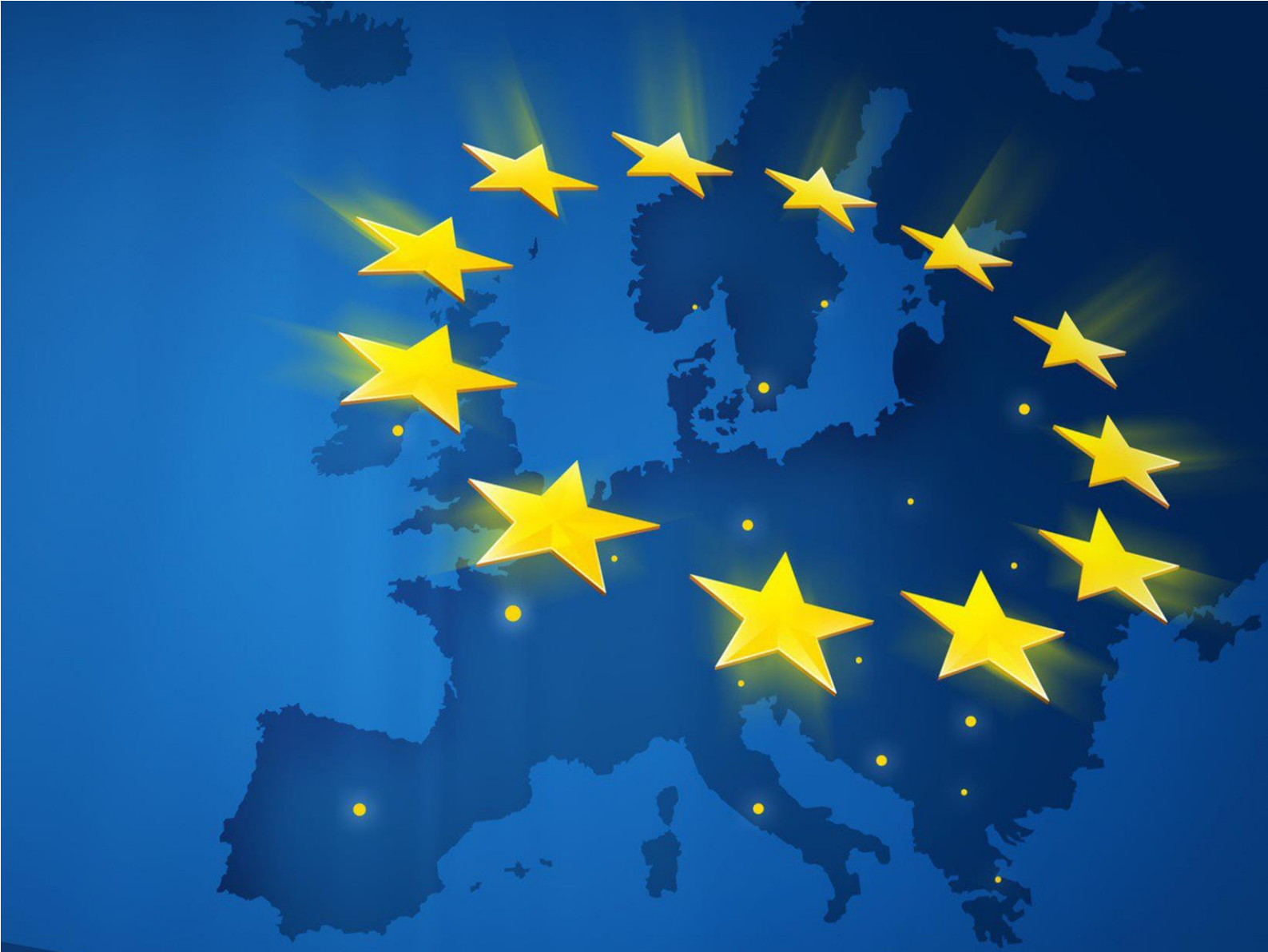

EUROPEAN COURT OF HUMAN RIGHTS

EUROsimA 2018

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Letter from the Secretary General

Highly meritorious participants,

It is my utmost please and honour to welcome you all to the fourteenth session of European Union Simulation in Ankara. My name is Tayanç GÜNGÖR and I will be serving as the Secretary General of this session. Our theme for this year is "Virtues of Humanity". As a person who has humanity in his very veins, I am more than glad that we will focus on issues which requires most of the virtues of humanity in order to solve. Also, one of my concerns which is uniqueness is well represented in this conference with its special committees selected conscientiously.

Each committee and topic were selected in order to prepare for delegates a stage on which they can show their diplomatic skills even on the most challenging situations throughout the conference. Although many challenges waiting for the delegates, these challenges also teach participants how to deal with important crisis and how to make important decisions accordingly. Participants should not await an easy task in sessions and that difficulty can fall within a range hard to "blood, toil, tears and sweat" like Mr. Churchill said.

In appreciation of this amazing work, I would like to thank Mr. Can Baran Beder, my dear friend, whose assistance and help is precious than any other both in terms of this amazing guide and in terms of moral support. Also I would like to thank Mr. Furkan Yücel Evsen for his efforts within the creation of this study guide.

To conclude, though the challenges ahead are great and many, I have full confidence in the participants' ability to manouever through these difficulties. I wish you all productive debates.

Kind regards,

Tayanç GÜNGÖR

Secretary General of EUROsimA 2018

LETTER FROM UNDER-SECRETARY GENERAL

Dear Participants,

It is my utmost honor and pleasure to welcome you all to the European Court of Human Rights committee of EUROsimA 2018. This year, the court committee will discuss a remarkable case that changed the development of human rights across the globe with hopes of shaping the understanding of human rights through heated debates.

The committee will discuss the actual case of H.L. v United Kingdom. The participants will be debating about right to liberty in a situation regarding mental health treatment, along with prohibition of discrimination. Judges will try to come to a conclusion whether the detention and treatment of the applicant was unlawful, in the light of arguments of advocates. The case will have another interesting aspect, as the domestic proceedings will be helping participants to have a better understanding of common law procedures. Being a unique situation, the case is combining many different matters, which increases my excitement for the committee personally.

I would like to conclude my letter by thanking the Secretary General of EUROsimA 2018, Mr. Tayanç Güngör for making this committee possible and welcoming me to the precious academic team of this great conference one more time; as well as my beloved friend Furkan Yücel Evsen who assisted me through the process of creating the study guide for the committee.

I once again sincerely welcome you all to the European Court of Human Rights committee and wish you all a pleasant conference.

Can Baran Beder

Under Secretary General responsible for European Court of Human Rights,
EUROsimA 2018

I. History of Human Rights in the United Kingdom and Europe

Existence of human rights in Europe dates back to 1200's. Since then the notion keeps on growing as well as the implementation throughout the continent. Although the proper implementation and violations have always been a question in mind, it is not doubted that the content of these essential rights keeps on expanding. The query, "what are the rights that are granted to a person by being a human?" is consistently answered nowadays by numerous conventions. Up until today, the most notable convention in Europe regarding the issue has been the European Convention on Human Rights (ECHR) of 1950, effective for all the members of the Council of Europe.

Development of human rights varies from region to region as well as culture to culture. These disparities should be considered, especially when discussing an issue in the United Kingdom. The first traces of codified human rights in the United Kingdom can be seen as early as 1166, with the Assize of Clarendon. Following the Assize the Magna Carta Libertatum, one of the most important milestones on this way, was issued in 1215. Libertatum changed the course of human rights developments not only in the United Kingdom, also in the whole world. Revolts and rebellions played an important role as well in the Kingdom as acts were issued in order to suppress these uprisings.

By any means, the progress in the understanding of human rights happened via many dramatic incidents in the whole continent as well as the United Kingdom. These circumstances have shaped the way these rights were recognized by governments since then.[1]

[1] Ellis Sandoz, The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law, edited and with an Introduction by Ellis Sandoz (Indianapolis: Liberty Fund, 2008). [Online] available from http://oll.libertyfund.org/titles/2180; accessed 30.11.2017; Internet.

A. Magna Carta Libertatum 1215

The Magna Carta Libertatum has been first drafted by the Archbishop of Canterbury and was agreed by King John on 15 June 1215. The name stands for "the great charter" in Latin and it is considered to be one of the most important documents regarding human rights.[2] It is referred to as one of the first foundations of rule of law. Most important aspect of this piece of legislation is that the charter made it clear that the king would act and decide lawfully from then on.

The original text of 1215 has been changed numerous times since the charter mostly dealt with specific issues of the time. Although the 1215 Magna Carta Libertatum was an unbroken whole text, with a close inspection it is possible to reveal that it consists of 63 unique clauses aiming to provide citizens with rights that are to be respected by the ruler. The influence of the charter is so big that almost all historic legislations regarding personal rights were inspired by it. Its influence was not only limited in Europe but it also inspired settlers in the North America considering their ancestry roots. [3]

The roots of the charter lie in the inequality between the citizens of the country and on-going wars. What literally ignited the fire of this remarkable move was the defeat of the English by the French and Pope Innocent III's decree (known as the Interdict). These so called failures of King John of England strained his relationship with Barons in the Kingdom. The king had no choice but to settle with Barons since they were quite powerful in London. Following the situation, Barons and King John of England met at Runnymede and the request for a charter of rights was handed to the king. Pursuing the demands coming from Barons, King John granted the Charter of Rights, which we know as Magna Carta Libertatum today.

