CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 72219/01
by Michael John WARDLE
against the United Kingdom

The European Court of Human Rights (Third Section), sitting on 27 March 2003 as a Chamber composed of

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Sir Nicolas BRATZA,
Mr P. KŪRIS,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN,
Mr K. TRAJA, *judges*,
Mr M. VILLIGER, *Deputy Section Registrar*,

Having regard to the above application lodged on 17 July 2001,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Michael John Wardle, is a national of the United Kingdom, who was born in 1975. He is currently in prison in HMP, Wormwood Scrubs. He is represented before the Court by Ms Anne Glen, a solicitor practising in Leeds, and by Messrs Alistar McDonald Q.C. and Nicholas Johnson B.L., both barristers practising in Leeds.

A. The circumstances of the case

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

On 20 July 1998 an elderly man collapsed and died during a violent burglary in his home. On 17 August 1998 the applicant was arrested on suspicion of murder. He was questioned 11 times over 5 days and 11 video recordings were made of those interviews. The applicant was then released. Some time later the police conducted extensive covert surveillance operations during the course of which the applicant was heard to make incriminating remarks.

The pathologist's report of 27 October 1998 recorded that the victim had been suffering from a long term hypertensive heart disease and that a combination of his minor injuries and the fear engendered by the burglary caused his death.

On 5 January 1999 the applicant was re-arrested and on 7 January 1999 he was charged with murder. He was interviewed 11 times over three days (along with a co-accused) during which videos from the covert surveillance were shown to him (image only). The applicant's legal representative indicated during those interviews that the images on the videos were poor. Videos were also taken of those interviews.

The applicant appeared before the Magistrates' Court on 8 January 1999 for the first time when he was remanded in custody on the murder charge, the statutory custody time-limit of 70 days to expire on 19 March 1999 according to section 22(1)(b)(I) of the Prosecution of Offences Act 1985 ("the 1985 Act") and Regulation 4(4)(b) of the Prosecution of Offences (Custody Time Limits) Regulations 1987 ("the 1987 Regulations"). The 19 March 1999 was, subject to an extension of that time-limit or the granting of a new time-limit, therefore the date foreseen for the applicant's committal on a charge of murder. As later established before the Crown Court, on 8 January 1999, 78 of the witness statements had already been prepared by the police (out of the total 120 statements eventually obtained).

By letter dated 14 January 1999 the applicant's representatives requested the prosecution to make full disclosure. The response, dated 26 January 1999, indicated that the police had been asked to supply the relevant extracts from the video surveillance, which constituted "key" prosecution

evidence in the case against the applicant. On 24 February 1999 the defence again requested the prosecution's disclosure.

On 26 February 1999 the police submitted its file of the evidence to the prosecution. On 1 March 1999 the prosecution requested further statements to be taken by the police.

In the meantime, the pathologist had been asked to comment specifically on the association between the burglary incident and the victim's death. On 4 March 1999 the pathologist produced a report leading to the same conclusions as the report of October 1998, albeit expressed more succinctly. On 5 March 1999 the prosecution also received the requested statements from the police.

Between 9 and 11 March 1999 the prosecution served its full file on the defence which included three four-hour videos of the covert surveillance, 22 interview tapes (together with transcripts of those videos) and 66 witness statements and 1600 pages of documents including police interviews. The prosecution confirmed that they were ready for committal of the applicant on a charge of manslaughter, although it reserved its position on the initial charge of murder pending perusal of any evidence received post-committal. The prosecution indicated what parts of the videos and material were relevant for its case.

The applicant's representative immediately reserved the first date available in the video room in the applicant's prison (18 March 1999) to view the videos with him. On viewing the videos on that date his representative noted that further copies of the videos would have to be obtained as the images were unclear and the audio was substandard. On 18 March 1999 the defence indicated that it was not ready for a committal hearing as it had insufficient time to fully consider the evidence served.

On 19 March 1999 the applicant appeared before the Magistrates' Court. The prosecution offered no evidence on the murder charge and formally preferred a new manslaughter charge indicating that it was ready to commit the applicant for trial on the latter charge. The Magistrates' Court extended the original custody time-limit (finding that the prosecution had acted with due expedition), accorded a further custody time-limit in light of the new charge and adjourned committal proceedings on the manslaughter charge for three weeks to allow the defence to consider the prosecution evidence.

On 22 March 1999 the Crown Court considered and decided the applicant's appeal from the Magistrates' Court. In the first place, the County Court found that the preferring of the new charge did indeed give rise to a new custody time-limit:

> "... the question is whether any new or amended charge is in substance a different offence, and there is no doubt that manslaughter is a different offence . . . carrying a different *mens rea*, and . . . significantly different consequences might flow in terms of length of sentence . . . it must follow that the time limit runs *de novo* from the preferment of the new offence of manslaughter."

The Crown Court also rejected the applicant's submission that the prosecution had demonstrated *mala fides,* which the applicant considered was demonstrated by the similar conclusions in the pathologist's reports of October 1998 and March 1999 and by the prosecution's reservation of the possibility of re-entering the murder charge depending on evidence later emerging. It found that the prosecution had not sought to manipulate the custody time-limit by the addition or substitution of a manslaughter charge.

