

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

FOURTH SECTION

DECISION

Application no. 6017/11
Momčilo KRAJISNIK
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 23 October 2012 as a Chamber composed of:

Lech Garlicki, *President,*
Nicolas Bratza,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Vincent A. De Gaetano, *judges,*

and Lawrence Early, *Section Registrar,*

Having regard to the above application lodged on 20 January 2011,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Momčilo Krajišnik, is a Bosnia and Herzegovina national who was born in 1945 and is currently detained at HM Prison Belmarsh. He was represented before the Court by Bhatt Murphy Solicitors, a firm of solicitors based in London.

A. The circumstances of the case

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



1. The background facts

3. In September 1990 the applicant was elected to the Bosnia-Herzegovina Assembly as a member of the Serbian Democratic Party ("SDS"). In December 1990 he became the President of the Assembly pursuant to a power-sharing agreement between the three principal political parties.

4. In October 1991, the Bosnia-Herzegovina Assembly, in the absence of the applicant, adopted a declaration asserting the sovereignty of Bosnia-Herzegovina. The SDS subsequently established the Assembly of the Serbian People of Bosnia-Herzegovina ("the Bosnian-Serb Assembly"). The applicant was elected President of the Bosnian-Serb Assembly. He remained President of the Bosnian-Serb Assembly until November 1995. He was also a member of the National Security Council and, from 12 May until 17 December 1992, he was an active member of the Presidency of the Bosnian-Serb Republic.

5. On 21 February 2000 an indictment was first issued against the applicant by the International Criminal Tribunal for the former Yugoslavia ("ICTY") in the Hague.

6. The applicant was arrested on 3 April 2000 by the Stabilisation Force in Sarajevo and transferred to the Hague on the same day.

2. The proceedings before the ICTY

7. In an amended indictment dated 7 March 2002 the applicant was charged with eight counts, including genocide and complicity in genocide, persecution, extermination, murder, deportation and inhumane acts. Criminal responsibility was charged under Articles 7(1) and 7(3) of the Statute of the ICTY (see paragraph 30 below). The Prosecutor alleged that the applicant had participated, as a co-perpetrator or aider and abettor, in a joint criminal enterprise which had as its objective the permanent removal, by force or other means, of Bosnian Muslims and Bosnian Croats from large portions of Bosnia-Herzegovina through the commission of the crimes mentioned above. The crimes were alleged to have taken place in all thirty-five municipalities of Bosnia-Herzegovina between 1 July 1991 and 30 December 1992.

8. On 27 September 2006 the Trial Chamber of the ICTY found the applicant responsible, pursuant to Article 7(1) of the ICTY Statute, for participating in a joint criminal enterprise to achieve the permanent removal of Bosnian Muslims and Bosnian Croats from large portions of Bosnia-Herzegovina through the commission of crimes. It convicted the applicant of five counts of crimes against humanity under Article 5 of the ICTY Statute (see paragraph 29 below), namely persecution, extermination, murder, deportation and inhumane acts (forcible transfer). He was sentenced

to twenty-seven years' imprisonment, but granted credit for the time spent in detention, which at the date of judgment amounted to 2,369 days.

9. The prosecution filed an appeal against the applicant's sentence on 26 October 2006. On 12 February 2007 the applicant filed a notice of appeal arguing that his convictions should be quashed or that a re-trial should be ordered. An *amicus curiae* was appointed by the Appeals Chamber and, on 8 June 2007, he also filed a notice of appeal arguing for the quashing of the convictions or a retrial. The appeals were heard on 21 August 2008.

10. On 17 March 2009 the Appeals Chamber allowed some of the grounds of appeal lodged by the applicant and by the *amicus curiae*. It reversed many of the applicant's convictions for persecution, extermination, murder and deportation. However, it upheld his convictions for crimes against humanity in respect of specific instances of persecution, deportation and inhumane acts (forcible transfer). As to whether a retrial should be ordered, the judgment of the Appeals Chamber noted:

> "799. ... [T]he convictions for the majority of crimes, of which Krajišnik had been found guilty, have been quashed. However, convictions for persecution, deportation and forcible transfer have been upheld, and the gravity of these crimes requires a severe and proportionate sentence. Therefore, in the circumstances of this particular case, the Appeals Chamber considers that it is not in the interests of justice to remit the case for further proceedings."

