

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

FOURTH SECTION

DECISION

Application no. 23543/11
Paul BLACK
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 1 July 2014 as a Chamber composed of:

Ineta Ziemele, *President,*
George Nicolaou,
Ledi Bianku,
Nona Tsotsoria,
Zdravka Kalaydjieva,
Paul Mahoney,
Faris Vehabović, *judges,*

and Françoise Elens-Passos, *Section Registrar,*

Having regard to the above application lodged on 5 April 2011,

Having regard to the declaration lodged by the respondent Government inviting the Court to strike part of the application out of its list and the applicant's reply to that declaration,

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

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Paul Black, is a British national who was born in 1959 is currently detained in HMP Wymott.

A. The circumstances of the case

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

3. In June 2007 the applicant was convicted of sexual assault following a guilty plea. He was sentenced to an indeterminate sentence for public protection with a tariff of six months and twenty-three days. He was detained at HMP Preston. His parole process commenced three weeks after sentence.

4. On 21 January 2008 the applicant's tariff expired.

5. On 3 March 2008 the Parole Board decided on the papers not to direct the applicant's release and not to recommend his transfer to open conditions. The applicant requested an oral hearing.

6. In April 2008 the applicant completed the Enhanced Thinking Skills ("ETS") course. However, he refused to participate in a post-programme review so was deemed to have failed the course.

7. On 28 August 2008 a Sentence Plan Board took place. The Board identified the Sex Offenders Treatment Programme ("SOTP") as a programme that the applicant had to complete to address his offending behaviour. It noted that he would have to transfer to another prison establishment in order to undertake the course.

8. On 14 October 2008, following an oral hearing, the Parole Board ruled that the applicant did not meet the test for release or transfer to open conditions. It noted that he had previous convictions, including convictions for sexual offences. It further noted that a risk assessment in September 2007 found him to be a medium risk of reconviction and a high risk of serious harm. The decision explained:

> "... At that time your sentence plan included being assessed for ETS, Alcohol Awareness, Victim Awareness and the SOTP. You had in fact commenced the SOTP during [a previous sentence] for rape but you had not completed it because you were removed from the programme following a physical confrontation with another course member ... [Y]ou refused to participate in any further courses and following your release you also refused to participate in any group programmes. You do accept that you needed to complete the programme but unfortunately the SOTP is not available at Preston where you have been held and because of a shortage of places at other establishments, it has not been possible to say when you might be transferred in order to do that programme."

9. The panel concluded that the applicant had to complete the SOTP before being released. It said:

> "... Until such time as you have demonstrated that you have fully addressed the issues which have led to your committing sexual offences the Panel are not persuaded that you have reduced your risk to a level which could safely be managed in the community ..."

10. On 28 October 2008 the applicant was transferred to HMP Channings Wood to participate in the SOTP.

11. On 24 November 2008 the applicant commenced the SOTP. The course was scheduled to last for six months.

12. By letter to the applicant dated 29 December 2008 the National Offender Management Service referred to the Parole Board decision and

identified outstanding risk factors requiring further work in closed conditions, namely thinking skills, sexual offending and alcohol abuse. It explained that the applicant's case would next be referred to the Parole Board for a provisional hearing to take place in April 2010. It said that the timetable would allow him to consolidate skills learned on the ETS course, to engage in offending behaviour work relating to sexual offending and to undertake any work deemed necessary on victim awareness and alcohol abuse.

13. In April 2009 the applicant completed the Alcohol Awareness course.

14. On 22 April 2009 the applicant was removed from the SOTP course because of alleged aggressive and hostile behaviour during one of the sessions. The applicant accepted having used inappropriate language but said that the words in question were uttered out of frustration and were not intended to offend. On 1 May 2009, he returned to HMP Preston.

15. The applicant's solicitors subsequently requested that his Parole Board review be brought forward to October 2009, since he had been removed from the SOTP. They suggested that completion of the SOTP was not necessary for the applicant's release. Meanwhile, the applicant applied to participate in the SOTP at HMP Wymott, beginning in January 2010.

