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

COURT (GRAND CHAMBER)

CASE OF BENHAM v. THE UNITED KINGDOM

(Application no. 19380/92)

JUDGMENT

STRASBOURG

10 June 1996

In the case of Benham v. United Kingdom [1],

The European Court of Human Rights, sitting, in pursuance of Rule 51 of Rules of Court A [2], as a Grand Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr R. BERNHARDT,
Mr THÓR VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr B. WALSH,
Mr R. MACDONALD,
Mr J. DE MEYER,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Sir John FREELAND,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,
Mr G. MIFSUD BONNICI,
Mr D. GOTCHEV,
Mr B. REPIK,
Mr P. JAMBREK,
Mr K. JUNGWIERT,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 26 January 1996 and 24 May 1996,

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

PROCEDURE

1. The case was referred to the Court on 23 January 1995 by the European Commission of Human Rights ("the Commission") and on

[1] The case is numbered 7/1995/513/597. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

26 January 1995 by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government"), within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 19380/92) against the United Kingdom lodged with the Commission under Article 25 (art. 25) on 20 September 1991 by a British national, Mr Stephen Andrew Benham.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 5 and 6 (art. 5, art. 6) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 5 May 1995, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr B. Walsh, Mr R. Macdonald, Mr I. Foighel, Mr L. Wildhaber, Mr G. Mifsud Bonnici and Mr D. Gotchev (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. The President of the Chamber (Rule 21 para. 6), Mr Bernhardt, through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 27 July 1995 and the applicant's memorial on 7 August 1995.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 November 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr M. EATON, Deputy Legal Adviser,
Foreign and Commonwealth Office, *Agent*,
Mr D. PANNICK QC,
Mr P. DUFFY, *Counsel*,
Mr M. COLLON, Lord Chancellor's Department, *Adviser*;

(b) for the Commission

Mrs J. LIDDY, *Delegate*;

(c) for the applicant

Mr B. EMMERSON
Professor A. BRADLEY, *Counsel*,
Mr J. WADHAM *Adviser*.

The Court heard addresses by Mrs Liddy, Mr Emmerson and Mr Pannick.

6. Following deliberations on 23 November 1995 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51 para. 1).

7. The Grand Chamber to be constituted included ex officio Mr Ryssdal, President of the Court, Mr Bernhardt, Vice-President of the Court, and the other members and substitute judges (namely, Mr B. Repik, Mr F. Gölcüklü, Mr R. Pekkanen and Mr K. Jungwiert) of the Chamber which had relinquished jurisdiction (Rule 51 para. 2 (a) and (b)). On 5 December 1995, in the presence of the Registrar, the President drew by lot the names of the seven additional judges called on to complete the Grand Chamber, namely Mr F. Matscher, Mr J. De Meyer, Mrs E. Palm, Mr A.N. Loizou, Mr A.B. Baka, Mr M.A. Lopes Rocha and Mr P. Jambrek (Rule 51 para. 2 (c)).

8. Having taken note of the opinions of the Agent of the Government, the Delegate of the Commission and the applicant, the Grand Chamber decided on 26 January 1996 that it was not necessary to hold a further hearing following the relinquishment of jurisdiction by the Chamber (Rule 38, taken together with Rule 51 para. 6).

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

9. On 1 April 1990 Mr Benham became liable to pay a community charge of £325. Since he did not pay it, on 21 August 1990 the Poole Magistrates' Court ordered the issue of a liability order, entitling Poole Borough Council ("the charging authority") to commence enforcement proceedings against him (see paragraph 19 below, Regulations 29 and 39 (1)).

10. Mr Benham did not pay the amount owed, and bailiffs visited his parents' house (where he was living), but were told that he had no goods of any value there or elsewhere which could be seized by them and sold in order to pay the debt.

11. Under Regulation 41 of the Community Charge (Administration and Enforcement) Regulations 1989 ("the Regulations": see paragraph 19 below), if a person is found to have insufficient goods on which to levy outstanding community charge the charging authority may apply to a

magistrates' court for an order committing him to prison. On such an application being made, the court must inquire in the presence of the debtor as to his present means and also whether his failure to pay which led to the liability order being made was due to wilful refusal or culpable neglect.

The charging authority applied for such an order, and on 25 March 1991 Mr Benham appeared at the Poole Magistrates' Court for the inquiry required by the Regulations.

He was not assisted or represented by a lawyer, although he was eligible for "Green Form" legal advice and assistance before the hearing (see paragraph 29 below), and the magistrates could have made an order for Assistance by Way of Representation ("ABWOR") if they had thought it necessary (see paragraph 30 below).

12. The magistrates found that Mr Benham, who had 9 "O" level General Certificates of Secondary Education, had started a Government Employment Training Scheme in September 1989, but had left it in March 1990 and had not worked since. He had applied for income support, but had been turned down because it is not payable to those who are voluntarily unemployed, and he had no personal assets or income.

On the basis of this evidence, the magistrates concluded that his failure to pay the community charge was due to his culpable neglect, "as he clearly had the potential to earn money to discharge his obligation to pay". Accordingly, they decided that he ought to be sent to prison for thirty days unless he paid what was owing.

Mr Benham was taken to Dorchester prison on the same day.

