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

CASE OF V. v. THE UNITED KINGDOM

(Application no. 24888/94)

JUDGMENT

STRASBOURG

16 December 1999

In the case of V. v. the United Kingdom,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr C.L. ROZAKIS,
Mr A. PASTOR RIDRUEJO,
Mr G. RESS,
Mr J. MAKARCZYK,
Mr P. KŪRIS,
Mr R. TÜRMEN,
Mr J.-P. COSTA,
Mrs F. TULKENS,
Mr C. BÎRSAN,
Mr P. LORENZEN,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mr A.B. BAKA,
Lord REED, ad hoc *judge*,

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

Having deliberated in private on 15 September and 24 November 1999,

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

PROCEDURE

1. The case was referred to the Court by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government") on 4 March 1999 and by the European Commission of Human Rights ("the Commission") on 6 March 1999, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 24888/94) against the United Kingdom lodged with the Commission under former Article 25 by a British national, "V.", on 20 May 1994. The applicant asked the Court not to reveal his identity.

1-2. *Note by the Registry*. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

The object of the Government's application and the Commission's request 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 3, 5, 6 and 14 of the Convention.

2. In accordance with the provisions of Article 5 § 4 of Protocol No. 11 taken together with Rules 100 § 1 and 24 § 6, a panel of the Grand Chamber decided on 31 March 1999 that the case would be examined by the Grand Chamber of the Court. The Grand Chamber included *ex officio* Sir Nicolas Bratza, the judge elected in respect of the United Kingdom (Article 27 § 2 of the Convention and Rule 24 § 4), Mr L. Wildhaber, the President of the Court, Mrs E. Palm and Mr C.L. Rozakis, the Vice-Presidents of the Court, and Mr G. Ress, Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kūris, Mr R. Türmen, Mrs F. Tulkens, Mrs V. Strážnická, Mr C. Bîrsan, Mr P. Lorenzen and Mr V. Butkevych (Rule 24 § 3). Subsequently Sir Nicolas Bratza, who had taken part in the Commission's examination of the case, withdrew from sitting in the Grand Chamber (Rule 28). The Government accordingly appointed Lord Reed to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1). Later, Mr A.B. Baka, substitute judge, replaced Mr Bonello, who was unable to take part in the further consideration of the case (Rule 24 § 5 (b)).

3. On 23 June 1999 the President decided to deny public access to all documents filed with the Court by the Government and the applicant and the Court decided to hold the hearing in private (Rule 33 §§ 2 and 3).

4. On 1 June 1999 the President granted leave to the non-governmental organisation Justice and to Mr R. Bulger and Mrs D. Fergus, the parents of the child who had been murdered by T. and the applicant (see paragraph 7 below), to submit written comments in connection with the case (Article 36 § 2 of the Convention and Rule 61 § 3). On 6 September 1999 the President granted leave to the victim's parents to attend the hearing and to make oral submissions to the Court (Rule 61 § 3).

5. The hearing took place in the Human Rights Building, Strasbourg, on 15 September 1999, jointly with that in the case of T. v. the United Kingdom (application no. 24724/94).

There appeared before the Court:

(a) *for the Government*

Mr H. LLEWELLYN, Foreign and Commonwealth Office, *Agent*,
Mr D. PANNICK QC, Barrister-at-Law,
Mr M. SHAW, Barrister-at-Law, *Counsel*,
Mr S. BRAMLEY, Home Office,

Mr J. LANE, Home Office,
Mr T. MORRIS, HM Prison Service, *Advisers*;

(b) *for the applicant T.*
Mr B. HIGGS QC, Barrister-at-Law,
Mr J. NUTTER, Barrister-at-Law, *Counsel*,
Mr D. LLOYD, *Solicitor*;

(c) *for the applicant V.*
Mr E. FITZGERALD QC, Barrister-at-Law,
Mr B. EMMERSON, Barrister-at-Law, *Counsel*,
Mr J. DICKINSON, *Solicitor*,
Mr T. LOFLIN, Attorney, *Adviser*;

(d) *for the victim's parents*
Mr R. MAKIN, Solicitor, *Counsel for Mr Bulger*,
Mr S. SEXTON, Solicitor, *Counsel for Mrs Fergus*,
Mrs M. MONTEFIORE, *Adviser*.

The Court heard addresses by Mr Fitzgerald, Mr Higgs, Mr Makin, Mr Sexton and Mr Pannick, and also Mr Pannick's reply to a question put by one of its members.