11. The Appeals Chamber considered the various relevant factors set out in Article 24 of the ICTY Statute and Rule 101 of the Rules of Procedure and Evidence ("the Rules") in determining the appropriate length of sentence (see paragraphs 10-11, 31 and 38 below). It noted *inter alia* that the crimes of which the applicant had been found guilty were among the most severe crimes known to mankind. It further identified relevant aggravating and mitigating features. The Appeals Chamber imposed a sentence of twenty years' imprisonment, subject to credit for the time spent in detention, which at the date of the appeal judgment amounted to 3,271 days.

12. The applicant remained in detention in the Hague throughout the trial and appeal proceedings.

3. The transfer to the United Kingdom

13. On 4 September 2009 the applicant was transferred to the United Kingdom to serve his sentence pursuant to an order of the President of the ICTY dated 24 April 2009. His transfer was governed by an agreement between the United Nations and the United Kingdom ("the UN-UK agreement on enforcement of sentences" – see paragraphs 34-37 below).

14. Pursuant to the terms of the agreement, the United Kingdom was bound by the duration of the sentence imposed and the conditions of imprisonment were governed by the law of the United Kingdom, subject to the supervision of the ICTY.

15. The UN-UK agreement on enforcement of sentences and the ICTY Statute provided that the United Kingdom was required to notify the ICTY if, pursuant to its law, the applicant became eligible for early release. The decision on early release would be taken by the President of the ICTY on the basis of the interests of justice and the general principles of law.

4. The request for early release

16. On 16 March 2010 the ICTY was notified by the United Kingdom authorities that the applicant would be eligible on 2 April 2010 for consideration for release on parole licence, after having served half of his sentence. A Seconded Probation Report dated 24 February 2010, a Sentence Planning and Review Report dated 25 February 2010 and a Prison Assessment for the Parole Board dated 9 February 2010 were attached to the notification. These were forwarded by the ICTY to the applicant for comment.

17. The applicant made submissions in reply, referring to the terms of the ICTY Practice Direction on the procedure for determining applications for pardon, commutation of sentence and early release (see paragraphs 41-42 below). He emphasised that he had been acquitted of charges of extermination, murder, genocide and complicity in murder in breach of the rules and conventions of war. He referred to the sentence imposed on, and time spent in detention by, his co-accused at trial, for the purposes of comparison. He also expressed remorse for the crimes committed and indicated his willingness to co-operate with the ICTY Prosecutor. Finally, he emphasised that his behaviour while in detention had been excellent.

18. The President of the ICTY handed down his decision on the applicant's early release on 26 July 2010. He noted at the outset that although the applicant had served more than half of his sentence, it was the practice of the ICTY to consider convicted persons to be eligible for early release when they had served at least two thirds of their sentences. In the applicant's case, this would be on 3 August 2013.

19. The President examined each of the factors set out in the Practice Direction on early release in turn. As regards comparison with similarly-situated prisoners, he rejected the applicant's suggestion that the case of his co-accused supported his early release, observing that his co-accused had, unlike the applicant, entered into a plea agreement with the prosecution and had served at least two thirds of her sentence when she was released.

20. As regards the gravity of the applicant's crimes, the President referred to the Appeals Chamber's finding that the convictions were among the most severe crimes known to mankind and that their gravity required a severe and proportionate sentence. He concluded that the very high gravity of the applicant's offences was a factor that weighed against his early release.

21. In so far as rehabilitation was concerned, the President reviewed the applicant's behaviour while in prison, his statements of remorse and the information he had provided regarding his plans post-release. He found that the applicant had demonstrated some rehabilitation, which militated in favour of his early release.

22. Finally, concerning cooperation with the Prosecutor, the President found the applicant's assertion that he had assisted the Prosecutor by providing documents and encouraging officials to give statements to be unsubstantiated. It could not therefore be considered a positive factor in respect of his early release. The applicant's willingness to assist post-conviction was, in the absence of any instance where his assistance had been requested, found to be a neutral factor.