[2] Collins Dictionary of Law. S.v. "Magna Carta Libertatum." Retrieved November 29 2017 from https://legal-dictionary.thefreedictionary.com/Magna+Carta+Libertatum

[3] "Magna Carta an introduction." The British Library. January 17, 2014. Accessed November 29, 2017. https://www.bl.uk/magna-carta/articles/magna-carta-an-introduction.

Henceforth, Barons have repeated their alliance to the king and the king was to obey the rule of law.

In its first year, Magna Carta has not been as effective considering the civil war that broke out in September of 1215, just two months after its recognition. However the successor of King John, Henry III has had faith in the charter and therefore a renewed version of it was published in his name in 1216, following his reign. He was just nine years old when he became the King of England and the renewed version of the charter was granted.

The charter remained as a main actor when it comes to human rights until the 16th century. Although the government has passed many laws till then, the Libertatum did not lose its staggering effect on the matter. It is considered as the birth of democracy in England. Although most of the rules that were recognized with Magna Carta applied to a privileged few, it was a significant step forward on the matter of human rights as it did take into account the people's consent, when it came to King's actions concerning them.

As a milestone of human history, four original copies of 1215 Magna Carta Libertatum, written on a parchment, are still on display today. Despite the numerous changes made on the text, different interpretations of courts and the fact that most of the clauses concern just a few of the citizens, what the charter have stated has been the inspiration that brought human rights to what it is today.

"To no one will we sell, to no one deny or delay right or justice."[4] [5]

B. Habeas Corpus Act 1679

Habeas Corpus is an act that is still in force today organizing the circumstances for imprisonment. It is an important piece of early legislation as it relies on rule of law when it comes to forcible detention. The actual roots of the Act

[4] *Clause 40, Magna Carta Libertatum 1215*
[5] "English translation of Magna Carta." The British Library. January 17, 2014. Accessed November 29, 2017. https://www.bl.uk/magna-carta/articles/magna-carta-english-translation.

stand at the political tensions that grew between the king and the parliament, which led to a civil war earlier. On the other hand, events occurring in France ended up with the monarch prisoning thousands of political figures. Therefore the English sought a way to prevent any similar incidents in their countries. Therefore the criteria of imprisonment and had to be organized and the Habeas Corpus Act was the writ that organized it. As a principle, Habeas Corpus (stands for "you may have the body") existed before in England, even with Magna Carta. Although a specific bill was thought to be necessary as the people realized the sufferings happening in countries nearby.[6]

The act makes it possible for the detained to submit a writ regarding his or her imprisonment to authorities. This was marked as a formal realization of a detainee's rights. The main goal was to avoid persecution as well as preventing any unjust detaining. The court was the official authority to check whether the imprisonment was lawful or not. The act was considered as a huge improvement of the time regarding personal liberty. This right given to the people, assuring that a court would react accordingly to their writ if it was correct, also prevented repeated and unjust convictions. Transportation of prisoners from one prison to another was also prohibited by this act, considering the chance that jailers might try to obstruct the prisoners will of submitting a writ to the court. [7]

The principle of habeas corpus exists to this date and the first specifically codified example of it in England is the Habeas Corpus Act. However in some specific cases, such as a war, the principle of habeas corpus is suspended temporarily, bearing in mind the necessity of preventions against existing security risks. A modern example of such occurrence can be named as the attempt to temporarily suspend the principle in the United States following the 9/11 acts.

The original act is stored at the parliamentary archive of the United Kingdom today, being one of the sources of praise when it comes to English history of law.

[6] "A Short Summary of the Habeas Corpus Act of 1679." Historyplex. Accessed December 01, 2017. https://historyplex.com/summary-of-habeas-corpus-act-of1679.
[7] "Online Library of Liberty." 1679: Habeas Corpus Act - Online Library of Liberty. Accessed December 01, 2017. http://oll.libertyfund.org/pages/1679-habeas-corpus-act.

Although it has been amended over the years, the effect of the act on modern English criminal law can't be underestimated. The Act was revised in 1816 to strengthen the rights given to the people. The name of the principle stands for "you may have the body", which might not sound as lawful but as in meaning, the principle states the "you may have the body, as long as you have a certification from a judge or a court".

Many legislative pieces were inspired by the astonishing vision that was brought by the Habeas Corpus Act. Even today, the fundamental rights given to those who are detained are taken as an example for many codes all around the globe. The act can be pointed as one of the most influential pieces of historical acts regarding penal law considering the innovative understanding when it comes to human rights, as it does not exclude detainees but provides them with certain rights in regard to their status.

C. English Bill of Rights and Claim of Right Act 1689

When discussing the evolution of human rights in the United Kingdom, two main documents created there can easily be named as the English Bill of Rights and the Scottish Claim of Right Act. Both these legislative documents were produced in 1689. As it is clear by its geography, the early legislation, English Bill of Rights was a great inspiration for the Claim of Rights Act in Scotland. Both these documents are recognized as the roots of the modern parliaments.

English Bill of Rights was one of the first steps towards free elections in the United Kingdom. Frequent parliaments, consisting parliamentarians elected by the citizens has been established alongside the birth of the term "parliamentary privilege" in England by providing freedom of speech within the parliament. These parliaments were to limit the power of the ruler by questioning any arbitrary action of the King. Right to petition the monarch without any possibility of persecution has been

inaugurated considering the strengthened reliance on rule of law by the monarchs henceforth.[8]

William III and Mary II of England have cited Bill of Rights in 1689. The principles that were brought to life by the Bill are still in effect today. This legislation has not only changed the path of law in England but has also inspired many different documents such as the United States Bill of Rights and the European Convention on Human Rights.[9]

When inspecting the development of human rights in the United Kingdom, situation in Scotland also has to be mentioned. A key document of Scottish Constitutional Law is the Claim of Right Act. The claim has been created under the influence of English Bill of Rights and serves a similar purpose by limiting the power of the crown. Although it is usually ignored in most of the sources, Scottish people consider it as their Magna Carta. [10]

The doctrine of George Buchanan played a great role in the creation of the ideas that produced Claim of Right Act. Interesting enough, alongside Montaigne and Mary I of Scotland Buchanan, whose ideas were found dangerous and therefore his books were burned by University of Oxford, was tutor of King James VI of Scotland. In his book, *De Jure Regni apud Scotos,* Buchanan stated that the "source of all political power is the people and the monarch is bound by these conditions".[11] As the time went by, Scottish people have also adopted this idea and its outcome was the Claim of Right Act.

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[8] Posted by H.E.N.R.Dewi Nurmayani on March 7, 2013 at 12:35pm View Blog. "Bill of Rights 1688." Global Ethics Network. Accessed November 29, 2017. http://www.globalethicsnetwork.org/profiles/blogs/bill-of-rights-1688.

[9] "Bill of Rights 1689." UK Parliament. Accessed November 29, 2017. https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/collections1/collections-glorious-revolution/billofrights/.

[10] Professor Emeritus, University of Edinburgh; Judge of the European Court of Justice 1992-2004. "SCOTLAND'S MAGNA CARTA: THE CLAIM OF RIGHT AND THE COMMON LAW." The UK Supreme Court Yearbook 6 (December 2015): 8-13. Accessed November 30, 2017. http://www.law.du.edu/documents/judge-david-edward-oral-history/2015-magnacarta.pdf.

[11] George Buchanan, *De Jure Regni apud Scotos* (1579).

Both pieces of legislation clearly gave a considerable amount of power to the citizens regarding politics. The right to be elected and the right to vote has been established in England as well as Scotland with these two documents alongside preventing persecution of the monarch in cases of disagreement. Bill of Rights and Claim of Right Act are considered to be the source of the harmony of politics in the United Kingdom today and the principles they have brought to life still exist to this day as principles that created the Common Law culture.