6. On 24 November 1999 Mr J. Casadevall, substitute judge, replaced Mrs Strážnická, who was unable to take part in the further consideration of the case (Rule 24 § 5 (b)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The trial

1. The offence

7. The applicant was born in August 1982.

On 12 February 1993, when he was ten years old, he and another ten-year-old boy, "T." (the applicant in case no. 24724/94), had played truant from school and abducted a two-year-old boy from a shopping precinct, taken him on a journey of over two miles and then battered him to death and left him on a railway line to be run over.

2. The trial process

8. The applicant and T. were arrested in February 1993 and detained pending trial.

9. Their trial took place over three weeks in November 1993, in public, at Preston Crown Court before a judge and twelve jurors. In the two months preceding the trial, each applicant was taken by social workers to visit the courtroom and was introduced to trial procedures and personnel by way of a "child witness pack" containing books and games.

The trial was preceded and accompanied by massive national and international publicity. Throughout the criminal proceedings, the arrival of the defendants was greeted by a hostile crowd. On occasion, attempts were made to attack the vehicles bringing them to court. In the courtroom, the press benches and public gallery were full.

The trial was conducted with the formality of an adult criminal trial. The judge and counsel wore wigs and gowns. The procedure was, however, modified to a certain extent in view of the defendants' age. They were seated next to social workers in a specially raised dock. Their parents and lawyers were seated nearby. The hearing times were shortened to reflect the school day (10.30 a.m. to 3.30 p.m., with an hour's lunch break), and a ten-minute interval was taken every hour. During adjournments the defendants were allowed to spend time with their parents and social workers in a play area. The judge made it clear that he would adjourn whenever the social workers or defence lawyers told him that one of the defendants was showing signs of tiredness or stress. This occurred on one occasion.

10. At the opening of the trial on 1 November 1993 the judge made an order under section 39 of the Children and Young Persons Act 1933 (see paragraph 32 below) that there should be no publication of the names, addresses or other identifying details of the applicant or T. or publication of their photographs.

On the same day, the applicant's counsel made an application for a stay of the proceedings, on the grounds that the trial would be unfair due to the nature and extent of the media coverage. After hearing argument, the judge found that it was not established that the defendants would suffer serious prejudice to the extent that no fair trial could be held. He referred to the warning that he had given to the jury to put out of their minds anything which they might have heard or seen about the case outside the courtroom.

11. Dr Bentovim, of the Great Ormond Street Hospital for Children, interviewed the applicant and his parents on behalf of the defence in September 1993, although he did not give evidence at the trial. He found that V. showed post-traumatic effects and extreme distress and guilt, with fears of punishment and terrible retribution. V. found it very difficult and distressing to think or talk about the events in question and it was not possible to ascertain many aspects. The doctor found that he showed evidence of immaturity, behaving in many ways like a younger child

emotionally, and recommended that, whatever happened, he was likely to need therapeutic care in a residential context.

12. During the trial, the prosecution presented evidence for the purpose of establishing that the two defendants were criminally responsible for their actions in that they knew that what they were doing was wrong (see paragraph 29 below).

The court heard evidence from Dr Susan Bailey, a consultant psychiatrist from the Adolescent Forensic Service of the Home Office, who had written a report on the applicant on behalf of the Crown. Dr Bailey gave evidence that the applicant presented as a child of average intelligence, and would have been able in February 1993 to distinguish between right and wrong. He would have known that it was wrong to take a child from his mother, injure him and leave him on a railway line. She had seen the applicant on a number of occasions. On each occasion, he had cried inconsolably and shown signs of distress. He was not able to talk about the events in issue in any useful way.

The prosecution also called the headmistress at the school attended by the two boys. She stated that from the ages of four and five children were aware that it was wrong to strike another child with a weapon. She stated that T. and the applicant would have been aware that what they were doing was wrong. Another teacher gave evidence to the same effect.

13. In addition, evidence was given by persons who had witnessed T. and the applicant in the shopping centre from which the two-year-old boy was taken and who had seen the three boys at various points between the shopping centre and the vicinity of the railway line, where the body was later found. The tapes of the interviews of the police with T. and the applicant were replayed in court. Neither the applicant nor T. gave evidence.

14. In his summing-up to the jury the trial judge noted that witnesses had arrived in court in a blaze of publicity and many had faced a bevy of photographers. They had had to give evidence in a large court packed with people and not surprisingly several of them were overcome with emotion and some had had difficulty in speaking audibly. This was one of the factors to be borne in mind in assessing their evidence. He instructed the jury, *inter alia*, that the prosecution had to prove beyond reasonable doubt, in addition to the ingredients of the offences charged, that the applicant and T. knew that what they were doing was wrong.