16. By letter dated 16 June 2009 the National Offender Management Service ("NOMS") replied to the request that the hearing be brought forward. It noted that the applicant had been convicted of sexual assault and that in October 2008 the Parole Board had said that completion of the SOTP was required. NOMS considered that there was no benefit in bringing forward the review if offending work was outstanding. NOMS further noted that the applicant had applied to be selected for a course at HMP Wymott in January 2010 and concluded:

> "Unless Mr Black completes the SOTP the Secretary of State will not be persuaded that his risk has reduced to allow advancement of his parole review."

17. On 11 December 2009 the applicant was transferred to HMP Wymott. At HMP Wymott, the Healthy Relationships Programme ("HRP") was identified as a course which he should also complete.

18. In March 2010 the applicant commenced judicial review proceedings to challenge the continuing delay to provide him access to the SOTP. On 29 March 2010, the High Court judge stayed the proceedings on the basis that the applicant was imminently to be assessed for the next course at HMP Wymott due to commence in June 2010. He indicated that the proceedings would be formally struck out if the assessment took place and the applicant subsequently commenced the course as planned.

19. On 23 April 2010 the applicant was assessed as suitable for the SOTP.

20. On 28 June 2010 the applicant began the SOTP course. The course was due to be completed in early January 2011.

21. On 15 July 2010 the Parole Board issued intensive case management directions in preparation of the Parole Board hearing. It noted that the target month of the hearing being April 2010, directions would have to have been completed by January 2010. Since these dates had passed, it was necessary to defer the hearing to October 2010.

22. On 13 October 2010 the applicant's solicitor advised him that his Parole Board hearing had been set for 14 December 2010. The letter continued:

> "Given that you are in the process of completing SOTP at HMP Wymott, I would like your instructions on whether the hearing should go ahead on the day or whether you wish to request a deferral on the premise that you are part way through the course and the post programme reports etc are not due to be made available for a few months yet. There is a strong possibility that should the hearing take place on 14 December 2010 and no reports regarding your progress on the SOTP are available the Parole Board themselves may defer it as your situation technically remains unchanged from your last review."

23. The applicant duly instructed his solicitor to request deferral. The request was granted and the hearing was rescheduled for March 2011.

24. On 2 November 2010 the applicant was removed from the SOTP because he displayed aggressive and intimidating behaviour towards staff.

25. On 10 March 2011 the Parole Board Panel Chair issued directions requesting addendum to reports, and a Structured Assessment of Risk and Need report if the SOTP had been completed.

26. On 15 April 2011 a Parole Board hearing took place. By letter dated 21 April 2011 the applicant was informed that the Parole Board had decided not to recommend his release or transfer to open conditions. The Panel referred to the applicant's history of sexual offending. It also noted that he had completed the ETS and Alcohol Awareness Courses (although he had not attended the ETS review) and that his behaviour while in prison presented no problems. However, it continued:

> "You have yet to fully address your sexual offending and have now been deselected from the Sex Offenders Treatment Programme (SOTP) on three occasions ... Common themes of your inability to complete the SOTP are your aggressive and challenging behaviour, hostility to facilitators, disagreeing with feedback and wanting to dictate.
>
> ... [Y]our supervisor on the last SOTP told the panel the reasons for your de-selection were that you were not meeting any treatment gains, that you did not acknowledge your risk factors and your challenging behaviour ... [She] was of the opinion that there is a need for alternative ways to be formulated for you to address your sexual offending. In the SARN report completed by ... a prison psychologist she states that both the SOTP and Healthy Relationships Programme (HRP) are sentence plan targets. It is her view that a potential way forward would be for you to undertake the Therapeutic Community at HMP Grendon which would provide a holistic approach. However this will require you to self-refer and you told the panel that you would not undertake the Therapeutic Community or HRP, you stated that you would

like to take a programme that works for you. It would appear that there is no suitable one to one work available at HMP Wymott for you to undertake to address your sexual offending."