D. Reform Acts of 1832, 1867 and 1884

Three reform acts in total were made regarding the right to vote in Britain, which was an important issue that was reorganized in 1689 by two acts in two countries. As the awareness grew amongst citizens, right to vote had to be expanded to those who were neglected by the previous practice. It seemed as the power was only shared with the upper class. However following these three reforms, the power was evenly distributed between the citizens of the United Kingdom.[12]

The Reform Act of 1832, also known as the Great Reform Act, was the first and the most influential of all three reform acts. Although a powerful parliament was established, many towns in England had no representatives in the parliament. As a result, violent riots broke out in the country. Having an example nearby, 1830 revolution in France that overthrew the monarch, the king had to take a step in order to silence these riots. [13]

The solution was of course to extend the electorate. Before the reform, so-called “rotten boroughs” had seats in the parliament however cities that grew with the industrial revolution had none. So the electorate was raised from 500,000 to 800,000 and the number of representatives was distributed evenly between cities, as well as

[12] Glenn Everett, Associate Professor of English, University of Tennessee at Martin. "The Reform Acts." The Victorian Web. Accessed November 29, 2017. http://www.victorianweb.org/history/hist2.html.
[13] "The Great Reform Act ." National Archives UK. http://www.nationalarchives.gov.uk/education/politics/g6/.

the suffrage. Criteria of right to vote differed immensely between boroughs. The act has made it possible for the middle class to also participate in the elections.[14]

Two following reform acts followed the same path with the Great Reform Act; they extended the electorate and provided many other citizens with political franchise. With the step taken forward in the extension of registered voters and acceptance of the idea, the circle kept growing. The Reform Act of 1867 almost doubled the number of voters with a whopping number of 1.940.000 votes in 1874 elections. It was the biggest increase in the number as the growing working class was also provided with suffrage. [15]

Following the working class in the cities, it was time for the agriculture workers in 1884 Reform Act. Hereafter, almost 40% of all the men in England were able to vote in the elections. As mentioned earlier, the criteria for right to vote differentiated in areas. Therefore 60% of men were still unable to vote. However the number of registered voters in England stood at 5.500.000 after the reform of 1884.[16]

With the extended electorate, first steps towards modern democracy were taken in England. Although almost half the men had right to vote, none of these three acts had any impact on the voting right of women. Electorate still consisted of only men that met the criteria in their borough. Women were granted suffrage in 1918 in England. It was not until 1928 that every bit of discrimination in suffrage was eliminated. The Equal Franchise Act of 1928 was the act that eliminated all the discrimination regarding right to vote in Britain.

E. European Convention on Human Rights

As the massacres and the violations of fundamental rights of human beings took place in second world war, it was clear that these fundamental rights and

[14] C N Trueman "The Impact Of The 1832 Reform Act" historylearningsite.co.uk. The History Learning Site, 27 Mar 2015. 30 Nov 2017.
[15] C N Trueman "The Impact Of The 1867 Reform Act" historylearningsite.co.uk. The History Learning Site, 27 Mar 2015. 30 Nov 2017.
[16] C N Trueman "The 1884 Reform Act" historylearningsite.co.uk. The History Learning Site, 27 Mar 2015. 30 Nov 2017.

necessities; such as right to live, had to be secured by a reliable legislative document. The actual goal of the document was to eliminate the inequalities between human races as well as genders, basically achieving the sensible equality regarding basic and indispensible aspects of life. [17]

The anew-formed Council of Europe in Rome drafted convention for the Protection of Human Rights and Fundamental Freedoms, or in short European Convention on Human Rights (ECHR), on 4 November 1950. It was originally proposed by the British Prime Minister at the time, Winston Churchill and primarily written down by British lawyers. The idea of shaping a convention to recognise greater safe guards for the equal rights of men and woman amongst the Community sprang after UN's Universal Declaration of Human Rights of 1948 where people of the United Nations made the very first global expression of human rights which every individual entitled by birth. This all came up after the traumas of Second World War when nations felt compelled to secure inalienable basic rights of men and women and Convention for the Protection of Human Rights and Fundamental Freedoms in this sense was a manifestation of an urge to ensure such basic rights of individuals within Community. [18]

In sequence the Convention was ratified and therefore came into force on 3 September 1953 and by today all 47 members of the Council of Europe are party to the Convention and future members are also expected to ratify in order to honour the commitments entered into by member states when joining the Council. [19]

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[17] The Editors of Encyclopædia Britannica. "European Convention on Human Rights (ECHR)." *Encyclopædia Britannica*, Encyclopædia Britannica, inc., 14 Mar. 2016, www.britannica.com/event/European-Convention-on-Human-Rights-Europe-1950.

[18] Gani, Aisha. "What is the European convention on human rights?" *The Guardian*, Guardian News and Media, 3 Oct. 2014, www.theguardian.com/law/2014/oct/03/what-is-european-convention-on-human-rights-echr.

[19] "What is the European Convention on Human Rights?" *What is the European Convention on Human Rights? | Equality and Human Rights Commission*, www.equalityhumanrights.com/en/what-european-convention-human-rights.

The most outstanding property of the Convention was undoubtedly the establishment of European Court of Human Rights (ECtHR). as indicated under the Article 19 of the Convention[20]:

"ARTICLE 19

Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis."

As mentioned in the Article the Party States founded "the Court" as a permanent mechanism to monitor the application of the Convention. In case the Court may find a breach under the meaning of the Convention it may also award the applicant with "just satisfaction" as a compensation of the damaged caused by the violation of the Convention by the local government. The Committee of Ministers of the Council of Europe is designated to monitor the execution of judgements to further safeguard the rights, especially the individuals'. In this sense European Convention of the Human Rights can be distinguished as the first human rights ensuring document to have its own enforcement mechanism.

A significant integration of human rights regime in Europe occurred on 1 November 1998 when two enforcement mechanisms established by the convention, the European Court of Human Rights and European Commission, were united under the name of European Court of Human Rights as a reconstituted court. This reconstruction has enabled further remedies to individuals by empowering the Court to hearing their complaints without prior approval of the Party State, which was a precondition before. All mentioned changes were applied pursuant to the Protocol No. 11 of the European Convention on Human Rights entering into the force.

[20] Greer, Steven C. *The European Convention on Human Rights: achievements, problems and prospects*. Cambridge: Cambridge Univ. Press, 2008.

The convention has been a major success considering that sovereign states have accepted the legal obligations to provide essential human rights to every human being within their jurisdiction. The effect of the convention on human rights law has been immense; as the previous idea was that the nationals of a country would be treated as their domestic law orders. However the recognition of the convention made these individuals subjects of international law. The change was not only in the idea itself, but the approval of obligations and court's jurisprudence on international human rights law has altered the understanding of human rights globally.

II. European Court of Human Rights (ECtHR)

Following the horrors of WWII, it became clear that the protection of human rights cannot be solely left to the governments of European nations, which can eventually put human dignity under jeopardy. Therefore, after the adoption of ECHR in 1950, the Court was established as a separate European monitoring mechanism, which ensures that "States respect the rights and guarantees set out in the Convention" through examining applications lodged by individuals (or sometimes by States) regarding breach of these rights and guarantees.[21]

This unique body was formed to respond to complaints coming from over 800 million people who are nationals of countries that are members of the Council of Europe. The court has been under the spotlight when it comes to human rights in Europe as it does have jurisdiction regarding on all branches of human rights law. With the establishment of court, the member parties had to reorganize their domestic law, however this has prevented these nations from a democratic decline and it can be considered as a big step forward for the continent when it comes to human rights issues.

Although the court was founded in 1959, the permanent court that exists today was formed in 1998 as a result of Protocol 11. However due to the number of growing cases that are brought before the court every year, the working scheme was subject to

[21] "European Court of Human Rights: Questions & Answers" pp. 3-4

change few more times. The last and the most dramatic reform was the Protocol 14 that was drafted and ratified by every member except Russia in 2006. The opposition coming from Russia has halted the negotiations for years. In 2010,Russia has ended its negative stance towards the Protocol, for a deal that would guarantee a Russian judges' involvement in cases regarding Russia, and reforms entered into force in June of 2010. [22]

a. Structure

ECHR is an international court consisting of a number of judges equal to the number of member States of the Council of Europe, 47 at present. The judges of the Court do not represent their States and are entirely independent in delivering judgments. Judges are assisted by a Registry, which consists of lawyers from all member States (legal secretaries), in dealing with applications. Neither judges nor legal secretaries represent any applicant or State. Parliamentary Assembly of the Council of Europe elects the judges from lists of three candidates proposed by each State for a non-renewable period of nine years. Judges are prohibited from engaging in "any activity that would be incompatible with their duty of independence and impartiality."[23] The Council of Europe finances the expenditure of the Court, which covers the salaries of the staff and various overheads.

b. Jurisdiction and Enforcement

The Court was set up in 1959 on the basis of the European Convention on Human Rights (ECHR), aiming to protect human rights in Europe. Its judgments are binding on the member States of the Council of Europe that ratified the Convention for the Protection of Human Rights and Fundamental Freedoms, meaning that the countries concerned are under an obligation to comply with them. The Committee of Ministers of the Council of Europe monitors executions of judgments. Regardless of the nationality of applicant, anyone, claiming to be "personally and directly the victim

[22] Loucaides, Loukis G. *The European Convention on Human Rights: collected essays*. Leiden: Martinus Nijhoff Publishers, 2007.
[23] "The ECHR in 50 Questions" p. 5

of a violation of the rights and guarantees set out in the Convention or its Protocols" by one of the States bound by the Convention, can lodge an application to the Court. States Party to the Convention may also lodge applications each other, which is called "inter-state application".[24]

c. Procedure

The applications go through two stages: admissibility stage and merits stage. Inadmissible complaints are not examined. Thus, the applications need to fulfill these requirements in order to be declared admissible: The local remedies must be exhausted, allegation must concern one or more of the rights defined in the Convention, the application must be lodged within six months following the last judicial decision, the applicant must personally and directly a victim of a violation of the Convention and must have suffered a significant disadvantage, and the application can only be lodged against a Party State. Applications complying with these requirements are declared admissible and proceed with the merits stage for examination. There are four formations with which the proceedings take place: single-judge formation, committee, chamber and grand chamber. A single-judge formation involves the declaration of inadmissibility (if it is clear from the outset) or admissibility. If the case can be settled by well-established case-law of the Court, then a Committee gives final decision or judgment in the case. A Chamber delivers a judgment that can be further taken to the Grand Chamber for fresh consideration within three months by the request of any party. If the request of referral is accepted, the case will be reconsidered by the Grand Chamber, which will give the final judgment.[25]

d. Decision and Judgment

It is always encouraged by the Court that parties reach a friendly settlement, which is "an agreement between parties to put an end to proceedings initiated by an

[24] Harris, D. J., M. OBoyle, and Colin Warbrick. *Law of the European Convention on Human Rights*. London: Butterworths, 2009.
[25] "The ECHR in 50 Questions" pp. 6-7

application." When parties do not reach an agreement, the Court proceeds with the examination of merits of the application. (Q&A 7)

A decision is only concerned with the admissibility of the case and is usually given by a single-judge, a Committee or a Chamber. A Chamber can examine both admissibility and merits of the case, therefore can give a judgment as well.