Secondly, it went on to consider the extension of the original custody time-limit, a relevant matter as any refusal of the extension would allow a bail application to be made. The prosecution argued that, although it had a good number of prosecution statements by 8 January 1999, it had considered it preferable to serve the entire prosecution file in March 1999 rather than do so piecemeal between January and March 1999. It considered the case was of some complexity and that there were ongoing enquiries concerning the nature of the charge (murder or manslaughter) to be retained against the applicant. It was of the view that the defence had sufficient time between 11 March and 19 March 1999 to review the documents to be ready for the committal hearing on 19 March 1999. The defence accepted that it was a complex matter, but submitted that the prosecution should have served the substantial material in their possession much earlier and that it had insufficient time to consider all the material and to take instructions prior to the committal hearing, not to mention the fact that the videos eventually served were of unacceptable quality.

The Crown Court judge found that the original time-limit should not have been extended since he had "no hesitation in finding" that the prosecution had not acted with "due expedition". He found that the prosecution, having been put on notice in early January 1999 that the videos were of poor quality, took until 9 March 1999 to produce further poor quality videos which could not be viewed by the prisoner until 18 March 1999, the day before the hearing before the Magistrates' Court. He concluded:

> "I could go into more detail than that, but I do not think I need to for this purpose. So I find, as I say, that the Prosecution have not acted with all due expedition, and of course one bears in mind that they had many, many of the witness statements in their possession before 8 January [1999], the date of [the applicant's] first appearance [before the Magistrates' Court], and they decided to hold on to them until eight days before the expiry of the time-limit. It just will not do."

The applicant was therefore entitled to apply for bail on the basis that the finding of insufficient expedition by the prosecution constituted "changed circumstances" within the meaning of the Bail Act 1976 (as amended – "the 1976 Act"). During the bail application, the applicant's counsel clarified that a bail application had not been previously made on the applicant's behalf. However, since the applicant had previously committed a number of offences on bail and had failed to surrender to bail on at least two occasions,

the Crown Court refused bail on the basis that it was believed the applicant would fail to surrender and would commit an offence on bail.

On 20 April 1999 the applicant applied to the High Court for leave to challenge by judicial review the Crown Court's ruling that a further custody time-limit had been created by the new manslaughter charge.

On 23 April 1999 the applicant was committed to the Crown Court for trial by the Magistrates' Court.

On 26 April 1999 the High Court rejected the applicant's leave application, Mr Justice Mitchell delivering the judgment of the court. He noted that, while the Prosecution had acted with commendable speed having received the papers from the police in February 1999, the period of time that had elapsed since the burglary in question was *prima facie* evidence that the police had not acted with "all due expedition". He also noted that the substitution of the charge of manslaughter for murder was unnecessary as the Magistrates' Court could have been invited to commit the applicant on the manslaughter charge but that its substitution led to a new custody time-limit being created. Noting that there was no submission that the prosecution had acted in bad faith, Mr Justice Mitchell found that the substitution of the manslaughter charge, although unnecessary, was:

> "a thoroughly desirable course to take, because accused persons should only be charged, committed and tried for offences which are reflected in the available evidence. That thoroughly desirable course, however, at the same time may provide a passport for avoiding the statutory consequence of thoroughly dilatory preparation."

Mr Justice Mitchell did add that he considered the law to be somewhat unsatisfactory:

> "The purpose of the [1987] Regulations has been stated and emphasised time and again. Once the custody time limit of 70 days has expired, the onus is fairly and squarely on the prosecution to seek and to justify, in accordance with section 22(3)(b) of the 1985 Act the granting of an extension. No question of the prosecution having to make out a case for an extension arises however if another offence is charged. Providing that offence is supported by evidence, the prosecutor's position, subject to the abuse point (which I will refer to in a moment), appears to be unassailable. If a charge is withdrawn and another one substituted or a further offence is charged (as an alternative) a new custody time limit is still created. This, quite legitimately, can happen more than once. New custody time limits could follow, one after the another, without there having been the slightest variation in size or content of the evidential canvas, but simply as a consequence of the prosecutor's decision to found a charge or a different charge or an alternative charge on a particular area of the evidential material. However dilatory the preparation, however late in the day the late charge is preferred, the prosecution's position may thereby be protected.
>
> For the claim "abuse of process" to succeed, bad faith must be established. That is a heavy burden to discharge. It is not altogether clear on the authorities whether the charging of an offence justified on the evidence, but solely for the purpose of creating a new custody time limit, itself amounts without more to bad faith. If it does not, then it is difficult to see how there could be any effective challenge to these practices. This considerable measure of latitude which has been extended to prosecutors seems to me

> to be wholly inconsistent with the purpose of Regulation 4, because, in effect, it enables the prosecution to bypass the requirement in section 22(3)(b) [of the 1985 Act] that any extension of the time limit has to be justified by showing, under the amendment to section 22(3)(b) introduced by paragraph 43 of the Crime and Disorder Act 1998 (which appears not yet to be in force), not only all due expedition but also due diligence."

Mr Justice Mitchell certified a point of law of public importance for the House of Lords to consider, namely:

> "When in a magistrates' court does the charging of an offence cause a fresh custody time limit to run."

On 18 May 1999 the Crown Court considered a new indictment including charges of manslaughter, wounding with intent and aggravated burglary. The applicant pleaded not guilty. However, at his trial on 22 September 1999 he pleaded guilty to manslaughter, the other charges remaining on the file. On 24 September he was sentenced to 10 years' imprisonment. His pre-trial custody was deducted from his sentence (Section 9(3) of the Crime (Sentences) Act 1997).

On 8 March 2001 the House of Lords rejected the applicant's submissions as to the meaning and application of the 1987 Regulations.