15. On 24 November 1993 the jury convicted T. and the applicant of murder and abduction. Neither applicant made any appeal to the Court of Appeal against his conviction.

16. Following their conviction, the judge modified the order under section 39 of the 1933 Act (see paragraph 10 above) to allow the applicant and T.'s names, but no other details, to be published. The following day – 25 November 1993 – their names, photographs and other particulars were published in newspapers throughout the country. On 26 November 1993 the

judge granted an injunction restraining, *inter alia*, the publication of the addresses where the boys were being detained or any other detail which could lead to information about their whereabouts, care or treatment being revealed.

3. The effect of the trial on the applicant

17. In January 1995 the applicant was interviewed again by Dr Bentovim for the purposes of the judicial review proceedings (see below). The doctor noted, *inter alia*, that V. was suffering from very high levels of fear that he would be attacked or punished for his actions. When the trial was mentioned, the applicant had described his sense of shock when he had seen the public being let in and his considerable distress when his name and photograph were published. He had been terrified of being looked at in court and had frequently found himself worrying what people were thinking about him. Most of the time he had not been able to participate in the proceedings and had spent time counting in his head or making shapes with his shoes because he could not pay attention or process the whole proceedings. He did not follow when he heard his and T.'s interviews with the police being played in court and he recalled crying at that time.

Dr Bentovim commented that:

> "In my view, because of his immaturity, and his age when the act was committed and when he was tried, [V.] did not have the capacity to fully take in the process of the trial except for the major actions for which he was responsible. ... [W]hether ... he had an understanding of the situation such that he could give an informed instruction to his lawyer to act on his behalf ... is, in my view, very doubtful given his immaturity. Although he was chronologically over the age of ten at the time of his action, I am in no doubt that he was less mature than this as far as psychological or emotional age was concerned."

18. In a report by Dr Bailey (see paragraph 12 above) dated November 1997, it was noted that until the trial the events during the offence were with the applicant ninety-eight per cent of the time and especially every night during the trial. It took him twelve months to get over the trial itself. He still thought of it every night. He had been most scared when in the magistrates' court on the first occasion. After the first three days at the Crown Court he had felt all right because he played with his hands and stopped listening. He had to stop listening because they played the police interviews with him and T. in front of everyone as if they were shouting it out. The press were laughing at him and he could tell from the faces of the jury that they would find him guilty. He still did not understand why the trial had been so long.

19. In a report on the applicant dated February 1998, Sir Michael Rutter, Professor of Child Psychiatry at the Institute of Psychiatry, University of London, observed:

"I have also been asked to comment on the likely mental and emotional effects on children in general, and on [V.] in particular, of the prolonged trial process being in public. In my opinion there are two negative aspects of the trial process as they apply to children of [V.'s] age. First, one serious consequence of the long time involved in a trial means that there is an inevitable delay in providing the psychological care and therapeutic help that is needed. A child of ten has many years of psychological development still to come and it is most important that there is not a prolonged hiatus when this is impeded by the trial process. In particular, when children have committed a serious act, such as killing another child, it is most important that they are able to come to terms with the reality of what they have done and with all that that means. That is not possible at a time when a trial is still under way and guilt has still to be decided by the court. Thus, I conclude that the very prolonged nature of the trial process is bound to be deleterious for a child as young as ten or eleven (or even older).

The fact that the trial process is held in public and that the negative public reactions (often extreme negative reactions) are very obvious is a further potentially damaging factor. While it is crucially important for young people who have committed a serious act to accept both the seriousness of what they have done and the reality of their own responsibilities in the crime, this is made more difficult by the public nature of the trial process ..."

B. The sentence

1. Detention during Her Majesty's pleasure and the setting of the tariff

20. Following the applicant and T.'s conviction for murder, the judge sentenced them, as required by law, to detention during Her Majesty's pleasure (see paragraph 36 below).

He subsequently recommended that a period of eight years be served by the boys to satisfy the requirements of retribution and deterrence (the "tariff" – see paragraphs 40-42 below). He commented that he could not determine the boys' relative culpability, and stated:

"Very great care will have to be taken before either defendant is allowed out into the general community. Much psychotherapeutic, psychological and educational investigation and assistance will be required.

Not only must they be fully rehabilitated and no longer a danger to others but there is a very real risk of revenge attacks upon them by others.

... If the defendants had been adults I would have said that the actual length of deterrence necessary to meet the requirements of retribution and general deterrence should have been eighteen years.