A judgment is the legal conclusion reached by a Chamber or Grand Chamber based on the examination of admissibility and merits of the case.[26]

Inadmissibility decisions given by Committees and judgments delivered by the Grand Chamber are final and cannot be appealed against. Finding of violation may require the concerned State to bring its legislation in line with the Convention, otherwise new judgments against them will be delivered by the Court. When the Court further observes that the applicant has sustained damage, it may award just satisfaction to the applicant, which is a sum of money in compensation for that damage. [27]

III. Circumstances of the Case

Applicant H.L. lives in Surrey, England and born in 1949. He is diagnosed with autism and he has been suffering from this disorder since birth. He has a limited capacity regarding understanding. He does not have the ability to communicate via speaking. The applicant H.L. has a history of self-harming actions and he lacks the capacity to consent or object to medical treatment. He was taken care of by the Intensive Behavioral Unit of Bournewood Hospital for more than thirty years. The applicant's caretaker was Dr. M (clinical director of learning disabilities, deputy medical director and consultant psychiatrist for psychiatry of learning disabilities). Dr. M has taken care of the applicant since 1977. The applicant's custody was given to Mr. and Mrs. E on a trial, whom were paid caretakers. The applicant resided with these caretakers until July of 1997 although he was never formally discharged from the hospital and the hospital was responsible for his treatment all that time. The applicant has attended a day-care center on a weekly basis.

[26] "The ECHR in 50 Questions" p. 9

[27] Schutter, Olivier De. *International human rights law: cases, materials, commentary*. Cambridge: Cambridge University Press, 2012.

On July 22 1997, as a result of his self-harming behavior, the applicant started hitting his own head with his fists as well as banging his head against the wall. Mr. and Mrs. E were not there and the staff at the day-care center was not able to contact them. Therefore a local doctor was contacted, who gave the applicant a sedative. The sedative did not end the agitation of the applicant. On the recommendation of the local authority care services manager (A.F.) with overall responsibility for the applicant, he was to the hospital.

Dr P. (acting consultant psychiatrist – learning disabilities services) handled applicant's assessment at the hospital. With the help of two nursing assistants, the applicant was then transferred to the Intensive Behavior Unit of the hospital. The applicant did not resist and did not attempt to leave the Unit once transferred there. Both Dr M and Dr P considered the case and decided that the in-patient treatment of the applicant would be beneficial for him; therefore he needed the admission for treatment. Since the applicant was compliant regarding his admission, the doctors took the admission as an "informal patient". Although the doctors were aware that the committal was done according to Mental Health Act 1983, they have decided that it was not necessary to note, therefore admission was done as an informal patient. Dr M. later confirmed (in her submissions in the judicial review proceedings referred to below) that, if the applicant had resisted admission, she would have detained him compulsorily under the 1983 Act as she was firmly of the view that he required in-patient treatment.

As seen on her attendance notes for that day, Dr M. has received many notes regarding patient's extremely disturbed behavior at the day-care. There were also reports regarding previous days the applicant spent at the day-care center. The care service manager A.F. suggested that the applicant might be suffering from a "cyclical mood disorder" and therefore he should be assessed regarding his state his of mind. Dr M.'s detailed consultation throughout the day with the applicant's local doctor, Dr P., A.F., ward staff and other care professionals; the conclusion that, given the escalation of behavioral problems, the applicant required readmission for "thorough investigation and treatment" but that he would not be "sectioned" as he was "quite compliant" and had "not attempted to run away"; the numerous unsuccessful attempts

to contact the applicant's caretakers; and the decision to discourage visits by the applicant's caretakers as it risked causing them and the applicant distress.

On the following day, 23 July 1997, the applicant's behavior was recorded as compliant and calm in the notes of Dr M. It was also mentioned in her notes that the applicant had accepted the change, to stay at the hospital. The caretakers of the applicant have also accepted the change, and were "happy with [the] suggestion not to visit for a few days". The necessity for this action to be taken was caused by the suggestion that A.F. brought up; which stated that the applicant might be suffering from cyclical disorder. Therefore the behavior of the applicant had to be observed and the proper treatment should have been administered. The applicant's escalating self-harming behavior also made keeping him at the hospital a better call, rather than sending him back to his caretakers. A number of test were decided to be made in order to assess whether the applicant was suffering from "organic pathology". A therapy session was also drawn up for the applicant "for maintenance purposes on discharge". Caretakers were noticed once again regarding the need not to visit the applicant until the doctors and responsible medical staff felt confident for them to do so.

In the letter written by the applicant's social worker on 23 July 1997 regarding the incident on the previous day, the circumstance was described in detail by the day-care center. The serious behavioral issues were emphasized and it was stated the health care staff had to consider these issues before letting the applicant return to the day-care center. An increase in the applicant's aggressive behavior in the past few months was noted, as well as clarifying that it was getting very hard for the applicant to cope with the day-care center and its environment. As an attachment, a detailed report on the applicant's behavior at the day-care center between January and July of 1997 was added to the letter in order to make the assessment easier for doctors and personnel at the hospital.

Following these events, Dr M. has written a report in depth regarding the applicant's history, progress and treatment on this matter and it was submitted to the manager (learning disabilities) of the local health authority. The recent discussions on applicant's behavior made this report necessary and this mentioned report was

submitted in 18 August 1997. Dr M. clearly noted the applicant's condition; the applicant is suffering from autism and has recently suffered from mood disorder. For that reason, the applicant's discharge at that time would not be appropriate and would be against medical opinion.

Four days later, on 22 August 1997, a consultant psychiatrist in learning disabilities assessed the applicant; following the request of Mr and Mrs E, who were applicant's caretakers. The psychiatric report on applicant's condition made it clear that he was suffering from a sever learning disability and a possible cyclical mood disorder. Final suggestion of that psychiatrist was that the Intensive Behavioral Unit at the hospital and a better cooperation between the hospital's team, Mr and Mrs E, and day-care center should assess the applicant's situation further in order to clarify the situation.

On 29 October 1997, the Court of Appeal signified that the applicant's appeal would be decided in his favor. Accordingly, on that day the applicant was detained in the hospital under section 5(2) of the 1983 Act (following receipt of a notice from a doctor in charge of an in-patient that an application ought to be made for the latter's detention for, inter alia, treatment under section 3 of the 1983 Act, the patient may be detained for up to seventy-two hours to allow for that application to be processed). On 31 October 1997 the applicant was admitted for treatment as an involuntary patient under section 3 of the 1983
Act (two medical practitioners having recently examined the applicant would have certified his detention for treatment as necessary).

The caretakers of the applicant have not been able to visit him since his readmission in July 1997. Their first visit after his readmission happened on 2 November 1997. Following this visit, the applicant's legal representatives asked for a review of the detention of their representee in the hospital, and applied for this review to be made by a Mental Health Review Tribunal. A report from an independent psychiatrist was also seen as a necessity and legal aid for this report was granted to the applicant. A consultant psychiatrist jointly prepared the independent psychiatric report and a registrar in the psychiatry of learning disability, both attached to the Department of Psychiatry at the University of Cambridge. This report was submitted

on 27 November 1997. Both psychiatrists have stated their thoughts on the report and recommended the applicant's discharge as they advocated the opinion that applicant's mental disorder was "currently neither of a nature or degree to warrant continued detention in hospital, nor [was] it necessary for his health or safety or for the protection of others".

Following the independent psychiatric report provided, the legal representatives of the applicant have applied for their representee's release from the hospital on 4 December 1997. This application was made to the hospital managers by regards to the section 23 of the 1983 Act.

The team responsible for the treatment of the applicant has decided that he has settled enough to be managed at home, so therefore on 5 December 1997 he was released on leave of absence (under section 17 of the 1983 Act) into the care of Mr and Mrs E.

A report has been prepared by Dr P to be presented at the next managers' review meeting. The report was on the applicant's condition and the recent occurrences on this matter. He noted that the applicant's discharge on 5 December 1997 under section 17 of the 1983 Act was to be complemented by weekly psychiatric outpatient follow-up appointments, continued medication and monitoring by a community nurse. Dr P was convinced that the community team and their consultant psychiatrist could take over the applicant's care so that he could be formally discharged from the hospital.