27. The panel concluded that although the applicant had completed some interventions, he had yet to address his sexual offending and had little insight into his risk factors. It found little evidence of a positive change in his beginning to address his offending behaviour and considered him to pose a high risk of serious harm to the public. Bearing in mind his past sexual and violent offending, the seriousness of the index offences and the applicant's past problems with alcohol use, it declined to direct release or transfer to open conditions. It recommended a full personality assessment with an appropriate professional.

28. A further Parole Board review took place on the papers on 12 January 2013. The Panel decided not to direct release or to recommend transfer to open conditions. It noted that in custody he had failed to complete the SOTP on three occasions and had now disengaged with his sentence planners, meaning that no further work had been completed since his 2011 Parole Board Review. It referred to the repeated attempts by the applicant's offender manager and offender supervisor to engage him in discussions concerning his risks and further essential work, and the applicant's refusal to discuss matters with his offender supervisor and to meet or respond to letters from his offender manager. It concluded that while the applicant refused to engage with attempts to help him address his risks or to consider further options, it was appropriate for him to remain in closed conditions. The panel emphasised the applicant's responsibility in working with professionals to reduce his high levels of risk.

B. Relevant domestic law and practice

29. The relevant domestic law and practice is set out in the Court's judgments in *James, Wells and Lee v. the United Kingdom*, nos. 25119/09, 57715/09 and 57877/09, 18 September 2012; and *Betteridge v. the United Kingdom*, no. 1497/10, 29 January 2013.

COMPLAINTS

30. The applicant complained under Article 5 § 4 of the Convention that the delay in holding the Parole Board review hearing, which had provisionally been scheduled for April 2010, did not comply with the "speediness" requirement in that Article.

31. He further alleged a breach of Article 5 § 1 as a consequence of the delay.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

32. The applicant complained that the delay in holding the Parole Board review hearing, which had provisionally been scheduled for April 2010, did not comply with the "speediness" requirement in that Article. He relied on under Article 5 § 4 of the Convention, which provides:

> "4. 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."

33. After the failure of attempts to reach a friendly settlement, by a letter of 21 February 2014 the Government informed the Court that they proposed to make a unilateral declaration with a view to resolving the issue raised by this part of the application. They further requested the Court to strike out the application in accordance with Article 37 of the Convention.

34. The declaration provided as follows:

> "1. The Government of the United Kingdom accept that, in the particular circumstances of this case, there has been a breach of the 'speediness' requirement of Article 5(4) of the Convention.
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> 2. The Government do so in the following circumstances:
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> i. A hearing of the Applicant's case before the Parole Board was provisionally fixed for April 2010. In order to prepare for that hearing, it would have been necessary for certain evidence gathering steps to have been completed by 23 November 2009.
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> ii. The necessary evidence was not gathered and the hearing did not take place in April 2010. Instead, in an Intensive Case Management Form dated 15 July 2010, the Parole Board issued new directions for the hearing of the Applicant's case with a revised target hearing date of October 2010.
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> iii. In fact, the Parole Board then set an actual hearing date of 14 December 2010.
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> iv. Prior to that hearing, however, the Applicant's solicitor invited the Parole Board to defer that the hearing. The Applicant and his solicitor were concerned that given that the Applicant was then participating in a Sex Offender Treatment Programme ('SOTP'), reports from that course would not be available to assist the Parole Board in its deliberations.
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> v. The Parole Board duly granted this deferral of the hearing. The Applicant then failed to complete the SOTP due to misbehaviour. The hearing before the Parole Board took place on 15 April 2011 and reports as to the Applicant's conduct during the SOTP were considered.
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> vi. In light of the above, the Government accept that the 'speediness' requirement of Article 5(4) of the Convention was not met between April 2010 (the original target date for the hearing of the Applicant's case) and December 2010 (the revised target date). Given that the Applicant asked for the deferral of his hearing from December, and then failed to complete the course which had prompted the request for that deferral, the duration of the breach of Article 5(4) was no more than 8 months.

