Caso de Ezeh y Connors contra el Reino Unido, de 09/10/2003 [ENG]

Violation of Art. 6-3-c

EUROPEAN COURT OF HUMAN RIGHTS

CASE OF EZEH AND CONNORS v. THE UNITED KINGDOM

(Applications nos. 39665/98 and 40086/98)

JUDGMENT

STRASBOURG

9 October 2003

This judgment is final but may be subject to editorial revision.

In the case of Ezeh and Connors v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. Wildhaber, *President*,

Mr C.L. Rozakis,

Mr J.-P. Costa,

Mr G. Ress,

Sir Nicolas Bratza,

Mrs E. Palm,

Mr L. Caflisch,

Mr M. Fischbach,

Mr J. Casadevall,

Mr B. Zupancic,

Mr J. Hedigan,

Mr M. Pellonpää,

Mrs M. Tsatsa-Nikolovska,

Mr A.B. Baka,

Mr R. Maruste,

Mr S. Pavlovschi,

Mr L. Garlicki, *judges*,

and also of Mr P.J. Mahoney, *Registrar*,

Having deliberated in private on 5 March and 10 September 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in two applications (nos. 39665/98 and 40086/98) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two United Kingdom nationals, Mr Okechukwiw Ezeh and Mr Lawrence Connors ("the first and second applicants"), on 23 and 29 January 1998, respectively.

2. The applicants, who had been granted legal aid, were represented before the Court by Mr J. Dickinson, a lawyer practising in London. The United Kingdom Government ("the Government") were represented by their Agents, Ms S. Langrish, Ms R. Mandal and, subsequently, by Mr C. Whomersley, all of the Foreign and Commonwealth Office.

3. The applicants complained under Article 6 of the Convention that they had been denied legal representation and, alternatively, legal aid for their adjudication hearings before the prison governor in 1996 and 1997, respectively.

4. The applications were transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The applications were allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court ("the Chamber") and it was composed of the following judges: Mr J.-P. Costa, *President*, Mr W. Fuhrmann, Mr L. Loucaides, Sir Nicolas Bratza, Mrs H.S. Greve, Mr K. Traja and Mr M. Ugrekhelidze, and also of Mrs S. Dollé, Section Registrar.

6. On 5 December 2000 the Chamber decided to join the proceedings in the applications (Rule 43 § 1).

7. On 30 January 2001, following a hearing on the admissibility and the merits (former Rule 54 § 4), the Chamber declared the applications admissible.

8. On 15 July 2002 the Chamber delivered its judgment. It found unanimously that there had been a violation of Article 6 § 3 (c) of the Convention in respect of both applicants. The finding of a violation was considered to constitute sufficient just satisfaction for any non-pecuniary damage sustained by the applicants, the applicants were awarded 17,124 pounds sterling ("GBP") in respect of the legal costs and expenses of the proceedings before the Convention organs and the remainder of their claims for just satisfaction was dismissed.

9. On 8 October 2002 the Government requested, pursuant to Article 43 of the Convention and Rule 73 of the Rules of Court, that the case be referred to the Grand Chamber, the Government taking issue with the Chamber's conclusion as to the applicability of Article 6 of the Convention to the adjudication proceedings of which each applicant complained.

10. The Panel of the Grand Chamber accepted this request on 6 November 2002.

11. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court. Judges Türmen, Bîrsan and Kovler, originally members of the Grand Chamber so composed, were replaced by three substitute Judges, namely Judges Palm, Caflisch and Tsatsa-Nikolovska (Rule 24 § 3). Judge Palm continued to deal with the case after the end of her term of office (Rule 24 § 4).

12. The parties filed observations on the applicability of Article 6 of the Convention, on the question of a violation of that Article and on any just satisfaction to be awarded (Rule 71).

13. A hearing took place before the Grand Chamber in public in the Human Rights Building, Strasbourg, on 5 March 2003 (Rule 71).

There appeared before the Grand Chamber:

(a) *for the Government*

Mr C. Whomersley, *Agent*,

Mr P. Sales, *Counsel*,

Mr S. Bramley,

Mr G. Underwood,

Mr G. Bradley, *Advisers*;

(b) *for the applicant*

Mr T. Owen, QC,

Mr P. Weatherby, *Counsel*,

Mr J. Dickinson, *Solicitor*,

Ms A. McDonald, *Adviser*.

The Court heard addresses by Messrs Sales and Owen.

14. The Government filed further observations on the merits and the applicants submitted documents concerning their just satisfaction claims.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The first applicant

15. The first applicant, born in the United Kingdom in 1967, lived in London until he was 4 years old. He then resided in Nigeria until he was 22 years old, after which he returned to the United Kingdom.

16. In 1991 the first applicant was convicted of rape, possessing an imitation firearm and attempted murder. He was sentenced to three concurrent terms of imprisonment, the longest term being 12 years.

17. On 14 October 1996 the first applicant attended a meeting in the “C wing Interview Room” with his probation officer for the preparation of his parole assessment report. The probation officer later alleged that the first applicant had threatened to kill her if she did not write down what he said. The first applicant was charged with an offence contrary to Rule 47(17) of the Prison Rules 1964 (“the Prison Rules”).

18. He was “put on report” and an adjudication hearing before the prison governor was convened for 15 October 1996. The first applicant requested legal representation in a form submitted to the governor dated 15 October 1996 and also during the hearing on that day before the governor. His reasons for such a request were not considered sufficient by the governor, but the hearing was adjourned to allow him to obtain legal advice. The first applicant's representative then advised him about the nature and format of the adjudication proceedings and about the questions which he should raise.

19. In his detailed reply to the complaint lodged against him and written after the hearing on 15 October 1996, the first applicant stated that he required legal representation to put his points clearly to the authorities.

20. The hearing resumed on 21 October 1996. The record of the hearing indicated that the first applicant was asked whether he had had time to speak to his solicitor and whether he was ready to proceed. The relevant part of the record was ticked to indicate that he had. The hearing went ahead. The first applicant disputed that he had used threatening words against the probation officer. He submitted that the probation officer had misunderstood the actual words he had used, because of either his accent or language, and that the impugned remarks were about his life in Nigeria. Evidence was heard from the first applicant and the probation officer, to whom questions were put by the governor and the first applicant.

21. The first applicant was found guilty and awarded 40 additional days' custody (pursuant to section 42 of the Criminal Justice Act 1991 – “the 1991 Act”) together with 14 days' cellular confinement, 14 days' exclusion from associated work and 14 days' forfeiture of privileges. This was the applicant's twenty-second offence against discipline and his seventh offence of threatening to kill or injure a member of the prison staff.

22. On 22 October 1996 and 11 February 1997 the applicant unsuccessfully petitioned the Secretary of State about the conduct of his adjudication proceedings. In a letter dated 1 May 1997, it was confirmed that the Secretary of State had reviewed the adjudication procedure as a whole and found it to have been satisfactory.

B. The second applicant

23. The second applicant was born in 1954.

24. In January 1988 he was convicted on two counts of rape and of robbery and was sentenced to four concurrent terms of imprisonment, the longest being 18 years.

25. On 23 March 1997 the second applicant was jogging around a track in the prison exercise yard when he collided with a prison officer. The officer alleged that the second

applicant had run into him deliberately and he was charged with the offence of assault, contrary to Rule 47(1) of the Prison Rules.

26. The adjudication hearing before the governor commenced on 24 March 1997 when the second applicant requested legal representation (or, alternatively, representation by his probation officer) at the hearing. This was refused but the hearing was adjourned to allow him to obtain legal advice, which he did on 27 March 1997. The second applicant's representative then advised him about the nature and format of the adjudication proceedings and about the questions which he should raise. He was also advised to request legal representation again for the adjudication hearing, which he did on 31 March 1997.

27. The adjudication hearing was reconvened on 11 April 1997. The governor rejected the application for legal representation. He heard evidence from the relevant prison officer and another prison officer, from the second applicant and from two prisoners called by the second applicant. The second applicant's case was that the collision had been accidental.

28. The second applicant was found guilty of assault and awarded 7 additional days' custody (pursuant to section 42 of the 1991 Act). Three days' cellular confinement was also awarded and he was fined 8.00 pounds sterling (GBP). It was his thirty-seventh offence against discipline.

C. Judicial Review

29. On 16 June and 7 July 1997, respectively, the applicants requested leave to apply for judicial review of the governor's refusal of legal representation. Mr Ezeh also applied for an extension of time in which to do so. They argued that the various statutory and regulatory changes since the case of *Hone and McCartan v. Maze Prison Board of Visitors* ([1988] 1 AC 379) had made adjudication of prison disciplinary matters indistinguishable from matters of summary jurisdiction and, therefore, legal representation ought to have been allowed as of right. On 1 August 1997 a single judge of the High Court refused leave to both applicants. He observed that there was no right to legal representation in adjudication hearings and that the governor's exercise of his discretion not to allow such representation was not irrational or perverse given the facts of the cases. In Mr Ezeh's case he added that there was therefore no good reason for extending time.

30. On 10 August 1997 the applicants' counsel advised that a renewed leave application had no realistic prospect of success, given the views expressed by the single judge of the High Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

31. Control over, and responsibility for, prisons and prisoners in England and Wales is vested by the Prison Act 1952 in the Home Secretary. He is empowered by section 47(1) of that Act to make rules “for the regulation and management of prisons ... and for the classification, treatment, employment, discipline and control of persons required to be detained therein”. Such rules are contained in statutory instruments.

32. The rules in force at the time of the present applicants' disciplinary hearings were the Prison Rules 1964 as amended ("the Prison Rules"). Those have since been replaced by the Prison Rules 1999 (as amended pursuant to the Chamber's judgment in these cases – paragraphs 54-55 below).

A. The charges

33. Section 47(17) of the Prison Rules provided that a prisoner was guilty of an offence against discipline if he used threatening, abusive or insulting words or behaviour.

The Prison Manual (section 6.63) provided as follows:

"It is important that it is shown how the action was threatening, abusive or insulting, but it may not always be necessary to establish at whom the action was aimed and it is not necessary to name an individual in every charge."

Section 6.64 further provided that the impugned matter could be a specific act or word or a general pattern of behaviour; that "threatening, abusive or insulting" words should be given their ordinary meaning and that it was only necessary to find that a reasonable person at the scene would consider the words or behaviour threatening, abusive or insulting; and that the accused intended to be, or was reckless as to whether he was, threatening, abusive or insulting.

34. Section 4 of the Public Order Act 1986 ("the 1986 Act") is entitled "Fear or provocation of violence" and provides:

"(1) A person is guilty of an offence if he –

(a) uses towards another person threatening, abusive or insulting words or behaviour; or

(b) distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting,

with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is distributed or displayed, by a person inside a dwelling and the other person is also inside that or another dwelling. ...

(4) A person guilty of an offence under this section is liable ... to imprisonment for a term not exceeding 6 months or a fine ... or both."

Section 5 of the 1986 Act is entitled "Harassment, alarm or distress" and section 5(1) provides:

"A person is guilty of an offence if he –

(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour; or

(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,

within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby."

Section 5(3) provides that it is a defence for the accused to prove that there was no person within hearing or sight likely to be caused such harassment, alarm or distress, or that he was inside a dwelling and had no reason to believe that the words of behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or that his conduct was reasonable.

Dwelling is defined for the purposes of sections 4 and 5 of the 1986 Act, as being any structure or part of a structure occupied as a person's home or as other living accommodation (whether the occupation is separate or shared with others) but does not include any part not so occupied, and for this purpose "structure" includes a tent, caravan, vehicle, vessel or other temporary moveable structure.

35. A prisoner was guilty of an offence against discipline if he committed an assault (section 47(1) of the Prison Rules). Section 39 of the Criminal Justice Act 1988 makes provision for the criminal offence of common assault.

36. Section 48(1) of the Prison Rules provided that a charge of an offence against discipline should be laid, save in exceptional circumstances, within 48 hours of the offence and, in general, inquired into by the governor the day after it is laid.

B. The punishments available to the governor

37. Rule 50 of the Prison Rules provided as follows:

"(1) If he finds a prisoner guilty of an offence against discipline the Governor may, ..., impose one or more of the following punishments:

(a) caution;

(b) forfeiture for a period not exceeding 42 days of any of the privileges under Rule 4 of these Rules;

(c) exclusion from associated work for a period not exceeding 21 days;

(d) stoppage of or deduction from earnings for a period not exceeding 84 days and of an amount not exceeding 42 days earnings;

(e) cellular confinement for a period not exceeding 14 days;

(f) in the case of a short-term or long-term prisoner, an award of additional days not exceeding 42 days;

(g) in the case of a prisoner otherwise entitled to them, forfeiture for any period of the right, under Rule 41(1) of these Rules, to have the articles there mentioned.

(2) If a prisoner is found guilty of more than one charge arising out of an incident, punishments under this rule may be ordered to run consecutively but, in the case of an award of additional days, the total period added shall not exceed 42 days."

38. Rule 54(1) of those Prison Rules also provided as follows:

"Subject to paragraph (2), where an offence against discipline is committed by a prisoner who is detained only on remand, additional days may be awarded notwithstanding that the prisoner has not (or had not at the time of the offence) been sentenced."

39. The Prison Rules (Rules 43, 45 and 46) provided other means of special control of prisoners including removal from association and temporary confinement. The Prison Rules 1999 provided that removal from association could lead to placement in a close supervision centre (Rule 46).

40. The Incentives and Earned Privileges scheme has been operating in prisons since mid-1996 with each prison adapting it to meet their particular needs and resources. It aims to encourage responsible behaviour, participation in constructive activity, prisoners' progress through the prison system and a more disciplined, controlled and safer environment for prisoners and staff.

The scheme operates a "basic" regime offering the least earnings and privileges up to "standard" and "enhanced" regimes offering progressively more privileges. Such privileges can include, *inter alia*, earnings for work, visiting rights, family events within the prison, association, gym, private cash, phone-cards, tobacco, education facilities, in-cell radio and television, computer access and hobby materials.