After all these happenings, the formally discharging of the applicant from the hospital has finally happened on 12 December 1997, by regards to the section 23 of the 1983 Act.

A. Correspondence between Dr M. and the applicant's caretakers

23 July 1997 was the date of the first letter written by Dr M. To Mr and Mrs E. after the admission of the applicant to the hospital. It should be noted that Dr M.'s

attempts to contact Mr and Mrs E. occurred on 22 July 1997, when she outlined what had happened thoroughly and the current status of applicant's progression. Dr. M explicitly indicated that, although they aimed to discharge the applicant on the soonest possible date, it was not possible to predict the length of applicant's stay, as it is reliant on the completion of all essential investigations and assessments. It was expressed by Dr M. that further visits would be undesirable until the hospital staff believed that it would be appropriate, for the purpose of averting applicant from thinking that he could return to his home with visitors each time they come to see him when the applicant clearly was not clinically apt for discharge.

On 31 July 1997, a further detailed update by Dr E. on the applicant's care, progress and assessments to Mr and Mrs E. was sent. Noting request to staff to visit the applicant by Mr and Mrs E., it was indicated by Dr M. that the on going serious observational assessment could be prejudiced by such visits and put forward that the situation be reviewed within the following week. He underlined that the applicant was not fully fit for discharge.

As Mr and Mrs E had voiced their concerns to hospital staff regarding the care and treatment of the applicant, a long letter was sent to them by Dr M. on 6 August 1997 in which she pointed out the clinical team's responsibility to provide patients with the care and clinical input they required. Particularly she noted:

"I would like to take the opportunity to stress, through this correspondence, that we, as a Clinical Team, within the [IBU], are here, primarily to provide the treatment for [the applicant] who was admitted under our care, as an emergency. It would be extremely irresponsible of us not to provide [the applicant] with the care and the clinical input that he deserves and is in need of. His disposal/discharge from within the unit is dependent ... on the Multidisciplinary Clinical Professionals' considered views, following their assessment and the work that they intend doing with [the applicant], specifically, in relation to his challenging behaviour and/or mental health needs. As I have stressed, in my earlier correspondence, these things do take time and unfortunately we have to be a little patient to allow the professionals some room and space to carry on with their work in the provision of care ... [The applicant] has been admitted to the [IBU] on an 'informal' basis and this is not a time-limited admission. I am not sure if you have misunderstood his status and are under the impression that

perhaps he was admitted and held under 'the Mental Health Act'. Even then, there is no 'one month' time-limit, as it all depends on the patient's fitness for discharge ... On behalf of the Clinical Team, I would like to stress that [the applicant] is being treated within the [IBU] and once he is fit for discharge, he will be discharged back to the address from where he was admitted, with a 'Treatment Plan' which will include all aspects of his care and a 'maintenance plan' prescribed."

Given the current treatment and assessments, it didn't seem to be possible to specify an exact discharge date. Also Dr M.'s offer to meet Mr and Mrs E. in order to discuss upon the applicant's care. Dr M. affirmed to Mr and Mrs E. that the latest conclusions drawn from the assessments on applicant to date meant, and the recent clinical professionals' meeting had decided, that the applicant was to be "fully" referred for care and treatment to the IBU and that his stay was likely to be a long one. Mr and Mr E. was invited by Dr M. on 18 September 1997 in order to attend a clinical meeting regarding the applicant's care and treatment and they were offered to meet separately with Dr M. to discuss the subject of visits.

Mr and Mrs E. replied in a letter dated 5 September 1997 and indicated that they could not agree upon the suggested plan for the care of applicant and would be in touch again before the relevant meeting. Mr and Mrs E. affirmed that they would not be able to attend the mentioned meeting on 18 September 1997 as they were seeking legal advice, by a letter dated 16 September 1997. A reply was made by Dr M. expressing regret that Mr and Mrs E. felt that their attendance at the meeting could put applicant's position in jeopardy by a letter dated 19 September 1997. Dr M. further outlined the results of the clinical meeting, including a recommendation suggesting Mr and Mrs. E to visit the applicant once a week, and requested them to contact her arrange this, in a separate letter for the same date. She reassured that Mr and Mrs E. that there had been a discussion at the hospital at some length regarding the subject of them visiting the applicant and encouraged them to meet her to discuss upon the applicant's needs.

Detailed behaviour management guidelines were issued on 27 November 1997 by the psychology service of the hospital to, among others, Dr M., Mr and Mrs E., the applicant's social worker and other therapeutic services that were to be involved in

the applicant's future care. Appendix 1 was a detailed clinical description of the applicant's mental state (autism and a cyclical mood disorder), needs and reactions prepared on the basis of extensive psychiatric and behavioural observations and assessments, with a view to achieving a global approach to his condition, treatment and care. Appendix 2 contained an extremely detailed "communication dictionary" which was designed to enhance communication with the applicant through voice, action and routine. Appendix 3 contained recording charts.

By a letter sent to the applicant's legal representatives dated 2 December 1997, receipt of the guidelines of 27 November 1997 (described above) was acknowledged by Dr M. and the clinical team's plans regarding the applicant's release on leave of absence in the near future with a view to a possible full discharge at a later date were explained.

B. The applicant's domestic proceedings

About September of 1997, the applicant has applied for a leave to apply for a judicial review of decision regarding his admittance to the hospital on 22 July 1997. His "next friend," who was his cousin, represented the applicant. The application was for a writ of habeas corpus and for damages for false imprisonment and assault. The assault mentioned in the application was in regards to a technical assault related with H.L.'s admission.

i. *High Court's Judgement 9 October 1997*

The High Court decided on the refusal of the application. The decision in order to refuse the application found its roots on the legal status of the patient. The applicant was accepted as an informal patient to the hospital. Therefore, even though the 1983 Act provides a comprehensive regime for those who are in a mental hospital, the section 131(1) of the Act preserved the common-law judgement for informal patients. Regarding the corresponding section of the Act, bearing in mind that the

applicant had not been detained but had been informally admitted, The High Court came to a conclusion stating that the necessity of common-law practice had been satisfied. Therefore the application was rejected.

ii. The Court of Appeal, 2 December 1997

The Master of Rolls, Lord Woolf, delivered the principal judgement. He stated that the issue regarding whether the patient was detained or not was an objective matter. This objective fact did not depend on consent or knowledge's existence in the case. Lord Woolf then explained the term of detainment. His consideration regarding person's status of detainment was depending on their ability to leave. If those who had control over the premises in their situation were not to allow the person to leave, then the person in question would be considered as a detainee. Lord Woolf then stated that the applicant was detained by saying:

"We do not consider that the [High Court] judge was correct to conclude that [the applicant] was 'free to leave'. We think it is plain that, had he attempted to leave the hospital, those in charge of him would not have permitted him to do so. ... Mr and Mrs E. had looked after [the applicant], as one of the family, for over three years. They had made it plain that they wanted to take him back into their care. It is clear that the hospital was not prepared to countenance this. If they were not prepared to release [the applicant] into the custody of his carers, they were not prepared to let him leave the hospital at all. He was and is detained there."

In addition to stating that the patient was detained, Lord Woolf also expressed the spot of right to detain a patient within the domestic law. He pronounced the 1983 Act as the only legislation to regulate the right to detain a patient with a mental disorder, as well as having the provisions to be applied to the exclusion of the common-law principle of necessity. The aforementioned section 131 of the 1983 Act did regulate the admittance of an informal patient. However the regulation could only be applied to a patient who had the capacity to and did consent to admission. He continued by stating that the patient had no consent on his admission, nor the other

formalities required by the 1983 Act were met. Therefore his detention was not lawful:

"It follows from our judgment that the whole approach of the [hospital] in this case was based on a false premise. It was based on the belief that they were entitled to treat [the applicant] as an in-patient without his consent as long as he did not dissent. That was a wrong approach. They were only allowed to admit him for treatment if they complied with the statutory requirements. ... [W]here [the 1983 Act] covers the situation, no necessity to act outside the statute can arise. The [hospital's] powers to act under the common-law doctrine of necessity can arise only in relation to situations not catered for by [the 1983 Act]."

Relying on the stated arguments, the court of appeal granted leave to appeal to the House of Lords, besides awarding nominal damages.

iii. House of Lords, 25 June 1998

Mental Health Act Commission have submitted a report to the House of Lords following the House granting leave to intervene to the commission. The Commission outlined the beneficial consequences to patients of the Court of Appeal's conclusion that persons in the applicant's position were "detained" for the purposes of the 1983 Act, which included the application to such persons of the substantive and procedural safeguards of the Act. There was also a survey conducted by the Mental Health Commission by sending a questionnaire to all related hospitals regarding the issue. The conclusion was, if the judgment of the Court of Appeal was to be applied to similar patients, the number of detained patients would rise 22,000 and the total number of formal admissions would rise approximately 48,000 per year.

The House of Lords, taking all the circumstances into consideration, gave its verdict on the case and allowed the appeal. The judgment was given on 25 June 1998 and was delivered by Lord Goff.

