within the meaning of Art. 5(1)(a), was of no further material relevance to the recall decision some years later, a decision which required justification under Art. 5(1)(e) as the lawful detention of a person of unsound mind. To hold otherwise would allow the indefinite detention of people like the applicant for periods wholly out of proportion to their criminal offence or record and without the possibility of a periodic review of their mental condition.

As to Article 5(1)(e)

42. The applicant submitted that Art. 5(1)(e) requires that a prima facie case of mental ill-health be shown. Furthermore the detention of a person of unsound mind must be necessary. To justify detention there must be a determination or review of the patient's condition at reasonable intervals to show that he continued to be of unsound mind. Although this sub-paragraph does not specify the kind of review, it must be reasonable. He contended therefore that it is unfair to have the detaining authority as the decision maker. There must be a genuine, independent review based on medical criteria. On this basis the review by the Home Secretary is insufficient as he is under no legal obligation to, and in practice does not, release patients if he considers that there might be the slightest danger to the public, even if a Mental Health Review Tribunal or the responsible Medical Officer considered the patient no longer of unsound mind or anyway well enough to cope with normal life and could, therefore, be released.

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43. The applicant acknowledged that his recall was in accordance with the domestic law. However, it was submitted that there had been no indication of any psychiatric evidence to suggest that between the date of conditional discharge and the date of recall the applicant acted in such a way as to give cause for concern about his mental condition. To satisfy the requirements of Art. 5(1)(e) it would have been necessary to have been certain at the time of the applicant's detention on 5 April 1974 that he was a person of unsound mind. It could not be assumed that he was of unsound mind from the date of the original court order in November 1968 indefinitely.

44. It was submitted that the recall was decided upon in an arbitrary manner. There had been no opportunity for an independent psychiatric examination of the applicant to establish whether he was on 5 April 1974 of unsound mind. It was also submitted that there was no check on the applicant's state of mental health between arrest in Sheffield on 5 April 1974 and his arrival at Broadmoor on the following day. Moreover there was little assessment of his condition during the first days of detention; he was not seen by the responsible medical officer until 24 April 1974.

45. During the Commission's proceedings the Government stated that the Broadmoor authorities took the view that on recall the applicant was psychotic and remained so for some time.

46. The applicant contended that the information relied on, according to the Government's observations, did not adequately determine the state of his mental health. No attempt was made to verify his wife's allegations which he claimed were exaggerated and anyway concerned the disharmony of his not altogether satisfactory marriage, rather than his mental condition. He referred to the Commission's recognition that detention based only on a relative's denouncements is open to abuse (Application No. 6301/73, Winterwerp v. the Netherlands, Commission's Report of 15 December 1977, para. 76).

As to Art. 5 (2)

47. The applicant claimed that neither on his arrest on 5 April 1974, nor soon after, was he given reasons for his recall.

48. He submitted that there is no material distinction to be made between an arrest in order to apprehend someone suspected of having committed a criminal offence and the manner in which he was recalled. The fact that this sub-paragraph refers to "any charge" indicates that it is intended to protect someone arrested where no charge is made.

49. The applicant stated that he could not have been deprived of his liberty on 5 April 1974 other than by his arrest by the Sheffield police and his subsequent detention until officers from Broadmoor collected him and returned him to the hospital where his detention continued. It was submitted therefore that Art. 5(2) implies the inclusion of the word detention as an alternative to arrest.

50. Even if it were conceded that it was not appropriate for the police to inform the applicant of the reasons for arrest, then, under Art. 5(2) the Broadmoor authorities should have done so. However, he claimed that the reasons given to his solicitors and to himself by his doctor were so brief and vague that they could not even be described as reasons given in very general terms. He guessed that his wife was involved but her role was never properly explained.

51. The applicant rejected the Government's suggestions that at the time of his recall he was violent or deluded and therefore unable to understand the explanation he was given. It was his wife who apparently described him in such a way but he stated that she was not qualified to say whether he was deluded, nor was any information given as to the instances of delusion. Even if the applicant had been violent and deluded, it was submitted that there could have been no objection to supplying his solicitors with full information even if this were given on the understanding that it should not be disclosed to the applicant himself. It could not be argued that the safety of the public could be adversely affected in any way by the giving of full reasons for recall.

As to Art. 5(4)

52. The applicant submitted that Art. 5(4) requires the lawfulness of detention, which includes, of necessity, the material reasons for the detention, to be decided by a court.

53. It is not sufficient in the case of mental health patients that their indefinite detention was initiated by a criminal court. A person's mental health can change and therefore a person so detained should have recourse to a periodic review of a judicial nature. The applicant endorsed the Commission's opinion in the case of Winterwerp against Netherlands Application No. 6301/73 and in particular at para. 90 of that Report:-

"Art. 5(4) is thus to be interpreted as conferring on anyone who considers himself to have been wrongly committed to a psychiatric hospital, following a procedure which the Convention leaves largely to the discretion of each State, the right to have both the substantive and the formal lawfulness of his detention verified by a court".

54. The applicant also endorsed the Commission's Decision on Admissibility in Application No. 6859/74 X against Belgium that the court referred to in Art. 5(4) has the responsibility "to establish that the conditions prescribed by law - a state of mental deficiency - are (still) satisfied and justify the continuation of the detention or, if not, require the release of the detainee." (DR 3, p. 145).