13. On 27 March 1991 a solicitor went on the record as representing Mr Benham and lodged a notice of appeal by way of case stated (see paragraph 21 below) and an application for bail pending appeal (see paragraph 22 below). Legal aid was obtained for the appeal, but not for the bail application, because it is not available for such proceedings. In the event, the solicitor appeared without payment before the magistrates on 28 March 1991 to apply for bail, but he was unsuccessful.

14. On 4 April 1991 Mr Benham's solicitor lodged an application for leave to apply for judicial review and for bail in the High Court. He was obliged to ask for judicial review, despite the fact that he had already lodged an appeal by way of case stated, because otherwise he could not have applied for bail in the High Court until the magistrates had stated a case (see paragraph 22 below). Bail was granted on 5 April 1991 and Mr Benham was thus released from prison, having served eleven days.

15. The Divisional Court heard the appeal by way of case stated and the application for judicial review together on 7 and 8 October 1991 (Regina v. Poole Magistrates, ex parte Benham, 8 October 1991, unreported). Mr Benham was represented and legally aided. The court noted that it had been necessary to apply for judicial review in order to get bail, but that the

case stated procedure was more appropriate. Accordingly no order was made on the judicial review application.

16. Mr Justice Potts in the Divisional Court held that the magistrates had been mistaken in concluding that Mr Benham's failure to pay the community charge had been due to culpable neglect:

> "In my view this finding was wrong on the evidence available to the justices. In certain circumstances a failure on the part of the debtor to work and put himself in funds to pay the community charge might constitute culpable neglect. In my judgment, however, before such a finding could be sustained, at the very least there would have to be clear evidence that gainful employment, for which he was fit, was on offer to the debtor and that he had rejected or refused that offer. There was no such evidence in this case. In my judgment, the justices' finding of culpable neglect cannot be sustained on the evidence adduced before them."

17. In addition, he found that the decision to commit Mr Benham to prison would have been wrong even if there had been evidence of culpable neglect, because he did not have any means with which to pay the debt at the time of the hearing before the magistrates, and because "[s]uch an order is only to be made if payment can be made and there is no other way of inducing the [debtor] to do so". In the circumstances it was incumbent upon them to consider the alternatives to immediate detention provided for by the Regulations: they could have suspended the term of imprisonment subject to such conditions as they thought fit, or refused to issue a warrant, since the local authority could have renewed their application at a later date if Mr Benham's circumstances had changed (see paragraph 19 below).

18. Mr Benham was not able to apply for compensation in respect of the time he spent in prison, because he was unable to show bad faith on the part of the magistrates, as was required by section 108 of the Courts and Legal Services Act 1990 (see paragraph 28 below).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Provisions concerning enforcement of payment of the community charge

19. The relevant subordinate legislation is the Community Charge (Administration and Enforcement) Regulations 1989 (Statutory Instrument 1989/438) ("the Regulations").

The relevant provisions of Regulation 29 ("application for a liability order") are as follows:

> "(1) If an amount which has fallen due ... is wholly or partly unpaid ... the charging authority may ... apply to a magistrates' court for an order against the person by whom it is payable.
>
> ...

(5) The court shall make the order if it is satisfied that the sum has become payable by the defendant and has not been paid."

Regulation 39 (1) provides for the seizure and sale of a debtor's property ("levying of distress"):

"Where a liability order has been made the authority which applied for the order may levy the appropriate amount by distress and sale of goods of the debtor against whom the order was made."

Regulation 41 is concerned with the committal to prison of a debtor, and provides, so far as is relevant:

"(1) Where a charging authority has sought to levy an amount by distress under Regulation 39, the debtor is an individual, and it appears to the authority that no (or insufficient) goods of the debtor can be found on which to levy the amount, the authority may apply to a magistrates' court for the issue of a warrant committing the debtor to prison.

(2) On such application being made the court shall (in the debtor's presence) inquire as to his means and inquire whether the failure to pay which led to the liability order concerned being made against him was due to his wilful refusal or culpable neglect.

(3) If (and only if) the court is of the opinion that his failure was due to his wilful refusal or culpable neglect it may if it thinks fit -

(a) issue a warrant of commitment against the debtor, or

(b) fix a term of imprisonment and postpone the issue of the warrant until such time and on such conditions (if any) as the court thinks just.

...

(7) The order in the warrant shall be that the debtor be imprisoned for a time specified in the warrant which shall not exceed three months, unless the amount stated in the warrant is sooner paid ..."

The relevant part of Regulation 42 provides:

(3) Where an application under regulation 41 has been made but no warrant is issued or term of imprisonment fixed, the application may be renewed ... on the ground that the circumstances of the debtor have changed."

20. In Regina v. Highbury Corner Magistrates, ex parte Watkins (9 October 1992, unreported) Mr Justice Henry said in the High Court that "The proceedings under Regulation 41 are plainly legal proceedings other than criminal proceedings. They are proceedings for the recovery of an unpaid tax." However, in Regina v. Hebburn Justices, ex parte Martin (31 July 1995, unreported), Mr Justice Sedley in the High Court held that although the initial obligation to pay community charge was a civil one, magistrates "who have reached the point of committal are entertaining a criminal process".

B. Appeal from a decision of a magistrates' court by way of case stated

21. By virtue of section 111 of the Magistrates' Court Act 1980 a party to proceedings before a magistrates' court may "question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved ...". This is known as the "case stated" procedure.

22. Under section 113 of the 1980 Act, magistrates may grant bail to a party who applies to them to state a case; but if they refuse to do so, in cases categorised as "civil" under the domestic law, the High Court has no jurisdiction to grant bail until it is seized of some substantive proceedings to which the grant of bail can be ancillary.