C. Forfeiture of remission and awards of additional days

41. Prior to 1989 disciplinary offences were adjudicated upon by governors who could award a maximum of 28 days' "loss of remission" (together with 3 days' solitary confinement). Grave or especially grave offences were adjudicated upon by a Board of Visitors which could order forfeiture of a maximum of 180 days' remission for a grave offence (together with 56 days' solitary confinement) or an unlimited forfeiture of remission for an especially grave offence.

42. Loss of remission was initially considered in domestic law to amount to nothing more than a loss of a privilege (see, for example, *Morris v. Winter* [1930] 1 KB 243). By at least the 1970s, however, the English courts had rejected that idea: whether or not it could be said, under the prevailing statutory framework, that remission was a privilege or a right, prisoners were told their earliest release date on arrival in prison and could expect, subject to forfeiture being ordered, release on that date. Forfeiture of remission had the effect of causing the detention to continue beyond the period corresponding to that legitimate expectation (*R. v. Hull Prison Board of Visitors, ex parte St. Germain and Others* [1979] 1 All England Law Reports 701 and "Prison Law" (second edition, 1999), Livingstone and Owen).

43. In 1983 the power of the Board of Visitors to award unlimited forfeiture of remission was removed.

44. The Prior Report on the Disciplinary System (October 1985) recommended that there should be an effective appeal process where issues of personal liberty were at stake and that there should be a right of appeal to a manifestly independent tribunal where there was any significant forfeiture of remission.

45. In 1989 the distinction between offences, grave offences and especially grave offences was removed and the maximum loss of remission was reduced to 120 days for any one offence.

46. Lord Woolf's report on Prison Disturbances (April 1990) recommended that governors (as opposed to Boards of Visitors) should continue to adjudicate disciplinary offences and that criminal offences should be referred to the criminal courts. The report recommended that the governor's order be limited to a maximum of 28 days' loss of remission and that there should be more recourse to alternative punishments such as the loss of facilities and privileges. It was suggested that the initial decision should be taken by a governor with a right of review by an area manager, with an appeal thereafter to a Complaints Adjudicator.

47. The Criminal Justice Act 1991 ("the 1991 Act") took away the disciplinary jurisdiction of the Visitors Boards, allocating it to prison governors. It also introduced a new framework for determining the period of a sentence which would be served in custody. The concept of remission, which would result in early release of prisoners prior to the expiry of their sentence, was abolished. In its place, a new regime was created which distinguished between those prisoners sentenced to less or more than four years' imprisonment (short and long-term prisoners, respectively).

48. Section 33(2) of the 1991 Act provides that, as soon as a long-term prisoner has served two-thirds of his sentence, it shall be the duty of the Secretary of State to release him on licence. Section 33(1) puts the same obligation of release on the Secretary of State as regards short-term prisoners who have served half of their sentences: release of the latter category of prisoner is unconditional if the original sentence was for a term of less than 12 months and is on licence if the original sentence was for between 1 and 4 years' imprisonment.

49. In addition, section 42 of the 1991 Act provided as follows for the award of "additional days" to a prisoner found guilty by the governor of disciplinary offences:

"(1) Prison rules, that is to say, rules made under section 47 of the 1952 Act, may include provision for the award of additional days –

(a) to short-term or long-term prisoners; or

(b) conditionally on their subsequently becoming such prisoners, to persons on remand.

who (in either case) are guilty of disciplinary offences.

(2) Where additional days are awarded to a short-term or long-term prisoner, or to a person on remand who subsequently becomes such a prisoner, and are not remitted in accordance with prison rules -

(a) any period which he must serve before becoming entitled to or eligible for release under this Part; and

(b) any period for which a licence granted to him under this Part remains in force,

shall be extended by the aggregate of those additional days."

50. The maximum additional days which could be awarded by the governor was 28 days, the same maximum period recommended by Lord Woolf's report in 1990.

However, the Prison (Amendment) Rules 1995 (statutory instrument No. 983/1995 which entered into force on 25 April 1995) increased the maximum award of additional days to 42 for each offence; the maximum cellular confinement was increased to 14 days and the maximum forfeiture of privileges was increased to 21 days (Rule 50(1) of the Prison Rules). An award of additional days could never extend beyond the length of the original sentence imposed by the trial court.

51. The case of *R. v. Governor of Brockhill Prison, ex parte Evans (No. 2)* ([1999] 2 WLR 103) concerned a short-term prisoner's detention beyond the statutory release date because of an erroneous calculation of the release date. The Court of Appeal found detention beyond that statutory release date to be unlawful and awarded damages for false imprisonment. Lord Justice Roch noted that, pursuant to section 42 of the 1991 Act, additional days could be added onto the core period foreseen by section 33(1) so that the date therein envisaged was not absolute, but was a date that could be affected by decisions made by the governor under section 42 of the 1991 Act. Lord Justice Judge pointed out that:

“The discretionary aspects of earlier arrangements for remission and parole were altered by the [1991 Act]. As a “short-term” prisoner within Section 33(5) of the [1991 Act], subject to an award of additional days in custody for disciplinary offences, the appellant was entitled to be released on licence as soon as she had served one half of the sentence imposed by the court. Therefore authorities such as *Morris and Winter* [1930] 1 KB 243, based on the principle that there was no entitlement to remission, cease to be relevant ...

The order of the court justifies the detention. Nevertheless, the prisoner is entitled to be released immediately the sentence has been completed. The method of calculating the date of release depends on statutory provisions which must be applied correctly, that is, correctly in law.”

The House of Lords ([2000] 3 WLR 843) later rejected an appeal and confirmed the finding of false imprisonment and the award of damages.

52. In the case of *R. v. the Secretary of State for the Home Department ex parte Carroll, Al-Hasan and Greenfield* (judgment of the Court of Appeal of 19 July 2001), the appellants argued that Article 6 of the Convention should apply to prison disciplinary proceedings referring, *inter alia*, to the changes brought about by the 1991 Act. The Court of Appeal, in a judgment delivered by Lord Woolf LCJ, held, in so far as relevant, as follows:

“Section 42(1) of the 1991 Act provided a power to make prison rules which included provision for the award of additional days but section 42(2) makes it clear that where additional days are awarded to a prisoner the additional days are aggregated with the period which would otherwise have to be served before the prisoner is released on licence. ...

The new statutory framework properly understood is not fatal to the cases advanced by the appellants. Section 42 merely gives their case its proper perspective. The awards of additional days to be served by each of the appellants did not have the effect of adding to their sentence. It was not a fresh sentence of imprisonment. Their effect was to postpone the appellant's release on licence. The awards clearly had a practical effect so far as the appellants were concerned and that practical effect was to postpone their

release. But there was no question of their sentence being increased as a matter of law. Additional days could not be imposed so that they extended the actual sentence, which the appellants were serving, and the sentence passed by the court was the justification for the appellant's detention for the purposes of Article 5(1) ECHR."

The judgment went on to apply "the Engel criteria" (*Engel and Others v. the Netherlands* judgment of 8 June 1976, Series A no. 22). It noted that the domestic categorisation of the relevant offences was not criminal but disciplinary. It was held, *inter alia*, that Article 6 did not apply to proceedings concerning a penalty of 21 additional days for a charge of administering a controlled drug to himself or failing to prevent the administration of a controlled drug by another person contrary to Rule 51(9) of the Prison Rules 1999. It was found that the offence of which the prisoner was found guilty did not precisely replicate any offence contrary to the criminal law and that "the power of punishment" was not disproportionate for a disciplinary offence although it was considered close to the borderline.

D. Prison Service Instruction No. 61/2000 (October 2000)

53. This document entitled "Prison Discipline and the European Convention on Human Rights: Guidance on the use of Additional Days" provided guidance in England and Wales on the implications of the Human Rights Act 1998 for the conduct of adjudications and for awards of additional days. Insofar as relevant, it provided as follows:

"5. Disciplinary proceedings in prisons require swift hearings and a speedy process to maintain discipline and order. They are not adversarial and the nature of the decision is an administrative public law decision rather than one which resolves a dispute between two parties. Domestic English law has distinguished prison disciplinary proceedings from criminal proceedings when deciding the procedural standards necessary for fairness. ECHR case law confirms this view.

6. However, the fact that the ECHR will not in general apply to disciplinary proceedings does not mean that there is not, in theory, a risk it could apply in certain circumstances. ...

7. It is therefore important that governors do not impose punishments which are disproportionate to what is necessary, taking account of all the circumstances of the case, to achieve their aim, namely to act as a deterrent to that prisoner and others in order to ensure good order and discipline in the prison. Considerations such as the nature of the conduct involved, the impact on any victim of the conduct, the impact on the running of the prison of the conduct, the likely impact of the punishment on the prisoner, the age of the prisoner, the length of time remaining to the prisoner's release and the length of the prisoner's sentence may all be material to the proportionality of the punishment. ...

Consideration of alternative punishments

12. Before making a decision to impose additional days, adjudicators must ensure that they have considered whether any other punishment available to them would be more appropriate, given all the circumstances of the case. Adjudicators must satisfy themselves that any punishment imposed is proportionate, taking into account the factors set out in paragraph 7. The key question to address is whether the punishment is justified,

and whether it is proportionate in the sense that a sledgehammer is not being used to crack a nut.

Guideline for situations where additional days will be appropriate

13. The imposition of additional days is generally the heaviest of the range of punishments available to adjudicators and should be used accordingly, in targeted fashion. It is not possible to give an exhaustive list of the types of offence where additional days might be appropriate; much will depend upon the circumstances of the individual case. The following, however, are examples where additional days may be particularly appropriate following a finding of guilt at adjudication.

(a) Cases which would have been referred to the police but for the wishes of the victim.

(b) Serious assaults and assaults on staff.

(c) Escapes, attempted escapes and absconds.

(d) Drug offences, particularly involving Class A drugs.

(e) Concerted or persistent acts of indiscipline.

Level of additional days to be imposed

14. ... the number of additional days imposed must be proportionate to the aim of securing good order and discipline in the prison. In making this decision, the governor will consider the same factors as those set out in paragraph 7.

15. Adjudicators should be particularly careful before imposing a large number of additional days. Overall, it should be extremely rare for punishments of more than 28 days to be made. As a guide, in 1998, only 3% of punishments of additional days were for more than 28 days.

Consideration of referral to police of more serious cases

16. For more serious cases, adjudicators must ensure that they have fully considered the alternative of referring the matter to [the] police ... Only if this is not possible in the circumstances or there are very good reasons where a disciplinary punishment is more appropriate ... should adjudicators use the disciplinary procedure instead."

E. The Prison (Amendment) Rules 2002 (No. 2116/2002)

54. Introduced following the delivery of the Chamber's judgment in the present cases, this Statutory Instrument came into force on 15 August 2002 to amend the Prison Rules 1999. Its explanatory note reads as follows:

"These Rules amend the Prison Rules 1999 by providing for an adjudicator, approved by the Secretary of State, to inquire into charges of serious offences against discipline set out in those Rules. Where the governor determines that a charge is sufficiently serious, he must refer it to the adjudicator, who is to inquire into the offence no later than 28 days after it has been referred. At an inquiry into a charge that has been referred to the adjudicator, the prisoner who has been charged is given the opportunity to

be legally represented. If the adjudicator finds a prisoner guilty, he has the power to impose upon him any punishment which the governor can impose, and can also impose an award of up to 42 additional days to be served in prison. These Rules also remove from the governor the power to impose any additional days as a punishment on a prisoner found guilty by him, and add to his powers in certain other respects."

In practice, Adjudicators are District Judges who visit prisons on a regular basis.

55. This statutory instrument also increased the maximum cellular confinement which could be awarded by the governor to a period not exceeding 21 days and added "removal from his wing or living unit for a period of 28 days" as a further punishment available to the governor.

F. Scottish Prison Service Notice of 8 June 2001

56. The instruction referred to advice received by the Scottish prison service to the effect that when additional days were imposed the proceedings arguably amounted to the determination of a criminal charge so that they should be held before an independent person rather than a prison service employee. The prison service had been recently advised that the risk of a successful challenge under the Convention to the use of additional days was greater than previously thought.

57. Accordingly, governors and others acting as adjudicators in disciplinary proceedings against prisoners in Scottish prisons were required to, *inter alia*, suspend awarding additional days as and from 11 June 2001. The relevant Ministers had taken into account legal advice and advice from the prison service, the latter based on consultation with governors, to the effect that ceasing to impose additional days' detention should not have significant operational or management implications for establishments. It was noted, in this respect, that the awards of additional days' detention had declined significantly in recent years. The judgment of the Court in the present cases would be examined when delivered and it would be of relevance to the Ministers and the prison service in deciding whether the suspension should be permanent.

58. The instruction attached a series of questions and answers. In response to the question whether the changes would increase indiscipline, the document noted:

"Figures show that the use of ADAs [additional days detention] has been falling steadily in recent years, Also, ADAs and LOR [loss of remission] have never been available for life prisoners, yet this does not seem to have caused any disciplinary problems. There is a wide range of other punishments and of management measures available to deal with indiscipline. In the most serious cases, that is where potentially criminal activity is involved, there also remains the option of referring the matter to the police for possible criminal charges."

G. Legal representation at an adjudication

59. Section 49(2) of the Prison Act 1952 provides:

"Rules made under this section shall make provision for ensuring that a person who is charged with any offence under the rules shall be given a proper opportunity of presenting his case."

60. The above provision is implemented through Rule 49(2) of the Prison Rules:

"At an inquiry into a charge against a prisoner, he shall be given a full opportunity of hearing what is alleged against him and of presenting his own case."

61. The courts have interpreted Rule 49(2) as conferring a power on the governor to grant, or to refuse, a prisoner legal representation at an adjudication hearing. In *R. v. the Home Secretary ex parte Tarrant and Others* ([1985] 1 QB 251), the High Court pointed out that there is no right to legal representation for prison adjudications and that its grant in a particular case should be determined by reference to certain factors. Those factors were stated to include the seriousness of the charge and of the potential penalty; whether any points of law are likely to arise; the capacity of the particular prisoner to present his own case; procedural difficulties; the need of the prison authorities for reasonable speed in making their adjudications; and the need for fairness as between prisoners and as between prisoners and prison officers.