Lord Goff stated his disagreement to Court of Appeal by expressing that the section 131, the section in question regarding its applicability, applied to patients who consented as well as to willing impotent patients. He emphasized the statutory history of the section in question. However Lord Goff also added that the Court of Appeal did not have the chance of being assisted by a counsel for the Secretary of State before the court, therefore their attention was not drawn on the historic background of the section. Lord Goff declared his thoughts on the specific issue of patients being admitted as informal patients under section 131, lacking the ability to consent by stating:

"It was plainly the statutory intention that such patients would indeed be cared for, and receive such treatment for their condition as might be prescribed for them in their best interests. Moreover, the doctors in charge would, of course, owe a duty of care to such a patient in their care. Such treatment and care can, in my opinion, be justified on the basis of the common-law doctrine of necessity ... (Re F. (Mental Patient: Sterilisation) [1990] 2 AC 1) It is not therefore necessary to find such justification in the [1983 Act] itself, which is silent on the subject. It might, I imagine, be possible to discover an implication in the statute providing similar justification; but even assuming that to be right, it is difficult to imagine that any different result would flow from such a statutory implication. For present purposes, therefore, I think it appropriate to base justification for treatment and care of such patients on the common-law doctrine."

Another question on the case answered by Lord Goff was whether the patient was unlawfully detained or not, as the detention was found unlawful by the Court of Appeal. He stated that for the false imprisonment felony to be committed, the person subject to the felony must lack completely or have a constraint on their liberty. The affidavit of Dr. M was considered and the quotes from the document were pointed out:

"At 11 o'clock on 22 July 1997 I was contacted by ... [the] social worker and [the applicant's] case manager. She advised me that there had been an incident at Cranstock Day Centre, where [the applicant] had been attending since 1995, when

[the applicant] had seriously self-harmed and was extremely disturbed. She said that he had to be sent to the Accident & Emergency Department and she requested assistance from the psychiatric services to assess [the applicant] with a view to admitting him if necessary. One of my team members, [Dr P.], staff grade psychiatrist, attended the Accident & Emergency Department as requested. His notes state that he took a history from ... the team manager at Cranstock Day Centre who reported that since March 1997 [the applicant's] episodes of self-injurious behaviour had increased in severity. On 22 July 1997 whilst he was at Cranstock he had been agitated, hyperventilating, pacing up and down and hitting himself on the head with his fists. He was also banging his head on the wall. The whole area had to be evacuated to avoid disturbance and assure the safety of others. He was given 4 mgs of Diazepam to try to calm him down at the time but this had no effect. The GP was therefore called who administered 5 mgs of Zimovane. However he still remained agitated in the Accident & Emergency Department. He was assessed and treated at A & E. [Dr P.] later assessed [the applicant] as being agitated and very anxious. He noted redness of both his temples, that he was punching his head with both his fists at times and hyperventilating. [Dr P.] assessed that [the applicant] required in-patient treatment and transferred [the applicant] to the Behavioural Unit. [Dr P.] noted that [the applicant] 'makes no attempt to leave'. I recorded that we considered whether it was necessary to detain [the applicant] under the Mental Health Act 1983 but it was decided that this was not necessary as he was, as I noted at the time, 'quite compliant' and had 'not attempted to run away'. He was therefore admitted as an informal patient. If [the applicant] had resisted admission I would certainly have detained him under the [1983] Act as I was firmly of the view that he required in-patient treatment. This was clearly thought through and supported following discussion with [Dr P.], ward staff, other professionals and the Care Services Manager. An appropriate framework of care and treatment was implemented."

Lord Goff then noted the actions taken by Dr. M. The caretakers, Mr. and Mrs. E were informed of the patient being admitted to the hospital on June 22. They were then asked to not visit the applicant for a few days, as it was the common practice that took place in the clinic. In the following day, June 23, a letter of invitation was sent to caretakers by Dr. M in order to discuss the future visits. Mr. and Mrs. E did not accept this invitation by the doctor and did not show up to the meeting. It was that day when

an advocate was appointed to the applicant. The applicant's situation was then assessed again and a program of tests and observations were conducted as planned.

Lord Goff went on with the affidavit of Dr. M:

"As [the applicant] is an informal patient there has never been any attempt to detain him against his will or carry out any tests, observations or assessments to which he indicated a dislike or with which he refused to cooperate. [The applicant] has always accepted his medication which has always been administered orally. He was also fully compliant when blood was taken from him for testing. He did not however cooperate with the attempts that were made to carry out a CT scan and EEG, which were necessary in view of his old history of fits and temporal lobe abnormality, on 5 and 6 August 1997 and so these tests were abandoned. [The applicant] cooperated to a certain extent with the speech therapy assessment which was carried out on 15 September 1997 and the occupational therapy assessment. However, as soon as he showed any signs of distress the assessments were postponed and reviewed. [The applicant] is accommodated on an unlocked ward and has never attempted to leave the hospital but has accepted the change in his environment very well and is not distressed by it ... It was, in my professional opinion, in [the applicant's] best interests to be admitted on 22 July 1997 and it is also in his best interests to continue with in-patient treatment to prevent further deterioration of his mental health. His discharge at this point in time would therefore be against medical advice. At the time of and since admission [the applicant] has been fully compliant with treatment and never indicated that he wishes to leave the hospital. In view of this it has not been necessary to detain him under the Act ... If [the applicant] stopped cooperating or indicated a wish to leave then I would have to consider at that time whether his condition warranted detention under section 3 of the Act. As these circumstances have not so far arisen detention has not been necessary."

In the light of Dr. M's statements and the circumstances of the case, Lord Goff continued with his own consideration:

"The first is that, as I have already recorded, although [the applicant] had been discharged from hospital into the community on a trial basis, and on that basis had

gone to live with Mr and Mrs E. as his paid carers, nevertheless he had not been finally discharged. It followed that the appellant trust remained responsible for his treatment, and that it was in discharge of that responsibility that the steps described by Dr M. were taken. The second is that when, on 22 July, [the applicant] became agitated and acted violently, an emergency in any event arose which called for intervention, as a matter of necessity, in his best interests and, at least in the initial stages, to avoid danger to others. Plainly it was most appropriate that the appellant trust, and Dr M. in particular, should intervene in these circumstances; certainly Mr and Mrs E., as [the applicant's] carers, could not assert any superior position. Third, I have no doubt that all the steps in fact taken, as described by Dr M., were in fact taken in the best interests of [the applicant] and, in so far as they might otherwise have constituted an invasion of his civil rights, were justified on the basis of the common-law doctrine of necessity.

I wish to add that the latter statement is as true of any restriction upon his freedom of movement as then occurred, as it is of any touching of his person. There were times during the episode when it might be said that [the applicant] was 'detained' in the sense that, in the absence of justification, the tort of false imprisonment would have been committed. I have particularly in mind the journey by ambulance from the Day Centre to the Accident and Emergency Unit. But that journey was plainly justified by necessity, as must frequently be so in the case of removal to hospital by ambulance of unfortunate people who have been taken ill or suffered injury and as a result are incapacitated from expressing consent. I wish further to add that I cannot see that DrM.'s statements to the effect that she would if necessary have taken steps compulsorily to detain [the applicant] under the Act of 1983 have any impact on the above conclusions. Those concerned with the treatment and care of mentally disordered persons must always have this possibility in mind although, like Dr M., they will know that this power is only to be exercised in the last resort and they may hope, as in the present case, that it would prove to be unnecessary to exercise it. Such power, if exercised in accordance with the statute, is of course lawful. In the present case all the steps in fact taken by Dr M. were, in my opinion, lawful because justified under the common-law doctrine of necessity, and this conclusion is unaffected by her realisation that she might have to invoke the statutory power of detention.

Finally, the readmission of [the applicant] to hospital as an informal patient under section 131(1) of the Act of 1983 could not, in my opinion, constitute the tort of false

imprisonment. His readmission, as such, did not constitute a deprivation of his liberty. As Dr M. stated in paragraph 9 of her affidavit, he was not kept in a locked ward after he was admitted. And the fact that she, like any other doctor in a situation such as this, had it in her mind that she might thereafter take steps to detain him compulsorily under the Act, did not give rise to his detention in fact at any earlier date. Furthermore, his treatment while in hospital was plainly justified on the basis of the common-law doctrine of necessity. It follows that none of these actions constituted any wrong against [the applicant].”

Bearing these in mind, Lord Goff allowed the appeal. To supplement his argument, he pointed out another fact:

“... the function of the common-law doctrine of necessity [lies] in justifying actions which might otherwise be tortious, and so has the effect of providing a defence to actions in tort. The importance of this was, I believe, first revealed in the judgments in Re F. (Mental Patient: Sterilisation) [1990] 2 AC 1. I wish, however, to express my gratitude to counsel for the appellants ... for drawing to our attention three earlier cases in which the doctrine was invoked, viz. Rex v. Coate (1772) Lofft 73, especially at p. 75, per Lord Mansfield, Scott v. Wakem (1862) 3 F. and F. 328, 333, per Bramwell B., and Symm v. Fraser (1863) 3 F. and F. 859, 883, per Cockburn CJ, all of which provide authority for the proposition that the common law permitted the detention of those who were a danger, or potential danger, to themselves or others, in so far as this was shown to be necessary. I must confess that I was unaware of these authorities though, now that they have been drawn to my attention, I am not surprised that they should exist. The concept of necessity has its role to play in all branches of our law of obligations – in contract (see the cases on agency of necessity), in tort (see Re F. (Mental Patient: Sterilisation) [1990] 2 AC 1), and in restitution (see the sections on necessity in the standard books on the subject) – and in our criminal law. It is therefore a concept of great importance. It is perhaps surprising, however, that the significant role it has to play in the law of torts has come to be recognised at so late a stage in the development of our law.”