However these two boys came from homes and families with great social and emotional deprivation. They grew up in an atmosphere of matrimonial breakdown where they were exposed to, saw, heard, or suffered abuse, drunkenness and violence. I have no doubt that both boys saw video films frequently showing violent and aberrant activities.

> In my judgment the appropriate length of detention necessary to meet the requirement of retribution and general deterrence for the murder, taking into account all its appalling circumstances and the age of the defendants when it was committed is eight years... . Eight years is 'very very many years' for a ten or eleven year old. They are now children. In eight years' time they will be young men."

21. The Lord Chief Justice recommended a tariff of ten years. The applicant's representatives made written representations to the Home Secretary, who was to fix the tariff period.

22. By a letter dated 16 June 1994, the Secretary of State informed the applicant that the family of the deceased child had submitted a petition signed by 278,300 people urging him to take account of their belief that the boys should never be released, accompanied by 4,400 letters of support from the public; that a Member of Parliament had submitted a petition signed by 5,900 people calling for a minimum of twenty-five years to be served; that 21,281 coupons from the *Sun* newspaper supporting a whole life tariff and a further 1,357 letters and small petitions had been received of which 1,113 wanted a higher tariff than the judicial recommendations.

The applicant's solicitors were given an opportunity to submit further representations to the Secretary of State.

23. By a letter dated 22 July 1994, the Secretary of State informed the applicant that he should serve a period of fifteen years in respect of retribution and deterrence. The letter stated, *inter alia*:

> "In making his decision, the Secretary of State had regard to the circumstances of the offence, the recommendations received from the judiciary, the representations made on your behalf and the extent to which this case could be compared with other cases. He also has regard to the public concern about this case, which was evidenced by the petitions and other correspondence the substance of which were disclosed to your solicitors by our letter of 16 June 1994, and to the need to maintain public confidence in the system of criminal justice.
>
> The Secretary of State takes fully into account the fact that you were only ten years old when the offence was committed. He further acknowledges that a much lesser tariff should apply than in the case of an adult.
>
> The Secretary of State notes the representations which were made on your behalf regarding the relative culpability of yourself and your co-defendant. The Secretary of State notes that the trial judge was unable to determine this. The Secretary of State has reached the same conclusion.
>
> The recommendations made by the trial judge and the Lord Chief Justice were that the appropriate tariff should be eight years, and ten years respectively. The trial judge added that if the defendants had been adults then the appropriate tariff would have been eighteen years. The Secretary of State has had regard to these views. He takes the view that this was an exceptionally cruel and sadistic offence against a very young and defenceless victim committed over a period of several hours. The Secretary of State believes that if the offence had been committed by an adult then the appropriate tariff would have been in the region of twenty-five years and not eighteen years as suggested by the trial judge.

> For these reasons, and bearing in mind your age when the offence was committed, the Secretary of State has decided to fix a tariff of fifteen years in your case. The Secretary of State is satisfied that such a tariff is consistent with the tariffs fixed in other cases.
>
> The Secretary of State is prepared to consider any fresh representations which you or your representatives might wish to make about the length of the tariff and, in the light of such fresh representations, to reduce the tariff if appropriate."

24. Dr Bentovim's January 1995 report (see paragraph 17 above) stated that the applicant had been distraught when told of the eight and ten year recommendations. When he was informed that a fifteen-year tariff had been fixed, he was devastated. He made comments that he would never be let out and had a preoccupation that he was like Myra Hindley[1]. He felt that his life was no longer worth living and there was no point going on.

2. The judicial review proceedings

25. The applicant instituted judicial review proceedings challenging, *inter alia*, the tariff which had been set by the Secretary of State as being disproportionately long and fixed without due regard to the needs of rehabilitation. Leave was granted on 7 November 1994.

26. On 2 May 1996 the Divisional Court upheld part of the applicant's claims. On 30 July 1996 the Court of Appeal dismissed the appeal of the Secretary of State. On 12 June 1997 the House of Lords by a majority dismissed the Secretary of State's appeal and allowed the applicant's cross-appeal. A majority of the House of Lords found that it was unlawful for the Secretary of State to adopt a policy, in the context of applying the tariff system, which even in exceptional circumstances treated as irrelevant the progress and development of a child who was detained during Her Majesty's pleasure. A majority of the House of Lords also held that in fixing a tariff the Secretary of State was exercising a power equivalent to a judge's sentencing power and that, like a sentencing judge, he was required to remain detached from the pressure of public opinion. Since the Secretary of State had misdirected himself in giving weight to the public protests about the level of the applicant's tariff and had acted in a procedurally unfair way, his decision had been rendered unlawful (see further paragraph 43 below). The tariff set by the Secretary of State was accordingly quashed.