> 3. As a result of recent decisions of the Court (Betteridge v the United Kingdom, no 1497/10, 29 January 2013) and the UK Supreme Court (R (Faulkner & Sturnham) v Secretary of State for Justice [2013] 2 AC 254 and R (Osborn) v Secretary of State for Justice [2013] UKSC 61), the Parole Board is currently undertaking substantial changes to the mechanism that it uses to manage and convene hearings.
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> 4. Accordingly, and in light of the above and the particular circumstances of this case, the Government offer to pay the Applicant the sum of EURO 450 to cover all pecuniary and non-pecuniary damage as well as costs and expenses and any tax payable to be paid in pounds sterling into a bank account nominated by the Applicant within 3 months from the date of the striking out decision of the Court pursuant to Article 37 of the Convention. The payment will constitute the final settlement of the Applicant's case as to Article 5(4) of the Convention."

35. By a letter of 12 April 2014, the applicant indicated that he was not satisfied with the terms of the unilateral declaration. He complained about the amount offered by the Government, contending that it was not adequate to compensate for an eight-month delay. He further referred to various delays which he alleged had occurred in his access to the SOTP course which he said caused further delay to his Parole Board hearing. He claimed that he had only agreed to the deferral of the Parole Board hearing scheduled to take place in December 2010 after being informed that deferral was in any event likely given his participation in the SOTP.

36. The Court recalls that Article 37 of the Convention provides that it may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to one of the conclusions specified, under (a), (b) or (c) of paragraph 1 of that Article. Article 37 § 1 (c) enables the Court in particular to strike a case out of its list if:

> "for any other reason established by the Court, it is no longer justified to continue the examination of the application".

37. It also recalls that in certain circumstances, it may strike out an application, or part thereof, under Article 37 § 1(c) on the basis of a unilateral declaration by a respondent Government even if the applicant wishes the examination of the case to be continued.

38. To this end, the Court will examine carefully the declaration in the light of the principles emerging from its case-law, in particular the *Tahsin Acar* judgment (*Tahsin Acar v. Turkey* (preliminary issue) [GC], no. 26307/95, §§ 75-77, ECHR 2003-VI; *WAZA Spółka z o.o. v. Poland* (dec.) no. 11602/02, 26 June 2007; and *Sulwińska v. Poland* (dec.) no. 28953/03).

39. The present case concerns an eight-month delay from April 2010, when his Parole Board hearing was supposed to take place, until December 2010, the scheduled date of the hearing. The Court considers the deferral of the hearing in December 2010 to have been fully justified and in the applicant's interests, given that at the time deferral was granted (on the applicant's request) he was expected to complete the SOTP and deferral

would have enabled the Parole Board to take the completion of that course into account.

40. The Court has, in its recent judgment in *Betteridge v. the United Kingdom*, no. 1497/10, 29 January 2013, established its practice concerning complaints about the violation of 5 § 4 as a consequence of a delay in a Parole Board review. Having regard to the nature of the admissions contained in the Government's declaration, as well as the amount of compensation proposed – which is consistent with the amounts awarded in similar cases – the Court considers that it is no longer justified to continue this part of the examination of the application (Article 37 § 1 (c)). Moreover, in light of the above considerations, and in particular given the clear and extensive case-law on the topic, the Court is satisfied that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue the examination of this part of the application (Article 37 § 1 *in fine*).

41. In the event of failure to pay within the three-month period stipulated in the partial unilateral declaration, simple interest shall be payable on the amount in question at a rate equal to the marginal lending rate of the European Central Bank plus three percentage points.

42. Finally, the Court emphasises that, should the Government fail to comply with the terms of their unilateral declaration, the application could be restored to the list in accordance with Article 37 § 2 of the Convention (*Josipović v. Serbia* (dec.), no. 18369/07, 4 March 2008).

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

43. The applicant alleged a breach of Article 5 § 1 as a consequence of the delay in his Parole Board hearing, which he contended was the consequence of the delay in affording him access to the SOTP. That Article provides, in so far as relevant:

> "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:
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> (a) the lawful detention of a person after conviction by a competent court ...."