23. Acts performed pursuant to an order made by a magistrates' court which is subsequently set aside by a superior court are not themselves inherently unlawful. It is at the discretion of the higher court whether these collateral acts are also invalid: Regina v. Deputy Governor of Parkhurst Prison, ex parte Hague [1992] 1 Appeal Cases 58, 124D-G (per Lord Justice Taylor in the Court of Appeal); London and Clydeside Estates Ltd v. Aberdeen District Council [1980] 1 Weekly Law Reports 182, 189C-190C (per Lord Hailsham, Lord Chancellor, in the House of Lords); Regina v. Panel on Take-overs and Mergers, ex parte Datafin PLC [1987] Queen's Bench 815, 840A-C (per Sir John Donaldson, Master of the Rolls).

C. The distinction between an act of a magistrates' court which is merely wrong in law and one which is so wrong as to be in excess of jurisdiction

24. In English law, orders of a magistrates' court which are in excess of jurisdiction are void from the outset, whereas orders made within jurisdiction remain valid until set aside by a superior court. It is only in respect of the former type of error that a court can be held civilly liable in damages (under section 108 of the Courts and Legal Services Act 1990, which replaced section 45 of the Justices of the Peace Act 1979 - see paragraphs 27-28 below).

25. The appropriate test for whether an order of a magistrates' court is void for lack of jurisdiction is that set out by the House of Lords in McC. v. Mullan [1985] Appeal Cases 528. In that case magistrates had made an order sending a 14-year-old boy to a training school after a hearing at which he was not legally represented, had not applied for legal aid and had not been informed of his right so to do. The order was quashed on judicial review on the ground that, by virtue of Article 15 (1) of the Treatment of Offenders (Northern Ireland) Order 1976, magistrates were not permitted to

pass a custodial sentence for the first time on a juvenile who was not legally represented, unless he had applied for legal aid and been refused on grounds of means or had been informed of his right to apply for it but had refused or neglected to do so.

The boy then applied for damages for false imprisonment against the magistrates. Since the case was decided prior to the enactment of the Courts and Legal Services Act 1990 and at a time when it was the law that magistrates were liable in damages for false imprisonment if they acted in excess of jurisdiction (see paragraph 26 below), the House of Lords was required to decide the jurisdictional question.

In its judgment, a magistrates' court acted in excess of jurisdiction in three circumstances only: (1) if it acted without having jurisdiction over the cause, (2) if it exercised its powers in a procedural manner that involved a gross and obvious irregularity, or (3) if it made an order that had no proper foundation in law because of a failure to observe a statutory condition precedent. The instant case fell within the third limb of the rule: the magistrates were liable in damages because they had not observed the requirements of Article 15 (1) of the 1976 Order.

During the course of his judgment speech, Lord Bridge commented (at page 546 E-F), on the jurisdiction of magistrates in conducting a criminal trial:

> "... once justices have duly entered upon a summary trial of a matter within their jurisdiction, only something quite exceptional occurring in the course of their proceeding to a determination can oust their jurisdiction ... [A]n error (whether of fact or law) in deciding a collateral issue on which jurisdiction depends will not do so. Nor will the absence of any evidence to support a conviction ..."

26. The final limb of the rule formulated by the House of Lords in McC. v. Mullan (that is, that magistrates exceed their jurisdiction when they make an order which has no foundation in law because of a failure to observe a statutory condition precedent) was applied by the Court of Appeal in R. v. Manchester City Magistrates' Court, ex parte Davies [1989] 1 All England Reports 30, a case concerning rates (the predecessor to the community charge). Again, the issue was whether magistrates had acted in excess of jurisdiction and were therefore liable in damages for false imprisonment.

The plaintiff had been unable to pay all of the rates for which he became liable in December 1984, and in January 1986 he failed to follow his accountant's advice to close his business and to go bankrupt. Applying legislation similar to Regulation 41 of the Community Charge Regulations, the magistrates found that his failure to follow the accountant's advice constituted culpable neglect and they committed him to prison. The Court of Appeal held that no causal connection had been established between the failure to follow advice in 1986 and the failure to pay the rates in 1984, and that the magistrates had not properly entered into the inquiry (as to whether

the failure to pay was due to culpable neglect) required by the legislation as a condition precedent of the warrant of commitment. They were therefore acting in excess of jurisdiction and were liable in damages.

The three Appeal Court judges expressed their findings in slightly different terms. Lord Justice O'Connor observed that "they never carried out the inquiry required [by the law]"; Lord Justice Neill found that "some inquiry about the applicant's finances was made", but that "a clear and crucial distinction can be drawn between the inquiry required by the statute and the inquiry which was in fact carried out. The justices never examined the question whether the failure to pay was due to culpable neglect"; and Sir Roger Ormrod (who dissented from the majority decision) said: "... it is quite clear that the justices carried out an inquiry into means carefully and in detail ... It is equally plain that they misdirected themselves completely ... They ... failed to realise that the question they had to decide was whether the applicant's failure to pay his rates was `due either to his wilful refusal or to his culpable neglect'" (see pp. 637 B, 642 H-643 G and 647 E).