62. The House of Lords endorsed the factors outlined in the aforementioned *Tarrant* judgment in the case of *Hone and McCartan v. Maze Prison Board of Visitors* ([1998] AC 379). Lord Bridge found it difficult to imagine that "the rules of natural justice would ever require legal representation before the governor". Lord Goff considered that:

"... it is easy to envisage circumstances in which the rules of natural justice do not call for representation, even though the disciplinary charge relates to a matter which constitutes in law a crime, as may well happen in the case of a simple assault where no question of law arises, and where the prisoner charged is capable of presenting his own case. To hold otherwise would result in wholly unnecessary delays in many cases, to the detriment of all concerned including the prisoner charged, and to a wholly unnecessary waste of time and money, contrary to public interest. Indeed to hold otherwise would not only cause injustice to prisoners: it would also lead to an adventitious distinction being drawn between disciplinary offences which happen also to be crimes and those which happen not to be so, for the punishments liable to be imposed do not depend on any such distinction."

H. Statistics

63. In its letter dated 12 November 1999, the Home Office supplied the numbers of prison adjudications which took place between 1996 and 1998, those in which the charges were considered proven and those where additional days were awarded. The approximate figures are set out below:

	Total Adjudications	Charges proved	Addit. days awarded
1996	129,000	115,700	77,300
1997	121,500	108,200	74,000
1998	126,000	111,500	75,000

64. That letter also pointed out that between 1994 and 1998 there were about 250 requests for legal or other representation, of which approximately two-thirds were granted.

65. The above-cited *R. v. Carroll, Al-Hasan and Greenfield* judgment noted that 118,860 adjudications had taken place in 1999, during which the charges were proven in 104,384 cases and a total of 70,625 additional days were awarded.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 3 (c) OF THE CONVENTION

66. The applicants complained under Article 6 § 3 (c) of the Convention about the lack of legal representation and, alternatively, of legal aid for their hearings before a prison governor in the disciplinary proceedings brought against them under the Prison Rules.

In its judgment of July 2002, the Chamber found that the proceedings determined a criminal charge against the applicants within the meaning of Article 6 § 1 and that there had been a violation of the second limb of Article 6 § 3 (c) since they had been denied the right to be legally represented. Before the Grand Chamber, the applicants agreed, and the Government disagreed, with both of those findings of the Chamber, most the submissions to the Grand Chamber being concerned with the applicability of Article 6 to the proceedings against the applicants.

67. The Court recalls that cases referred to its Grand Chamber embrace all aspects of the application previously examined by the Chamber in its judgment, and not just the matters that warranted the cases' referral to the Grand Chamber pursuant to Article 43 § 2 of the Convention (*K. and T. v. Finland* [GC], no. 25702/94, § 140, ECHR 2001-VII, and *Kingsley v. the United Kingdom* [GC], no. 35605/97, § 34, ECHR 2002-IV).

68. Article 6 §§ 1 and 3 (c) read, in so far as relevant, as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights:

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”

A. Applicability of Article 6 of the Convention

1. The criteria by which the applicability of Article 6 is determined

(a) The Chamber's judgment

69. The Chamber took, as a starting point for the determination of the applicability of the criminal aspect of Article 6, the criteria set down by the Court in its *Engel and Others v. the Netherlands* judgment of (8 June 1976, Series A no. 22, §§ 82-83) as applied in the prison context in the *Campbell and Fell v. the United Kingdom* judgment (of 28 June 1984 Series A no. 80, §§ 68-69).

(b) The applicants' submissions to the Grand Chamber

70. The parties did not dispute that this was the appropriate point of departure for an assessment of the applicability of the criminal aspect of Article 6 of the Convention.

71. The applicants pointed out that each development in the legal status of prisoners in England and Wales over the last 25 years had been opposed by the Government on the basis that added judicial intervention in prisons would undermine prison discipline. However, the changes to the prison discipline regime in Scotland in June 2001, and those subsequently implemented in England and Wales in August 2002, had not and would not have such a negative impact.

72. The removal in England and Wales of the governors' power to award additional days and the appointment of Adjudicators in August 2002 (see paragraphs 54-55 above) had produced, in the applicants' opinion, a system of prison discipline which complied with Article 6, was workable and answered the Government's central concern about the need to maintain the speed and efficiency of prison disciplinary proceedings.

Indeed, the applicants contended that the new system contributed to the effectiveness of prison discipline. While the power to award additional days was now vested in an Adjudicator, governors retained a broad range of other formal and informal effective disciplinary powers. The applicants considered absurd any suggestion that the immediate prospect of a governor's sanction was less of a deterrent than the prospect of serving some time later a number of additional days' detention awarded by an Adjudicator. The new adjudication hearings were to be conducted within a strict time-limit and there was a perception of legitimacy surrounding the Adjudicators who were seen to be independent.

The applicants accepted that additional days could not be awarded if the charges could not be processed by Adjudicators in time for the date already fixed for early release, but governors had also experienced the same difficulty. The Government had not, in the applicants' opinion, demonstrated that prejudicial delays had been caused by the new system and they noted, in particular, that Adjudicators should be able to deal efficiently with unwarranted adjournment requests. As to the Government's suggestion that the new system is administratively cumbersome and costly, the applicants noted that the Government provided no clear evidence of this and contended that, in any event, it is for the State to organise its legal system so as to enable it to comply with the Convention's requirements.

73. The Scottish prison disciplinary system, the applicants pointed out, had been changed in June 2001 in a more far-reaching manner than in England and Wales with the suspension of awards of additional days and the Scottish authorities had not envisaged significant adverse consequences for prison discipline. The only material difference between the systems in Scotland and in England and Wales prior to their being so amended was the different maximum awards of additional days (14 in Scotland and 42 in England and Wales) and it could not be maintained that the Scottish prison population was uniquely unproblematic. Accordingly, the successful abandonment in Scotland almost two years ago of awards of additional days' detention made it difficult to accept the Government's argument that the more modest amendments introduced in England and Wales would undermine the prison disciplinary regime.

74. The applicants submitted an article by Mr Newell, the President of the Prison Governors' Association of England and Wales, published in the association's quarterly,

The Key, in which he welcomed the Chamber's judgment in the present cases and opined that the loss of additional days would not have a significant impact on prison discipline. The applicants also submitted a comparative study completed in 2003 by a criminologist (Dr Loucks) on systems of remission and prison discipline in Belgium, France, Germany, Italy, Northern Ireland, Ireland, Scotland, Sweden and Switzerland. A further statement was submitted by a Mr Quinn, a Visiting Fellow at the Faculty of Law, University of West England and Editor of *The Key.* He had been a prison governor, had worked in the prison service of England and Wales headquarters and had been involved in providing training and advice to adjudicating governors. Mr Quinn concluded that governors had lost faith in the legitimacy of their imposing additional days and that that system had had its day. Finally, the applicants submitted an affidavit of their legal representative in which he summarised anecdotal information received from governors as to the impact of the new system in England and Wales.

75. The applicants concluded that the Chamber's approach to the application of the *Engel* criteria was correct and in accordance with the Convention organs' jurisprudence.

(c) The Government's submissions to the Grand Chamber

76. The Government maintained that the dividing line between the criminal and the disciplinary had been fixed in a manner consistent with Article 6 of the Convention.

77. The Chamber, in applying the *Engel* criteria, had not taken sufficient account of the need to maintain an effective prison disciplinary regime, a factor which justified a wider disciplinary sphere in a prison context.

The Government submitted in this respect that there was a unique need to effectively enforce discipline in prisons. The prison population was inherently dangerous and deliberately challenged authority. Prisoners lived in close proximity to one another, often in overcrowded conditions. A regime was required which buttressed public order, ensured security in prison and the rights of other inmates; which preserved the authority of the prison managers; which through tailor-made sanctions including additional days gave strong incentives to good behaviour and rehabilitation (objectives enhanced by the transparency introduced by the 1991 Act and by the possibility of the remittal of the additional days by the Home Secretary); which provided strong deterrents to disorderly behaviour; which provided opportunities for social interaction and education; and which provided an immediate response to the impugned behaviour. The sanction of the loss of early release was not only a necessary and effective incentive, but it was a common sanction of prison disciplinary regimes in many Council of Europe States. Indeed it was a sanction which did not appear on a prisoner's criminal record (as noted in the *Engel and Others* case, at § 80).

78. The Government submitted that the Chamber had departed from prior case-law of the Commission (including *X v. the United Kingdom*, no. 7219/75 (1976) 2 Digest 241; *Kiss v. the United Kingdom*, no. 6224/73, Commission decision of 16 December 1976, Decisions and Reports (DR) 7, p. 55; *X v. the United Kingdom*, no. 7466/76 (1977) 2 Digest 243; *Eggs v. Switzerland*, no. 7341/76, Commission report of 4 March 1978, DR 15, p. 35; *McFeeley v. the United Kingdom*, no. 8317/78, Commission decision of 15 May 1980, DR 20, p. 44; *Hogben v. the United Kingdom*, no. 11653/85, Commission decision of 3 March 1986, DR 46, p 231; *Pelle v. France,* no. 11691/85, Commission decision of 10 October 1986, DR 50, p. 263; and *Borelli v. Switzerland,* no. 17571/90, Commission decision of 2 September 1993, unreported). They noted that the Chamber judgment did

not refer to the *Pelle v. France* or *Hogben v. the United Kingdom* decisions and they contested the basis upon which the Chamber distinguished the *Kiss* and *McFeely* cases considering that those cases still provided valid guidance. Indeed, the Court in its *Campbell and Fell* judgment had not disapproved of those Commission cases. Neither had the Chamber properly applied the principles established in the *Campbell and Fell* judgment, in which case the Court, alive to the particular prison requirements and concerns, had accepted broader parameters in a prison context for the disciplinary classification of proceedings.

79. As to the changes to the prison disciplinary regime of England and Wales introduced since the Chamber's judgment, the Government argued that the Grand Chamber's judgment should not depend on whether or not England and Wales had found an adequate disciplinary response to the Chamber's judgment. In any event, they maintained their position that the imposition of additional days was an essential part of the maintenance of discipline in prisons and of the authority of the prison management. The new procedure was not as effective as the old and was regarded as “second best”. The Government provided the following reasons.

In the first place, the new system involved greater delays. A governor had to examine a disciplinary charge the day after it had been laid whereas an Adjudicator was required to examine a charge not later than 28 days after it had been laid. Adjournments before a governor delayed matters a number of days but those before an Adjudicator involved delays for weeks, a factor compounded by the requirement for legal representation. Adjudicators had already complained to the Government that the system was unwieldy and that adjournments were frequently sought. Such delays undermined the faith in the system of victims of offending behaviour and weakened the deterrent value of the system. Delay also meant that in the days running up to early release a prisoner could regard him or herself as immune from an Adjudicator's award of additional days leading to a difference in treatment between those at the earlier and later stages of their sentences.

Secondly, the system was administratively more cumbersome in that it required notification of the Lord Chancellor's department of the need for an Adjudicator and that department's identification of an Adjudicator free to hear the case. Suitable facilities in prison were required for the hearing, the judge and the solicitors, and additional escorting requirements took prison officers away from their normal duties.

Thirdly, the added administrative costs to the prison service of the new system directed funds away from other more needy concerns. Since the number of cases to be referred to Adjudicators had therefore to be significantly reduced, the new system had effectively removed the availability in many cases of the penalty of additional days.

Fourthly, the added costs and reduced effectiveness of the new prison disciplinary system would increase the incentive to revert to a completely discretionary based remission system, the revocation of which had led to the Chamber's conclusion as to the applicability of Article 6 of the Convention. The Government maintained that the Chamber's judgment effectively penalised a State for structuring its remission system with a view to enhancing its incentive objective so that it had undermined the legitimate policy objectives of an effective prison disciplinary system. Connected to this, the Government argued that the Chamber's approach placed too much emphasis on how the State organised its disciplinary and remission systems so that a State could avoid the

application of Article 6 by cleverly re-organising those systems, a result which would be contrary to the autonomous requirements of Article 6 which are meant to have a uniform application throughout the States. The best approach would be to recognise that both discretionary and structured systems of remission and awards of additional days had the same effect in substance upon a prisoner and then to apply a common approach to all in assessing the width of the disciplinary sphere in a prison context.

80. As to the changes introduced by the Scottish prison service, the Government submitted there were material differences between the disciplinary systems operating in Scotland and in England and Wales prior to the changes in 2001 and 2002, respectively: in Scotland the maximum number of additional days which could have been awarded was lower and awards of additional days were made less often. The Scottish Executive felt therefore less constrained by the abandonment of this system and, indeed, had only suspended the use of additional days subject to review.

81. The Government also commented on the statements and reports submitted by the applicants. As to Dr Loucks' report, they pointed out that, even taking those systems to which she referred, it was common for European countries to operate their prison disciplinary and remission systems in a manner which assumed that Article 6 did not apply, whether remission time or privileges were lost by way of sanction for disciplinary infractions. Indeed, of the countries reviewed by Dr Loucks, Scotland was the only one that no longer retained the possibility of sanctioning misconduct by loss of early release or remission. The Government also submitted statements of Mr P. Wheatley (the Director General of the prison service of England and Wales with extensive experience in that service) and of Ms S. Tasker (an experienced governor with extensive adjudication experience in the prison service of England and Wales) which refuted the claims made in the statements of Mr Quinn and of the applicants' representative.

(d) The Court's assessment

82. The Court notes that it remains undisputed that the starting point, for the assessment of the applicability of the criminal aspect of Article 6 of the Convention to the present proceedings, is the criteria outlined in the above-cited *Engel and Others* judgment (see §§ 82-83):

"[I]t is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.