Lord Nolan, on the contrary, agreed that the patient had been detained, although he was in favor to allow the appeal. He expressed his satisfaction:

"the trust and its medical staff behaved throughout not only in what they judged to be the best interests of [the applicant], but in strict accordance with their common-law duty of care and the common-law principle of necessity".

Lord Steyn was another member who allowed the appeal with a different point of view. Emphasizing that uphold of Court of Appeal's decision would cause an immense gap in mental health law. Albeit, Lord Steyn suggested that a contextual interpretation of the 1983 Act would allow the appeal. Firstly, he referred to detention issue:

"It is unnecessary to attempt a comprehensive definition of detention. In my view, this case falls on the wrong side of any reasonable line that can be drawn between what is or what is not imprisonment or detention. The critical facts are as follows: (1) When on 22 July 1997 at the Day Centre [the applicant] became agitated and started injuring himself, he was sedated and then physically supported and taken to the hospital. Even before sedation he was unable to express dissent to his removal to hospital. (2) Health care professionals exercised effective power over him. If [the applicant] had physically resisted, the psychiatrist would immediately have taken steps to ensure his compulsory admission. (3) In hospital staff regularly sedated him. That ensured that he remained tractable. This contrasts with the position when he was with carers: they seldom resorted to medication and then only in minimal doses. (4) The psychiatrist vetoed visits by the carers to [the applicant]. She did so, as she explained to the carers, in order to ensure that [the applicant] did not try to leave with them. The psychiatrist told the carers that [the applicant] would be released only when she, and other health care professionals, deemed it appropriate. (5) While [the applicant] was not in a locked ward, nurses closely monitored his reactions. Nurses were instructed to keep him under continuous observation and did so.
Counsel for the Trust and the Secretary of State argued that [the applicant] was in truth always free not to go to the hospital and subsequently to leave the hospital. This argument stretches credulity to breaking point. The truth is that for entirely bona fide reasons, conceived in the best interests of [the applicant], any possible resistance by him was overcome by sedation, by taking him to hospital and by close supervision of him in hospital. And if [the applicant] had shown any sign of wanting to leave, he

would have been firmly discouraged by staff and, if necessary, physically prevented from doing so. The suggestion that [the applicant] was free to go is a fairy tale. ... In my view [the applicant] was detained because the health care professionals intentionally assumed control over him to such a degree as to amount to complete deprivation of his liberty".

In regards to his statement regarding applicant's detention, he went on and found detention to be justified under the common-law doctrine of necessity:

"It is now necessary to consider whether there was lawful authority to justify the detention and any treatment of [the applicant]. This is a matter of statutory construction. But it is important to approach the mental health legislation against the context of the principles of the common law. The starting-point of the common law is that when a person lacks capacity, for whatever reason, to take decisions about medical treatment, it is necessary for other persons, with appropriate qualifications, to take such decision for him: Re F. (Mental Patient: Sterilisation) [1990] 2 AC 1, at 55H, per Lord Brandon of Oakbrook. The principle of necessity may apply. For the purposes of the present case it has been assumed by all counsel that the requirements of the principle are simply that (1) there must be 'a necessity to act when it is not practicable to communicate with the assisted person' and (2) 'that the action taken must be such as a reasonable person would in all circumstances take, acting in the best interests of the assisted person': Re F., supra, per Lord Goff of Chieveley, at 75H. There was not unanimity on this point in Re F. But I am content to approach the matter in the same way as counsel did ... Against this common-law background the Percy Report recommended a shift from the 'legalism' whereby hospital patients were 'certified' by special procedures, to a situation in which most patients would be 'informally' received in hospital, the term 'informally' signifying 'without any legal formality'. This was to be achieved by replacing the existing system 'by the offer of care, without deprivation of liberty, to all who need it and are not unwilling to receive it': see Report of the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency (1954-1957) ... The desired objective was to avoid stigmatising patients and to avoid where possible the adverse effects of 'sectioning' patients. Where admission to hospital was required compulsion was to be regarded as a measure of last resort. The Mental Health Act of 1959 introduced the recommended

changes. Section 5(1) was the critical provision. ... Counsel appearing on behalf of [the applicant] accepted that the effect of section 5 was to leave in place the common-law principle of necessity as a justification for informally receiving in hospital or mental nursing homes compliant incapacitated patients.

In 1982 Parliament substantially amended the Act of 1959. In 1983 Parliament enacted a consolidating statute with amendments, namely the Mental Health Act 1983. By section 131(1) of the Act of 1983 the provisions of section 5(1) of the Act of 1959 were re-enacted verbatim. ... Prima facie section 131(1) must be given the same meaning as section 5(1). On this basis, section 131(1) also preserved the common-law principle of necessity as a means of admitting compliant incapacitated individuals. But counsel for [the applicant] submitted that section 131(1), unlike its predecessor, only applies to consenting capacitated patients. He argued that contextual differences between the statutes of 1959 and 1983 required the court to interpret the language of section 131(1) of the Act of 1983 in a narrower sense than section 5(1) of the Act of 1959. ... On orthodox principles of statutory interpretation the conclusion cannot be avoided that section 131(1) permits the admission of compliant incapacitated patients where the requirements of the principle of necessity are satisfied. Having had the benefit of the fuller argument produced by the intervention of the Secretary of State, I have to accept that the view of the Court of Appeal on the meaning of section 131(1) cannot be upheld."

As mentioned earlier, common-law doctrine of necessity was declared on section 131(1) of 1983 Mental Health Act. However he also found a distressing issue regarding the judgment of the House of Lords. He highlighted that the judgment was to leave compliant patients, whom had no capacity, without safeguards:

"This is an unfortunate result. The common-law principle of necessity is a useful concept, but it contains none of the safeguards of the 1983 Act. It places effective and unqualified control in the hands of the hospital psychiatrist and other health care professionals. It is, of course, true that such professionals owe a duty of care to patients and that they will almost invariably act in what they consider to be the best interests of the patient. But neither habeas corpus nor judicial review are sufficient safeguards against misjudgments and professional lapses in the case of compliant incapacitated patients. Given that such patients are diagnostically indistinguishable

from compulsory patients, there is no reason to withhold the specific and effective protections of [the 1983 Act] from a large class of vulnerable mentally incapacitated individuals. Their moral right to be treated with dignity requires nothing less. The only comfort is that counsel for the Secretary of State has assured the House that reform of the law is under active consideration."

Report of The Health Service Commissioner, 15 November 2001

Caretakers of the applicant sent in two complaints regarding the patient's case. Firstly they complained about the decision that ked him to be admitted to the institution was unreasonable. Secondly, they expressed their worries regarding the clinical management of the applicant's admission. The inspector then monitored the situation and came to a conclusion by stating that the applicant's admission to the Intensive Behavioral Unit was unavoidable. However the matter of sending the patient home should be considered more seriously. It was not clear for the investigators to realize why the patient was retained overnight at the facility. Considering the resources at the unit in question, the assessment phase of returning home could be carried out quicker. Albeit the delay in the assessment phase, the assessors thought that medical staff did not act irresponsibly. The main focus of their investigation outcome was that the time spent at the Intensive Behavioral Unit should be time-limited from then on.

The Commissioner's report was based on this assessment. With his report submitted 15 November 2001, he passed on the apologies of the hospital to the caretaker family. Shortly after the report, the hospital have stressed that they have implemented the suggested measures in the report and that the assessment time of the patients will be quicker from then on.

IV. Applicable Law

A. Relevant Domestic Law

- *The Mental Health Act 1983*

The Mental Health Act of 1983 regulates the mental treatment process as well as determining the difference between informal and formal patients and their admission phases. The majority of patients in psychiatric care are treated as informal patients. The part 2 of the Act determines the measures to be taken regarding formal patients whom are incapable of stating consent.[28]

Section 131 (1):

"Nothing in this Act shall be construed as preventing a patient who requires treatment for mental disorder from being admitted to any hospital or mental nursing home in pursuance of arrangements made in that behalf and without any application, order or direction rendering him liable to be detained under this Act, or from remaining in any hospital or mental nursing home in pursuance of such arrangements after he has ceased to be so liable to be detained."

- *The Health Service Commissioners Act 1993*

The 1993 act makes it possible for an ombudsman to investigate an issue regarding health service and provide necessary reports. The act determines the conditions, depth and necessity for such an investigation.