23. The President concluded:

> "33. While Mr. Krajišnik has displayed some evidence of rehabilitation, I am of the view that there remain significant factors that weigh against granting him early release. Mr. Krajišnik's crimes are of a very high gravity, involving a widespread displacement of the non-Serb population in Bosnia and Herzegovina, which caused great suffering. Moreover, in respect of the requirement that the President shall take into account the treatment of similarly-situated prisoners, the practice of the Tribunal is to consider the eligibility of a convicted person only after he has served two-thirds of his sentence; therefore, the fact that Mr. Krajišnik has only recently completed serving half of his sentence does not weigh in favour of his early release.
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> 34. Taking all of the foregoing into account and having considered those factors identified in Rule 125 of the Rules [see paragraph 40 below], I am of the view that Mr. Krajišnik should not be granted early release.
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> 35. I note that my colleagues unanimously share my view that Mr. Krajišnik should be denied early release."

24. No appeal was possible against the President's decision.

B. Relevant law and practice

1. The law in the United Kingdom concerning early release

25. At the relevant time, section 33(2) of the Criminal Justice Act 1991 provided that as soon as a long-term prisoner had served two thirds of his sentence, it would be the duty of the Secretary of State to release him on licence. Section 33(5) defined "long-term" prisoner as a person serving a sentence of imprisonment for a term of four years or more.

26. Section 35 provided to the Secretary of State an additional discretionary power to release long-term prisoners before the two-thirds point of their sentence and provided that:

> "(1) After a long-term prisoner has served one-half of his sentence, the Secretary of State may, if recommended to do so by the [Parole] Board, release him on licence."

27. Under the Parole Board (Transfer of Functions) Order 1998 the Secretary of State transformed his section 35 discretion to release long-term prisoners serving a sentence of imprisonment for a term of less than fifteen years into a duty. For those serving sentences of fifteen years or more, the Secretary of State retained his discretion to order early release after the half-way point and before two thirds of the sentence had been served.

2. The ICTY Statute

28. Article 1 of the Statute provides that the ICTY has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

29. Article 5 provides:

> "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
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> (a) murder;
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> (b) extermination;
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> (c) enslavement;
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> (d) deportation;
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> (e) imprisonment;
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> (f) torture;
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> (g) rape;
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> (h) persecutions on political, racial and religious grounds;
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> (i) other inhumane acts."

30. Pursuant to Article 7(1), a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in, *inter alia*, Article 5 is to be considered individually responsible for the crime. Article 7(3) provides that the fact that any of the relevant acts were committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts, or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

31. Article 24 sets out factors relevant to determining the appropriate length of sentence. It provides that the ICTY must have recourse to the general practice regarding prison sentences in the courts of the former

Yugoslavia and should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

32. Article 27 addresses enforcement of sentences and provides that imprisonment will be served in a State designated by the ICTY from a list of States which have indicated their willingness to accept convicted persons. It further provides that such imprisonment will be in accordance with the applicable law of the State concerned, subject to the supervision of the ICTY.

33. Article 28 deals with pardon or commutation of sentences. It provides:

> "If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law."

3. The Agreement between the United Nations and the Government of the United Kingdom of Great Britain and Northern Ireland on the Enforcement of Sentences of the International Criminal Tribunal for former Yugoslavia, 11 March 2004

34. The UN-UK agreement on enforcement of sentences was adopted following the United Kingdom's confirmation of its willingness, pursuant to Article 27 of the ICTY Statute, to enforce sentences imposed by the ICTY.

35. Article 3 of the Agreement provides:

> "1. In enforcing the sentence pronounced by the International Tribunal, the competent national authorities of the United Kingdom shall be bound by the duration of the sentence.
>
> 2. The conditions of imprisonment shall be governed by the law of the United Kingdom, subject to the supervision of the International Tribunal ...
>
> 3. The conditions of imprisonment shall be equivalent to those applicable to prisoners serving sentences under the law of the United Kingdom and shall be in accordance with relevant human rights standards."

36. Pursuant to Article 7(1)(d) the United Kingdom is required to notify the registrar of the ICTY six months prior to the point at which early release would be considered for an equivalent domestic sentence in the jurisdiction of the United Kingdom.

37. Article 8 of the agreement, which deals with early release, pardon or commutation of sentence, provides:

> "1. If, pursuant to the applicable national law of the United Kingdom, the sentenced person is eligible for early release, pardon or commutation of the sentence, the United Kingdom shall notify this to the Registrar, in advance of such eligibility, and shall include in any such notification all the circumstances pertaining to the eligibility for early release, pardon or commutation of the sentence.

> 2. The President of the International Tribunal shall determine, in consultation with the Judges of the International Tribunal, whether any early release, pardon or commutation of the sentence is appropriate ... If the President determines that an early release, pardon or commutation of the sentence is not appropriate, the United Kingdom shall act accordingly."