55. As regards United Kingdom domestic law, the applicant contended that the Writ of Habeas Corpus does not satisfy the requirements of Art. 5(4) as the Courts may only examine the technical legal authority for detention. Apart from his own case where the Divisional Court, once satisfied as to the wide scope of the Home Secretary's discretionary powers under Section 66 of the Act, dismissed his application for a Writ of Habeas Corpus, the applicant also referred to other case law concerning this Writ including recent decisions (for example in R. v. Secretary of State for Home Affairs Ex parte Andrew Medway (Q.B.D. 28 June 1977 and Proceedings before the Appeal Committee of House of Lords 21 July 1977)) which indicates that the Divisional Court refuses to look beyond the technical legality of the detention, whether it be continuous detention or recall.

56. As Mental Health Review Tribunals may only advise the Home Secretary in cases of restricted patients, advise which is frequently rejected (rejection of recommendations for discharge 59% - 1972, 40% - 1973, 46% - 1974, 31% - 1975), the applicant considered that they also do not fulfil the requirements of Art. 5(4).

B. Submissions of the Government

57. The Government denied that the recall of the applicant to Broadmoor hospital was in violation of any of the provisions of Art. 5.

As to Art. 5(1)(a)

58. The Government contended that the applicant, as from 7 November 1968, was at all times (including the recall) lawfully detained after conviction by a competent court within the meaning of Art. 5(1)(a). They drew an analogy with normal offenders who may be sentenced to an indeterminate sentence of imprisonment and prisoners conditionally released on parole. The recall to prison of a paroled prisoner or a conditionally discharged restricted patient does not constitute deprivation of liberty within the meaning of Art. 5(4). Restricted patients had adequate safeguards before the criminal court that ordered their detention by virtue of the requirements of convincing medical evidence provided for in sections 60 and 65 of the Act.

As to Art. 5(1)(e)

59. Although the Government's principal argument lay within Art. 5(1)(a), they submitted that the applicant's detention was also lawful within the meaning of Art. 5(1)(e).

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60. They contended that Art. 5(1)(e) does not guarantee particular procedures to determine the material justification of detention. As mental disorder is susceptible to gradual amelioration or deterioration discretion must be left to the domestic law of each State concerning the frequency and method of assessing the patient's condition. The United Kingdom law provides a fair and sensitive system of administrative review based primarily on medical evidence with the possibilities of a periodic opinion given by a Mental Health Review Tribunal and periodic reports from the detaining hospital and the possibility that the patient's responsible medical officer would recommend discharge.

61. The Government considered that it was appropriate for the final responsibility for restricted patients to rest with the Secretary of State who is competent to evaluate on the basis of the above advisory procedures not only the interests of the patient but also the interests of public safety. He is answerable to Parliament and the Ombudsman in the event of maladministration. A court would be no better equipped to carry out these tasks, the administrative procedures allowing for flexibility and fairness as well as a greater uniformity of practice.

62. The legality of detention could be challenged in the courts by an application for a writ of Habeas Corpus.

63. The Government submitted that the applicant was detained at all times due to his mental illness in accordance with a procedure prescribed by domestic law and in conformity with Art. 5(1)(e).

As to Art. 5(2)

64. The Government rejected the suggestion that the applicant's recall was an arrest but they asserted that in any event the applicant was informed promptly of the reason for his recall.

65. The Government submitted that there is a distinction to be drawn in Art. 5(2) between arrest and detention. Arrest in this sub-paragraph refers only to the initial deprivation of liberty and this is borne out by the reference to a "charge" being notified to the person arrested. The applicant's recall was detention not arrest, arrest only arising at the criminal case against him in 1968, and there was no question of any charge against him.

66. It was further submitted that the applicant was anyway given sufficient reasons for his recall in two stages. The police officers informed the applicant of the legal authority for the arrest. It was not for police officers to divulge the source of the information justifying arrest. It would not be appropriate in the case of a mentally ill person, who, moreover, might be violent, for police officers to have this responsibility. This

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responsibility lay with the applicant's doctor at Broadmoor and it was claimed that the doctor fully discussed the matter with the applicant as may be shown in his outgoing correspondence at that time.

As to Art. 5 (4)

67. The Government submitted that the necessary supervision by a court envisaged in Art. 5(4) was incorporated into and satisfied by the initial court decision in 1968 to convict the applicant and make a hospital order committing him to Broadmoor for an indefinite period. Reference was made, inter alia, to the decisions of the European Court of Human Rights in the "Vagrancy" Cases and Engel and Others v. the Netherlands. It was contended that Art. 5(4), like the other provisions of Art. 5, applied only to the initial detention. Thus the applicant's court conviction and committal in 1968 provided sufficient judicial authority for any subsequent recall. They repeated that the powers given to the Secretary of State by the criminal courts under the Mental Health Act are complemented by the aforementioned administrative procedures for reviewing patients' progress.

68. It was asserted that Art. 5(4) gave no right to a periodic review of the material justifications for the detention of persons of unsound mind by a court, i.e. a judicial determination of whether a patient continued to be mentally ill or of his mental condition on recall. "Lawfulness" within the meaning of Art. 5(4) meant only compliance with the relevant domestic law. In the United Kingdom the domestic law confers extensive powers to administrative and executive authorities in the domain of mental health care.

69. Also in the United Kingdom the speedy remedy of a Writ of Habeas Corpus is available to challenge the legality of detention, whether initial detention, continuing detention or recall. The courts could examine whether the patient has been detained lawfully in accordance with the requirements of the Mental Health legislation and, if there is evidence of a misuse of power, whether the responsible authority has acted in bad faith or capriciously or for a wrongful purpose, but subject to this the courts would not review the grounds or merits of the decisions taken. For example the applicant's initial detention and throughout would have been unlawful if the oral medical evidence required by S.65(2) of the Act had not been heard. In that case the court on an application for a Writ of Habeas Corpus would have discharged him. Thus a Writ of Habeas Corpus may not challenge the material justification for detention but only act as a check against arbitrariness. Not only does the United Kingdom law not provide such a judicial remedy but also it was submitted that Art. 5 (4) does not require one, this being a matter only within the discretion of the High Contracting Party. They concluded that Art. 5 (4) is merely intended to secure a right of judicial supervision and not a right of substantive appeal to a court.