44. Having regard to the nature of the initial submissions made by the applicant in his application form and to its judgment in *James, Wells and Lee*, cited above, the Court considers that this complaint raises an issue under Article 5 § 1 concerning timely access to rehabilitative courses.

A. The parties' submissions

45. The Government contended that the applicant had failed to exhaust domestic remedies since he had not commenced judicial review proceedings alleging a breach of Article 5 § 1 of the Convention.

46. In the alternative, they invited the Court to declare the applicant's complaint inadmissible as manifestly ill-founded. They emphasised that various attempts had been made to progress the applicant through the prison system. The applicant himself was responsible for his removal, on account of his disruptive behaviour, from a course which had been offered to him. It could therefore not be said that any period of time waiting for that course had been arbitrary and, unlike in *James, Wells and Lee*, cited above, it could not be said that the Government had failed to make provision for the course required. Proportionate resources had been made available; indeed, the applicant's partial participation in the course on three occasions had denied other prisoners, who might have engaged and completed the course, the opportunity to participate. The applicant had failed, and was continuing to refuse, to engage with the course and with prison staff.

47. The Government further noted that the applicant appeared to seek, in his written observations, to contest the facts surrounding his removal from the SOTP. In this respect, the Government invited the Court to rely on the factual findings of the Parole Board.

48. The applicant contested the Government's submission that he had failed to exhaust available remedies. He referred to advice received from his solicitor prior to lodging his application which counselled against judicial review proceedings.

49. The applicant further disputed that he had not properly engaged with the SOTP and invited the Government to clarify in what sense he had not engaged. He argued in particular that his failure to complete the SOTP during his previous term of imprisonment was irrelevant, since at that time he had been imprisoned pursuant to a determinate sentence and was therefore eligible for release without the intervention of the Parole Board and regardless of any courses completed.

50. The applicant further contended that contradictory reasons had been given for his removal from the SOTP in 2010 (see paragraph 26 above). He maintained that he had been removed solely because he was not meeting treatment aims and did not recognise his risk factors. He denied any misconduct on his part during the 2010 SOTP and provided his own account of the precise circumstances of his removal from the SOTP. He argued that his detention was arbitrary on account of his removal from the SOTP since completion of the course was required for his release. He argued that the question whether he was meeting his treatment aims or acknowledging risk factors out to have been addressed at the conclusion of the programme and not part-way through.

51. Finally, the applicant contended that since his removal from the SOTP, he had not been provided with access to any other course designed to reduce his risk.

B. The Court's assessment

52. The Court is satisfied that at the point at which the applicant lodged his application, the possibility of judicial review proceedings offered no prospect of success as regards systemic delay in access to rehabilitative courses in light of the House of Lords judgment in *James, Wells and Lee*, cited above, §§ 100-121. The Government's objection is accordingly dismissed in so far as it concerns the period of delay in accessing the SOTP about which the applicant complained at the time of lodging his application, namely delay from tariff expiry in January 2008 and until the April 2011 Parole Board hearing.

53. In *James, Wells and Lee*, cited above, § 209, the Court explained that in cases concerning indeterminate sentences of imprisonment for the protection of the public, a real opportunity for rehabilitation was a necessary element of any part of the detention which was to be justified solely by reference to public protection. It held that while Article 5 § 1 did not impose any absolute requirement for prisoners to have immediate access to all courses they might require, any restrictions or delays encountered as a result of resource considerations had to be reasonable in all the circumstances of the case, bearing in mind that whether a particular course was made available to a particular prisoner depended entirely on the actions of the authorities (see § 218 of the judgment). It found violations of Article 5 § 1 of the Convention in respect of the three applicants following the expiry of their tariff periods and until steps were taken to progress them through the prison system with a view to providing them with access to appropriate rehabilitative courses (§ 221 of the judgment).