Lord Slynn of Hadley noted that a mere change of the details of a charge does not mean that the time-limit begins again since the offence remains the same. Equally, where the initial and second offences are plainly distinct (for example, burglary and rape), the second charge attracts its own time-limit. While the present case fell somewhere between those two situations, it was not possible to interpret the legislation so as to exclude a further time-limit where the initial charge "necessarily includes or amounts to, whether expressly or impliedly, the new offence charged" as suggested by the applicant. A further time-limit would only be excluded where the constituent elements of the new offence were "in substance the same as those of the original offence", which was not the case of the murder and manslaughter charges.

It was accepted that a new time-limit would not, however, begin if the preferring of a further charge amounted to an abuse of process:

> "It has been said that where the new charge is brought in bad faith or dishonestly, that would amount to an abuse of process. In my view the ambit of 'abuse of process' is not so limited. If a new charge is brought simply to keep the accused in custody for a longer period, that is clearly contrary to the intention of the legislation and constitutes an abuse of process. As Professor Smith said in his commentary to *R v. Great Yarmouth Magistrates, Ex p Thomas, Davis and Darlington* ([1992] Crim. LR 116, at p. 117):
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> 'Perhaps the more specific question to be asked is whether the charges of possession with intent were brought solely for the purpose of retaining the applicants in custody.'
>
> Equally if the court is satisfied that the way in which and the time at which the new charge is added or substituted, indicates that it is not done for the genuine purpose of

introducing a new charge on a revised assessment of the case, but is done primarily to keep the accused in custody on the initial charge, then this will constitute an abuse of process. Of course on the other hand if the purpose is genuinely to introduce a new charge on such a revised assessment the fact that the accused begins a new custody period does not in itself constitute an abuse of process.

It was not contended [in the High Court] that there was an abuse of process here and on my view of the construction of the section and the Regulation such a matter does not fall for consideration on the present appeal."

As to the applicant's complaint that this manner of proceeding was arbitrary and in violation of Article 5 of the Convention:

"In my view, however, it has not been shown that his detention was arbitrary. No complaint can be made for the first 70 day period: the second is justified because a new charge is brought on the basis of a very substantial body of evidence delivered to the defence shortly before the second charge was laid. It was right to change the charge to the lesser offence of manslaughter in the light of the reconsideration of the case. For the serious offences involved here, I do not consider that the periods prescribed in the Regulations can be said to be unreasonable.

Moreover there was an opportunity to challenge the laying of the second charge and the second detention period as an abuse of the process of the court. That was not done, understandably. There existed a procedure by which the decision of the Magistrate could be challenged by way of judicial review. That was done in this case. During the period when the appellant was in the custody of the magistrates' court, the provision of section 128(6) of the Magistrates' Court Act 1980 requires that a [Magistrates'] "court may not remand a person for a period exceeding 8 clear days" [subject to certain exceptions]."

Lord Hope of Craighead also found that the ordinary canons of construction implied that each offence laid before the Magistrates' Court attracted its own custody time-limit. In his reasoning he described the inquiry of the Magistrates' Court under sections 4 and 6 of the Magistrates' Courts Act 1980 ("the 1980 Act") as follows:

"The function of the magistrates' court, as described in sections 4 to 6 of [the 1980] Act, is to inquire into 'an offence as examining justices': see section 5(1) and section 6(1) and (2) [of the 1980 Act]. If a magistrates' court is satisfied that there is sufficient evidence to put the accused on trial by jury 'for any indictable offence', the court must commit him for trial: section 6(1) [of the 1980 Act]. The implication is that it will take that step with regard to 'the offence under inquiry': see the concluding words of the subsection. Alternatively the court may commit him for trial 'for the offence' if it is satisfied that all the evidence before the court consists of written statements tendered under the 1980 Act without consideration of their contents.

...

Thus the scope of the inquiry is determined by the information which has been laid before the magistrates' court. The guiding principle is that the offence should be described in the information clearly and definitely, without duplicity or uncertainty ... The court's function is to inquire into the offence charged in the information as examining justices. I do not think that there is any ambiguity about what is meant in

> regulation 4(4) [of the 1987 Regulations] by the word 'offence' in these circumstances. It means the offence with which the person is charged in the information which has been laid against him in that court.
>
> It is normal and proper practice for the prosecution to review the charge or charges in the information which was initially laid before the court as further inquiries are conducted into the state of the evidence. This may lead to the bringing against the accused of what are undoubtedly fresh charges, with the consequence that these new charges will attract their own custody time limit."

As to the compatibility of that interpretation of Regulation 4(4) of the 1987 Regulations with Article 5 of the Convention, he noted that the primary means for controlling the detention of a person while in the custody of the Magistrates' Court are found in the provisions of the 1976 Act. The function of the 1987 Regulations was to set maximum custody time limits. If a custody time limit expired before the completion of the stage of the proceedings in question, "the accused had to be granted bail". It was also open to the justices to grant bail at any time before the expiry of the time limit, bearing in mind that section 4(1) of the 1976 Act gave a general right to bail except in certain specified circumstances (Schedule 1 to that Act). Furthermore the accused, if remanded in custody, had to be brought again before the Magistrates' Court to enable his case to be reviewed at regular intervals, as the general rule is that a Magistrates' Court may not remand a person for a period exceeding 8 clear days (section 128(6) of the Magistrates' Courts Act 1980). His detention was thus subject to judicial control in the Magistrates' Court throughout the period while he is in the custody of that court. Decisions of the Magistrates' Courts were amenable to judicial review and if that court decided to extend a custody time limit the accused could appeal against that decision to the Crown Court (section 22(7) of the 1985 Act). He continued:

> "The effect of these provisions can, I think, be summarised in this way. A person can only be detained in the custody of a Magistrates' Court while awaiting the completion of a preliminary stage of the proceedings under a procedure which has been laid down by statute, and the effect of Regulation 4 of the 1987 Regulations is that any such detention is subject to strictly defined custody time limits. As to the complaint that this procedure is not precise or accessible because of the possibility of the substitution of fresh custody time limits, I would reject it. The provisions of the Bail Act 1976 and of the Magistrates' Courts Act 1980, as amended, deal with the procedure for remands in custody in considerable detail with a view to ensuring that every situation is provided for. It is a procedure which is prescribed by law. Detention under this procedure is lawful under domestic law, and it complies with the general requirements of the Convention. If a fresh custody time limit is to be substituted, the procedure under which this is to be done is laid down by statute and the regulation defines the length of the substituted time limit."

However, he found more substantial the applicant's complaint that the procedure was open to abuse as a result of arbitrary decisions of the prosecution: Regulation 4(4) of the 1987 Regulation was vulnerable to abuse if it was used for improper purposes. But this, Lord Hope of

Craighead considered, was a matter which was subject to judicial control by the justices or the stipendiary magistrates who could find that the new charge was simply a reproduction of the old charge with amendments which were minor or unimportant (and, on this ground, refuse to accept that the new charge gave rise to a fresh custody time-limit) or who could refuse to inquire into the information relating to the new charge on the basis that to do so would be an abuse of the process of the court.

As to what constituted an abuse of process in this context he considered that the essence of abuse of process in criminal proceedings was that the prosecution had "sought to take advantage of a procedural rule for a purpose which can be described as improper or as arbitrary". Difficulty had arisen because of the suggestion in previous case-law that a complaint of abuse of process had to contain an allegation of bad faith. Having reviewed the relevant authorities, he found that:

> "I do not think that it can be doubted that, where dishonesty or *mala fides* can be established, that will be sufficient to show that there has been an abuse of process. But the concept of abuse of process is not to be confined to cases where there is proof of conscious dishonesty or of an improper motive of that kind. To the extent that the authorities to which I have referred may be taken as indicating the contrary, I would be inclined not to follow them. It seems to me that a broader and simpler test is, in this context, more appropriate. That would be more in keeping with the purpose of Article 5(1) of the Convention, which is to protect the individual from arbitrariness when he is deprived of his liberty.
>
> The true question, as Buxton J indicated in *R v. Wolverhampton Justices and Stafford Crown Court, Ex p Uppal* (1994) 159 JP 86, is whether the new charge has been brought solely for the purpose of avoiding a custody time limit. The issue can best be tested by requiring the prosecutor to demonstrate why, on the facts of the case, the bringing of the new charge is necessary. If the necessity of bringing the new charge can be demonstrated, the substitution of a new custody time limit will follow according to the rules which regulation 4(4) has laid down. But if the prosecutor is unable to satisfy this test, it will be open to the court to infer that there is an abuse of process because the charge has been brought solely for the arbitrary and improper purpose of substituting a new custody time limit."

Lord Clyde also found that the 1987 Regulations allowed the substitution of a new time-limit and, further, that that was not incompatible with Article 5 of the Convention:

> "The regulation is clear, precise and accessible. There are safeguards for the accused in the recognition by both parties that the court can intervene in the event of the prosecution acting in a way which would constitute an abuse of process. The regulation prescribes relatively short periods for the completion of the relevant stage of the proceedings and the court has a discretion whether or not an extension to the period is or is not to be allowed. Moreover the accused has remedies in law, including that of judicial review. Finally the whole scheme of the regulation has to be seen in the context of the Bail Act 1976 which gives, subject to certain exceptions, a general right to bail."

Lord Nicholls of Birkenhead dissented. He considered that the substitution of a manslaughter charge, already implicit in the murder charge, allowing the extension of the time-limit was an absurd result which could not have been intended by parliament. The power to grant bail did not address this absurdity since the individual had lost the benefit entirely of fixed time-limits extendable in limited circumstances for which parliament had provided by way of the 1985 Act. The Court's ability to prevent an abuse of process did not provide an answer since the prosecution had nonetheless exercised its powers and discharged its responsibilities "properly and conscientiously".

Lord Scott of Foscote also dissented finding that, where the new charge was based on the facts on which the original charge was based and was simply a lesser charge than that originally preferred, the proposition that the preferment of the new charge attracts a new custody time-limit defeated legislative intention.

> "In the present case the prosecution did not act with all due diligence and expedition. [The Crown Court] so found and refused the application for an extension. It has not been suggested that [it] was in error. And yet, by introducing the manslaughter charge on the day of expiry of the original custody time limit, the prosecution procured a further 70 days during which the appellant could be kept in custody. It is, of course, true that it was open to the appellant on 19 March to make an application for bail, and indeed he did so. But the new custody time limit defeated his absolute right to the grant of bail under section 4(8A) of the Bail Act 1976 and his bail application was, in the event, refused.
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> If the committal hearing had taken place on 19 March, as it would have done if the prosecution had not failed to act with all due diligence and expedition, the prosecution could at the same time have substituted the manslaughter charge for the murder charge and the appellant would have been committed to the Crown Court for trial on the manslaughter charge. If the proceedings had taken that course, the period during which he would have been in custody before the committal would not have exceeded the original 70 days.
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> On this appeal, the critical question for your Lordships, in my opinion, is whether there is a permissible application of section 22 and regulation 4 of the 1987 Regulations that would prevent, in a case such as this, the substituted charge from attracting a fresh 70 day custody time limit. There is no doubt, I believe, that if that result can be reached it ought to be reached."