70. The Government rejected the Commission's apparently different interpretation of Art. 5(4) in Application No. 6692/74, X. against Belgium and in Application No. 6301/73, Winterwerp against the Netherlands that this provision covered both the technical legality of detention and the material justification for the deprivation of liberty. They submitted that in the Winterwerp case the point was not fully considered as it was not contested that Netherlands law provided for a judicial determination of the material justification for the compulsory detention of persons of unsound mind.

71. Thus the Government concluded that in any event no breach of Art. 5(4) was disclosed by the case because the applicant was able to take Habeas Corpus proceedings before a court to question the legality of his detention.

IV. OPINION OF THE COMMISSIONA. Introduction

72. The points at issue in the present case are whether
1. the applicant's recall to Broadmoor Hospital and further compulsory indefinite detention there constituted a deprivation of liberty compatible with Art. 5 (1) of the Convention;
 2. the provisions of Art. 5 (2) of the Convention were applicable to the applicant's recall and, if so, whether they were respected;
 3. the applicant was entitled to have a further review of the lawfulness of his detention by a court, as guaranteed by Art. 5 (4) of the Convention, after his initial court committal to Broadmoor Hospital in November 1968; if so, what is the scope of such a review?
 4. the remedies of Habeas Corpus and review by a Mental Health Review Tribunal pursued by the applicant satisfied the control of lawfulness envisaged by Art. 5 (4).

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

73. The provisions of Art. 5 (1) relevant to the present case are as follows:

"1. 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:

- (a) the lawful detention of a person after conviction by a competent court;

.....

- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;"

./.

74. The applicant was convicted of an offence of grievous bodily harm on 7 November 1968 and was compulsorily committed to Broadmoor Hospital, a secure mental hospital for the criminally insane, for an indefinite period, in accordance with Sections 60 and 65 of the Mental Health Act 1959 (the Act). The Home Secretary conditionally discharged the applicant from Broadmoor Hospital on 19 May 1971, in accordance with Section 66 (2) of the Act. However on 5 April 1974, after, unbeknownst to the applicant, his wife had alerted the competent authorities, the applicant was recalled to Broadmoor Hospital, in accordance with Section 66 (3) of the Act, where he was further compulsorily detained.

75. The applicant complained that his recall violated Art. 5 (1) of the Convention.

1. As to Art. 5 (1)(a)

76. The Government submitted that the applicant, throughout his detention and including the recall, was lawfully detained after his conviction by a criminal court in November 1968 in accordance with the provisions of Art. 5 (1)(a) of the Convention.

77. The applicant submitted that his detention could only have been justified under the provisions of Art. 5 (1)(e) of the Convention. He stated that the hospital order of the court transferred the basis of his detention from the scope of punishment/sentence to that of treatment as a mental health patient. Alternatively the applicant contended that only his initial detention fell within the scope of Art. 5 (1)(a), his continued indefinite detention and subsequent conditional discharge and recall being supposedly based on the presumption of his mental ill-health. Such detention could only be justified, if at all, under Art. 5 (1)(e).

78. The Commission is required, therefore, to consider, firstly, whether the applicant's deprivation of liberty since November 1968 fell within the scope of Art. 5 (1)(a), lawful detention after a criminal conviction, or Art. 5 (1)(e), lawful detention of a person of unsound mind.

79. The Commission observes that the two provisions are fundamentally different: Art. 5 (1)(a) justifies the detention of a person whenever the mere formal condition of a conviction is fulfilled, whereas Art. 5 (1)(e) requires the observance of material criteria, such as the existence of the specific condition of mental ill-health, in order to justify detention. Nevertheless, at first sight, it could be said that both provisions applied to the applicant's situation in view of his formal criminal conviction in 1968 and his undisputed mental ill-health at that time.

80. However in the Commission's opinion only Art. 5 (1)(e) applies whenever the case of an accused person of unsound mind is disposed of by committal to a mental hospital for treatment, rather than punishment:

81. "Conviction" within the meaning of Art. 5 (1)(a) refers narrowly to the conviction and sentence of a person found guilty of a criminal offence, with the attendant notions of social blame and punishment. Moreover, in principle, detention in accordance with Art. 5 (1)(a) follows a procedure which respects the guarantee of a fair hearing provided for in Art. 6 (1) of the Convention.

82. On the other hand, Art. 5 (1)(e) of the Convention provides for the detention of a person by virtue of the specific state of his mental health, irrespective of criminal conduct, as a person of unsound mind, by definition, cannot be held fully responsible for his acts. Periodic control of this justification for detention is necessary in view of the changeable nature of mental ill-health (see paras.120 - 124 below). The mere fact that such a person had an equitable criminal procedure prior to his detention should not deprive him of such further guarantees.

83.. The Commission notes that national systems have adopted different solutions in dealing with persons of unsound mind who have committed criminal acts. Some jurisdictions require a formal conviction before a hospital order can be made. Under other national systems a hospital order can be made by a court or an administrative authority in the absence of a conviction (cf Application No 6859/74 X v. Belgium, DR 3 p. 139). Such domestic law differences cannot be conclusive for the application of the guarantees under Art. 5. For the purposes of Art. 5 (1), there is no distinction to be drawn between persons of unsound mind who have committed criminal offences and those persons of unsound mind who have not, and there is no reason for applying a lower standard of legal protection to the former.