27. On 10 November 1997 the Secretary of State informed Parliament that, in the light of the House of Lords' judgment, he had adopted a new policy in relation to young offenders convicted of murder and sentenced to detention during Her Majesty's pleasure, pursuant to which, *inter alia*, he would keep the tariff initially set under review in the light of the offender's

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1. *Note by the Registry*. Myra Hindley was convicted of murder in 1966 and is still detained.

progress and development. The Secretary of State invited the applicant's representatives to make representations to him with regard to the fixing of a fresh tariff.

28. At the time of the adoption of this judgment, no decision has been taken in respect of the applicant's tariff. The Government in their memorial informed the Court that although the applicant V. had submitted representations regarding the appropriate length of tariff, similar representations were still awaited in respect of T., and the Home Secretary was in addition seeking independent psychiatric advice regarding both detainees.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Age of criminal responsibility

29. Pursuant to section 50 of the Children and Young Persons Act 1933 as amended by section 16(1) of the Children and Young Persons Act 1963 ("the 1933 Act"), the age of criminal responsibility in England and Wales is ten years, below which no child can be found guilty of a criminal offence. The age of ten was endorsed by the Home Affairs Select Committee (composed of Members of Parliament) in October 1993 (*Juvenile Offenders*, Sixth Report of the Session 1992-93, Her Majesty's Stationary Office). At the time of the applicant's trial, a child between the ages of ten and fourteen was subject to a presumption that he did not know that what he was doing was wrong (*doli incapax*). This presumption had to be rebutted by the prosecution proving beyond reasonable doubt that, at the time of the offence, the child knew that the act was wrong as distinct from merely naughty or childish mischief (*C. (a minor) v. the Director of Public Prosecutions* [1996] Appeal Cases 1).

The *doli incapax* presumption has since been abolished with effect from 30 September 1998 (section 34 of the Crime and Disorder Act 1998).

B. Mode of trial for child defendants

30. Pursuant to section 24 of the Magistrates' Courts Act 1980, children and young persons under eighteen years must be tried summarily in the magistrates' court, where the trial usually takes place in the specialist youth court, which has an informal procedure and from which the general public are excluded. The exceptions are children and young persons charged with murder, manslaughter or an offence punishable if committed by an adult with fourteen or more years' imprisonment, who are tried in the Crown Court before a judge and jury.

C. Protection of child defendants from publicity

31. Where a child is tried in the youth court, section 49 of the 1933 Act imposes an automatic prohibition restraining the media from reporting the child's name or personal details or from publishing his photograph or any other information which might lead to his identification. The court has a discretion to dispense with the restriction following conviction if it considers it in the public interest to do so.

32. Where a child is tried in the Crown Court, there is no restriction on the reporting of the proceedings unless the trial judge makes an order under section 39 of the 1933 Act, which provides:

> "(1) In relation to any proceedings in any court ... the court may direct that –
>
> (a) no newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification of any child or young person concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness therein;
>
> (b) no picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid;
>
> except in so far (if at all) as may be permitted by the direction of the court.
>
> (2) Any person who publishes any matter in contravention of any such direction shall on summary conviction be liable in respect of each offence to a fine ..."

This provision was extended by section 57(4) of the Children and Young Persons Act 1963 to cover sound and television broadcasts.

The Court of Appeal interpreting section 39 has held that, since Parliament intentionally distinguished between trial in a youth court, where there is a presumption against publicity, and trial in the Crown Court, where the presumption is reversed, there should be a good reason for the making of an order under section 39 of the 1933 Act (*R. v. Lee (a minor)* 96 Criminal Appeal Reports 188).

D. Fitness to plead and ability to comprehend criminal proceedings

33. An accused is "unfit to plead" if by reason of a disability, such as mental illness, he has "insufficient intellect to instruct his solicitors and counsel, to plead to the indictment, to challenge jurors, to understand the evidence, and to give evidence" (*R. v. Robertson* 52 Criminal Appeal Reports 690). The question whether or not a defendant is fit to plead must be decided by a jury upon the written or oral evidence of at least two medical experts. Where a jury has found the defendant unfit to plead, either the same or another jury may be required to proceed with the trial and decide whether the accused did the act or made the omission charged

against him as the offence, in which case the court may make a hospital order against him (Criminal Procedure (Insanity) Act 1964, sections 4, 4A and 5). Alternatively, the trial may be postponed indefinitely until the accused is fit to plead.