The very nature of the offence is a factor of greater import. ...

However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental ...

It is on the basis of all these criteria that the Court will ascertain whether some or all of the applicants were the subject of a 'criminal charge' within the meaning of Article 6 § 1 of the Convention".

83. It is further recalled that in its later *Campbell and Fell v. the United Kingdom* judgment (cited above, at §§ 68-69), the Court applied the *Engel* criteria in a prison context. In its judgment, the Court considered where the dividing line legitimately fell between the criminal and the disciplinary in the prison context and noted as follows:

"The Convention is not opposed to the Contracting States creating or maintaining a distinction between criminal law and disciplinary law and drawing the dividing line, but it does not follow that the classification thus made is decisive for the purposes of the Convention.

... If the Contracting States were able at their discretion, by classifying an offence as disciplinary instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7, the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention.

69. The Court was careful in the *Engel and Others* judgment to state that, as regards the dividing line between the 'criminal' and the 'disciplinary', it was confining its attention to the sphere with which the case was concerned, namely military service. It is well aware that in the prison context there are practical reasons and reasons of policy for establishing a special disciplinary regime, for example security considerations and the interests of public order, the need to deal with misconduct by inmates as expeditiously as possible, the availability of tailor-made sanctions which may not be at the disposal of the ordinary courts and the desire of the prison authorities to retain ultimate responsibility for discipline within their establishments.

However, the guarantee of a fair hearing, which is the aim of Article 6, is one of the fundamental principles of any democratic society, within the meaning of the Convention (see the *Golder* judgment ...). As the *Golder* judgment shows, justice cannot stop at the prison gate and there is, in appropriate cases, no warrant for depriving inmates of the safeguards of Article 6.

It follows that the principles set forth in the *Engel and Others* judgment are also relevant, *mutatis mutandis*, in a custodial setting and that the reasons mentioned above cannot override the necessity of maintaining, there too, a dividing line between the 'criminal' and the 'disciplinary' that is consistent with the object and purpose of Article 6. It therefore has to be determined whether the proceedings against Mr. Campbell have to be regarded as coming within the 'criminal' sphere for Convention purposes. To this end, the Court considers it right to apply, making due allowance for the different context, the criteria stated in that judgment."

84. While the Court in its *Campbell and Fell* judgment therefore recognised the special nature of the prison environment which distinguished prisons from the military context examined in the *Engel* case, it went on to emphasise the fundamental nature of the fair hearing guarantees of Article 6 and that there was, in appropriate cases, no warrant for depriving prisoners of the safeguards of that Article.

85. In such circumstances, as in the *Campbell and Fell* judgment, the Grand Chamber agrees with the Chamber that it is correct to apply the "*Engel* criteria" to the facts of the present cases in determining where to place the dividing line between the "criminal" and the "disciplinary". The Court will do so in a manner consistent with the object and purpose of Article 6 of the Convention, while making "due allowance" for the prison context and for the "practical reasons and reasons of policy" in favour of establishing a special prison disciplinary regime.

86. In addition, it is the Court's established jurisprudence that the second and third criteria laid down in the *Engel* judgment are alternative and not necessarily cumulative: for Article 6 to be held applicable, it suffices that the offence in question is by its nature to be regarded as "criminal" from the point of view of the Convention, or that the offence made the person liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere (*Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, § 54, and *Lutz v. Germany,* judgment of 25 August 1987, Series A no. 123, § 55). This does not exclude that a cumulative approach may be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (*Bendenoun v. France,* judgment of 24 February 1994, Series A no. 284, § 47; *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, § 56; *Garyfallou AEBE v. Greece,* judgment of 24 September 1997, *Reports* 1997-V, § 33; *Lauko v. Slovakia,* judgment of 2 September 1998, *Reports* 1998-VI, § 57).

87. The Court would also make certain observations on the more general submissions of the parties concerning the application of the *Engel* criteria to a prison environment.

88. In the first place, the Court notes that the Government's central submission was that the necessity of maintaining an effective prison disciplinary regime had to weigh heavily in determining where the dividing line between the criminal and disciplinary lay. As in its *Campbell and Fell* judgment, the Court would not question the importance of preserving an effective system of order and control in prison. However, it does not find compelling the Government's argument that the loss by the governor of the power to award "additional days" would undermine the prison disciplinary regime in England and Wales.

In this regard, the Court notes that other sanctions were available to the governor at the relevant times (including forfeiture of privileges, exclusion from associated work and cellular confinement) and that the range and severity of sanctions other than additional days has been extended and increased since the applicants' adjudication proceedings, most recently in August 2002 (paragraphs 37 and 55 above). The Court considers that it has not been convincingly explained why these other sanctions would not have an impact comparable to awards of additional days in maintaining the effectiveness of the prison disciplinary system, including the authority of the prison management. In this regard, the Government did not address how a sanction with immediate application would be less effective than an award of additional days which is not served until a prisoner's early release date (set pursuant to section 33 of the 1991 Act) and which in many cases will be therefore served some time, even years, after the adjudication hearing. Further, the Court does not consider that the Government have convincingly demonstrated significant material differences between the disciplinary needs in Scottish prisons, where use of

additional days was suspended almost two years ago, and those needs in prisons in England and Wales.

A new disciplinary system has been in place in prisons in England and Wales since August 2002: it retains the sanction of additional days but vests the power to make such awards in Adjudicators. The fact that the Government responded to the Chamber's judgment by making certain domestic changes cannot be determinative of the contested issue of applicability still before this Court.

The Government have argued, as a practical consideration against interpreting Article 6 so as to make its guarantees applicable to cases such as the present ones, that the new system is less effective than the former system, and, in particular, that it has given rise to additional administrative and financial burdens, as well as to delay in adjudication (see paragraph 79 above). The Court in its *Campbell and Fell* judgment (at § 69 of that judgment and see paragraph 83 above) accepted that there might be practical reasons and reasons of policy for establishing a special prison disciplinary system, but responded by emphasising that, in appropriate cases, there was no warrant for depriving prisoners of the safeguards of Article 6 of the Convention. In the Court's view, the obstacles relied on by the Government are not, on their own, such as to entail the inapplicability of Article 6 to proceedings before the prison governor.

89. Secondly, the parties exchanged submissions on the systems of early release and discipline currently in place in certain European countries and on decisions of the Commission concerning certain of those systems as they operated at the relevant times. The Government also considered it anomalous that the guarantees of Article 6 should apply because a State had introduced into its law a more transparent and legally certain system for the benefit of prisoners but which provided for the grant of awards of additional days' detention, whereas such guarantees would not be applicable to a less transparent system involving the grant and loss of discretionary periods of remission.

However, it is not for the Court to decide in the present cases whether such an anomaly, in fact, exists or how in the present day the Court would apply the *Engel* criteria to a system based on principles of discretionary remission. The Court's task is to determine how those criteria are to be applied to the system at issue in the present cases, namely a system under which governors had the power to award up to 42 days of custody additional to the period during which a prisoner would otherwise have been detained for the offence for which he or she was initially convicted.

2. The first of the Engel criteria – the domestic classification of the offences

90. The offences with which the applicants were charged were classified by domestic law as disciplinary: paragraphs 1 and 17 of Rule 47 state that the relevant conduct on the part of a prisoner shall be “an offence against discipline” and the Prison Rules go on to provide how such offences shall be dealt with under the prison disciplinary regime by adjudication before the governor (see paragraphs 31, 33 and 35 above).

Thus, as the Chamber noted, according to national law the adjudication of such offences was treated as a disciplinary matter and was designed to maintain order within the confines of the prison. The fact, as pointed out by the Government, that a governor's findings would not form part of the applicants' criminal records is simply a natural consequence of the disciplinary classification of the offence.

91. However, the indications so afforded by the national law have only a formal and relative value; the "very nature of the offence is a factor of greater import" (the above-cited *Engel and Others* judgment, at § 82).

3. The second of the Engel criteria – the nature of the charge

(a) The Chamber's judgment

92. Having noted the facts surrounding the charge of violent threats against the first applicant (see paragraph 17 above), the Chamber did not exclude that those facts could also have lent themselves to criminal prosecution under sections 4 and 5 of the 1986 Act. While the Chamber found that the charge of assault against the second applicant (see paragraph 25 above) involved a relatively trivial incident which might not necessarily have led to prosecution outside the prison context, it observed that assault was an offence under the criminal law as well as under the Prison Rules. The Chamber concluded that those factors gave the charges a certain colouring which did not entirely coincide with that of a purely disciplinary matter.

(b) The applicants' submissions to the Grand Chamber

93. The applicants endorsed this approach and conclusion of the Chamber. While certain offences are characteristic of a disciplinary system as their very existence depends on the status of the person as a prisoner, other charges are "mixed" in that they belong simultaneously to the criminal and disciplinary sphere, which factor tends strongly in favour of treating those charges as criminal for the purpose of Article 6. In this latter respect, the applicants reminded the Court that the offences of which they were charged were of a generally applicable character; the elements of the offences were precisely the same as those of the equivalent criminal offences; the conduct alleged could have been the subject of criminal prosecution outside the prison; the proceedings were adversarial in character; the burden and standard of proof adopted in disciplinary proceedings were the same as in a criminal court; and the penalties imposed were both punitive and preventative in nature, purpose and effect.

(c) The Government's submissions to the Grand Chamber

94. The Government considered that there were essentially four factors which should be examined in determining the nature of a charge.

95. In the first place, the hallmark of a disciplinary offence was one directed towards a given group possessing a special status as opposed to directed towards all citizens. The offences of which the applicants were charged were contrary to Rule 47 of the Prison Rules and they were, as such, prima facie, disciplinary and not criminal offences.

96. Secondly, it was also relevant to look at the seriousness of the impugned conduct. The *Campbell and Fell* judgment emphasised that it was the especially grave nature of the offences at issue which led the Court to the conclusion that the offences in that case had a "certain colouring" not coinciding with that of a purely disciplinary offence. The Government considered that the Chamber did not sufficiently take account of the fact that the offences at issue in the present cases were not at all of the same order of seriousness as the offences at issue in the *Campbell and Fell* case.

97. Thirdly, while the Government accepted that it was relevant to consider whether the offence gave rise, at least in theory, to concurrent disciplinary and criminal liability, they pointed out that it was inevitable that there would be an overlap between offences

forming part of prison disciplinary and criminal regimes, given that the objective of both was to seek to maintain reasonable and acceptable standards of behaviour. Accordingly, such an overlap was just one factor to be taken into account in the overall assessment of the nature of the charge but such an overlap should not obscure the fact that the offences under a prison disciplinary code generally had a predominantly disciplinary character. The Chamber accorded, in the Government's opinion, far too much weight to this concurrent liability issue. In the *Engel* case itself, although the offences were considered “mixed”, the Court held that the State was in principle entitled to employ the disciplinary rather than the criminal law as the impugned acts were in contravention of “legal rule[s] governing the operation of the **armed forces**” (the *Engel and Others* judgment, at § 82).

98. Fourthly, the Government accepted that the Court's case-law provided that a charge's punitive purpose was indicative of its criminal nature and that the purpose of disciplinary sanctions under the Prison Rules was to some extent punitive. However, that was not their primary purpose. Maintaining a defined set of offences against discipline with the imposition (and, as appropriate, remitting) of sanctions was but an aspect of the successful operation of the early release system: the possibility of early release gave prisoners an incentive to behave well but it was correspondingly necessary that a prisoner should lose early release for bad behaviour. The primary purpose of the prison disciplinary system was therefore “preventative”. Indeed, the predominant significance of the applicants' conduct was that it had a tendency to undermine the good management of the prison and the authority of prison officers. There was “no real prospect” that the first applicant would have carried out the threat against the probation officer and the assault of which the second applicant was found guilty was minor. However, it would have been inimical to the maintenance of good order in prison if they had been allowed to carry out such acts with impunity and had these acts gone unpunished.

99. The Government concluded therefore that the predominant colouring of the offences of which the applicants were charged was disciplinary rather than criminal.

(d) The Court's assessment

100. In explaining the autonomous nature of the concept of “criminal” in Article 6 of the Convention, the Court has emphasised that the Contracting States could not at their discretion classify an offence as disciplinary instead of criminal, or prosecute the author of a “mixed” offence on the disciplinary rather than on the criminal plane, as this would subordinate the operation of the fundamental clauses of Article 6 to their sovereign will. The Court's role under that Article is therefore to satisfy itself that the disciplinary does not improperly encroach upon the criminal (the above-cited *Engel and Others* judgment, § 81).

101. In the above-cited *Campbell and Fell* judgment (§ 71), it was noted that misconduct by a prisoner might take different forms; while certain acts were clearly no more than questions of internal discipline, others could not be seen in the same light. Relevant indicators were that “some matters may be more serious than others”, that the illegality of the relevant act might turn on the fact that it was committed in prison and that conduct which constituted an offence under the Rules might also amount to an offence under the criminal law so that, theoretically at least, there was nothing to prevent conduct of this kind being the subject of both criminal and disciplinary proceedings.

102. Moreover, criminal penalties have been customarily recognised as comprising the twin objectives of punishment and deterrence (the above-cited *Öztürk*, *Bendenoun* and *Lauko* judgments, at § 53, § 47 and § 58, respectively).

103. In the present cases, the Court notes, in the first place, that the offences in question were directed towards a group possessing a special status, namely prisoners, as opposed to all citizens. However, the Court does not accept the Government's submission that this fact renders the nature of the offences *prima facie* disciplinary. It is but one of the "relevant indicators" in assessing the nature of the offence (the *Campbell and Fell* judgment, cited above, at § 71).