His conclusion was fortified by the impact of the requirement to interpret the applicable law compatibly with Article 5 of the Convention. A construction and application of section 22(1) of the 1985 Act and Regulation 4(4) of the 1987 Regulations that enabled the prosecution, by preferring a new charge, to withhold from the accused the release from custody to which he would otherwise have been entitled, in a case where there were no new facts and the new charge was and always had been comprehended within the original charge, would subject the accused to arbitrariness:

"In my opinion, it is open to your Lordships to rule that if an accused, having appeared or been brought before a magistrates' court on an information charging him with an offence, is then charged with a new offence of which he might, if tried on the original offence, have been convicted (see section 6 (2), (3) and (4), Criminal Law Act 1967), a new custody time limit will not be attracted by the new offence and the accused's 'first appearance' in relation to the new offence will be the date on which he first appeared or was brought before the magistrates' court on the information or charge relating to the original offence.

If the addition, or substitution, of the new offence has the consequence that the prosecution is not ready to proceed with the committal hearing within the original 70 day custody time limit, it is always open to the prosecution to apply for an extension. Whether the prosecution would obtain an extension would depend on their showing they had acted "with all due diligence and expedition". The end result would thus be in accordance with the legislative intention."

Having so concluded, Lord Scott of Foscote provided his view on the meaning of "abuse of process":

"In my opinion, the requirement of dishonesty or *mala fides* distracts attention from the true requirements if an allegation of abuse of process is to be made out. The concept of abuse of process is no different in criminal cases from the like concept in civil cases. It involves a use of court process for a purpose other than that for which the purpose in question was intended. It is in that sense that one may speak of some procedural step being taken for an improper purpose and, therefore, constituting an abuse of process. The procedural step will often be accompanied by bad faith or dishonesty — in that a legitimate purpose, not being the true purpose, may be put forward as the true purpose. But bad faith or dishonesty are not essential. What is essential is that court process has been used for some ulterior purpose.

There will be difficulty where the purpose is mixed. The present case may well be an example. There was every reason, it being clear that the known facts did not support a murder charge but only manslaughter, for the withdrawal of the former and the substitution of the latter as soon as practicable. But the timing of the substitution suggests very strongly, to my mind, that it was done in order to forestall the automatic release of the appellant from custody. There was no evidence at all from the prosecution as to its reasons for formally substituting manslaughter for murder on 19 March. The prosecution could simply have informed the defence that the murder charge would not be proceeded with and that they would be seeking a committal on manslaughter. In my opinion, however, if a step in litigation is taken for a legitimate reason, whether or not it is also taken for an illegitimate one, the step cannot be categorised as an abuse of process. The legitimate reason must, of course, be more than merely makeweight or trivial. If abuse of process can be shown, the procedural step taken should, strictly, be regarded as a nullity. ... It is, in my respectful opinion, unanswerable and obviously right. If a new charge is preferred, not with any genuine intention that the accused should be tried on that charge, but simply in order to attract a new custody time limit, the preferring of the new charge is an abuse of process and the new charge should be struck out as soon as that has become apparent.

If there is a genuine intention that the new charge should be proceeded with to trial and it is simply the timing of the new charge that appears to be motivated by an intention to avoid the consequences of the expiry of the original custody time limit, the court cannot, in my opinion, strike out the new charge as an abuse of process. But

the circumstances in which the substitution of the new charge took place can, and should, in my opinion, be taken into account in considering whether the accused should be released on bail.

...

If I am right in the present case that the substituted charge of manslaughter should not have been treated as giving rise to a fresh custody time limit, the abuse of process point does not arise. If I am wrong, however, and I understand a majority of your Lordships to take a different view on that point, this was not a case in which the manslaughter charge could have been set aside on abuse of process grounds. However, it was a case in which, on the bail application made to [the Crown Court], the circumstances in which the substituted charge was preferred should have been taken into account. The fact that the prosecution had failed to act with all due diligence and expedition was relevant. So was the fact that there was nothing new which explained why the substitution was being made when it was made. The judge should, in my view, have inferred that a substantial reason for the change was that the prosecution wanted to avoid the custody time limit consequences of their own dilatoriness. A decision to award bail in those circumstances would have reflected Parliament's intention in introducing the custody time limit statutory provisions."

B. Relevant domestic law and practice

1. The Bail Act 1976 (as amended) ("the 1976 Act")

Section 4 of the 1976 Act as amended provided, in so far as relevant, as follows:

"(1) A person to whom this section applies shall be granted bail except as provided in Schedule 1 to this Act.

...

(8) This section is subject to section 25 of the Criminal Justice and Public Order Act 1994 (exclusion of bail in cases of homicide and rape);

(8A) Where a custody time-limit has expired this section shall have effect as if, in subsection (1), the words "except as provided in Schedule 1 to this Act" were omitted."

Paragraph 2 of Schedule 1 provided that a defendant need not be granted bail if the court was satisfied that there were substantial grounds for believing that the defendant, if released on bail, would fail to surrender to custody, commit an offence while on bail or interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.