84. The Commission finds, therefore, that the justification for the detention of the applicant by virtue only of his mental ill-health in November 1968 and thereafter (including his recall and further detention in April 1974) falls for consideration under Art. 5 (1)(e) of the Convention.

2. As to Art. 5 (1)(e)

85. The next question to be determined by the Commission is whether the applicant's detention was justified under Art. 5 (1)(e).

86. Deprivation of liberty in accordance with Art. 5 (1)(e) must fulfil three conditions:- it must result from a procedure prescribed by law, be based on a legal provision and satisfy one of the relevant material criteria cited therein. In the present case the criterion is that of unsoundness of mind.

87. The Government have submitted that the applicant was lawfully detained under the provisions of the Mental Health Act 1959 by reason of his mental ill-health, the verification of which having been adequately dealt with by a system of administrative review based primarily on medical evidence.

88. The applicant conceded that his indefinite detention was authorised by the domestic law and even that his initial detention in 1968 was justified by his mental ill-health. However, he submitted that his recall to Broadmoor in 1974 was not justified for this reason, no prima facie case of his mental ill-health having been put forward which could be independently reviewed.

89. It is not in dispute therefore that the applicant's detention was in pursuance of a procedure prescribed by law and that, throughout, it was in conformity with the relevant domestic law provisions of the Mental Health Act 1959, as revealed by the Habeas Corpus proceedings, which the applicant pursued.

90. It is disputed, however, that the applicant was mentally ill and required further detention in Broadmoor Hospital at the time of his recall in 1974.

91. The scope of the review by the Convention organs of a patient's unsoundness of mind is, of necessity, limited. As the Government have pointed out, mental disorder may be susceptible to gradual amelioration or deterioration, speedy cures being rare. Thus the Commission's task is to review under the Convention the decisions of the competent authorities (Eur. Court HR Winterwerp case, judgment of 24 October 1979, para. 40), and consider whether a prima facie case of the applicant's mental ill-health was apparent throughout the period of detention and, in particular, at the time of the recall.

92. To avoid arbitrary detention, it must be shown that there is objective medical evidence of the detainee's mental disorder, warranting compulsory confinement, and continued confinement may only be justified if the disorder persists. (Winterwerp case, judgment para. 39.)

93. In this respect the Commission notes the following facts:

94. The applicant was first committed to Broadmoor Hospital because of his mental ill-health, established after he had violently attacked a workmate. Periodic medical opinion justified his continued detention and subsequent discharge on a conditional basis only, medical supervision being required. As an out-patient the applicant was thought by medical opinion to be coping, although it was conceded that a rapid deterioration in the applicant's condition was still a possibility. For example, in a medical report annexed to an affidavit for the Habeas Corpus proceedings, one of the consultant psychiatrists treating the applicant as an out-patient was particularly anxious about the applicant's volatile mental health and potentially violent behaviour. He expressed no surprise that the applicant was recalled at the mere hint of a crisis. Such a hint was notified by the applicant's wife who renounced previous progress reports she had made to the probation officer supervising the applicant's well-being. Her allegations concerning the applicant's disturbing behaviour, although not verified, alarmed the responsible medical officer at Broadmoor Hospital. In view of his knowledge of the applicant's medical background, he was concerned that a difficult family situation was arising in which the applicant might have broken down and reverted to violent behaviour.

95. In the Commission's opinion the arrest and detention of a patient on the indications of a member of the patient's family may run a serious risk of being an unjustified deprivation of liberty and ought only to be effected in exceptional circumstances (cf. Commission's Report in Application No 6301/73 Winterwerp v. the Netherlands, para. 76 in fine). In view of the fact, however, that the present case concerned the recall of a mental health patient, who was on conditional release only, and whose medical history indicated a certain danger of violent behaviour, a prima facie justification existed for the applicant's speedy recall and further medical examination at the first sign of any possible emergency.

96. Furthermore on recall and examination, the applicant's responsible medical officer was of the opinion that he should be further detained for treatment. This medical opinion was maintained until December 1975 when, on the advice of the Mental Health Review Tribunal, to whom the applicant had referred his case, and the Broadmoor medical staff, the Home Secretary agreed in principle to the applicant's being allowed limited periods of leave of absence under close supervision. However treatment was still considered by the medical staff to be necessary throughout. The Commission finds no reason to doubt the competence of the medical staff concerned.

97. Thus the Commission considers that the Government have submitted sufficient indications that the applicant's rearrest and further detention in order to verify the exact state of his mental health was justified.

98. The Commission is of the opinion therefore that the applicant's detention in Broadmoor Hospital, particularly as regards his recall, constituted "the lawful detention of /a person/ of unsound mind" within the meaning of Art. 5 (1) (e) of the Convention.

3. Conclusion

99. The Commission concludes, by a vote of 14 against 2 that in the present case there has been no violation of Art. 5 (1) of the Convention.

C. As regards Art. 5 (2) of the Convention

100. The applicant complained that, at the time of his recall, he was not adequately and promptly informed of the reasons for his arrest or detention, either by the arresting police officers or, subsequently, by the responsible medical staff at Broadmoor although he stated that he had guessed that his arrest had had something to do with his wife. He claimed to be a victim of a violation of Art. 5 (2) of the Convention which provides that:

"Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

1. Applicability

101. The first question to be determined by the Commission is whether Art. 5 (2) is applicable in the circumstances of the present case.