D. The immunity of magistrates from civil proceedings

27. Magistrates enjoy a statutory immunity from civil liability in certain circumstances. Before the coming into force of section 108 of the Courts and Legal Services Act 1990 on 1 January 1991, this immunity was provided for by sections 44 and 45 of the Justices of the Peace Act 1979. In brief, a magistrate was liable in damages for acts done by him in his official capacity if it could be proved either (1) that the act was done maliciously and without reasonable and probable cause or (2) that it was performed outside or in excess of jurisdiction (see paragraph 25 above for the meaning of the latter expression).

28. The position under section 108 of the Courts and Legal Services Act 1990 is now that an action lies against a magistrate only if it can be proved that he acted both in bad faith and in excess of jurisdiction:

> "An action shall lie against any justice of the peace ... in respect of any act or omission of his -
>
> (a) in the purported execution of his duty -
>
> (i) as such a justice; ...
>
> (b) with respect to any matter which is not within his jurisdiction, if, but only if, it is proved that he acted in bad faith."

E. Legal aid

29. The legal-aid scheme does not provide for full representation before magistrates for proceedings for committal to prison for non-payment of the community charge. The "Green Form" scheme provides at least two hours'

worth of advice and assistance from a solicitor (the time limit can be extended), including preparation for a court case, but it does not provide for representation.

30. Assistance by Way of Representation ("ABWOR") enables a magistrates' court, in certain circumstances, to appoint a solicitor who happens to be within the court precincts to represent a party who would not otherwise be represented. Regulation 7 (1) (b) of the Legal Advice and Assistance (Scope) Regulations 1989 provides that ABWOR may be given:

> "at a hearing in any proceedings in a magistrates' court to a party who is not receiving and has not been refused representation in connection with those proceedings, where the court -
>
> (i) is satisfied that the hearing should proceed on the same day;
>
> (ii) is satisfied that that party would not otherwise be represented; and
>
> (iii) requests a solicitor who is within the precincts of the court for purposes other than the provision of ABWOR in accordance with this sub-paragraph, or approves a proposal from such a solicitor, that he provide that party with ABWOR ..."

PROCEEDINGS BEFORE THE COMMISSION

31. In his application (no. 19380/92) of 20 September 1991 to the Commission, the applicant complained that his detention between 25 March 1991 and 5 April 1991 was unlawful, in violation of Article 5 para. 1 of the Convention (art. 5-1); that section 108 of the Courts and Legal Services Act 1989 deprived him of an enforceable right to compensation in respect of it, contrary to Article 5 para. 5 (art. 5-5); and that the fact that full legal aid was not available to him for the committal hearing before the magistrates constituted a violation of Article 6 (art. 6).

32. The Commission declared the application admissible on 13 January 1994. In its report of 29 November 1994 (Article 31) (art. 31), it concluded, by twelve votes to six, that there had been a violation of Article 5 para. 1 of the Convention (art. 5-1); by seventeen votes to one that there had been a violation of Article 5 para. 5 (art. 5-5); and by fifteen votes to three that there had been a violation of Article 6 para. 3 (c) (art. 6-3-c).

The full text of the Commission's opinion and of the five separate opinions contained in the report is reproduced as an annex to this judgment [3].

[3] For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-III), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS MADE TO THE COURT

33. At the hearing on 22 November 1995 the Government, as they had done in their memorial, invited the Court to hold that there had been no violations of Articles 5 and 6 of the Convention (art. 5, art. 6).

34. On the same occasion the applicant reiterated his request to the Court, stated in his memorial, to find that there had been breaches of Articles 5 and 6 (art. 5, art. 6) and to award him just satisfaction under Article 50 of the Convention (art. 50).

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 PARA. 1 (art. 5-1) OF THE CONVENTION

35. The applicant submitted that his detention between 25 March 1991 and 5 April 1991 constituted a violation of Article 5 para. 1 (art. 5-1) of the Convention, which reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance 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."

The Commission agreed with the applicant, whereas the Government contested his allegations.

36. The applicant argued that the decision of the Divisional Court (see paragraphs 16-17 above) was not distinguishable from that of the Court of Appeal in Manchester City Magistrates' Court, ex parte Davies (see

paragraph 26 above) and amounted in substance to a ruling that his detention had been ordered by the magistrates in excess of their jurisdiction and was thus unlawful under English law. If this was so, it was in violation of Article 5 para. 1 (art. 5-1), which refers back to the position under national law.

Furthermore, his imprisonment was not covered by any of the sub-paragraphs of Article 5 para. 1 (art. 5-1). It did not result from a criminal conviction as required by Article 5 para. 1 (a) (art. 5-1-a), and, since he did not have any way of paying the debt, it could not have been intended to secure the fulfilment of an obligation prescribed by law within the terms of Article 5 para. 1 (b) (art. 5-1-b).

In addition, he argued that his detention was manifestly arbitrary. The Divisional Court found that there was no evidence of culpable neglect and that the magistrates' decision to imprison him was unreasonable in the sense of being irrational or perverse. The magistrates, therefore, acted beyond their powers in imprisoning him, and the imposition of a penalty which is beyond the authorisation of the law is necessarily an arbitrary one.

Finally, he contended that, since he was denied legal representation in violation of Article 6 of the Convention (art. 6), the detention was for that reason unlawful.

37. For the Commission, the weight of argument tended to the view that, in domestic law, the applicant's detention was not "lawful" as required by Article 5 para. 1 (art. 5-1).