4. Rules of Procedure and Evidence of the ICTY

38. Rule 101 sets out the factors relevant to determining the appropriate length of sentence, namely the factors to which Article 24 of the State refers; any aggravating or mitigating circumstances, including substantial cooperation with the Prosecutor before or after conviction; the general practice regarding prison sentences in the courts of the former Yugoslavia; and the extent to which any penalty imposed by a court of any State for the same act has already been served. Credit must be given for time spent in pre-trial detention.

39. Part nine of the Rules makes provision for pardon and commutation of sentences. Rule 123 requires the State of imprisonment to notify the ICTY, in accordance with Article 28 of the ICTY Statute, if a convicted person is eligible for pardon or commutation of sentence. Pursuant to Rule 124, the President shall determine whether pardon or commutation is appropriate.

40. Rule 125 provides:

> "In determining whether pardon or commutation is appropriate, the President shall take into account, *inter alia*, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor."

5. The Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted at the International Tribunal

41. The President of the ICTY, after consultation with other judges, the prosecutor and the registrar, issued the Practice Direction on early release in order to establish an internal procedure for the determination of applications for pardon, commutation of sentence, and early release of persons convicted by the tribunal.

42. The Practice Direction provides that the State of imprisonment is required, where practicable, to notify the ICTY at least forty-five days prior to the date on which a convicted person becomes eligible for early release. The Practice Direction also sets out the applicable procedure and includes guidance on requests for reports, participation of the convicted person and consultation with other judges.

43. Paragraph 8 of the Practice Direction explains that the President shall determine whether to grant early release having regard to the criteria

specified in Rule 125 of the Rules and any other relevant information, and after consultation with other judges.

6. Recommendation Rec (2003) 22 of the Committee of Ministers of the Council of Europe on conditional release (parole)

44. The appendix to the Council of Europe's Recommendation on conditional release contains principles intended to guide States in their legislation, policies and practice on conditional release.

45. Principle 18 provides:

> "The criteria that prisoners have to fulfil in order to be conditionally released should be clear and explicit. They should also be realistic in the sense that they should take into account the prisoners' personalities and social and economic circumstances as well as the availability of resettlement programmes."

46. Principle 20 provides:

> "The criteria for granting conditional release should be applied so as to grant conditional release to all prisoners who are considered as meeting the minimum level of safeguards for becoming law abiding citizens. It should be incumbent on the authorities to show that a prisoner has not reached that level."

47. Paragraph 18 of the Explanatory Memorandum accompanying the Recommendation notes:

> "In a discretionary release system the most important decision to be made is which criteria will be used to determine whether a prisoner can or cannot be granted release. The primary aim of these criteria should be to identify those prisoners who can be released without posing an unbearable risk to safety in the community. Whether and which of these criteria have been fulfilled will also be a relevant consideration in deciding on the conditions or supervision measures to be imposed. The personality and socio-economic circumstances of the prisoner should always be taken into account.
>
> The criteria should be clear and explicit so as to avoid erratic decisions or disparities in decision-making. This requirement is also in the interest of the prisoners and the staff involved in the preparation of release. The lack of clear and explicit criteria might lead to reduced confidence in the system and less motivation on the part of prisoners to participate actively in the preparation for conditional release.
>
> A similar lack of confidence or motivation would be produced if the criteria were felt to be unrealistic, in other words, impossible to fulfil given the prisoner's personal and social circumstances (such as age, family situation, health, professional qualifications etc) and the unavailability of resettlement programmes
>
> Care should also be taken to avoid criteria that are too closely related to the type of the offence committed, or the dangerousness of the offender at the start of his/her prison sentence. It has to be recalled that such criteria have already been used to decide on the length of the sentence and the classification and sentence plan of the prisoner. The decision to grant conditional release should be based on realistic criteria related to the present situation and prospects of the prisoner."

COMPLAINTS

The applicant complained under Article 5 §§ 1 (a) and 4 of the Convention that in delegating all decisions regarding his early release to the President of the ICTY and continuing to detain him, the United Kingdom failed adequately to secure his rights under the Convention.

The applicant also complained of a violation of Article 14 of the Convention, read in conjunction with Article 5 § 4, because he was subject to less favourable treatment compared to others imprisoned in the United Kingdom.