102. The Government contended that Art. 5 (2) does not apply as Art. 5 (2) only concerns arrest prior to a charge being laid. Thus it does not apply to the recall of a mental health patient to hospital. They submitted that such a conclusion follows from the particular difficulties of dealing with the mentally unsound and the inappropriateness of expecting police officers arresting a patient to explain the reasons for detention.

103. The Commission is unable to accept the Government's submission that Art. 5 (2) only applies to arrest prior to a charge being laid, as this would in effect limit the protection of Art. 5 (2) to the lawful arrest or detention of a person for the purpose of bringing him before a competent court on reasonable suspicion of having committed an offence, as authorised by Art. 5 (1)(c).

104. In the Commission's opinion Art. 5 (2) is a disposition which clearly applies to all the cases of justifiable detention listed in Art. 5 (1). Its purpose is to adequately inform any detained person of the reason for his arrest so that he may judge the lawfulness of the measure and take steps to challenge it if he sees fit, thus availing himself of the right guaranteed by Art. 5 (4).

105. As to whether Art. 5 (2) applies to the recall of a detainee to his place of detention, the Commission recognises that usually the right to be informed of the reasons for arrest occurs on the initial arrest. Thus there is no duty to keep the detainee constantly informed. However if the grounds for detention change, or if new relevant facts arise concerning the detention, the Commission considers that the detainee has a right to this further information, because new reasons call for a modified or new defence. Thus, in the Commission's opinion, if a person is rearrested after a significant period of conditional release, the new arrest must be motivated in accordance with Art. 5 (2).

106. The Commission considers that mental health patients are not, by way of exception, excluded from the protection of Art. 5 (2) because of their particular difficulties. The amount of detail and type of information to be disclosed to the detainee to fulfil the obligations imposed by Art. 5 (2) will depend on the circumstances of the particular case. Thus it may be justifiable in the case of certain persons of unsound mind to withhold information from the patient himself, if he is obviously unable to receive or understand it or where there may be serious reasons to believe that the patient might react in a dangerous way or that the information would run contrary to the aim of detention by gravely distressing the patient with negative results for future therapy. However if the patient is incapable of receiving proper information then the Commission is of the opinion that the relevant details must be given to those persons who represent his interests such as a lawyer or guardian.

107. Because of the particular difficulties posed by certain mental health patients, the Commission accepts that it may not be the role of police officers, who are charged with the sometimes delicate task of arresting a patient, to inform him of the detailed reasons of arrest or recall, as they are not qualified to assess the patient's condition and his ability to understand the position. However the responsibility of informing the patient or his representatives will, in such circumstances, fall on the medical officers concerned. Nevertheless this obligation has to be discharged promptly, i.e. at the latest, on arrival at the hospital.

108. The Commission concludes, therefore, that Art. 5 (2) applies to the situation in the present case, the recall of a mental health patient to a secure mental hospital.

2. Compliance

109. The remaining question is whether in April 1974 the applicant was adequately and promptly informed of the reasons for his arrest and recall to Broadmoor Hospital, in accordance with Art. 5 (2).

110. It is not disputed that the police officers who arrested the applicant did not inform him of the reasons for his arrest. It is, however, disputed whether the responsible medical officers at Broadmoor performed this task. The applicant contended that on arrival at Broadmoor he was not given any reasons for the recall by the responsible medical officer. As a result of interviews with the responsible medical officer some time after recall, he claimed that he could only conjecture, as is shown in his correspondence, that his arrest had had something to do with his wife. The Government submitted that the applicant was in a resentful, disturbed and deluded state on arrival at Broadmoor and was unable to understand the explanations given by the responsible medical officer. They claimed that the responsible medical officer fully informed the applicant and that the applicant's eventual comprehension of the position is reflected in his outgoing correspondence.

111. The Commission leaves this question of fact open for, in its opinion, whether the applicant was given proper explanations or not, or whether he was in such a deluded state that he could not comprehend what the medical staff told him, nevertheless there could have been no justification for withholding detailed information from persons acting on the applicant's behalf, namely his solicitors. No official explanation was given to them, despite their requests, apart from a statement on the initiation of the Habeas Corpus proceedings that the probation officer had reported that the applicant's condition was giving cause for concern. Such a vague statement cannot, in the Commission's view, constitute the information necessary to make effective and intelligent use of the right ensured by Art. 5 (4) to challenge the lawfulness of detention.

112. The Commission is of the opinion, therefore, that the applicant was not given prompt and sufficient reasons for his arrest and further detention at Broadmoor Hospital in 1974.

3. Conclusion

113. The Commission unanimously concludes that in the present case there was a violation of Art. 5 (2) of the Convention.

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

114. The applicant has complained that he had no possibility to have the lawfulness of his recall judicially determined. By lawfulness he referred not only to the technical legal authorisation but also to the material justification for detention, namely a determination that he was at that time of unsound mind. He claims to be a victim of a breach of Art. 5 (4) of the Convention.

115. Art. 5 (4) of the Convention provides:

"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."

1. Applicability to the applicant's recall

116. The Government submitted that the requirements of Art. 5 (4) were satisfied by the initial court order committing the applicant to Broadmoor Hospital in November 1968. They referred to the jurisprudence of the European Court of Human Rights in the "Vagrancy" cases and Engel and others v. the Netherlands for the proposition that Art. 5 (4) did not confer a further right of access to a court where detention was initially ordered by a court, the necessary judicial supervision being incorporated in that original decision.

117. Furthermore, the Government stated that United Kingdom law does not provide for periodic judicial determination of the state of a person's mental health and they submitted that Art. 5 (4) does not require this.