Section 3:

"(1) On a complaint duly made to a Commissioner by or on behalf of a person that he has sustained injustice or hardship in consequence of –

[28] Barnes, Marian, Ric Bowl, and Mike Fisher. *Sectioned: social services and the 1983 mental health act*. London: Routledge, 1990.

(a) a failure in a service provided by a health service body,
(b) a failure of such a body to provide a service which it was a function of the body to provide, or
(c) maladministration connected with any other action taken by or on behalf of such a body,

the Commissioner may, subject to the provisions of this Act, investigate the alleged failure or other action."

Section 5:

"(1) A Commissioner shall not conduct an investigation in respect of action taken in connection with –
(a) the diagnosis of illness, or
(b) the care or treatment of a patient,

which, in the opinion of the Commissioner, was taken solely in consequence of the exercise of clinical judgment"

B. Conventions and International Law

<u>European Convention on Human Rights</u>

ARTICLE 1

Obligation to respect Human Rights The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

SECTION I

RIGHTS AND FREEDOMS

ARTICLE 5: Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

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

(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

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

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

...

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

....

Right To Liberty

In proclaiming the "right to liberty", the Article 5 of the Convention contemplates individual's physical liberty and it intends to ensure that "no one should be dispossessed of this liberty in an arbitrary fashion".

In this regard, although this right is lied amongst the fundamental rights and freedoms within the section I of the Convention, the "right to liberty" -within the context of Article 5- cannot be absolute. Despite the fact that, most of the Article 5 is dedicated to a list of conditions under

which one's liberty can justly be curtailed, each of these permissible practices of detention rely upon its legitimacy on the availability of legal review. In other words, periodic examination of the legality of the detention by an independent court or tribunal is a must, as indicated in subclause 4 of the Article. It should also be underlined that these permissible circumstances are numerus clausus, i.e under no other conditions a lawful constraint to the right to liberty of the person can be made.

Criteria to be applied

When examining whether or not the liberty is deprived in the case , although the Court may consult domestic authorities related findings it does not consider itself bound by their legal conclusions but rather undertakes an autonomous assessment of the present circumstances. Furthermore, in order to determine whether an individual has been " deprived of his/her liberty " the Court has listed some criteria to apply as shortly named in its Guzzardi v Italy judgment: " *The starting point must be the concrete situation of the individual concerned and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure*". In the same judgement the Court reiterated that a deprivation of liberty is not enclosed to the classic case of detention following conviction or arrest, but may be in many other forms. The variation of mentioned practices " is being increased by developments in legal standards and in attitudes; and the Convention is to be interpreted in the light of the notions currently prevailing in democratic States", as indicated by the Court.

Additionally, when applying the criteria relevant objective factors such as the possibility to leave the restricted facility, the extent of confinement and the availability of social contacts, the degree of supervision and control over the individual's movements should also be considered.

Losing the Benefit of the Protection

Fundamental liberties, in today's modern civilization, are essential and the value they possess require a sensitive approach towards them. In this regard, the Court has touched upon this sensitivity in the context of Article 5 as the protection for rights and liberties provided under

the Article are “too important in a democratic society” to renounce for the single reason the person has given himself/herself into detention.

Legal Certainity

Where deprivation of liberty is the matter the importance of the general principle of legal certainty to be satisfied should be emphasised. Thus, conditions for deprivation of liberty under domestic law should be explicitly defined and that the law itself needs be foreseeable in its practice so that it can meet the “lawfulness” standard with regards to Convention. Fulfillment of this standard, as set by the Convention, requires all law to be sufficiently precise to allow the individual – with appropriate advice in case of a need – to foresee, to an extent that is sensible in the circumstances, “the consequences which a given action may entail”.

Detention of Persons of Unsound Mind

Neither the initial Convention nor the added Protocols does not include any definitive clauses to express what is to be understood from “a person of unsound mind”.
The term “a person of unsound mind” itself, does not allow the doctrine to put a precise definition since psychiatry as a discipline of medicine is an evolving field, both in social attitudes and medically. Nevertheless, it cannot be taken to permit the detention of a person solely by reason of his/her views or behaviour deviate from established norms.

Also the Court, many times in its decisions, stated that following three conditions must be satisfied at a minimum for the exception of “ a person of unsound mind “ under the Article can be applied :

- the individual must be reliably established to be of unsound mind;
- the mental disorder of the individual must be of a degree or kind necessitating imperative confinement
- the validity of continued confinement relies upon the mental disorder, that is substantiated by medical evidence, to persist through the procedure.

Reviewing the Conditions of the Individual

In order to establish whether the person in question should be detained as a "person of unsound mind", the national authorities with their findings will have the margin of appreciation as they are in the first place to evaluate the relevant evidence adduced before them in a present case.

ARTICLE 14: Prohibition of discrimination

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

ARTICLE 41: Just Satisfaction

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.

C. Relevant Cases

Ashingdane v. the United Kingdom 1985

H.M. v. Switzerland

On Hospital's Responsibilities

Nielsen v. Denmark 1988

Ashingdane Test

Ashingdane v. The United Kingdom

The distinction between a deprivation of, and a restriction upon, liberty is merely one of degree or intensity and not one of nature or substance

Guzzardi v. Italy, 1980 para. 92-93
Ashingdane v. The United Kingdom para. 41-42

The right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention

De Wilde, Ooms and Versyp v. Belgium 1971 para. 65-65

Unsound Mind

Winterwerp v. the Netherlands 1979

House of Lords is considering the case from the point of view of the tort of false imprisonement while the Court will take Article 5 into consideration as in the concept of "deprivation from liberty"

The Court reiterates that an individual cannot be deprived of his liberty on the basis of unsoundness of mind unless three minimum conditions are satisfied: he must reliably be shown to be of unsound mind; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder

Winterwerp, § 39
Luberti v. Italy 1984§ 27
Johnson v. the United Kingdom 1997 § 60
Hutchison Reid v. the United Kingdom 2003 § 48

Further Readings

GUIDE ON ARTICLE 5 OF THE CONVENTION: RIGHT TO LIBERTY AND SECURITY

Disclaimer : The participants should be reminded that they are not limited with the claims stated below. These claims, whose consideration and use are definitely expected from the participants, are also cited to guide you during your discussions of the case. Therefore, the participants are strongly encouraged to present new claims of their own.

The applicant claimed that:

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Applicant

1- His stay in the hospital as an "informal patient" between 22 July and 29 October 1997, amounted to a "deprivation of liberty" and this constitutes a breach of his right to liberty. He argued that his detention was neither prescribed by fixed procedural rules nor lawful in any sense.

Whether the Applicant was Deprived of His Liberty

Whether the detention was "in accordance with a procedure prescribed by law" and "lawful" within the meaning of Article 5 § 1 (e)

Whether the Applicant was of unsound mind

2- His detention was unlawful because, while he may have been suffering from a mental disorder on 22 July 1997 and the circumstances that led to his being taken to the hospital on that day amounted to an emergency, his mental disorder was not of such a nature or degree as to justify his subsequent admission to the hospital's IBU or, alternatively, it ceased to be of such a degree shortly thereafter.

Lawfulness and protection against arbitrary detention

3- The concepts of “best interests” and “necessity” were imprecise and unforeseeable when the procedures were applied.

5/4

4- The procedures available to him as an informal patient for the review of the legality of his detention did not fulfill the standards and requirements set by the Convention.

14

5-Whe Article 14 of the Convention and Article 5 is taken into consideration in conjunction, he was incurred to discrimination as an “informal patient”.

Respondent

The Government of the United Kingdom claimed that:

Whether the Applicant was Deprived of His Liberty

1- When the case of a person who plainly had the capacity to consent to psychiatric treatment is on the one hand, the application of the procedure in the hospital clearly did not amount to a deprivation of liberty. The procedure applied was not materially different and cannot be considered as it amounted to a deprivation of liberty only because the Applicant lacked capacity. He did not object to being in hospital anyways. While he might have been detained if he had attempted to leave the hospital, however he did not.

An intention to detain someone in the future does not amount to detention for the purposes of right to liberty in the context of the Convention.

Whether the detention was “in accordance with a procedure prescribed by law” and “lawful” within the meaning of Article 5 § 1 (e)

Whether the Applicant was of unsound mind

2- It was the mutual understanding between the authorities during the domestic proceedings that the applicant was a person of unsound mind and therefore he required detention for his treatment before he could be released to his carers.

Lawfulness and protection against arbitrary detention

3- The doctrine of necessity was a well-established doctrine and it fulfills the lawfulness criteria as It had also been accepted that unwritten law, so long as it was sufficiently precise, could satisfy the requirements of Article 5 § 1 of the Convention.

Also, there was no risk of arbitrary detention because of the availability of judicial review

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4- An action in judicial review (combined with a writ of habeas corpus) allowed an assessment of the essential conditions bearing on the lawfulness of Applicant's detention. In particular, those domestic proceedings were sufficiently flexible to allow the court to examine the objective medical evidence to establish whether the conditions had been met.

14

5- He had not suffered a discriminatory difference in treatment. There was an objective and reasonable difference between informal patients and those requiring compulsory detention and there was a reasonable relationship of proportionality between the means chosen to regulate both situations and the legitimate aims sought to be achieved

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