THE LAW

A. Complaint under Article 5 §§ 1 (a) and 4 of the Convention.

48. The applicant alleged that the ICTY President's approach to early release, which he said focused on the gravity of his crimes and the general practice to release after two thirds of the sentence had been served, was inconsistent with the requirements of Article 5 §§ 1 (a) and 4 of the Convention, which provide:

> "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; ...
>
> 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."

49. The applicant argued that while it was not necessary for States to adopt an early release scheme in order to comply with Article 5, any scheme adopted was required to comply with the terms of that Article. In his case there was no evidence of dangerousness and the President's decision to focus on the severity of the crimes was arbitrary. By enforcing the sentence imposed by the ICTY and allowing the President of the ICTY to decide on early release, the respondent State had failed in its obligations under the Convention. He referred, *inter alia*, to the Council of Europe Recommendation on conditional release (see paragraphs 44-47 above) and to the cases of *Clift v. the United Kingdom*, no. 7205/07, §§ 74-77, 13 July 2010 and *Gębura v. Poland*, no. 63131/00, §§ 27-29, 6 March 2007 in support of his claim.

1. The complaint under Article 5 § 1 (a)

50. The Court notes at the outset that the applicant is being detained in the United Kingdom by the British authorities. Although the mandate for the detention was issued by the ICTY, a tribunal established by the Security Council in accordance with Chapter VII of the UN Charter, the Court is satisfied that the acts about which the applicant complains are his continued detention by the British authorities and their *de facto* delegation of the decision on his early release to the President of the ICTY. The complaint therefore falls within the jurisdiction of the respondent State.

51. The Court has consistently held that Article 5 of the Convention does not guarantee a right to automatic parole (*Gerger v. Turkey* [GC], no. 24919/94, § 69, 8 July 1999; and *Clift*, cited above, § 42). Similarly, the Convention does not create any particular right to have access to a pre-release scheme (see *Estrikh v. Latvia*, no. 73819/01, § 84, 18 January 2007; *Bullivant v. the United Kingdom* (dec.), no. 45738/99, 28 March 2000; and *Csoszánszki v. Sweden* (dec.), no. 22318/02, 27 June 2006).

52. It can be seen from the details provided as to the nature of the applicant's complaint that he does not challenge the compliance of his continued detention with domestic law, nor does he dispute the existence of a causal connection between his conviction and the deprivation of liberty at issue. His complaints focus on the alleged arbitrariness of his continued detention. The Court will therefore examine whether the deprivation of liberty in his case is arbitrary, within the meaning of Article 5 § 1 of the Convention.

53. The Court has previously indicated that arbitrariness may arise where there has been an element of bad faith or deception on the part of the authorities; where the order to detain and the execution of the detention did not genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1; where there was no connection between the ground of permitted deprivation of liberty relied on and the place and conditions of detention; and where there was no relationship of proportionality between the ground of detention relied upon and the detention in question (see *Saadi*, cited above, § 69; and *James, Wells and Lee v. the United Kingdom*, nos. 25119/09, 57715/09 and 57877/09, §§ 192 195, 18 September 2012 (not yet final) and the references therein). The applicant has not argued that any of these elements are present in his case, and the Court does not consider them to be so present.

54. It remains to be examined, therefore, whether there are any other indications of arbitrariness in the applicant's case arising as a result of the role of the President of the ICTY in deciding on the applicant's early release or the reasons given for his decision. In assessing the question of arbitrariness, the Court reiterates that the Convention cannot be interpreted in a vacuum but should so far as possible be interpreted in harmony with other rules of international law of which it forms part (see *Al-Adsani v. the*

United Kingdom [GC], no. 35763/97, § 55, ECHR 2001-XI; *Csoszánszki v. Sweden* (dec.), no. 22318/02, 27 June 2006; and *Rantsev v. Cyprus and Russia*, no. 25965/04, § 274, ECHR 2010 (extracts)). In the present case, the Court must, in particular, take into account the special position of the ICTY as well as its rules and procedures, and the UN-UK agreement on enforcement of sentences, which regulated the applicant's transfer to and detention in the United Kingdom. The applicant has also referred to the need to have regard to the terms of the Council of Europe's Recommendation on conditional release (see paragraphs 44-47 above)

55. The Court notes that in the applicant's case, the "competent court" for the purposes of Article 5 § 1 (a) was the ICTY, an international criminal tribunal established under the auspices of the UN Security Council. Under its Statute, the ICTY has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 (see paragraph 28 above). The sentences imposed on those convicted reflect the gravity of their offences – after taking into account any aggravating or mitigating factors – and the ICTY is required to have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia (see paragraphs 31 and 38 above). This requirement ensures consistency in sentences imposed by the ICTY on different defendants, which the Court considers to be vital in the interest of fairness and justice in the context of the crimes against humanity which fall within the ICTY's mandate (see paragraph 29 above).