34. In the case of *Kunnath v. the State* ([1993] 1 Weekly Law Reports 1315), the Privy Council quashed the conviction of an uneducated peasant from Kerala in southern India who had been sentenced to death for murder after a trial in Mauritius conducted in a language he did not understand and where the evidence was not translated for him by an interpreter. The Privy Council stated, *inter alia*:

> "It is an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the defendant. The basis of this principle is not simply that there should be corporeal presence but that the defendant, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and if so, upon what matters relevant to the case against him."

E. Detention during Her Majesty's pleasure

1. Nature of detention during Her Majesty's pleasure

35. In England and Wales, adults convicted of murder are subject to mandatory life imprisonment (Murder (Abolition of Death Penalty) Act 1967). Adults convicted of certain violent or sexual offences, for example manslaughter, rape or robbery, may be sentenced to life imprisonment at the discretion of the trial judge, if he or she considers that (i) the offence is grave and (ii) there are exceptional circumstances which demonstrate that the offender is a danger to the public and that it is not possible to say when that danger will subside.

36. Offenders under the age of eighteen who are convicted of murder are automatically to be detained during Her Majesty's pleasure, in accordance with section 53(1) of the Children and Young Persons Act 1933 (as amended), which provides:

> "A person convicted of an offence who appears to the court to have been under the age of eighteen years at the time the offence was committed shall not, if he is convicted of murder, be sentenced to imprisonment for life nor shall sentence of death be pronounced on or recorded against any such person but in lieu thereof the court shall ... sentence him to be detained during Her Majesty's pleasure, and if so sentenced he shall be liable to be detained in such a place and under such conditions as the Secretary of State may direct."

Until the age of eighteen a child or young person detained during Her Majesty's pleasure will be held at a children's home or other institution providing facilities appropriate to his age. At the age of eighteen the detainee becomes liable to be transferred to a Young Offenders' Institution

and, at the age of twenty-one, to detention in the same institution as an adult sentenced to life imprisonment for murder.

37. At the time of the applicant's conviction, the effect of the sentence of detention during Her Majesty's pleasure was that the child or young person was detained for an indeterminate period, the duration of which was wholly within the discretion of the Home Secretary. The Secretary of State had a discretion to refer the case of a detained child to the Parole Board for its advice and, if so advised by the Parole Board, had a discretion to decide to order the child's release (Criminal Justice Act 1991 ("the 1991 Act"), sections 35(2) and (3) and 43(2); see the speech of Lord Browne-Wilkinson in the House of Lords, *R. v. Secretary of State for the Home Department, ex parte V. and T.* [1998] Appeal Cases 407 at p. 492A-F, hereafter "*Ex parte V. and T.*").

38. On 1 October 1997 section 28 of the Crime (Sentences) Act 1997 was brought into force in order to implement the judgments of the European Court in the Hussain and Singh cases (Hussain v. the United Kingdom judgment of 21 February 1996, *Reports of Judgments and Decisions* 1996-I, p. 252, and Singh v. the United Kingdom judgment of 21 February 1996, *Reports* 1996-I, p. 280). The section provides that, after the tariff period has expired (see paragraphs 40-42 below), it shall be for the Parole Board, and not, as previously, for the Secretary of State, to decide whether it is safe to release on licence an offender serving a sentence of detention during Her Majesty's pleasure for an offence of murder committed before the age of eighteen.

39. A person detained during Her Majesty's pleasure who is released on licence is liable to be recalled throughout his or her life, subject to the decision of the Parole Board.

2. The "tariff"

40. Over the years, the Secretary of State has adopted a "tariff" policy in exercising his discretion whether to release offenders sentenced to life imprisonment. This was first publicly announced in Parliament by Mr Leon Brittan on 30 November 1983 (*Hansard* (House of Commons Debates) cols. 505-507). In essence, the tariff approach involves breaking down the life sentence into component parts, namely retribution, deterrence and protection of the public. The "tariff" represents the minimum period which the prisoner will have to serve to satisfy the requirements of retribution and deterrence. The Home Secretary will not refer the case to the Parole Board until three years before the expiry of the tariff period, and will not exercise his discretion to release on licence until after the tariff period has been completed (*per* Lord Browne-Wilkinson, *Ex parte V. and T.*, op. cit., at pp. 492G-493A).

41. Pursuant to section 34 of the 1991 Act, the tariff of a discretionary life prisoner is fixed in open court by the trial judge after conviction. After

the tariff has expired, the prisoner may require the Secretary of State to refer his case to the Parole Board which has the power to order his release if it is satisfied that it is no longer necessary to detain him for the protection of the public.