118. The applicant did not dispute that the decision of the criminal court in 1968 to commit him to Broadmoor Hospital could then have been considered as having "incorporated" the judicial supervision required by Art. 5 (4) as interpreted by the Court in the "Vagrancy" cases (Eur. Court HR, judgment of 18 June 1971, para. 76). However he submitted that this decision could not serve as a lawful basis for further detention nearly six years later, in 1974, particularly after three years of apparently normal existence prior to the recall.

119. The Commission notes that the parties agree that the decisions of the criminal court in November 1968 to commit the applicant to Broadmoor Hospital fulfilled the requirements of Art. 5 (4) at that time. It is disputed, however, whether the applicant should have had the right to judicial determination of the lawfulness of his recall in April 1974.

120. The first question to be determined by the Commission, therefore, is whether Art. 5 (4) requires the possibility of further periodic judicial review on request of the lawfulness of the compulsory detention of persons of unsound mind for indefinite periods.

121. It is true that the European Court of Human Rights in the "Vagrancy" cases held that "Art. 5 (4) is observed if the arrest or detention of a vagrant, provided for in paragraph (1)(e), is ordered by a 'court'" and that only one such judicial intervention is required (aforementioned "Vagrancy" cases, judgment, para. 76). However the Commission has since distinguished the situation of mentally ill persons compulsorily and indefinitely detained from that of vagrants and has concluded that further review of the former's position is required by Art. 5 (4) (cf. Application No 6692/74, X v. Belgium, D & R 2, p. 108, Application No 6859/74, X v. Belgium, D & R 3, p. 139 and the Report of the Commission in Application No 6301/73, Winterwerp v. the Netherlands, para. 95).

122. The rationale of the Commission's conclusion is expressed in Mr Welter's individual opinion in the Commission's Report of 19 July 1969 in the "Vagrancy" cases (at para. 190, p. 98).

"In the case of mental derangement it is in most cases impossible to determine in advance the time for which detention will prove necessary. It is therefore understandable that it should be ordered for an indefinite period, but at the same time it seems essential to allow the person detained to apply at reasonable intervals for a review of the original decision, whether this decision was administrative or judicial."

123. The Court, in its judgment of 24 October 1979 in the Winterwerp case, a case concerning a mental health patient, has reached the same conclusion:

"In the Court's opinion, except in emergency cases, 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" (para. 39 emphasis added).

Thus,

"the reasons initially warranting confinement of this kind may cease to exist Consequently, it would be contrary to the object and purpose of Article 5 to interpret paragraph 4 thereof, read in its context, as making this category of confinement immune from subsequent review of lawfulness merely provided that the initial decision issued from a court. The very nature of the deprivation of liberty under consideration would appear to require a review of the lawfulness to be available at reasonable intervals" (para. 55, third sub-para.).

124. The Commission finds no reason to reach a different opinion in the present case. It concludes therefore that the applicant had the right to a periodic judicial determination of the lawfulness of his detention. Thus the requirements of Art. 5 (4) of the Convention applied to the applicant's recall in April 1974, the 1968 criminal court decision being an insufficient basis for such further detention nearly six years later.

2. Compliance with Art. 5 (4) on recall

(a) The scope of the judicial determination of "lawfulness" within the meaning of Art. 5 (4)

125. The Government submitted that, even assuming that Art. 5 (4) conferred on the applicant the right to have the lawfulness of his detention determined speedily by a court, in fact the applicant did have such access to a court in the Habeas Corpus proceedings which he pursued and by which the formal legality of his detention was verified.

126. The applicant countered that Art. 5 (4) conferred the right on a mental health patient to have not only the formal, but also the substantive lawfulness of his detention determined by a court.

127. Thus the question to be resolved by the Commission concerns the scope of the judicial determination of the lawfulness of the detention of mental health patients i.e. whether the review envisaged by Art. 5 (4) must deal with the material grounds for detention.

128. This issue was put to the Court in the Winterwerp case, but the Court left the question open in view of the fact that the Netherlands legislation in question in that case was not limited in scope, providing for review of the substantive justification of the deprivation of liberty.

129. The Commission, however, was of the opinion in its Report in the said Winterwerp case that the scope of the control of lawfulness included the material grounds for detention:

"Art. 5 (4) is thus to be interpreted as conferring, on anyone who considers himself to have been wrongly committed to a psychiatric hospital, following a procedure which the Convention leaves largely to the discretion of each State, the right to have both the substantive and the formal lawfulness of his detention verified by a court" (p. 29, para. 90 of the said Report).

130. The Commission finds no grounds to depart from this conclusion in the present case for the following reasons:

131. The Convention guarantees to everyone the right to personal freedom. Art. 5 (1) sets out an exhaustive list of exceptional cases of permissible arrest or detention. Deprivation of liberty for any other reasons would be incompatible with the Convention. Art. 5 (4) provides for a special judicial control of the legality of detention which, to be of any effect, cannot, in the case of persons of unsound mind, be limited to the mere formal legality under domestic law.

132. In this connection it is noteworthy that when Art. 9 of the International Covenant on Civil and Political Rights (corresponding to Art. 5 of the European Convention) was being drafted, the representatives of Australia, Denmark, France, Lebanon and the United Kingdom commented on the inadequacy of reliance on procedures merely prescribed or established by domestic law with respect to arrest and detention:

"The words 'as established by law' in paragraph 2, although intended as a safeguard against abuse, do not appear to be effective for that purpose. As was pointed out in the course of debate, any dictator would be prepared to accept such an article." (United Nations ECOSOC Official Records. Report of the Fifth Session of the Commission on Human Rights Supplement No 10 (Lake Success May - June 1949 Doc E/1371, pp. 31 - 33 Item (b)).)