56. As a consequence of its international nature, certain specificities as regards post-conviction detention arise. In particular, the need for penal establishments in which those convicted could serve their sentence necessitated the participation of States themselves in the arrangement for the enforcement and supervision of sentences. The United Kingdom duly entered into an agreement with the UN to enforce sentences imposed by the ICTY, and the applicant was transferred to the United Kingdom pursuant to that agreement.

57. However, the transfer of a prisoner pursuant to such an agreement cannot be likened to the transfer of prisoners between a convicting and a receiving State under bilateral and multilateral prisoner transfer treaties. In the latter case, the sentence could be enforced in the convicting State but the detainee's transfer to another State, usually his home State, is arranged to accommodate his own wishes or pursuant to a deportation order of the convicting State. Because such transfers are optional, in the sense that if not effected the sentence can nonetheless continue to be enforced in the convicting State, there is generally some scope for conversion of sentences; and the enforcement of the sentence, including questions of early release, is usually a matter solely for the receiving State (see, for example, Articles 3 and 9-12 of the Council of Europe Convention on the Transfer of Sentenced Persons 1983 and Article 3 of the Additional Protocol, set out in

Csoszánszki, cited above). If the convicting State is not satisfied with the proposed arrangements in the receiving State, it can refuse to allow the transfer. In the former case however, as the Court has explained, the transfer is required in order for the sentence to be enforced. In agreeing to accept persons convicted by the ICTY, receiving States are in essence agreeing to act, in respect of those prisoners, as penal establishments of the ICTY. In these circumstances, and given the gravity of the offences leading to a conviction by the ICTY, it is not unreasonable that the link between the ICTY and the supervision of the enforcement of the sentence is maintained after transfer.

58. Under the ICTY Statute, the Rules and the Practice Direction on early release, provision is made for the possibility of pardon, commutation of sentence or early release (see paragraphs 33, 39-40 and 41-43 above). This is governed by a hybrid scheme under which eligibility for pardon, commutation of sentence or early release is determined by the law of the receiving State but the final decision on whether it should be granted in a particular case is taken by the President of the ICTY. It is therefore clear that in receiving States where there is no possibility of pardon, commutation of sentence or early release, a convicted person will be required to serve his full term of imprisonment. It is equally clear that the date of eligibility for early release in the case of a particular applicant is likely to vary depending on the State to which he is transferred to serve his sentence. If the decision on early release were delegated to the receiving State, the consistency of sentences and detention would risk being seriously undermined in light of the different practices and approaches prevailing. The Court is accordingly satisfied that the reasons for reserving to the President of the ICTY the final decision on matters of early release are compelling and that there is no evidence of any arbitrariness in this approach.

59. As to the specific reasons for the refusal of early release in the applicant's case, the Court similarly considers that no arbitrariness is disclosed. The ICTY Statute provides that the President will decide on requests for pardon and commutation on the basis of the interests of justice and the general principles of law (see paragraph 33 above). The specific factors which will be taken into account by the President are identified in the Rules, and include the gravity of the crimes, the treatment of similarly-situated prisoners, demonstration of rehabilitation and evidence of cooperation with the ICTY Prosecutor (see paragraph 40 above). These factors appear both pertinent and reasonable, and were the factors to which the President expressly referred in his decision on the applicant's early release (see paragraphs 18-23 above). Nor can the factors be said to be inconsistent with the terms of the Council of Europe's Recommendation on conditional release: they are clearly and explicitly set out in Article 27 of the ICTY Statute and in Rule 125 and cover a range of elements, of which the gravity of the crimes is only one.