38. The Government submitted that Mr Benham's detention was "lawful" and "in accordance with a procedure prescribed by law" for the purposes of Article 5 para. 1 (art. 5-1). The Community Charge Regulations (see paragraph 19 above) conferred on the magistrates' court the power to send him to prison if they were of the opinion that his failure to pay was due to culpable neglect. Unlike the magistrates in Manchester City Magistrates' Court, ex parte Davies (see paragraph 26 above), the magistrates in the instant case did carry out the inquiry required by law as to whether Mr Benham's failure to pay resulted from culpable neglect. They made errors of fact and law in answering that question, but the Divisional Court did not find that these errors were such as to deprive them of jurisdiction.

39. The Court first observes that this case falls to be examined under sub-paragraph (b) of Article 5 para. 1 (art. 5-1-b), since the purpose of the detention was to secure the fulfilment of Mr Benham's obligation to pay the community charge owed by him.

40. The main issue to be determined in the present case is whether the disputed detention was "lawful", including whether it complied with "a procedure prescribed by law". The Convention here essentially refers back to national law and states the obligation to conform to the substantive and procedural rules thereof, but it requires in addition that any deprivation of

liberty should be consistent with the purpose of Article 5 (art. 5), namely to protect individuals from arbitrariness (see the Quinn v. France judgment of 22 March 1995, Series A no. 311, p. 18, para. 47).

41. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 para. 1 (art. 5-1) failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with (see the Bouamar v. Belgium judgment of 29 February 1988, Series A no. 129, p. 21, para. 49).

42. A period of detention will in principle be lawful if it is carried out pursuant to a court order. A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention. For this reason, the Strasbourg organs have consistently refused to uphold applications from persons convicted of criminal offences who complain that their convictions or sentences were found by the appellate courts to have been based on errors of fact or law (see the Bozano v. France judgment of 18 December 1986, Series A no. 111, p. 23, para. 55, and the report of the Commission of 9 March 1978 on application no. 7629/76, Krzycki v. Germany, Decisions and Reports 13, pp. 60-61).

43. It was agreed by those appearing before the Court that the principles of English law which should be taken into account in this case distinguished between acts of a magistrates' court which were within its jurisdiction and those which were in excess of jurisdiction. The former were valid and effective unless or until they were overturned by a superior court, whereas the latter were null and void from the outset (see paragraph 24 above).

It was further submitted that the appropriate test under English law for deciding whether or not magistrates acted within their jurisdiction was that laid down by the House of Lords in McC. v. Mullan (see paragraph 25 above). The third limb of that test was relevant to the instant case, namely that magistrates exceeded their jurisdiction when they made an order which had no foundation in law because of a failure to observe a statutory condition precedent.

This limb was applied by the Court of Appeal in Manchester City Magistrates' Court, ex parte Davies (see paragraph 26 above). In that case the appeal court found that magistrates had acted in excess of jurisdiction when they committed a man to prison for non-payment of rates without having carried out the inquiry required by law as to whether his failure to pay was due to culpable neglect.

44. In each of the two cases referred to above it was necessary for the courts to decide the jurisdictional issue, because at the relevant time damages could be awarded against magistrates who acted in excess of jurisdiction. However, section 108 of the Courts and Legal Services Act

1990 has since changed the law to provide that there is no right to damages unless magistrates acted in bad faith (see paragraph 28 above). For this reason, when the Divisional Court reviewed the magistrates' order for Mr Benham's detention, there was no reason under English law for it to decide whether or not the order had been made in excess of jurisdiction.

Mr Justice Potts in the Divisional Court found that the magistrates had carried out some inquiry as to whether Mr Benham's failure to pay the community charge was due to his culpable neglect. However, he concluded that their finding of culpable neglect could not be sustained on the evidence available to them (see paragraph 16 above).

45. In the view of the Court, there are undoubtedly similarities between this decision and that of the Court of Appeal in Manchester City Magistrates' Court, ex parte Davies, but there are also notable differences. In the latter case, the Court of Appeal held that the magistrates had failed altogether to carry out the inquiry required by law as to whether the debtor's failure to pay was the result of culpable neglect (see paragraph 26 above). In the instant case, however, the Divisional Court found that the magistrates had addressed themselves to this question, although their finding of culpable neglect could not be sustained on the available evidence.

46. Against the above background, it cannot be said with any degree of certainty that the judgment of the Divisional Court was to the effect that the magistrates acted in excess of jurisdiction within the meaning of English law. It follows that the Court does not find it established that the order for detention was invalid, and thus that the detention which resulted from it was unlawful under national law (see the above-mentioned Bouamar judgment p. 21, para. 49). The mere fact that the order was set aside on appeal did not in itself affect the lawfulness of the detention (see paragraph 42 above).

47. Nor does the Court find that the detention was arbitrary. It has not been suggested that the magistrates who ordered Mr Benham's detention acted in bad faith, nor that they neglected to attempt to apply the relevant legislation correctly (see the above-mentioned Bozano judgment, pp. 25-26, para. 59). It considers the question of the lack of legal aid to be less relevant to the present head of complaint than to that under Article 6 (art. 6) (see paragraph 64 below).

Accordingly, the Court finds no violation of Article 5 para. 1 of the Convention (art. 5-1).

II. ALLEGED VIOLATION OF ARTICLE 5 PARA. 5 (art. 5-5) OF THE CONVENTION

48. The applicant, with whom the Commission agreed, argued that since he was detained in violation of Article 5 para. 1 (art. 5-1), he was entitled to compensation from public funds in accordance with Article 5 para. 5 of the Convention (art. 5-5), which reads as follows:

"Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article (art. 5) shall have an enforceable right to compensation."