133. In the present application, the Commission confirms, therefore, its conclusion in the Winterwerp case that the scope of judicial review under Art. 5 (4) must encompass the substantive justification for the deprivation of liberty under Art. 5 (1)(e).

(b) The scope of judicial review in Habeas Corpus proceedings

134. The Government themselves have submitted that Habeas Corpus proceedings act as a check on arbitrariness, the Divisional Court only reviewing the correct application of domestic law i.e. whether the detaining authority acted ultra vires or in bad faith.

135. The legislation relevant to the present application is the Mental Health Act 1959, Section 66 of which confers a seemingly limitless discretion on the Home Secretary to discharge restricted patients, such as the applicant, either absolutely or subject to conditions and, in the latter case, to recall the patient by warrant at any time. Thus, on an application for a Writ of Habeas Corpus by a restricted patient, the Divisional Court is not obliged, by the domestic law, to evaluate his mental health.

136. The Commission finds, therefore, that the remedy of Habeas Corpus, in dealing with only limited aspects of the lawfulness of the detention of persons of unsound mind under the Mental Health Act 1959, does not satisfy the requirements of Art. 5 (4).

137. In view of this finding, it is not necessary for the Commission to attempt to assess the extent to which the Divisional Court did go into the material elements of the applicant's mental ill-health. The Commission finds that the applicant was unable, as of right, to have the substantive lawfulness of his further detention determined by a Court through the Habeas Corpus proceedings, as required by Art. 5 (4) of the Convention.

(c) Mental Health Review Tribunal

138. The Commission finally notes that six months after his recall the applicant had the right to, and took advantage of, a substantive review of his case by the Mental Health Review Tribunal. However such a review six months after the event complained of does not satisfy the requirement of speed provided for in Art. 5 (4). Moreover, in the case of restricted patients, like the applicant, the Tribunal cannot order release, but may only transmit an advisory opinion to the Home Secretary, with whom the power of decision rests. In the absence of this competence, the Commission finds that the proceedings before the Mental Health Review Tribunal did not satisfy the requirements of Art. 5 (4).

139. The Commission is of the opinion that, on recall to Broadmoor Hospital, the applicant was not afforded adequate "proceedings by which the lawfulness of his detention ... was decided speedily by a court" within the meaning of Art. 5 (4) of the Convention.

3. Conclusion

140. The Commission unanimously concludes that in the present case there was a violation of Art. 5 (4) of the Convention.

Secretary to the Commission

Acting President of the Commission

(H.C. KRUGER)

(C.A. NØRGAARD)

Dissenting opinion of Mr Opsahl

1. My disagreement with the Commission concerns only one point; but that is the first at issue and the most fundamental one. I find that in the circumstances the recall of the applicant to Broadmoor violated his right to liberty under Art. 5 (1). This opinion is based on the facts as described by the Commission. The way he was arrested and initially detained shows that there had not then been and could not have been established any sufficient justification under the Convention for such a deprivation of liberty.

2. As the Commission holds, his arrest and detention in 1974 could not be justified on the ground of Art. 5 (1)(a) by the conviction dating from 1968, and the powers it gave to recall the applicant. However, since the authorities may have thought that they could rely on this ground, it is quite possible that they did not in fact direct their minds sufficiently to the conditions implied in Art. 5 (1)(e), and I disagree with the Commission in its opinion that these conditions were satisfied.

3. As I understand the judgment of the European Court of Human Rights in the Winterwerp case (referred to in paras. 91 - 92 of the present Report), Art. 5 (1)(e) requires:

- i. objective medical evidence of mental disorder, and
- ii. a need to detain the person concerned for this reason.

These are material requirements which, like the other specific provisions of Art. 5 (1), have as their purpose the prevention of arbitrariness. I find it rather clear that at the time of his arrest and initial detention, (i) the first condition was lacking, no doctor having seen him, and (ii), the second had not been established in anything but the most superficial manner on the basis of hearsay. The procedure followed was not sufficient to prevent arbitrariness or mistake. On this point it is in my opinion irrelevant whether the required justification could be established or arose later.

4. The findings of breaches of the subsequent procedural guarantees in Art. 5 (2) and 5 (4) are in my opinion not sufficient in such a case. These guarantees have as their purpose to enable the victim to obtain his release if the detention is not justified. It is true that the judicial control envisaged under Art. 5 (4) must apply the criteria mentioned above. But such a control - which was not ensured in the present case - would in my opinion not have been sufficient to satisfy the Convention. The administrative authorities - Home Office, police, health personnel - have to observe the requirements laid down in Art. 5 (1)(e) as interpreted by the Convention organs. And these organs have to control the actual decisions and acts of national authorities. This view does not require that the Convention organs themselves examine the mental health of applicants or the need to detain them. That would be impracticable. But they must control the administrative procedures to see whether they offer reasonable guarantees on these points. It is not enough to refer to the national judicial control prescribed by Art. 5 (4) or, as in this case, to find that this control has been lacking.