104. Secondly, it was not disputed before the Grand Chamber that the charge against the first applicant corresponded to an offence in the ordinary criminal law (sections 4 and 5 of the 1986 Act). It is also clear that the charge of assault against the second applicant is an offence under the criminal law as well as under the Prison Rules. It is true that the latter charge involved a relatively minor incident of deliberately colliding with a prison officer which may not necessarily have led to prosecution outside the prison context. It is also true that the extreme gravity of the offence may be indicative of its criminal nature, as indicated in the *Campbell and Fell* judgment (see paragraph 101 above). However, that does not conversely mean that the minor nature of an offence can, of itself, take it outside of the ambit of Article 6 as there is nothing in the Convention to suggest that the criminal nature of an offence, within the meaning of the second of the *Engel* criteria, necessarily requires a certain degree of seriousness (the above-cited *Öztürk* judgment, § 53). The reliance on the severity of the penalty in the *Campbell and Fell* judgment (at § 72) was a matter relevant to the third of the *Engel* criteria as opposed to a factor defining the nature of the offence.

Relying on Convention case-law, the Government contested the weight to be attached to this concurrent criminal and disciplinary liability. However, in the case most directly in point, the *Campbell and Fell* judgment (at § 71), the Court referred to even a "theoretical" possibility of the impugned acts being the subject of concurrent criminal and disciplinary pursuit as a relevant factor in the assessment of the nature of the offence and it did so independently of the gravity of the offences in question. Accordingly, and even noting the prison context of the charges, the theoretical possibility of concurrent criminal and disciplinary liability is, at the very least, a relevant point which tends to the classification of the nature of both offences as "mixed" offences.

105. Thirdly, the Government submit that disciplinary rules and sanctions in prison are designed primarily to ensure the successful operation of a system of early release so that the "punitive" element of the offence is secondary to the primary purpose of "prevention" of disorder. The Court considers that awards of additional days were, on any view, imposed after a finding of culpability (*Benham v. the United Kingdom*, cited above, at § 56) to punish the applicants for the offences they had committed and to prevent further offending by them and other prisoners. It does not find persuasive the Government's argument distinguishing between the punishment and deterrent aims of the offences in question, these objectives not being mutually exclusive (the above-cited *Öztürk* judgment, at § 53) and being recognised as characteristic features of criminal penalties (see paragraph 102 above).

106. Accordingly, the Court considers that these factors, even if they were not of themselves sufficient to lead to the conclusion that the offences with which the applicants

were charged are to be regarded as “criminal” for Convention purposes, clearly gives them a certain colouring which does not entirely coincide with that of a purely disciplinary matter.

107. The Court finds, as did the Chamber, that it is therefore necessary to turn to the third criterion: the nature and degree of severity of the penalty that the applicants risked incurring (the *Engel and Others* judgment, § 82, and the *Campbell and Fell* judgment, § 72, both cited above).

4. The third of the Engel criteria – the nature and severity of the penalty

(a) The Chamber's judgment

108. As to the nature of the penalty, the Chamber considered that any right to release did not arise until the expiry of any additional days awarded under section 42 of the 1991 Act. The legal basis for the applicants' detention during those additional days continued to be the original conviction and sentence and that detention was thus clearly lawful under domestic law. However, the Chamber found that the applicants were, nevertheless, detained in prison beyond the date on which they would otherwise have been released, as a consequence of separate disciplinary proceedings unrelated to the original conviction. On the question of the severity of the deprivations of liberty which were at stake and which were actually imposed, the Chamber found that those deprivations of liberty had to be regarded as appreciably detrimental and that the presumption that the charges resulting in such awards were criminal had not been rebutted.

(b) The applicants' submissions to the Grand Chamber

109. The applicants agreed with this analysis and conclusion of the Chamber, although they noted that the Chamber had disagreed with their analysis of the impact of the 1991 Act on the question of whether a decision of a governor to award additional days altered the legal basis for a prisoner's detention.

110. They added that the Chamber's approach to the application of the “appreciably detrimental” test was the only workable one, not least because the due process requirements of a hearing could not be determined retrospectively in the light of the actual penalty imposed after that process. The procedural protection of Article 6 should not depend, in the applicants' view, on an individual's status (whether as a prisoner, soldier or “civilian”) nor should it progressively decrease the longer the sentence the prisoner was currently serving.

111. The applicants further maintained that the Government's suggestion that Article 5 § 4 provided sufficient protection was incorrect for the reasons set out in the Chamber's judgment, was inconsistent with the Government's own position that the original sentence by the court was the sole basis for detention during the period of additional days and amounted to an acceptance that separate issues of legality arose on the award of additional days which were not covered by the original sentence. In any event, whether Article 6 or Article 5 § 4 applied to adjudication hearings, both required an independent and impartial tribunal and the Government had accepted that the governor could not constitute such a body. Applying for leave to take judicial review proceedings would not cure this deficiency since it would be a review on narrow legal grounds and not an appeal

on the merits (*Weeks v. the United Kingdom*, judgment of 2 March 1987, Series A no. 114, § 69).

112. Finally, the applicants considered that the Chamber's judgment had correctly looked behind appearances to the reality of the situation in order to apply Article 6 to their adjudication proceedings.

(c) The Government's submissions to the Grand Chamber

113. The Government disputed the Chamber's application of, and conclusions on, the third of the *Engel* criteria.

114. The Government did not contest that the primary consideration was the penalty the applicants were liable to receive under the relevant provision or that the actual penalty imposed remained relevant. However, they argued that the domestic requirement of proportionate awards meant that the actual penalty imposed should be considered indicative of what was risked. It could be said therefore that the second applicant never risked an award of 42 additional days.

115. The Government took issue with each of the remaining elements of the Chamber's approach to the third of the *Engel* criteria. In particular, they contested that even the full 42 additional days fell outside of the disciplinary sphere: even reasonably substantial awards of additional days would fall within the disciplinary sphere. While the Chamber had correctly analysed the effect of an award of additional days under the 1991 Act in domestic law, the Government disagreed that such an award amounted to a fresh "deprivation of liberty". They argued that the Chamber was wrong to presume that the charges were criminal once there was a loss of remission. Further, neither the *Engel and Others* nor the *Campbell and Fell* judgments supported a presumption that *any* appreciably detrimental loss of remission in a prison context would lead to a criminal classification of charges. They also disagreed with the Chamber's application of the "appreciably detrimental" test.

116. In doing so, the Government mainly argued that the Chamber had not sufficiently taken into account the "prison context". By this the Government was referring to the fact that prisoners were already subject to a sentence lawfully imposed by a court so that awards of additional days formed part of a scheme for the implementation of that sentence (additional days would never exceed the length of that original sentence). Accordingly, no direct comparison was possible between the situation of a person at liberty or even that of military personnel (at issue in the *Engel and Others* case), the latter personnel being otherwise at liberty, albeit subject to a code of military discipline. In short, equating awards of additional days against prisoners with the detention of persons at liberty (including military personnel) was to ignore the prison context and, in particular, the fact that additional days were served during a sentence already lawfully imposed by a court.

117. The Chamber had, according to the Government, also failed adequately to take into account the legitimacy of a State setting up a remission system dependent upon the good behaviour of prisoners and to be administered by the prison authorities.

118. The Government further pointed out that the penalties imposed were of a completely different order to the awards found to attract the protections of Article 6 in the *Campbell and Fell* case. In addition, it was not consistent with the Convention

jurisprudence to apply a presumption as to the criminal nature of charges in the case of *any* loss of remission.

119. Finally, the Government submitted that, even if Articles 6 and 7 did not apply to the adjudication proceedings, the prisoner retained the protections of Article 5 since he or she could challenge by judicial review the lawfulness and arbitrariness of his continuing detention as well as the imposition of a sanction of additional days.

(d) The Court's assessment

120. The nature and severity of the penalty which were “liable to be imposed” on the applicants (the *Engel and Others* judgment, § 82) is determined by reference to the maximum potential penalty for which the relevant law provides (the above-cited *Campbell and Fell* judgment, at § 72; *Weber v. Switzerland,* judgment of 22 May 1990, Series A no. 177, § 34; *Demicoli v. Malta,* judgment of 27 August 1991, Series A no. 210, § 34; *Benham v. the United Kingdom,* judgment cited above, § 56; and the above-cited *Garyfallou AEBE v. Greece* judgment, §§ 33 and 34).

The actual penalty imposed is relevant to the determination (the *Campbell and Fell* judgment, § 73, and *Bendenoun v. France,* judgment of 24 February 1994, Series A no. 284, § 47) but it cannot diminish the importance of what was initially at stake (the *Engel and Others* judgment, § 85, together with the above-cited *Demicoli*, *Garyfallou* and *Weber* judgments, at § 34 of each judgment).

121. Turning therefore to the nature of the penalties in question in the present cases, the Court notes that the parties did not dispute the Chamber's observations concerning the effect in domestic law of the award of additional days under the 1991 Act.

The Chamber found in this connection that remission of part of a prisoner's sentence was initially considered in domestic law to be a privilege which could be granted and taken away at the discretion of the authorities, and to which the prisoner had no legal entitlement. However, prior to the 1991 Act, the domestic courts had already come to reject the notion that remission was a privilege and that prisoners who had lost remission had not lost anything to which they were entitled. The courts considered that, if remission was not a legal “right”, prisoners had at least a legitimate expectation of release on the expiry of the relevant period (see paragraph 42 above). The Court in its *Campbell and Fell* judgment (§ 72) accepted that the practice of granting remission, as it existed at that time, was such that it created in the prisoner a legitimate expectation that he would recover his or her liberty before the end of the term of imprisonment and that forfeiture of remission had the effect of causing the detention to continue beyond the period corresponding to that expectation – the Court found support for that view in the judgment of Waller L.J. in the above-cited case of *R. v. Hull Prison Board of Visitors, ex parte St. Germain and Others*.

The Court does not see any reason to differ from this analysis made by the Chamber of domestic law prior to the 1991 Act.

122. The Court therefore considers, as did the Chamber, that the effect of the 1991 Act was to introduce more transparency into what was already inherent in the system of grants of remission. While it abandoned the language of “loss of remission” in favour of awards of “additional days”, the 1991 Act embodied in law what had already been the reality in practice. Accordingly, any right to release did not arise until the expiry of any

additional days awarded under section 42 of the 1991 Act. The legal basis for detention during those additional days continued to be therefore the original conviction and sentence.

123. As noted by Lord Woolf LCJ in the case of *R. v. the Secretary of State for the Home Department ex parte Carroll, Al-Hasan and Greenfield* (see paragraph 52 above), the award of additional days did not increase a prisoner's sentence as a matter of domestic law. The applicants' custody during the additional days awarded was thus clearly lawful under domestic law. Nevertheless, the Court does not consider that this goes to the heart of the question of the precise nature of the penalty of additional days. As recently demonstrated by the Court in its Stafford judgment (*Stafford v. the United Kingdom* [GC], no. 46295/99, §§ 64 and 79, ECHR 2002-IV), the Court's case-law indicates that it may be necessary to look beyond the appearances and the language used and concentrate on the realities of the situation. The reality of awards of additional days was that prisoners were detained in prison beyond the date on which they would otherwise have been released, as a consequence of separate disciplinary proceedings which were legally unconnected to the original conviction and sentence.

124. Accordingly, the Court finds that awards of additional days by the governor constitute fresh deprivations of liberty imposed for punitive reasons after a finding of culpability (see paragraph 105 above). The Court finds further support for this view in the provisions of Rule 54(1) of the Prison Rules which allow for the imposition of additional days during a prisoner's detention on remand and, therefore, prior to any conviction, although such days would not be served in the event of acquittal.

125. This being so, the mere fact, emphasised by the Government, that at the time of the governor's decision the applicants were prisoners serving a lawfully imposed prison sentence does not, in the view of the Court, serve to distinguish their case from that of civilians or military personnel at liberty. It is, moreover, for this reason that the question of the procedural protections to be accorded to prison adjudication proceedings is one properly considered under Article 6 and not, as the Government suggest, under the provisions of Article 5 of the Convention.

It is true that in its *Campbell and Fell* judgment the Court concluded that the penalty imposed “came close to, even if it did not technically constitute” a deprivation of liberty. However, the Court was constrained to so frame its finding since it was examining a “loss of remission” as opposed to an “award of additional days” for which the later 1991 Act provided.

126. It is recalled that, in its *Engel and Others* judgment, the Court found (at § 82) as follows:

“In a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so.”

Accordingly, given the deprivations of liberty, liable to be and actually imposed on the present applicants, there is a presumption that the charges against them were criminal within the meaning of Article 6, a presumption which could be rebutted entirely

exceptionally, and only if those deprivations of liberty could not be considered "appreciably detrimental" given their nature, duration or manner of execution.

127. As to whether the presumption can be rebutted in the present cases, the Chamber could not find much guidance from the Court's *Campbell and Fell* judgment and the Grand Chamber agrees. In that judgment the Court concluded that the level of "remission lost" by Mr Campbell (570 days) involved "such serious consequences as regards the length of his detention" that that penalty had to be regarded as "criminal" for the purposes of Article 6 of the Convention. It was not therefore relevant, in the *Campbell and Fell* case, to apply the "appreciably detrimental" test.

128. In the present cases, it is observed that the maximum number of additional days which could be awarded to each applicant by the governor was 42 for each offence (Rule 50 of the Prison Rules). The first applicant was awarded 40 additional days and this was to be his twenty-second offence against discipline and his seventh offence involving violent threats. The second applicant was awarded 7 additional days' detention and this was to be his thirty-seventh offence against discipline. The awards of 40 and 7 additional days constituted the equivalent, in duration, of sentences handed down by a domestic court of approximately 11 and 2 weeks' imprisonment, respectively, given the provisions of section 33 (1) of the 1991 Act (see paragraph 48 above).

The Court also observes that there was nothing before the Chamber, and nothing was submitted to the Grand Chamber, to suggest that awards of additional days would be served other than in prison and under the same prison regime as would apply until the normal release date set by section 33 of the 1991 Act.

129. In these circumstances, the Court finds that the deprivations of liberty which were liable to be, and which were actually, imposed on the applicants cannot be regarded as sufficiently unimportant or inconsequential as to displace the presumed criminal nature of the charges against them.