42. A different regime, however, applies under the 1991 Act to persons detained during Her Majesty's pleasure or serving a mandatory sentence of life imprisonment. In relation to these prisoners, the Secretary of State decides the length of the tariff. The view of the trial judge is made known to the prisoner after his trial, as is the opinion of the Lord Chief Justice. The prisoner is afforded the opportunity to make representations to the Secretary of State who then proceeds to fix the tariff and is entitled to depart from the judicial view (*R. v. Secretary of State for the Home Department, ex parte Doody* [1994] 1 Appeal Cases 531; and see the Home Secretary, Mr Michael Howard's, policy statement to Parliament, 27 July 1993, *Hansard* (House of Commons Debates) cols. 861-864).

43. In the judicial review proceedings brought by the applicant (*Ex parte V. and T.*, op. cit.), the House of Lords gave consideration, *inter alia*, to the nature of the tariff-fixing exercise in respect of sentences of detention during Her Majesty's pleasure.

Lord Steyn held:

> "The starting point must to be inquire into the nature of the power to fix a tariff which the Home Secretary exercises. Writing on behalf of the Home Secretary the Home Office explained that: 'The Home Secretary must ensure that, at all times, he acts with the same dispassionate fairness as a sentencing judge.' The comparison between the position of the Home Secretary, when he fixes a tariff representing the punitive element of the sentence, and the position of the sentencing judge is correct. In fixing a tariff the Home Secretary is carrying out, contrary to the constitutional principle of the separation of powers between the executive and the judiciary, a classic judicial function. Parliament entrusted the underlying statutory power, which entailed a discretion to adopt a policy and fix a tariff, to the Home Secretary. But the power to fix a tariff is nevertheless equivalent to a judge's sentencing power."

Lord Hope held:

> "But the imposition of a tariff, which is intended to fix the minimum period in custody is, in itself, the imposition of a form of punishment. This has, as Lord Mustill observed in *R. v. Secretary of State for the Home Department, ex parte Doody* at p. 557A-B, the characteristics of an orthodox judicial exercise, which is directed to the circumstances of the offence and those of the offender and to what, having regard to the requirements of retribution and deterrence, is the appropriate minimum period to be spent in custody. The judge, when advising the Secretary of State about the tariff, must and does confine his attention to these matters ...
>
> If the Secretary of State wishes to fix a tariff for the case – in order to replace the views of the judiciary with a view of his own about the length of the minimum period – he must be careful to abide by the same rules ..."

Lord Hope also commented on the imposition of a tariff on a child offender:

"A policy which ignores at any stage the child's development and progress while in custody as a factor relevant to his eventual release date is an unlawful policy. The practice of fixing the penal element as applied to adult mandatory life prisoners, which has no regard to the development and progress of the prisoner during this period, cannot be reconciled with the requirement to keep the protection and welfare of the child under review throughout the period while he is in custody."

Lord Goff stated, *inter alia*:

"... if the Secretary of State implements a policy of fixing a penal element of the sentence of a mandatory prisoner pursuant to his discretionary power under section 35, he is to this extent exercising a function which is closely analogous to a sentencing function with the effect that, when doing so, he is under a duty to act under the same restraints as a judge will act when exercising the same function. In particular, should he take into account public clamour directed towards the decision in the particular case which he has under consideration, he will be having regard to an irrelevant consideration which will render the exercise of his discretion unlawful.

In so holding I wish to draw a distinction in the present context between public concern of a general nature with regard to, for example, the prevalence of certain types of offence, and the need that those who commit such offences should be duly punished; and public clamour that a particular offender whose case is under consideration should be singled out for severe punishment ..."

44. On 10 November 1997 the Secretary of State announced that, in the light of the House of Lords' decision, he would adopt the following policy in respect of fixing the tariff for young offenders convicted of murder and detained during Her Majesty's pleasure:

"I shall continue to seek the advice of the trial judge and that of the Lord Chief Justice in deciding what punishment is required in any case of a person convicted under section 53(1) of the Children and Young Persons Act 1933. I shall then set an initial tariff with that advice, and the offender's personal circumstances, in mind; I shall continue to invite representations on the prisoner's behalf and give reasons for decisions.

Officials in my Department will receive annual reports on the progress and development of young people sentenced under section 53(1) whose initial tariff has yet to expire. Where there appears to be a case for considering a reduction in tariff, that will be brought to the attention of Ministers.