Under paragraph 9 of Schedule 1 to the 1976 Act, in taking the above decision, the court was to have regard to such of the following

considerations, as well as to any other considerations, as appeared to that court to be relevant:

– the nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it);

– the character, antecedents, associations and community ties of the defendant;

– the defendant's record as regards the fulfilment of his obligations under previous grants of bail in criminal proceedings; and

– except in the case of a defendant whose case was adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having defaulted.

According to paragraph 9A of Schedule 1 to the 1976 Act, if a defendant (who had been charged with murder, manslaughter, rape, attempted murder or attempted rape) was granted bail and representations had been made as regards the matters mentioned in paragraph 2 of Schedule 1, the court had to state its reasons for granting bail and cause those reasons to be included in the record of the proceedings.

The Criminal Justice Act 1988 made certain additions to Schedule 1 to the 1976 Act for the purpose of ensuring that accused persons would have two bail applications as of right, the second application being a *de novo* consideration of bail. Subsequently, an accused can make a further bail request if there had been a "change in circumstances".

2. Prosecution of Offences Act 1985 ("the 1985 Act")

Section 22 of the 1985 Act gave the Secretary of State power to set time limits with respect to the preliminary stages of proceedings for an offence. Subsection (1) of that section provides:

> "The Secretary of State may by regulations make provision, with respect to any specified preliminary stage of proceedings for an offence, as to the maximum period -
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> (a) to be allowed to the prosecution to complete that stage;
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> (b) during which the accused may, while awaiting completion of that stage, be -
>
> (i) in the custody of a magistrates' court; or
>
> (ii) in the custody of the Crown Court."

3. Prosecution of Offences (Custody Time Limits) Regulations 1987(as amended) ("the 1987 Regulations")

Custody time-limits in the Magistrates' Court are governed by Regulation 4 which, in so far as relevant, provides:

> "(1) ...the maximum period during which a person accused of an indictable offence other than treason may be in the custody of a magistrates' court in relation to that

offence while awaiting completion of any preliminary stage of the proceedings specified in the following provisions of this Regulation shall be as stated in those provisions.

(2) Except as provided in paragraph (3) below, in the case of an offence triable either way the maximum period of custody between the accused's first appearance and the start of summary trial or, as the case may be, the time when the court decides whether or not to commit the accused to the Crown Court for trial shall be 70 days...

(3) In the case of an offence triable either way if, before the expiry of 56 days following the day of the accused's first appearance, the court decides to proceed to summary trial in pursuance of sections 19 to 24 of the [Magistrates' Courts Act 1980] the maximum period of custody between the accused's first appearance and the start of the summary trial shall be 56 days.

(4) In the case of an offence triable on indictment exclusively the maximum period of custody between the accused's first appearance and the time when the court decides whether or not to commit the accused to the Crown Court for trial, shall be 70 days...

(5) The foregoing provisions of this regulation shall have effect as if any reference therein to the time when the court decides whether or not to commit the accused to the Crown Court for trial were a reference -

(a) where a court proceeds to inquire into an information as examining justices in pursuance of section 6(1) of the 1980 Act, to the time when it begins to hear evidence for the prosecution at the inquiry..."

Custody time-limits in the Crown Court are governed by Regulation 5 which, in so far as relevant, provides:

"(2) Where -

(a) a person accused of an indictable offence other than treason is committed to the Crown Court for trial; or

(b) a bill of indictment is preferred against a person under section 2(2)(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933,

the maximum period during which he may be in the custody of the Crown Court in relation to that offence, or any other offence included in the indictment preferred against him, while awaiting the preliminary stage of the proceedings specified in the following provisions of this Regulation shall be as stated in these provisions.

(3) The maximum period of custody -

(a) between the time when the accused is committed for trial and the start of the trial; or

(b) where a bill of indictment is preferred against him under the said section 2(2)(b), between the preferment of the bill and the start of the trial,

shall, subject to the following provisions of this Regulation, be 112 days.

(4) Where, following a committal for trial, the bill of indictment preferred against the accused (not being a bill preferred under the said section 2(2)(b)) contains a count charging an offence for which he was committed for trial at that committal together with a count charging an offence for which he was committed for trial on a different occasion, paragraph (3) above applies in relation to each offence separately.

...

(6) Where, following a committal for trial, the bill of indictment preferred against the accused (not being a bill preferred under the said section 2(2)(b)) contains a count charging an offence for which he was not committed for trial, the maximum period of custody -

(a) between the preferment of the bill and the start of the trial, or

(b) if the count was added to the bill after its preferment, between that addition and the start of the trial,

shall be 112 days less any period, or the aggregate of any periods, during which he has, since the committal been in the custody of the Crown Court in relation to an offence for which he was committed for trial."

In the case of *R v. Manchester Crown Court, Ex parte McDonald* ([1999] 1 W.L.R. 841) Lord Chief Justice Bingham outlined the three objectives of the 1985 Act and the 1987 Regulations: to ensure that the period for which unconvicted defendants are held in custody awaiting trial are as short as reasonably and practically possible; to oblige the prosecution to prepare cases for trial with all due diligence and expedition; and to invest the court with a power and duty to control any extension of the maximum period under the regulations for which any person may be held in custody awaiting trial.

COMPLAINT

The applicant complained under Article 5 §§ 1 and 3 of the Convention that the 1985 Act and the 1987 Regulations as applied by the courts failed to protect him from arbitrary detention as there was insufficient judicial control over his remand in custody on 19 and 22 March 1999.