The Court notes that the maximum penalty that could have been awarded against *Mr Engel* and the actual penalty imposed on him – 2 days' strict arrest in both respects – was found to be of too short a duration to belong to the criminal sphere. However, it observes that, in any event even the lowest penalty imposed in the present cases was substantially greater than that in Mr *Engel's* case.

5. The Court's conclusion

130. In such circumstances, the Court concludes as did the Chamber that the nature of the charges together with the nature and severity of the penalties, were such that the charges against the applicants constituted criminal charges within the meaning of Article 6 of the Convention, which Article applied to their adjudication hearings.

B. Compliance with Article 6 § 3 (c)

1. The second limb of Article 6 § 3 (c)

(a) The Chamber's judgment

131. The Chamber reasoned and found as follows on the merits of the applicants' complaints under the second limb of Article 6 § 3 (c) of the Convention:

"103. The Court recalls that the Convention requires that a person charged with a criminal offence who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing (the above-cited *Campbell and Fell* judgment, § 99, and the *Pakelli* judgment of 25 April 1983, Series A no. 64, § 31).

104. In this respect, the Court notes that it is not disputed that both of the applicants requested legal representation, *inter alia*, for the hearing before the governor. This was refused by the governor because he considered it unnecessary. Any such consideration of legal representation was to be based on the criteria outlined in the above-cited cases of *R. v. the Home Secretary ex parte Tarrant and Others,* approved by the House of Lords in *Hone and McCartan v. Maze Prison Board of Visitors.* These judgments exclude any 'right' to legal representation for adjudications, and indeed Lord Bridge in the latter case found it difficult to imagine that the rules of natural justice would ever require legal representation before the governor. In the present case, the single judge of the High Court confirmed that there was no right to legal representation and that the governor's refusal of legal representation was not irrational or perverse.

105. Accordingly, the question whether the applicants could have secured representation (either through personal funding or free of charge) was not a relevant consideration for the governor: the governor excluded the applicants' legal representation, as he was entitled to under domestic law, irrespective of whether they could have obtained the services of a lawyer free of charge.

106. In such circumstances, the Court considers that the applicants were denied the right to be legally represented in the proceedings before the prison governor in violation of the guarantee contained in the second limb of Article 6 § 3 (c) of the Convention."

(b) The applicants' submissions to the Grand Chamber

132. The applicants agreed with the Chamber that there had been a violation of the second limb of Article 6 § 3 (c) because they were not allowed to be legally represented. They emphasised that this complaint was not about the failure of the State to provide free legal representation but concerned the refusal of the governor to allow them to be legally represented at all. Indeed, the issue of State funding could not have been considered by the governor as he had reached the opinion that such representation was not necessary, however it would be funded (and the applicants' solicitor would have been willing to so represent them free of charge). Since the second limb of Article 6 § 3 (c) was unqualified in its protection, the refusal of legal representation for their adjudication hearings constituted a violation of that provision.

(c) The Government's submissions to the Grand Chamber

133. The Government submitted that the circumstances in which this complaint fell to be assessed had to be those which presented themselves to the governor at the time. The governors in both cases had no knowledge that either of the applicants might have had available to them a lawyer willing to act for them in the adjudication and at no stage did either indicate that they had the means or opportunity to obtain legal representation without assistance. The governors therefore considered that the applicants' requests for legal representation were requests for legal aid. The refusal by the governors of those requests fell to be considered therefore under the third, and not the second, limb of Article 6 § 3 (c) of the Convention.

(d) The Court's assessment

134. The Court does not find any material difference between the parties' positions before the Chamber and Grand Chamber and sees no reason to depart from the Chamber's findings as to a violation of the second limb of Article 6 § 3 (c) of the Convention in the present cases. It therefore concludes that, for the reasons indicated by the Chamber in its judgment and set out above, there has been a violation of this provision.

2. The third limb of Article 6 § 3 (c)

(a) The Chamber's judgment

135. The Chamber found as follows on the merits of this alternative complaint of the applicants:

"108. In the light of its conclusions as to a violation of their right to obtain legal representation (see paragraph 106 above), the Court does not consider it necessary to consider the applicants' alternative argument that the interests of justice required that they be granted free legal assistance for the adjudication proceedings."

(b) The applicants' submissions to the Grand Chamber

136. The applicants maintained their alternative argument under this limb of Article 6 § 3 (c) that the interests of justice required a grant of free legal aid, arguing that the guidelines approved in the above-cited *Hone and McCartan* case did not meet the Convention "interests of justice" test. Alternatively, they complained that, where a deprivation of liberty was at stake, the interests of justice in principle required free legal representation both before and during the hearing on all questions of guilt or innocence (the above-cited *Benham* judgment, §§ 61-64).

(c) The Government's submissions to the Grand Chamber

137. The Government considered that the applicants' legal representation complaints should be considered under this limb and they maintained that a denial of legal aid to the applicants was not contrary to the interests of justice.

(d) The Court's assessment

138. The Grand Chamber considers that, in the light of its conclusions as to a violation of the applicants' right to obtain legal representation (see paragraph 134 above), it is not necessary to consider their alternative complaint that the interests of justice required that they be granted free legal for the adjudication proceedings.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

139. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

140. The applicants did not claim just satisfaction for any pecuniary damage suffered by them.

141. As regards their claim for non-pecuniary damage, the Chamber reasoned and found as follows:

"112. The Court recalls that it will not speculate as to what might have occurred had there been no breach of the procedural guarantees of Article 6 of the Convention (the above-cited *Benham* judgment, § 68, and the *Findlay v. the United Kingdom,* judgment of 25 February 1997, *Reports* 1997-I, §§ 84-88) unless it finds special features in the case amounting to a "real loss of opportunity" (the *Perks and Others* judgment, cited above, §§ 80-81, and the *Goddi v. Italy* judgment, cited above, § 35).

113. In the *Goddi* case, both the applicant and his representative had been prevented from attending the relevant court hearing where his sentence had been increased, and it was considered that such a loss of real opportunity warranted the award of just satisfaction (§ 35 of that judgment). In the *Perks and Others* case, the Court saw no reason to disregard the Government's concession that the situation of Mr Perks was exceptional given that the appeal court had found it unlikely that the Magistrates' Court would have committed him to prison if they had known more about his health problems and personal circumstances, matters to which, the Government had also accepted, a reasonably competent solicitor would have drawn the Magistrates' Court's attention. An award for non-pecuniary loss was therefore made to Mr Perks. It is noteworthy that the Court went on to find that there was no basis to speculate, as regards the other applicants in the *Perks and Others* case, as to the outcome of their proceedings before the Magistrates' Courts, and found that the finding of a violation constituted sufficient just satisfaction.

115. In the present cases, the Court finds that there is similarly no basis to speculate as to the outcome of the adjudication proceedings and is unable to find any factor in the present cases which could justify a departure from the Court's approach in the *Benham* judgment. Accordingly, it considers that the finding of a violation of Article 6 § 3 (c) of the Convention constitutes, in itself, sufficient just satisfaction for any non-pecuniary damage sustained by the applicants."

142. Before the Grand Chamber, the applicants repeated their submissions to the Chamber in support of their claim for compensation for non-pecuniary damage.

The Government supported the Chamber's findings. They considered that the Chamber had followed the Court's constant practice of not speculating as to the result of proceedings had the guarantees of Article 6 been met and it had properly distinguished the judgments in the particular cases of *Goddi v. Italy* (judgment of 9 April 1984, Series A no. 76), and of *Perks and Others v. the United Kingdom*, (nos. 25277/94, 25279/94, 25280/94, 25282/94, 25285/94, 28048/95, 28192/95 and 28456/95, 12 October 1999). That approach of the Court was, in the Government's view, consistent with the fundamental limitations deriving from the Court's supervisory role and the argument for the application of the general rule was particularly strong on the facts of these cases. Alternatively, the Government argued that the amounts claimed in non-pecuniary loss were excessive.

143. The Court sees no reason to depart from the Chamber's reasoning and conclusion on the applicants' claims for awards of just satisfaction for any non-pecuniary damage suffered by them. It notes, in addition, the intervening *Kingsley v. the United Kingdom* judgment (cited above, at § 43) and concludes that the finding of a violation of Article 6 § 3 (c) of the Convention constitutes, in itself, sufficient just satisfaction for any non-pecuniary damage sustained by the applicants.

B. Costs and expenses

144. The Chamber's conclusion, not disputed before the Grand Chamber, as regards the applicants' claims for reimbursement of their costs and expenses was as follows:

"116. The Court recalls that that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, Nikolova v. Bulgaria [GC], no. 31195/96, 25 March 1999, § 79, and *Smith and Grady v. the United Kingdom* (just satisfaction), nos. 33985/96 and 33986/96, § 28, ECHR 2000-IX).

117. It is satisfied that the applicants' costs claim meets these requirements and, accordingly, awards the sum of GBP 17,124, inclusive of any VAT that may be chargeable, and less 2,387.50 euros (EUR) paid in legal aid by the Council of Europe."

145. The parties' submissions to the Grand Chamber concerned exclusively the applicants' additional costs incurred since the Chamber proceedings.

The applicants submitted a bill of costs which requested reimbursement of a total of GBP 22,731.36 and EUR 87.70. Their claim comprised GBP 10,398.75 (Counsel's fees inclusive of value-added tax (VAT) in respect of work done by junior and leading counsel between 7 February and 5 March 2003 vouched by fee notes submitted); GBP 10,285.16 (solicitors' fees inclusive of VAT incurred before the Grand Chamber until 17 March 2003 vouched by fee notes submitted) and GBP 528.75 (estimated solicitors' fees inclusive of VAT to be incurred from 17 March 2003) together with GBP 1,518.70 and EUR 87.70 (disbursements mainly concerning the applicants' representatives' attendance in Strasbourg for the oral hearing and the report fees of Dr Loucks and Mr Quinn).

The Government commented that the amounts claimed were excessive given that much of the detailed work had already been undertaken during the Chamber proceedings. The Government suggested that GBP 9,000 (inclusive of VAT) would be a more reasonable figure in respect of the applicants' costs before the Grand Chamber.

146. The Court agrees with the Chamber's finding as to the just satisfaction to be awarded in respect of the legal costs and expenses incurred prior to the delivery of the Chamber judgment.

147. As to the costs and expenses incurred before the Grand Chamber, the Court observes that the Government requested that the case be referred to the Grand Chamber solely in connection with the question of the applicability of Article 6 to the applicants' adjudication proceedings. However, that issue had already formed an important part of the parties' submissions before the Chamber and, before the Grand Chamber, the applicants relied heavily upon the Chamber's conclusions in this respect.

148. In these circumstances, the Court considers that it would be equitable to award a total of EUR 44,000 (inclusive of any VAT that may be chargeable) in respect of all costs before the Convention organs, less EUR 4,294.79 paid in legal aid by the Council of Europe, which amount is to be converted to pounds sterling at the rate applicable on the date of settlement.

C. Default interest

149. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank to which should be added three percentage points (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 124, ECHR 2002-VI).

FOR THESE REASONS, THE COURT

1. *Holds* by 11 votes to 6 that Article 6 of the Convention applies to the proceedings against the applicants;

2. *Holds* by 11 votes to 6 that there has been a violation of Article 6 § 3 (c) of the Convention in respect of both applicants;

3. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;

4. *Holds* by 16 votes to 1

(a) that the respondent State is to pay the applicants, within three months of the date of this judgment, EUR 44,000 (forty-four thousand euros) in respect of the applicants' legal costs and expenses before the Convention organs, inclusive of any value-added tax that may be chargeable and less EUR 4,294.79 (four thousand two hundred and ninety-four euros and seventy nine cents) paid in legal aid by the Council of Europe, the amount payable to be converted into pounds sterling at the rate applicable at the date of settlement; and

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 9 October 2003.

Luzius Wildhaber

President

Paul Mahoney

Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Judge Pellonpää, joined by Judges Wildhaber, Palm and Caflisch;

(b) joint dissenting opinion of Judges Zupancic and Maruste.

L.W.

P.J.M.

DISSENTING OPINION OF JUDGE PELLONPÄÄ

JOINED BY JUDGES WILDHABER, PALM AND CAFLISCH

I have voted against the finding of a violation in the present case since, in my view, Article 6 does not apply to the disciplinary proceedings at issue. My conclusion does not mean that I deny the need for legal safeguards in the field of prison discipline. However, if such safeguards are to be developed through the case-law of the Court, these developments should take place in a reasonably foreseeable manner and respect the continuum linking new precedent to previous case-law.

A break in such a continuum is not obvious at first sight, as the majority affirms its allegiance to the so-called *Engel* criteria (paragraph 85).[1] I have no difficulties in agreeing with this. I can also fully subscribe to the Court's conclusion regarding the first criterion, namely that “according to national law the adjudication of such offences was treated as a disciplinary matter and was designed to maintain order within the confines of the prison” (paragraph 90).

My disagreement concerns the application of the second and, especially, the third criterion.

In analysing the nature of the charge – the second of the *Engel* criteria – the majority does note “that the offences in question were directed towards a group possessing a special status” (paragraph 103),[2] and also seems to admit that the second applicant's charge involved a relatively minor incident as compared to those at issue in the *Campbell and Fell* case (paragraph 104).[3] Despite this, in the present case, the Court comes to the same conclusion as in *Campbell and Fell* in so far as the relevant circumstances are said to give the offences “a certain colouring which does not entirely coincide with that of a purely disciplinary matter” (paragraph 106).

There are inevitably similarities between many disciplinary offences, or any sanctioned conduct whatsoever, on the one hand, and common offences on the other,

and thus “a certain colouring” in this sense. The colours in the present case are, however, rather faded as compared to *Campbell and Fell*. I

also do not see how the “finding of culpability” (paragraphs 105 and 124 of the present judgment) could be regarded as a very important element for the distinction between “criminal” and “disciplinary” offences, as many forms of sanctioned behaviour, including behaviour which is traditionally tried in disciplinary proceedings, presuppose culpability.[4]

All in all, an analysis of the nature of the charges in the light of the *Campbell and Fell* judgment moves this case further away from the criminal sphere. At the same time I accept that this is not decisive, since in the last resort the classification of the proceedings depends on the third criterion, the nature and severity of the penalty. However, it is on this point that I disagree most strongly with the majority.