49. The Government submitted that Article 5 para. 5 (art. 5-5) did not apply because the applicant's detention was not in contravention of Article 5 para. 1 (art. 5-1).

50. The Court observes that Article 5 para. 5 (art. 5-5) guarantees an enforceable right to compensation only to those who have been the victims of arrest or detention in contravention of the provisions of Article 5 (art. 5) (see the Wassink v. the Netherlands judgment of 27 September 1990, Series A no. 185-A, p. 14, para. 38). In view of its finding that there was no violation of Article 5 para. 1 (art. 5-1) in this case, it concludes that Article 5 para. 5 (art. 5-5) is not applicable.

III. ALLEGED VIOLATION OF ARTICLE 6 (art. 6) OF THE CONVENTION

A. Article 6 para. 1 (art. 6-1) taken alone

51. The applicant contended that the fact that he had no automatic right to legal representation at the hearing before the magistrates meant that he was denied access to a fair hearing for the purposes of Article 6 para. 1 (art. 6-1), which provides, so far as is relevant:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

52. Since the guarantees in paragraph 3 of Article 6 (art. 6-3) are specific aspects of the right to a fair trial in criminal proceedings guaranteed by paragraph 1 of the same Article (art. 6-1), the Court considers it appropriate to examine this complaint from the perspective of paragraphs 3 (c) and 1 taken together (art. 6-1+6-3-c) (see, for example, the Granger v. the United Kingdom judgment of 28 March 1990, Series A no. 174, p. 17, para. 43).

B. Article 6 para. 3 (c) taken together with Article 6 para. 1 (art. 6-1+6-3-c)

53. The applicant further complained that his lack of legal representation during the proceedings before the magistrates constituted a violation of Article 6 para. 3 (c) (art. 6-3-c) of the Convention, which provides as follows:

"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;"

1. Applicability

54. The applicant, with whom the Commission agreed, argued that the proceedings before the magistrates involved the determination of a criminal charge for the purposes of Article 6 para. 3 (c) (art. 6-3-c). He referred to the facts that what was in issue was not a dispute between individuals but rather liability to pay a tax to a public authority, and that the proceedings had many "criminal" features, such as the safeguards available to defendants aged under 21, the severity of the applicable penalty and the requirement of a finding of culpability before a term of imprisonment could be imposed. Furthermore, it was by no means clear that the proceedings were classified as civil rather than criminal under the domestic law.

55. The Government argued that Article 6 para. 3 (c) (art. 6-3-c) did not apply because the proceedings before the magistrates were civil rather than criminal in nature, as was borne out by the weight of the English case-law. The purpose of the detention was to coerce the applicant into paying the tax owed, rather than to punish him for not having paid it.

56. The case-law of the Court establishes that there are three criteria to be taken into account when deciding whether a person was "charged with a criminal offence" for the purposes of Article 6 (art. 6). These are the classification of the proceedings under national law, the nature of the proceedings and the nature and degree of severity of the penalty (see the Ravnsborg v. Sweden judgment of 23 March 1994, Series A no. 283-B).

As to the first of these criteria, the Court agrees with the Government that the weight of the domestic authority indicates that, under English law, the proceedings in question are regarded as civil rather than criminal in nature. However, this factor is of relative weight and serves only as a starting-point (see the Weber v. Switzerland judgment of 22 May 1990, Series A no. 177, p. 17, para. 31).

The second criterion, the nature of the proceedings, carries more weight. In this connection, the Court notes that the law concerning liability to pay the community charge and the procedure upon non-payment was of general application to all citizens, and that the proceedings in question were brought by a public authority under statutory powers of enforcement. In addition, the proceedings had some punitive elements. For example, the magistrates could only exercise their power of committal to prison on a finding of wilful refusal to pay or of culpable neglect.

Finally, it is to be recalled that the applicant faced a relatively severe maximum penalty of three months' imprisonment, and was in fact ordered to be detained for thirty days (see the Bendenoun v. France judgment of 24 February 1994, Series A no. 284, p. 20, para. 47).

Having regard to these factors, the Court concludes that Mr Benham was "charged with a criminal offence" for the purposes of Article 6 paras. 1 and 3 (art. 6-1, art. 6-3). Accordingly, these two paragraphs of Article 6 (art. 6-1, art. 6-3) are applicable.

2. Compliance

57. The applicant submitted that the interests of justice required that he ought to have been represented before the magistrates. He referred to the facts that lay magistrates have no legal training and in this case were required to interpret quite complex regulations. If he had been legally represented the magistrates might have been brought to appreciate the error that they were about to make. He asserted, further, that the Green Form and ABWOR schemes which were available to him (see paragraphs 29 and 30 above) were wholly inadequate.

58. The Government contended that the legal-aid provision available to Mr Benham was adequate, and that the United Kingdom acted within its margin of appreciation in deciding that public funds should be directed elsewhere.

59. For the Commission, where immediate deprivation of liberty was at stake the interests of justice in principle called for legal representation.

60. It was not disputed that Mr Benham lacked sufficient means to pay for legal assistance himself. The only issue before the Court is, therefore, whether the interests of justice required that Mr Benham be provided with free legal representation at the hearing before the magistrates. In answering this question, regard must be had to the severity of the penalty at stake and the complexity of the case (see the Quaranta v. Switzerland judgment of 24 May 1991, Series A no. 205, pp. 17-18, paras. 32-38).