THE LAW

The applicant complained that there was insufficient judicial control over his remand in custody on 19 and 22 March 1999 and that his pre-trial detention was therefore arbitrary within the meaning of Article 5 §§ 1 and 3 of the Convention. These provisions, in so far as relevant read 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:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence ... ;

...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

1. The applicant mainly argued that his pre-trial detention lacked adequate judicial control. He submitted that the central purpose of Article 5 is to protect an individual from arbitrary detention and that judicial control is an essential feature of this guarantee. He considered that section 22 of the 1985 Act and Regulation 4 of the 1987 Regulations as interpreted and applied in his case robbed his remand procedure of adequate judicial control to prevent such arbitrary detention and meant that his custodial status was effectively determined by the prosecution. In particular, the prosecution was allowed to substitute a new charge immediately prior to the first custody time-limit running out with the result that a second custody time-limit applied. Neither sections 4 and 6 of the 1980 Act nor a claim of abuse of process provided sufficient judicial safeguards.

The Court recalls that judicial control of interference by the executive with an individual's right to liberty is an essential feature of the guarantees embodied in Article 5 § 3, the purpose being to minimise the risk of arbitrariness in the pre-trial detention of accused persons. Certain procedural and substantive guarantees ensure that judicial control: the judge (or other officer) before whom the accused is "brought promptly" must be seen to be independent of the executive and of the parties to the proceedings; that judge, having heard the accused himself, must examine all the facts arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the presumption of innocence, a departure from the rule of respect for the accused's liberty, and that judge must have the power to order an accused's release. Accordingly, in cases concerning former section 25 of the Criminal Justice and Public Order Act 1994, the Court found that any consideration by a Magistrate of an accused's pre-trial release on bail had been excluded in advance by the legislature by section 25 and that such removal of the judicial control over pre-trial detention

amounted to a violation of Article 5 § 3 of the Convention (see, for example, *S.B.C. v. the United Kingdom*, no. 39360/98, §§ 22-23, to be published in ECHR-2001).

The Court has therefore considered whether the applicant's pre-trial detention was the subject of adequate judicial control.

The Court notes than the applicant's essential submission is that he lost a statutory right to release on 19 March 1999 as a result of the prosecution's substitution of the manslaughter charge on that date, a step which escaped judicial control. The Court accepts that, according to the text of section 4 of the 1976 Act (as amended) and the judgments of the majority of the House of Lords in this case, the applicant would have been entitled as of right to release on bail on 19 March 1999 if the original custody time-limit had expired (and the County Court found that it had expired) and no other time-limit was applied.

However, the Court does not consider that his pre-trial detention lacked adequate judicial safeguards within the meaning of Article 5 by reason of the second custody time-limit granted on 19 March 1999.

The Court has noted, at the outset, that under the 1976 Act, the applicant was entitled as of right to make two bail applications before the Magistrates' Court, the second a *de novo* hearing, in accordance with the criteria set down by that Act. According to the applicant's submissions to the Crown Court, he had not applied for bail before the Magistrates' Court under these provisions.

Importantly, while the second custody time-limit may have effectively deprived him of a right to release on 19 March 1999, it did not amount to an order that the applicant was to be detained until the expiry of that second period. As Lord Hope of Craighead noted, that time-limit was a statutory indication of the maximum period (subject to the later grant of an extension or additional custody time-limit) of pre-committal custody before the Magistrates' Court. The second custody time-limit did not therefore restrict the applicant's right to apply for bail during that period. Accordingly, the applicant could have applied for bail after 19 March 1999, either prior to or after his committal, arguing that there had been a "change in the circumstances" relative to his pre-trial detention and requesting his release on bail under the terms of the 1976 Act.

Indeed, during his appeal to the Crown Court, he applied for release on bail on 22 March 1999, that court accepting that its findings about prosecution delay amounted to a "change of circumstances" allowing an application for release on bail to be made. The Crown Court had the applicant before it, heard the legal submissions of the parties for and against his release on bail and refused bail recording as its reasons that the applicant had previously committed offences on bail and had failed to surrender to bail on at least two occasions. A refusal of bail by a Magistrates' Court is amenable to judicial review (see the judgment of Lord Hope of Craighead)

and the applicant did not challenge the Crown Court's refusal of bail, nor does he take issue with the merits of that decision to this Court.

In such circumstances, the Court considers that sufficient judicial control was available to the applicant in respect of his pre-trial detention, a control which was not excluded by the substitution of the manslaughter charge on 19 March 1999. It is not therefore necessary to examine whether an appeal to the Crown Court and an application in judicial review to the High Court (including a challenge on the basis of abuse of process) against the Magistrates' Court's orders on the new charge and custody time-limit would themselves constitute adequate judicial control over the applicant's pre-trial detention.

This complaint of the applicant under Article 5 §§ 1-3 of the Convention is manifestly ill-founded within the meaning of 35 § 3 of the Convention.

2. The applicant further submitted under Article 5 § 3 that the late substitution of the manslaughter charge and the consequent new custody time-limit meant that his pre-trial detention was longer than it otherwise would have been and, indeed, that it was too long.

The Court recalls that it falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine, in the manner outlined above, the substance of an application for release on bail and record the reasons for their decisions. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of the continued detention but after a certain lapse of time it no longer suffices; the Court must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty. Where such grounds are "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (*Letellier v. France*, judgment of 26 June 1991, Series A no. 207, § 35). However, the latter requirement of expedition must not stand in the way of the efforts of the judges to clarify fully the facts in issue, to give both the defence and the prosecution all facilities for putting forward their evidence and stating their cases and to pronounce judgment only after careful reflection on whether the offences were in fact committed and on the sentence (*Wemhoff v. Germany*, judgment of 27 June 1968, Series A no. 7, § 17).