It is recalled that in *Campbell and Fell* the Court considered a penalty of a total of 570 days of loss of remission, together with other penalties.[5] In *R. v. the Secretary of State for the Home Department ex parte Carroll, Al-Hasan and Greenfield* (judgment of the Court of Appeal of 19 July 2001) Lord Woolf (at paragraph 53 of his judgment) correctly held that *Mr Greenfield's* case, involving 21 additional days, was “a long way from the situation” in *Campbell and Fell*. Our applicants were awarded 7 and 40 additional days respectively.

I accept that for a person at liberty a penalty involving a deprivation of that liberty for 7 and, *a fortiori*, for 40 days, would bring Article 6 into play.

But can the imposition of additional days to a person already lawfully in prison really be equated to a “fresh” deprivation of liberty (paragraph 124 of the present judgment)? To answer this question one should analyse the applicants' factual situation in light of its characterisation in domestic law. Like Judges Zupancic and Maruste in their dissenting opinion, I take as the starting point the judgment of Lord Woolf in the above-mentioned case. Lord Woolf, a leading judge with particular expertise in the field of prisoners' rights and apparently fully committed to applying the standards of the Convention, held that the change in the legal regime which took place in 1991 (paragraphs 46-50 of this judgment), and thus after the *Campbell and Fell* judgment, was not as important as had been suggested.

As before the entry into force of the 1991 Act, the sentence pronounced by the court was still the actual period of the sentence.[6]

In his reasoning finding Article 6 inapplicable, Lord Woolf went on to say that (paragraph 44 of his judgment):

“The awards of additional days to be served by each of the claimants did not have the effect of adding to their sentence. It was not a fresh sentence of imprisonment. Their effect was to postpone the claimants' release on licence. The awards clearly had a practical effect so far as the appellants were concerned and that practical effect was to postpone their release. But there was no question of their sentence being increased as a matter of law. Additional days could not be imposed so that they extended the actual sentence which the claimants were serving, and the sentence passed by the court was

the justification for the claimants' detention for the purposes of article 5(1) of the Convention."

Like Judges Zupancic and Maruste, I "do not know how much clearer one can be". The majority, however, tells us that the considerations put forward by Lord Woolf fail to go "to the heart of the question of the precise nature of the penalty of additional days" (paragraph 123 of the present judgment). In support of this criticism the judgment relies on *Stafford v. the United Kingdom* (cited at paragraph 123) and the emphasis laid therein on the necessity to look "beyond the appearances ... and concentrate on the realities of the situation". The reality of the additional days, so the argument goes on, "was that prisoners were detained in prison beyond the date on which they would otherwise have been released, as a consequence of separate disciplinary proceedings which were legally unconnected to the original conviction and sentence" (also paragraph 123).

I cannot but agree with the general principle that in interpreting the Convention one should go beyond appearances and look at the realities of the situation. I also accept the development of the case-law brought about by the *Stafford* case, as evidenced by the fact that I formed a part of the majority on all points in that case. I am, however, disturbed by the apparent ease with which the majority has referred to the *Stafford* case, which concerned a prisoner serving what was *de facto* found to be an indeterminate life sentence and Article 5, in the context of the present case involving prisoners serving a fixed sentence and Article 6.

The judgment in *Stafford v. the United Kingdom* was a logical step in a rather lengthy development whereby certain guarantees of, and principles concerning, Article 5 as applied in *Weeks v. the United Kingdom* (judgment of 2 March 1987, Series A no. 114) to a discretionary life prisoner were extended to apply, first to juvenile murderers detained "during her majesty's pleasure" (for example, *Hussain v. the United Kingdom*, judgment of 21 February 1996, *Reports* 1996-I) and then, finally, to mandatory life prisoners (*Stafford*). The "connection" mentioned in the passages of the *Stafford* judgment cited at paragraph 123 cannot be anything other than a reference to the requirement of a "causal connection",[7] read into Article 5 § 1 in the *Weeks* case, between the original conviction and the reasons for the recall to prison of a "discretionary" lifer who has been released on licence and thereby has regained his "liberty" – a question of fact (*Weeks* judgment, paragraph 40). Without such a causal connection the original conviction could not constitute, for the purpose of Article 5 § 1, a legal basis for the new deprivation of liberty in the form of recall to prison.

The issue has been considered and further developed in subsequent case-law. In *Stafford* the Court could find it "established in domestic law that there is no distinction between mandatory life prisoners, discretionary life prisoners and juvenile murderers" (*Stafford* judgment, paragraph 79). As the mandatory life sentence had, due to domestic legal developments, in reality ceased to mean imprisonment for life (save in the exceptional cases involving a whole life "tariff"), there was every reason to apply the requirement of the "causal connection", within the meaning of the *Weeks* judgment, to any deprivation of liberty going beyond the tariff period – whether by recall or otherwise – in the same way as it is applied to discretionary lifers.

In my view there are important differences between this case and situations which arise in the *Weeks/Stafford* category of case. In the first place, in the light of the judgment of Lord Woolf I cannot find that the shift from the "loss of remission" regime to "additional

days" (or from a "privilege" to a "legitimate expectation", see paragraph 121 of the present judgment) did represent in domestic law a change which could be compared to the disappearance of the distinction between the different forms of life sentences, as evidenced by the developments referred to above.[8] Secondly, I remain unpersuaded that the circumstances of the present case are sufficiently similar to the *Weeks*/*Stafford* situation as to make it possible to transfer from those cases the above-mentioned requirement of "connection" to the situation in the present case involving persons serving fixed term prison sentences after conviction of, for example, rape and attempted murder. Typically a situation in which disciplinary measures would legitimately be needed is likely to arise in relation to behaviour not having any connection with the original conviction. The majority appears to imply, in the final sentence of paragraph 123, that there may be situations in which the disciplinary proceedings could be connected to the original conviction and sentence and that such a connection could be relevant to the classification of these proceedings. I confess that I find it difficult to envisage a situation where that might be the case. In my view, if one is to operate with the requirement of "connection" at all, then the connection between the original sentence and the additional days lies simply in the fact that the original sentence also covers the period during which the additional days would have to be served and provides a legal basis,[9] for the purposes of Article 5 § 1, for the detention during that period.

It follows naturally from what I have said that I also disagree with the view of the majority that "the mere fact" that "the applicants were prisoners serving a lawfully imposed sentence does not ... serve to distinguish their case from that of civilians or military personnel at liberty" (paragraph 125). To me, the difference is fundamental. This also leads me to conclude that the additional days awarded cannot be regarded as "appreciably detrimental" within the meaning of paragraph 82 of the *Engel* judgment. I note that even the imposition of the maximum penalty of 42 days would not as such have prevented the applicants' release long – indeed, several years – before the expiry of their respective sentences.

Having said this, I admit that the changes in the domestic regime and conceptions culminating in the reform of 1991 should also be reflected in the interpretation of the Convention. While these changes do not in my view justify the conclusion that the additional days should be regarded as a criminal sanction within the meaning of Article 6, they do create for the prisoner an expectation of being released on licence after the service of half or two-thirds of their sentence (see paragraph 48). The frustration of this expectation by the imposition of additional days, although these days do not exceed the original sentence still forming the legal basis for the deprivation of liberty, can be said to raise new legal issues concerning the person's deprivation of liberty. In this respect, the case is comparable to other cases in which "new issues of lawfulness" arise during a detention for which the original conviction or other decision does continue to provide a legal basis for the purposes of Article 5 § 1. There is a line of precedent including, among others, cases concerning mental health patients[10], recidivists placed "at the Government's disposal"[11] and different categories of life prisoners in the United Kingdom[12] in which the applicants have been found to be entitled by Article 5 § 4 to a review of a legality of the possible new issues concerning their detention despite the fact that the legal basis, for the purposes of Article 5 § 1, of that detention remains unchanged.

In my view there is much to be said for the argument that the imposition of additional days under a system such as that at issue in this case should trigger the guarantees of

Article 5 § 4. However, I refrain from going further than that, as Article 5 § 4 is not before the Court. I in particular refrain from speculating whether the English law as applied in this case would comply with such an obligation arising under Article 5 § 4.

DISSENTING OPINION OF JUDGES ZUPANCIC AND MARUSTE

A. Introduction

We regret that we cannot join with the majority in finding a violation in this case.

Principally, to put into operation the full powers of Article 6, including the right to legal representation under Article 6 § 3 (c), in the context of post conviction remedies (parole), presupposes a premise concerning the legal nature of the original sentence. With this premise we cannot wholly agree. On the other hand, if the situation were reversed, i.e. if a member State were to introduce full formalisation of the in-prison disciplinary procedures, we would perhaps question the wisdom of such a solution – but we could not *a priori* maintain that this violates any aspect of the Convention. That is, unless dire consequences were to derive from such formalism – as they in fact did in *Mastromatteo v. Italy*, ([GC], no. 37783/99, ECHR 2002-VIII).

If it were true that hard cases make bad law we feel this is one of those situations.

1. In what we consider the key paragraphs 123 and 124 of the Grand Chamber judgment it is said:

"[123.] As noted by Lord Woolf LCJ in the case of R. v. the Secretary of State for the Home Department ex parte Carroll, Al-Hasan and Greenfield [...], the award of additional days did not increase a prisoner's sentence as a matter of domestic law. The applicants' custody during the additional days awarded was thus clearly lawful under domestic law. Nevertheless, the Court does not consider that this goes to the heart of the question of the precise nature of the penalty of additional days. [...] The Court's case-law indicates that it may be necessary to look beyond the appearances and the language used and concentrate on the realities of the situation. The reality of awards of additional days was that prisoners were detained in prison beyond the date on which they would otherwise have been released, as a consequence of separate disciplinary proceedings which were legally unconnected to the original conviction and sentence. [124.] Accordingly, the Court finds that awards of additional days by the governor constitute fresh deprivations of liberty imposed for punitive reasons after a finding of culpability [...]." (Underlining added)

2. We do not concur with the purported realism of the majority judgment – basically relying on the distinction between the so-called "*realities of the situation"* as opposed to mere "*appearances"* – especially since it is contradicted by the very last sentence of the next paragraph where it is said:

"It is true that in its Campbell and Fell judgment the Court concluded that the penalty imposed 'came close to, even if it did not technically constitute' a deprivation of liberty. However, the Court was constrained to so frame its finding since it was examining a 'loss of remission' as opposed to an 'award of additional days' for which the later 1991 Act provided."

Either the distinction is only apparent or it is real. Its authenticity, as we shall demonstrate, cannot depend just on the semantic modifications in the domestic law.

3. Our dissenting opinion thus turns on the legal nature of the three or respectively four concurring *original sentences*: for rape, for the possession of the imitation firearm, for attempted murder in case of the first – and respectively, for rape and robbery in the case of the second applicant. Before we grow sentimental about the human rights of the two gentlemen, let it be noted that these are not traffic offences. Formalistic assessment of the risk personified by the unreformed and potentially recidivist prisoners may grievously endanger human rights of other people. This is just what we saw in the above-cited *Mastromatteo* case where we have examined the other side of the same coin, i.e. the positive obligations of the State under Article 2.

4. With reference to paragraphs 36 and 37 of the Chamber judgment here referred, and more specifically to section 33(2) of the 1991 Criminal Justice Act – the real question is whether, under this legal regime, the "original sentence" – at least in the established criminal law sense (and in its entirety) – is *stricto sensu* still a sentence. Has a final judgment which *ex lege* entails the automatic *right* to be released, after only two thirds of it have been served and insofar as the remainder one third is concerned – become a superfluous legal fiction? Moreover, since the execution of a final penal judgment necessitates an exchange between the two branches of power (the judiciary and the executive branch), does this not raise a fundamental constitutional issue?

With reference to paragraph 116 of the Grand Chamber's judgment, it is clear, that it has applied the *Engel* criteria – despite the Government's showing how different these situations are and that no direct comparison is possible. We agree with the Government. We would like to point out, however, that the main difference between the situations is not in that someone is in the course of fulfilment of his civil duty under certain (military) discipline. We consider it essential that military service is not served as a consequence of a final criminal conviction by the court of law – whereas the prison sentence is. In principle, the final criminal conviction and sentence are, at least in theory of penal and penitentiary law, *res judicata*. Consequently, what is happening within this conviction and sentence (in the course of serving the sentence) is related to the original penal judgment. Were there no original conviction, neither would there have been any disciplinary proceedings against the applicants. It is thus not accurate to argue, as the Grand Chamber does in paragraph 108, that disciplinary proceedings are "unrelated to the original conviction".

B. Constitutional Implications

5. The constitutional legal aspect arises indirectly as it did for Lord Woolf in the case of *R. v. the Secretary of State for the Home Department ex parte Carroll, Al-Hasan and Greenfield* (judgment of the Court of Appeal of 19 July 2001). There the appellants argued that Article 6 of the Convention should apply to prison disciplinary proceedings referring, *inter alia*, to the changes brought about by the 1991 Act. Lord Woolf, in order to resolve the issue, cogently reverted to the crucial preliminary question concerning the true legal nature of the "original sentence".

"Section 42(1) of the 1991 Act provided a power to make prison rules which included provision for the award of additional days but section 42(2) makes it clear that where

additional days are awarded to a prisoner the additional days are aggregated with the period which would **otherwise** have to be served before the prisoner is released on licence. ...

The new statutory framework properly understood is not fatal to the cases advanced by the appellants. Section 42 merely gives their case its proper perspective. The awards of additional days to be served by each of the appellants **did not have the effect of adding to their sentence.** It was **not a fresh sentence** of imprisonment. Their effect was to postpone the appellant's release on licence. The awards clearly had a practical effect so far as the appellants were concerned and that practical effect was to postpone their release. But there was **no question of their sentence being increased as a matter of law**. Additional days could not be imposed so that they extended the actual sentence, which the appellants were serving, and the sentence passed by the court was the justification for the appellant's detention for the purposes of Article 5(1) ECHR." [Emphasis added.]