Appendix IHISTORY OF PROCEEDINGS

Item	Date	Note
1. <u>Examination of admissibility</u>		
Date of introduction of application	14 July 1974	
Date of registration	2 May 1975	
Commission's deliberations on admissibility and decision to declare the application inadmissible insofar as it related to an alleged breach of Art. 3 of the Convention and to give notice of the remaining part of the application concerning Art. 5 of the Convention to the Government of the United Kingdom and invite the parties to submit observations on admissibility	11 March 1976	MM G. Sperduti J.E.S. Fawcett C.A. Nørgaard F. Ermacora M. Triantafyllides E. Busuttil B. Daver T. Opsahl J. Custers C.H.F. Polak J.A. Frowein G. Jörundsson R.J. Dupuy G. Tenekides S. Trechsel B. Kiernan N. Klecker
Date of Government's observations on admissibility	11 May and 25 August 1976	
Date of applicant's observations on admissibility	24 September 1976	
Commission's deliberations on admissibility and decision to invite the parties to an oral hearing on the admissibility and merits of the application together with three other cases against the United Kingdom concerning mental health patients	4 and 7 March 1977	MM G. Sperduti J.E.S. Fawcett C.A. Nørgaard E. Busuttil L. Kellberg B. Daver T. Opsahl J. Custers C.H.F. Polak J.A. Frowein G. Jörundsson G. Tenekides S. Trechsel B. Kiernan N. Klecker

Item	Date	Note
Hearing on the admissibility and merits	11 and 12 May 1977	MM C.A. Nørgaard J.E.S. Fawcett E. Busuttil L. Kellberg T. Opsahl J. Custers C.H.F. Polak J.A. Frowein G. Jörundsson R.J. Dupuy G. Tenekides S. Trechsel B. Kiernan N. Klecker
		<u>For the applicant</u>
		Mr T.M. Napier Mr L. Gostin Mr T. Smythe Mrs J. Murdie
		<u>For the Government</u>
		Mrs E.M. Denza Mr D.H. Anderson MM H. Woolf S. Ingram H. Knorpel L.A. Wood T. Williams A. Marshall Dr McGrath
Commission's deliberations and decision to declare the application admissible	14 May 1977	MM C.A. Nørgaard J.E.S. Fawcett E. Busuttil L. Kellberg T. Opsahl J. Custers C.H.F. Polak G. Jörundsson G. Tenekides S. Trechsel B. Kiernan

Item	Date	Note
2. <u>Examination of the merits.</u>		
Commission's deliberations and decision to adjourn further consideration of the case pending the outcome of the related application No 6301/73, <u>Winterwerp v. the Netherlands</u>	15 December 1977	MM G. Sperduti J.E.S. Fawcett C.A. Nørgaard F. Ermacora E. Busuttil L. Kellberg B. Daver T. Opsahl J. Custers C.H.F. Polak J.A. Frowein G. Jörundsson R.J. Dupuy S. Trechsel B. Kiernan N. Klecker
Date of Government's letter requesting an opportunity to address to the Commission further information and argument on the merits of the case	2 May 1978	
Commission's decision to invite the Government to submit their proposed observations	11 May 1978	MM G. Sperduti J.E.S Fawcett C.A. Nørgaard E. Busuttil L. Kellberg B. Daver T. Opsahl J. Custers J.A. Frowein G. Jörundsson R.J. Dupuy G. Tenekides S. Trechsel B. Kiernan
Date of submission of Government's observations on the merits	25 September 1978	
Date of letter from applicant's legal representative informing the Commission of the applicant's death on 17 January 1979	23 January 1979	

Item	Date	Note
Commission's decision to retain the application despite the applicant's death in view of the wishes of his next-of-kin to continue the application and the issues of general interest raised by the case	1 March 1979	MM G. Sperduti J.E.S. Fawcett C.A. Nørgaard E. Busuttil L. Kellberg B. Daver C.H.F. Polak G. Tenekides S. Trechsel B. Kiernan N. Klecker M. Melchior
Date of submission of applicant's observations on the merits	12 and 13 April 1979	
Commission's deliberations and decision to adjourn consideration of the case pending the delivery by the European Court of Human Rights of its judgment in the <u>Winterwerp</u> case on 24 October 1979	10 October 1979	MM G. Sperduti J.E.S. Fawcett C.A. Nørgaard E. Busuttil L. Kellberg B. Daver C.H.F. Polak J.A. Frowein S. Trechsel B. Kiernan N. Klecker M. Melchior
Commission's deliberations on merits and decision to initiate friendly settlement proceedings	5 December 1979	MM C.A. Nørgaard J.E.S. Fawcett G. Sperduti L. Kellberg B. Daver T. Opsahl C.H.F. Polak J.A. Frowein G. Tenekides S. Trechsel B. Kiernan N. Klecker M. Melchior

Item	Date	Note
	and 8 December 1979	MM C.A. Nørgaard J.E.S. Fawcett G. Sperduti B. Daver T. Opsahl C.H.F. Polak J.A. Frowein G. Tenekides S. Trechsel B. Kiernan N. Klecker M. Melchior
Commission's deliberations on merits and consideration of friendly settlement positions	11 March 1980	MM C.A. Nørgaard J.E.S. Fawcett G. Sperduti F. Ermacora E. Busuttil L. Kellberg B. Daver J.A. Frowein G. Jörundsson G. Tenekides S. Trechsel B. Kiernan N. Klecker M. Melchior J. Sampaio J.A. Carrillo
Commission's deliberations, final vote on the merits of the Art. 5 (1) and 5. (4) issues in the case	13 May 1980	MM C.A. Nørgaard J.E.S. Fawcett G. Sperduti E. Busuttil B. Daver T. Opsahl C.H.F. Polak J.A. Frowein G. Jörundsson R.J. Dupuy G. Tenekides S. Trechsel B. Kiernan N. Klecker M. Melchior J.A. Carrillo

Item	Date	Note
Commission's deliberations, final vote on the merits of the Art. 5 (2) issue in the case and adoption of the Report	16 July 1980	MM. C.A. Nørgaard F. Ermacora B. Daver C.H.F. Polak R.J. Dupuy S. Trechsel B. Kiernan N. Klecker M. Melchior J.A. Carrillo