Having regard to the reasons for the Court's rejection of the applicant's bail application of 22 March 1999 (outlined above), the Court finds that there were "relevant" and "sufficient" reasons justifying his detention. As noted above the applicant did not challenge the merits of that refusal of bail domestically or before this Court.

The Court has therefore considered whether the additional "special diligence" requirement of Article 5 § 3 was complied with.

The Court observes that the impugned period of pre-trial detention began with the applicant's arrest on 5 January 1999 and ended at the latest on 24 September 1999. As to the relevant events during this period, the Court notes that on 8 January 1999 the Magistrates' Court remanded the applicant on a charge of murder and fixed the custody time-limit to expire on 19 March 1999. On 19 March 1999 the Magistrates' Court extended that time-limit, applied a new custody time-limit in respect of the manslaughter charge and adjourned the committal period for three weeks. On 22 March 1999 the Crown Court partially accepted his appeal. It also considered and refused bail. On 23 April 1996 he was committed by the Magistrates' Court for trial by the Crown Court on the manslaughter charge. On 26 April 1999 the High Court rejected his application for leave to apply for judicial review (solely on the validity of the new custody time-limit) but certified a point of law of public importance to the House of Lords. Further charges of wounding with intent and of burglary were laid against him on 18 May 1999, his trial took place on 22 September 1999 and he was sentenced on 24 September 1999.

The defence did not dispute before the Crown Court on 22 March 1999 that the case was complex, a point supported by the voluminous documentary and video evidence disclosed by the prosecution to the defence on 9-11 March 1999.

It is true that the Crown Court found, as regards the period from 8 January to 11 March 1999, that the prosecution had not acted with "due expedition", essentially because police already had many of the witness statements together with videos of the covert surveillance and police interviews on 8 January 1999 and did not serve them on the defence until 8 days before the hearing before the Magistrates' Court fixed for 19 March 1999. Indeed, the applicant's submission about delay focuses on this period.

In this latter respect, the Court recalls that it is for it to determine, having regard to all of the particular circumstances of the case, whether the prosecution proceeded with "special diligence" within the meaning of Article 5 § 3 of the Convention. In this respect, the Court notes that the Crown Court's determination of "due expedition" was based on its assessment of domestic standards and law without reference to Article 5 § 3 of the Convention. It was also made in the context of a looming committal hearing fixed for 19 March 1999 and the defence's ability to assess the prosecution case prior to that hearing.

In addition, the Court notes that that relevant period of approximately 8 weeks immediately followed the applicant's re-arrest. While much of the prosecution evidence was retained by the police at the beginning of this period, the material was voluminous and required careful consideration by the police as to its completeness prior to its submission to the prosecution.

The prosecution obtained the police file on 26 February 1999 and by 1 March 1999 had requested the police to take further statements, which statements were received by the prosecution on 5 March 1999. The review of the evidence also indicated that clarification was required from the pathologist of his findings. His second report was obtained by the prosecution on 4 March 1999. Given the importance of his findings in the assessment of what charge should be preferred against the applicant, the fact that the pathologist's conclusions of March 1999 were essentially the same as those in his first report of October 1998 does not mean that the clarification requested of him was unnecessary. The Court also considers reasonable (as did Mr Justice Mitchell in the High Court and Lord Hope of Craighead and Lord Slynn of Hadley of the House of Lords) the prosecution's aim of seeking the applicant's committal only on the precise and less serious charge which it considered the evidence supported.

Moreover, the Court notes that the prosecution decided to provide the defence with the full prosecution file on 9-11 March 1999 as opposed to prior piecemeal service throughout the relevant period. It does not consider this sufficient of itself to fall foul of the "special diligence" requirement of Article 5 § 3 of the Convention, particularly given that the question of the precise charge which the evidence supported remained open for the prosecution until it had obtained its final pre-committal evidence on 5 March 1999. When the evidence was served on the defence a number of days later, the prosecution confirmed to the defence (while reserving its position pending post-committal evidence) that it intended to apply for the applicant's committal on a manslaughter charge and, further, it pointed the defence to the particular elements of the evidence on which the prosecution would seek to rely.

The applicant argued that the prosecution should have sought his committal at the hearing on the 19 March 1999 on the manslaughter charge as opposed to formally preferring a new manslaughter charge and obtaining a new custody time-limit. However, the Court notes that the Crown Court accepted the applicant's representative argument that the defence had insufficient time to review the prosecution evidence served on it in early March 1999 to be ready for a committal hearing on 19 March 1999. To this end the Magistrates' Court adjourned committal proceedings for three weeks only and the applicant was committed for trial just over four weeks after that hearing before the Magistrates' Court on 23 April 1999.

Finally, the applicant does not complain about any period of delay, and the Court does not find evidence of any lack of "special diligence", in respect of the prosecution of his case after 19 March 1999.

In all of the above circumstances, the Court does not consider that the domestic authorities failed to act with the necessary dispatch in their prosecution of the case against the applicant.

Accordingly, the applicant's complaints under Article 5 § 3 of the Convention are manifestly ill-founded within the meaning of 35 § 3 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Mark VILLIGER
Deputy Registrar

Georg RESS
President