61. The Court agrees with the Commission that where deprivation of liberty is at stake, the interests of justice in principle call for legal representation (see the above-mentioned Quaranta judgment p. 17, para. 33). In this case, Mr Benham faced a maximum term of three months' imprisonment.

62. Furthermore, the law which the magistrates had to apply was not straightforward. The test for culpable negligence in particular was difficult to understand and to operate, as was evidenced by the fact that, in the judgment of the Divisional Court, the magistrates' finding could not be sustained on the evidence before them.

63. The Court has regard to the fact that there were two types of legal-aid provision available to Mr Benham. Under the Green Form scheme he was entitled to up to two hours' advice and assistance from a solicitor prior to the hearing, but the scheme did not cover legal representation in court (see paragraph 29 above). Under the ABWOR scheme, the magistrates could at their discretion have appointed a solicitor to represent him, if one

had happened to be in court (see paragraph 30 above). However, Mr Benham was not entitled as of right to be represented.

64. In view of the severity of the penalty risked by Mr Benham and the complexity of the applicable law, the Court considers that the interests of justice demanded that, in order to receive a fair hearing, Mr Benham ought to have benefited from free legal representation during the proceedings before the magistrates. In conclusion, there has been a violation of Article 6 paras. 1 and 3 (c) of the Convention taken together (art. 6-1+6-3-c).

IV. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

65. The applicant sought just satisfaction under Article 50 (art. 50) of the Convention, which reads as follows:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Non-pecuniary damage

66. Mr Benham claimed compensation for non-pecuniary damage in respect of the violation of Article 6 (art. 6).

67. The Government pointed out that Mr Benham was legally represented from 28 March 1991 onwards, when an unsuccessful bail application was made on his behalf, and that any time spent in prison after that date could not be attributed to his lack of representation at the hearing.

68. The Court considers, particularly in view of the impossibility of speculating as to whether the magistrates would have made the order for Mr Benham's detention had he been represented at the hearing before them, that the finding of a violation is sufficient satisfaction.

B. Legal fees and expenses

69. The applicant further sought reimbursement of costs and expenses totalling £26,523.80.

70. The Government objected that the amounts claimed by the applicant were excessive. They submitted that, if the Court were to find for the applicant on all counts, a figure of £23,293.94 should be substituted for that sought.

However, in the event that the Court found violations in respect of certain claims only, the costs and expenses allowed should be reduced proportionately.

71. In view of the fact that the Court finds a violation in respect of one of the applicant's complaints only, it considers that £10,000 (VAT included) is an appropriate amount for the respondent Government to pay towards the applicant's legal costs and expenses, less the 25,510 French francs already paid in legal aid by the Council of Europe.

C. Default interest

72. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT

1. Holds by seventeen votes to four that there has been no violation of Article 5 para. 1 of the Convention (art. 5-1);

2. Holds by seventeen votes to four that Article 5 para. 5 of the Convention (art. 5-5) is not applicable;

3. Holds unanimously that there has been a violation of Article 6 paras. 1 and 3 (c) of the Convention taken together (art. 6-1+6-3-c);

4. Holds by nineteen votes to two that the finding of a violation constitutes adequate satisfaction for the non-pecuniary damage suffered by the applicant;

5. Holds unanimously
   (a) that the respondent State is to pay the applicant, within three months, in respect of costs and expenses, £10,000 (ten thousand pounds sterling) less 25,510 (twenty-five thousand, five hundred and ten) French francs to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment;
   (b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;

6. Dismisses, unanimously, the remainder of the claim for just satisfaction in respect of costs and expenses.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 10 June 1996.

Rolv RYSSDAL

President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the partly dissenting opinions of Mr Bernhardt, Mr Thór Vilhjálmsson, Mr De Meyer and Mr Foighel are annexed to this judgment.

R.R.
H.P.

PARTLY DISSENTING OPINION OF JUDGE BERNHARDT

In my view there is a violation of Article 5 para. 1 (art. 5-1) (and consequently also of Article 5 para. 5 (art. 5-5)) of the Convention in the present case.

I leave aside my doubts whether a prison sentence is in the circumstances of the case proportionate to the failure of Mr Benham to pay a community charge. Detention may in such a case be appropriate if there exists a chance that the detainee can and will pay the charge under such pressure. But if it is undisputed that the detained person has no means to pay the charge, a prison sentence is in my view hardly compatible with the proper role of criminal sanctions in present-day societies. But this is not the final reason of my dissent.

I understand Article 5 para. 1 of the Convention (art. 5-1) in the sense that the words "lawful detention" refer to the conformity of the decision ordering the detention with national law, in so far as the material and procedural conditions contained in national law must be satisfied. In the present case, it is clear from the decision of the Divisional Court that under English law the magistrates should not have sent Mr Benham to prison.

The present decision of the Court goes further and understands the reference to national law in the sense that a detention which has been ordered in violation of national law remains nevertheless lawful if under national law the deciding judge or magistrate acted inside his jurisdiction, if he did not act in bad faith, and if the order was not void ab initio. This understanding of Article 5 (art. 5) has far-reaching consequences. Even if the conditions provided for by national law are not satisfied, the detention remains nevertheless "lawful" if the national law distinguishes (which is often not the case) between decisions which are void ab initio and other decisions. Such a distinction - which leads often, including in the present case, to extremely unclear results - neglects the situation and the interests of the detained person. Decisive are the degree of the violation of the national law, the corresponding error of the judge concerned and the difference between void and "voidable" decisions. In my view, Article 5 (art. 5) refers to national law only in so far as the original detention order must be compatible with that law.