60. A Practice Direction on early release has been issued by the President of the ICTY in order to establish an internal procedure for determining applications for early release (see paragraph 41-43 above). This provides some further guidance on how the procedure for early release operates in practice. It further appears from the documents submitted by the applicant that a general practice has developed to consider early release only when two thirds of the sentence has been served (see paragraph 18 above). This approach again promotes consistency in the treatment of persons convicted by the ICTY who are serving their sentences in a number of different States. The identification of a specific point at which early release is more likely to be granted reflects the similar approach to early release in domestic systems, including the United Kingdom, with additional flexibility in that the general practice of the ICTY is merely one of a number of factors to be considered by the President in determining a request for early release, as can be seen by the President's approach in the applicant's case (see paragraphs 18-23 above).

61. In these circumstances, the continued detention of the applicant by the United Kingdom cannot be said to be arbitrary within the meaning of Article 5 § 1 (a). The applicant's complaint is therefore inadmissible pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

2. The complaint under Article 5 § 4

62. The Court observes that a fixed-term sentence of twenty years' imprisonment was imposed on the applicant by the Appeals Chamber. In determining the appropriate length of the sentence, the Appeals Chamber referred chiefly to the gravity of the crimes (see paragraphs 10-11 above). In particular, it made no reference to considerations of risk or public safety in determining the length of sentence to impose.

63. Where an applicant is convicted and sentenced by a competent court to a determinate term of imprisonment for the purposes of punishment, the review of the lawfulness of detention required by Article 5 § 4 is incorporated in the decision depriving the applicant of his liberty at the close of the judicial proceedings (see *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 76, Series A no. 12; *Mansell v. the United Kingdom*, no. 32072/96, Commission decision of 2 July 1997, unreported; *Brown v. the United Kingdom* (dec.), no. 968/04, 26 October 2004; and *Iorgov v. Bulgaria (no. 2)*, no. 36295/02, § 72, 2 September 2010).

64. Further, in the present case the applicant has not shown that the grounds relied on by the Appeals Chamber when deciding the length of sentence to impose on him were by their nature susceptible of change with the passage of time (compare *Weeks*, cited above, § 58; *Thynne, Wilson and Gunnell v. the United Kingdom*, 25 October 1990, § 76, Series A no. 190-A; and *Stafford*, cited above, § 87)). No new issues of lawfulness concerning the basis of the applicant's detention therefore arise.

65. It follows that the judicial control required by Article 5 § 4 of the Convention was incorporated in the original conviction and sentence by the ICTY. This complaint is accordingly manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

B. Complaint under Article 14 taken in conjunction Article 5 § 4

66. The applicant argued that provisions for early release fell within the ambit of Article 5 § 4. He claimed that he was placed in an entirely different position as regards early release compared to British nationals imprisoned in the United Kingdom, as a result of his status as a person convicted by the ICTY.

67. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

68. The Court has previously indicated that where procedures relating to the release of prisoners appear to operate in a discriminatory manner, this may raise issues under Article 5 of the Convention taken together with Article 14 (see *Webster v. the United Kingdom*, no. 12118/86, Commission Decision of 4 March 1987, unreported; and *Gerger*, cited above, § 69; and *Clift*, cited above, § 42)

69. The Court reiterates that Article 14 does not prohibit all differences in treatment but only those differences based on an identifiable, objective or personal characteristic, or "status", by which persons or groups of persons are distinguishable from one another (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, §§ 61 and 70, ECHR 2010; and *Clift*, cited above, § 55). In order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (see *Carson*, cited above, § 61; and *Clift*, cited above, § 66). A difference of treatment is discriminatory if it has no objective and reasonable justification, in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

70. The Court observes at the outset that the applicant claims that he is being treated differently to British nationals imprisoned in the United Kingdom. However, he has failed to demonstrate any difference in treatment between him and British nationals convicted by the ICTY who are imprisoned in the United Kingdom. Having regard to the arguments he has advanced and the legal provisions to which he has referred, the Court is satisfied that the applicant is in fact alleging a difference in treatment between him and those detained in prisons in the United Kingdom a

conviction by a British court. It will therefore assess his complaint in this context.

71. In the present case the applicant relied on his status as a prisoner convicted by the ICTY. The Court is content to accept that this constituted "other status" for the purposes of Article 14.

72. However, for the reasons set out in respect of the applicant's complaint under Article 5 § 1 (a) of the Convention (see paragraphs 55-59 above), the Court does not consider that the applicant was in an analogous situation to those convicted by British courts.

73. This complaint must therefore be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Lawrence Early
Registrar

Lech Garlicki
President