54. As the Court explained in *James, Wells and Lee*, cited above, § 201, in examining whether an applicant's detention post-tariff has been unjustified for the purposes of Article 5 § 1 (a) of the Convention it "must have regard to the detention as a whole". Thus, where, as in the present case, the applicant claims that delay in his access to prison courses constituted a violation of Article 5 § 1 (a), the applicant's general progression through the prison system must be assessed in light of the particular circumstances of the case see *Hall v. the United Kingdom* (dec.), no. 24712/12, § 32, 12 November 2013).

55. It is clear from the papers before the Court that the applicant was able to participate in rehabilitative courses throughout his detention. In April 2008, shortly after tariff expiry, he completed the ETS course (see paragraph 6 above). In April 2009 he completed an Alcohol Awareness course (see paragraph 13 above).

56. As regards the SOTP, about which the applicant specifically complains, this was identified as a suitable course for him as early as August 2008 (see paragraph 7 above). Despite having been removed from the SOTP, during a previous sentence, for aggressive behaviour (see paragraph 14 above), he was transferred to a prison establishment offering the course two months later, in October 2008, and commenced the course a month after that (see paragraphs 10-11 above). In April 2009 he was removed from the course prior to completion because of aggressive and hostile behaviour (see paragraph 14 above). A year later, he was once again assessed as suitable for the course and he commenced it two months after that assessment (see paragraphs 19-20 above). Again, he was removed from the course – in November 2010 – for aggressive and intimidating behaviour (see paragraph 24 above).

57. The facts of the applicant's case show that, unlike the applicants in *James, Wells and Lee*, cited above, he was provided with timely access to the prison course required for him to show a reduction in his risk. His removal from the course in 2009 was the consequence of his own disruptive behaviour. Having failed to complete the course on this occasion, and having regard to resource issues in respect of the provision of prison courses, it was not unreasonable that he was not offered another opportunity to participate in the course until a year later. Having once again been removed from the course for aggressive behaviour, his detention did not become unjustified as a consequence of the failure to provide him with yet another opportunity to participate prior to his Parole Board hearing in April 2011.

58. The applicant has contested the reasons given for his removal from the SOTP course. However, it is not the Court's task to substitute its own assessment of the facts for that of the relevant domestic decision-making body (see, *mutatis mutandis*, *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 61, ECHR 2012). In the present case, the Parole Board examined the applicant's case in detail more than once and following oral hearings. It was satisfied that the applicant's removal from the SOTP, once during his previous sentence and twice during his present one was, on each occasion, the result of his own conduct (see paragraphs 8 and 26 above). In its decision of April 2011, it noted that the common themes of his inability to complete the SOTP were his aggressive and challenging behaviour, hostility to facilitators, disagreement with feedback and desire to dictate (see paragraph 26 above). The applicant has not provided any cogent reasons for the Court to depart from these findings.

59. The Court is accordingly satisfied that a real opportunity for rehabilitation was provided to the applicant during the period following the expiry of his tariff and up until April 2011 and that any restrictions on his access to the SOTP were reasonable, having regard to all the circumstances

of his detention and his own negative conduct. His complaint under Article 5 § 1 is accordingly manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must be declared inadmissible pursuant to Article 35 § 4.

60. In so far as the applicant, in his written submissions of April 2014, seeks to complain about any continuing delay in access to appropriate courses, he has failed to provide any reason to explain why judicial review proceedings, in which it would be open to him to invite the domestic courts to consider the circumstances of his individual case in the light of this Court's judgment in *James, Wells and Lee*, would not be effective. In these circumstances, this complaint must be declared inadmissible pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court unanimously

Takes note of the terms of the respondent Government's declaration in respect of the complaint under Article 5 § 4 of the Convention and of the modalities for ensuring compliance with the undertakings referred to therein;

Decides to strike the application out of its list of cases in so far as it relates to the above complaint in accordance with Article 37 § 1 (c) of the Convention;

Declares the remainder of the application inadmissible.

Françoise Elens-Passos
Registrar

Ineta Ziemele
President