I do not think that the comparison drawn in paragraph 42 of the judgment with convictions which are subsequently quashed by a higher court is convincing. The present case concerns exclusively the question whether the detention was "lawful" at the time when the detention order was made.

PARTLY DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

To my regret, I have not found it possible to follow the majority of the Court on the question whether there was a violation of Article 5 para. 1 of the Convention (art. 5-1).

The Commission came to the conclusion that "the weight of the argument before it tends to be of the view that, in domestic law, the applicant's detention was not lawful" (Commission's report, paragraph 48).

The Court, on the other hand, did "not find it established that the order for detention was invalid, and thus that the detention which resulted from it was unlawful under national law ...".

The arguments for and against these different conclusions are complicated and I am left in some uncertainty as to how to assess them.

This uncertainty reveals that the national law is far from clear, yet what is in issue is an important question concerning personal liberty.

As stated by the Court in the Bozano judgment, "Lawfulness, in any event, also implies absence of any arbitrariness ..." (Series A no. 111, p. 25, para. 59).

As in that judgment, the particular circumstances of the case are relevant. Mr Benham was ordered to be detained for thirty days, and actually served eleven days, for failure to pay a community charge, in all £355, costs included. He had no personal assets or income, but the English magistrates found that he clearly had the potential to earn money to discharge his obligation to pay.

In my opinion, the warrant issued by the magistrates was very severe in the circumstances.

For these reasons, I am of the opinion that Article 5 para. 1 (art. 5-1) was violated.

Consequently, I find Article 5 para. 5 (art. 5-5) to be applicable. There was therefore, obviously, also a violation of that provision (art. 5-5).

PARTLY DISSENTING OPINION OF JUDGE DE MEYER

I have no doubt that the purpose of the legal provision under which the applicant was deprived of his liberty was to "secure the fulfilment of" an "obligation prescribed by law".

However, since he had failed to fulfil the obligation concerned and since that failure was found by the magistrates' court to be due to his culpable neglect, the detention as such was, in my view, a punishment "after conviction by a competent court" [1]. It was indeed a sanction imposed on him on account of conduct considered reprehensible [2]. That also suffices for me to conclude that he was entitled to enjoy the rights recognised in Article 6 of the Convention (art. 6) [3].

As far as Article 5 (art. 5) is concerned, I agree with Mr Foighel for the reasons set forth in his dissenting opinion [4], that the applicant's detention was not lawful.

As to Article 6 (art. 6), it is enough for me to see that he was not assisted by counsel before the magistrates' court and that it has not been shown either that he had willingly and knowingly waived such assistance or that the interests of justice did not require it in the instance concerned [5].

Finally, I feel that the Court should have granted some financial compensation to the applicant.

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[1] See Mr Justice Sedley's opinion referred to in paragraph 20 of the present judgment and our Court's own conclusion in paragraph 56.

[2] See my opinion in Putz v. Austria, 22 February 1996, at paragraph 6.

[3] Once again the Court applies, in paragraph 56 of the present judgment, the three Engel criteria. As I have already tried to explain in my opinion in Putz, at paragraphs 2-6, these criteria are not very useful. It would be better to forget them altogether.

[4] See below.

[5] See my concurring opinion in Boner v. the United Kingdom, 28 October 1994, Series A no. 300-B, p. 78.

PARTLY DISSENTING OPINION OF JUDGE FOIGHEL

It has been constantly held by this Court that the right to liberty and security of person in Article 5 (art. 5) is one of the fundamental rights in the Convention.

The Court's starting-point should therefore be that any exceptions to this rule are to be interpreted narrowly.

The exception relevant to this case is Article 5 para. 1 (b) (art. 5-1-b), which permits

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

It is obvious that the Convention here essentially refers back to national law and lays an obligation on the national authority to comply with the substantive and procedural rules of that law, but it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5 (art. 5), namely to protect individuals from arbitrariness.

The duty of interpreting and applying domestic law falls, in the first place, to the national authorities, notably the courts.

If, however, the national law is obscure or uncertain, or if different interpretations of it are equally possible, it is incumbent on this Court - for the purpose of interpreting and implementing the Convention - to choose the interpretation of the national law which most closely corresponds with the purpose of Article 5 (art. 5), namely to protect individuals from arbitrariness.

In this case the Divisional Court found at the hearing in October 1991 that the magistrates' decision to commit Mr Benham to prison had been unlawful. The Divisional Court was, however, silent as to whether Mr Benham's detention was unlawful from the start or whether it was unlawful only subsequent to the Divisional Court's decision. Further, it appeared from the addresses to the Court that - according to some interpretations of the English case-law - both interpretations were possible.

Against this background I would hold that in relation to Article 5 para. 1 (art. 5-1) the detention of Mr Benham was unlawful from the start, as the detention of a young man for thirty days for not having paid a tax of £325 is in itself, notwithstanding technical arguments, a flagrant violation of the liberty of person protected by the Convention.

Consequently, I find Mr Benham entitled to compensation for non-pecuniary damage in accordance with Article 50 (art. 50).