We do not know how much clearer one can be. Taking such a view, with which we fully agree, on the "original sentence", of course implies that the early release, the remission, the conditional release, the parole or whatever one chooses to call it, *cannot* be a prisoner's right. It may be a factual "expectation", even a reasonable one, but at bottom it is still a privilege. The privilege may or may not be granted.

6. The accepted meaning of *res judicata* doctrine in criminal law implies that the final judgment pronounced by the judicial branch is to be executed by the executive branch. In criminal law the doctrine entails the finality of the sentence pronounced by the trial judge. The judicial branch of power, while applying the substantive criminal law norm, finally establishes the required term of imprisonment. When taking into account the retributive, the preventative, the reformative and other decisive factors for his legally binding sentencing decision, the judge, and especially so in the Anglo-Saxon legal tradition, enjoys a certain margin of discretion (teleologically, in terms of comparative justice etc.). The resulting pronouncement of a criminal sentence to a particular defendant is therefore a final act of an independent judicial power.

7. The execution of the judgment in criminal law may not be a single event. The due execution of the sentence of imprisonment may take many years. It requires the unremitting involvement of the executive branch (the prison authorities). At the end of the trial, the retributive element of the sentence may be finally determined but it is impossible for the trial judge to foresee the evolution of the desired improvement in the prisoner's personality (re-socialisation). On a day to day basis, it is hence the executive branch (the prison authorities) who must deal with the prisoner.

In consequence, for example two thirds of the sentence continues to depend on the retributive, reformative, preventative etc. criteria contemplated at the outset by the sentencing judge – whereas the latter two criteria are now, through the monitoring of the behaviour of the prisoner, under the discretionary power of the prison authorities. The secondary nature of this assessment derives from the fact that the "just desert" and other determinate aspects of punishment have been unyieldingly fixed in the original sentence. The early release is therefore by its very legal nature a less determinate matter of the prospective in-prison assessment of the prisoner's response to re-socialisation endeavours by the prison authorities and of mercy, clemency, leniency etc.

8. Into this constitutional division of labour between the branches of power falls the *judicial* proviso that e.g. one third of it may at discretion of the executive branch be possibly subtracted from the original sentence if and only if the prisoner has demonstrated his real and personal capacity to be re-socialised. The import of parole (prospective conditional release), or the release earlier than foreseen in the final judicial sentence is simply that it provides (a) for the required *flexibility* in the application of a certain fraction of punishment and (b) for the prisoner's direct *motivation* to improve his attitude vis-à-vis society.

9. This does not mean that the judicial branch of power, fully governed by the "fair trial" requirements of Article 6 as it should be, has thus surrendered its sovereignty (the finality of its judgment) to the executive branch. Judicial discretion and the power it implies have, as it were, already been exhausted. The final result, however, is the *full* original sentence.

A "window of opportunity" has been left open in case the prisoner serving his full original sentence behaves well. This should be seen as an exception to the rule implying the prisoner's duty to serve the *full* original sentence. The prison authorities are therefore assessing the situation within the legally binding context of the original sentence. It is *that* sentence and that sentence alone which empowers them to use their own discretion as to whether they will fully (or only partially) execute it.

10. In terms of constitutional law, therefore, the judicial discretion is primary, whereas the executive branch's discretion is secondary and derivative.

11. However, under the current English regime what was formerly a judicial proviso is now mandated by the legislature. In terms of comparative law this is not at all unusual. Most national criminal laws provide for the prospect of parole after two thirds of the sentence will have been served. The idiosyncrasy of the English legal regime is the prisoner's automatic "right", unless he breaches the prison rules, to be released earlier than foreseen by the original sentence.

This "automatic right" represents a further legislative incursion into the definiteness of the judicial decision. Certain legislative mandatory sentencing schemes were for this reason found to be unconstitutional by the various national supreme and constitutional courts - mostly on the grounds of the checks and balances doctrine. All such legislative intercession takes place in the context of a *binding* original sentence. The legislature cannot constitutionally set up a system in which every prisoner would automatically acquire the right to be released once he has served two thirds of his sentence.

12. It is thus logically compelling that the denial of early release cannot be interpreted as "fresh deprivation of liberty" (see paragraph 124 of the majority judgment).

C. The Right and the Privilege

13. The "proper perspective" (or, in the language of the majority judgment, "the precise nature of the penalty of additional days"), Lord Woolf is referring to, stems from the clear jurisprudential distinction between a "right" and a "privilege". This differentiation has many decisive legal implications.[13] Rights, especially in criminal law, require restrictive substantive criteria (*lex certa, lex clara*, principle of legality etc.) and strict procedural formalism – whereas privileges (clemency, rewards, awards, prizes, honours

etc.) do not.[14] Rights and duties lend themselves to legal remedies and regulation, whereas the privileges do not. To confuse the two, i.e. to say that the prisoner now has *ex lege* the *right* (or the enforceable "legitimate expectation")[15] to be released, rather than a *privilege* obtaining from his morally desirable "good behaviour", makes the law defeat precisely what it is intended to defend, i.e. the accepted wisdom of parole. If the law makes the conditional release a right rather than a privilege, it effectively deprives the prisoner of his motivation to improve.

14. We suspect that the established custom of awarding early release led the English legislature pragmatically to enshrine the *status quo* into law. It thus made it all of a sudden to appear as a prisoner's *right* to be released – unless he breaches the prison rules. It was this pragmatic "nomotechnical" approach which had created the present mystification in the first place.

D. The Philosophy of Parole

15. One should keep in mind that probation and parole in criminal law have, ever since their inception in the 19th century, been predicated upon the positive and flexible – i.e. non rigid and non formalistic – prospect of rewarding prisoners' good behaviour. The historic success of both parole (conditional release) and probation (conditional sentence) are explained by this positive and lasting influence the rewarding of good behaviour has on the personality of the convicted criminal.[16]

16. The early release in England is now semi-automatic and mandated by law. The prison governor may prolong the imprisonment for the forty-two days (for each breach of prison rules). Yet, in comparison with the classic early release systems this is simply the reversal of the method. *Grosso modo* and in advance this regime promises the prisoner to reward his "good behaviour"– unless he breaches the prison rules. In the classical parole system the duty to serve the full sentence appears in the first plane and the privilege of the reward of early release is in the second remove. Here, the privilege is promised beforehand and the original duty to serve a longer fraction of the sentence ensues only if there is a breach of prison rules. This should dispel the false impression that the reverting to the initial duty to serve a larger portion of the original sentence constitutes *"the new reality of the situation and that awards of additional days by the governor constitute fresh deprivations of liberty imposed for punitive reasons after a finding of culpability."* (see paragraphs 123 and 124 of the Grand Chamber judgment). The denial of a conditionally promised privilege (reward) cannot be construed as a new punishment. That the refusal of the provisional reward may now *appear* to be a (new) punishment does not at bottom change the nature of the parole system. The "new reality" of the situation, in other words, is simply the mirror image of the old reality.

17. To be clearer, let us take this one step further. Were the legislature minutely to regulate – say in various "prison rules" – all the preconditions for the early release, surely it would include in this regulation (since this is the principal purpose of parole, conditional release etc.) the criterion of "good behaviour". The assessment of what constitutes "good behaviour," even if "bad behaviour" were to be exhaustively itemised in the prison rules, would inevitably require some discretionary judgment on the part of somebody, say prison authorities. It should not perplex us that the situation here is reversed – since the question

becomes whether the prison governor has the right to impose up to another forty-two days for each piece of "bad behaviour" (breach of prison rules).

18. In addition, it would be illogical to infer only from this, that the prisoner's privilege to be released has for this reason become a right. Of course, once a privilege is granted, it does become a right. But the decision *whether* it should be granted is a decision about privilege, not about a right. This misunderstanding, we think, is part of the perplexity of this case.

19. Another pragmatic discrepancy (with fundamental procedural consequences) between judicial sentencing, on the one hand and the early release assessment by the prison authorities, on the other hand, stems from the two very different kinds of reasoning required by the two different appraisals.

The sentencing phase of the criminal trial is wholly *retrospective* whereas the monitoring of the prisoner by prison authorities with a prospect of early release is mostly *prospective*. The retrospective assessment performed by the sentencing judge derives from the facts established beyond reasonable doubt during the main trial. The prospective assessment, however, since it deals with the probabilistic imponderables of the prisoner's future dangerousness – we have seen the tragic consequences of this in the above-cited *Mastromatteo* case where the assessment was perfunctorily performed by the Milan *giudice delle pene* –, simply does not lend itself to the same "fair trial" requirements as do the hard facts in the retrospective criminal trial.

The speculative imponderables concerning the future probability that the particular prisoner will upon (conditional or early) release relapse into criminal conduct make unfeasible the regular adversarial ("fair trial") give and take based on hard facts proven beyond reasonable doubt. A measure of exploratory and provisional "arbitrariness", it being a prognostic exercise, is unavoidable in this prospective assessment procedure.

Are we really prepared to make the early release procedure a mini "fair trial", this being consequent to calling an early release a "right" requiring the application of Article 6 procedural minimal standards – if the formalistic prospective assessment will result in such appalling consequences?

20. Yet herein precisely lay the ingeniousness of the whole idea of parole. It lets the judicial branch pronounce the full "original" sentence – with the proviso that the potential early release be subject only to the anticipated, because unavoidable, uncertainty of the subsequent decision by executive branch.

As Lord Woolf saw it, the "original sentence" legally covers the prisoner's duty to serve his term until the last day of mandated imprisonment. Should he behave well and thus justify a benevolent expectation concerning his future civility, this cannot mean that the conditional release has become his right, his "legitimate expectation" etc. A higher form of pragmatism tells us that the conditional release of a prisoner can only be a privilege authorised by the judge or the legislature and bestowed upon him by the executive branch of power (the prison authorities.)

21. Are the forty-two days, which at a maximum the prison governor may impose, part of this prospective assessment, or are they simply a retrospective punishment for the breach of prison rules? If they are punishment, do they not require a separate trial? If they do not, are they not somehow connected to the original sentence? If they are justified as an extrapolation from the original sentence, are they not so because they imply the

prospective assessment we described above? If they do not, i.e. if they are a fresh punishment for the breach of prison rules, then they require a separate and "fair trial" – not just certain elements of it.

The Grand Chamber judgment either goes too far, or it does not go far enough.

1. The *Engel v. Switzerland* judgment is cited at paragraph 69.

2. See, for example, *Weber v. Switzerland,* judgment of 22 May 1990, series A no. 177, § 33 (Disciplinary sanctions are generally designed to ensure that the members of particular groups comply with the specific rules governing their conduct.").

3. It is recalled that in *Campbell and Fell v. the United Kingdom* (cited at paragraph 69 of the present judgment) the "especially grave" nature of the offences and related considerations, "whilst not of themselves sufficient to lead to the conclusion that the offences with which the applicant was charged have to be regarded as 'criminal' for Convention purposes, do give them a certain colouring which does not entirely coincide with that of a purely disciplinary matter." (*Campbell and Fell* judgment, § 71). Mr Campbell was found guilty of charges concerning mutiny and gross personal violence (See §§ 13-14 of the last-mentioned judgment).

4. Cf. *Tyler v. the United Kingdom* (no. 21283/93, Commission decision of 5 April 1994, DR 77-A, p. 81) in which the applicant had been "found guilty" of charges of adultery by English ecclesiastic courts in proceedings characterised as "disciplinary" by the Commission.

5. *The Campbell and Fell* judgment §§ 14-16 and 72.

6. "The changes are not, however, as significant as the claimants contend. The most important common feature between sentences before the 1991 Act came into force and sentences after it came into force are that in both cases the sentences announced by the court are the actual period of the sentence" (§ 41 of that domestic judgment). Lord Woolf also emphasised that he had to deal with Article 6 of the Convention, as Mr Greenfield had committed an offence against prison rules after the entry into force of the Human Rights Act 1998 (§§ 24 and 33).

7. At paragraph 39 of the *Weeks* judgment (quoted at paragraph 64 of the *Stafford* judgment to which a reference is made at paragraph 123 of the present judgment) it is stated, *inter alia*, as follows: "Furthermore, the word 'after' in sub-paragraph (a) does not simply mean that the detention must follow the 'conviction' in point of time: in addition, the 'detention' must result from, 'follow and depend upon' or occur 'by virtue' of the conviction

... In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue..."

8. Indeed, the *Stafford* judgment, more than just taking into account the domestic legal developments, shows that the Court's earlier approach to the situation of mandatory lifers (as reflected in *Wynne v. the United Kingdom*, judgment of 18 July 1994, series A no. 294) had even been regarded by some domestic judges as a hindrance to desirable developments. (see *Stafford*, §§ 46-47).

9. The majority judgment (paragraph 122) accepts that the original conviction and sentence continued to be the legal basis for the deprivation of liberty during the additional days.

10. See, for example, *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, §§ 53 and 55.

11. See *Van Droogenbroeck v. Belgium*, judgment of 24 June 1982, Series A no. 50,

§§ 44-48

12. See, for example, the above-cited *Weeks* case, §§ 56-58.

13. The distinction derives from the fundamental dissimilarity between the morality of duty and the morality of aspiration as elucidated by Lon L. Fuller in his *'Morality of Law'* (1965).

14. This should not be interpreted to mean that the privilege of early, temporary, conditional etc. release may be granted arbitrarily, in a discriminatory fashion etc. (see, *infra* § 9).

15. The term "legitimate expectation" (in French e*spérance légitime*) is what might be called the *legitimatio ad causam activa* relevant in terms of Protocol No. 1, Article 1 § 1. We find its use in the present context misleading.

16. See, for example, http://www.appa-net.org/media2003/parolehistory.htm