When half of the initial tariff period has expired, I, or a Minister acting on my behalf, will consider a report on the prisoner's progress and development, and invite representations on the question of tariff, with a view to determining whether the tariff period originally set is still appropriate ..."

III. RELEVANT INTERNATIONAL TEXTS

A. United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules")

45. The Beijing Rules were adopted by the United Nations General Assembly on 29 November 1985. These Rules are not binding in international law; in the Preamble, States are invited, but not required, to adopt them. They provide, as relevant:

"**4. Age of criminal responsibility**

4.1 In those legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.

Commentary

The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of criminal responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.).

Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally.

...

8. Protection of privacy

8.1 The juvenile's privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.

8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.

...

17. Guiding principles in adjudication and disposition

17.1 The disposition of the competent authorities shall be guided by the following principles:

(a) The reaction taken shall always be in proportion not only to the circumstances and gravity of the offence but also to the circumstances and the needs of the child as well as to the needs of the society;

(b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;

...

(d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.

...

Commentary

...

Rule 17.1(b) implies that strictly punitive approaches are not appropriate. Whereas in adult cases, and possibly also in cases of severe offences by juveniles, just desert and retributive sanctions might be considered to have some merit, in juvenile cases such considerations should always be outweighed by the interest of safeguarding the well-being and future of the young person.

..."

B. The United Nations Convention on the Rights of the Child (1989)

46. This treaty (hereafter "the UN Convention"), adopted by the General Assembly of the United Nations on 20 November 1989, has binding force under international law on the Contracting States, including all of the member States of the Council of Europe.

Article 3 § 1 of the UN Convention states:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Article 37 (a) and (b) provides:

"States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time ... "

Article 40 provides, as relevant:

"1. States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with

the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end ... the States Parties shall, in particular, ensure that:

...

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

...

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions, specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for the dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

..."

C. Report on the United Kingdom by the Committee on the Rights of the Child

47. In its concluding observations in respect of the United Kingdom (CRC/C/15/add. 34) dated 15 February 1995, the Committee set up by the United Nations to monitor compliance with the UN Convention stated, *inter alia*:

"35. The Committee recommends that law reform be pursued to ensure that the system of the administration of juvenile justice is child-oriented ...

36. More specifically, the Committee recommends that serious consideration be given to raising the age of criminal responsibility throughout the areas of the United Kingdom ..."

D. International Covenant on Civil and Political Rights (1966)

48. The Covenant provides in Article 14 § 4, which broadly corresponds to Article 6 of the European Convention, that:

"In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."

E. Recommendation no. R (87) 20 of the Committee of Ministers of the Council of Europe

49. The above recommendation, adopted by the Committee of Ministers on 17 September 1987, states, *inter alia*:

"The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

...

Considering that social reactions to juvenile delinquency should take account of the personality and specific needs of minors, and that the latter need specialised interventions and, where appropriate, specialised treatment, based in particular on the principles embodied in the United Nations Declaration of the Rights of the Child;

Convinced that the penal system for minors should continue to be characterised by its objective of education and social integration ...;

...

Having regard to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules),

Recommends the governments of member states to review, if necessary, their legislation and practice with a view:

...

4. to ensuring that minors are tried more rapidly, avoiding undue delay, so as to ensure effective educational action;

5. to avoiding committing minors to adult courts, where juvenile courts exist;

...

8. to reinforcing the legal position of minors throughout the proceedings ... by recognising, *inter alia*:

...

the right of juveniles to respect for their private lives;

..."

IV. THE AGE OF CRIMINAL RESPONSIBILITY IN EUROPE

50. The age of criminal responsibility is seven in Cyprus, Ireland, Switzerland and Liechtenstein; eight in Scotland; thirteen in France; fourteen in Germany, Austria, Italy and many eastern European countries; fifteen in the Scandinavian countries; sixteen in Portugal, Poland and Andorra; and eighteen in Spain, Belgium and Luxembourg.

PROCEEDINGS BEFORE THE COMMISSION

51. The applicant applied to the Commission on 20 May 1994. He alleged that, in view of his young age, his trial in public in an adult Crown Court and the punitive nature of his sentence constituted violations of his right not to be subjected to inhuman or degrading treatment or punishment as guaranteed under Article 3 of the European Convention on Human Rights. He further complained that he had been denied a fair trial in breach of Article 6 of the Convention, that he had suffered discrimination in breach of Article 14 in that a child aged younger than ten at the time of the alleged offence would not have been held criminally responsible; that the sentence imposed on him of detention during Her Majesty's pleasure amounted to a breach of his right to liberty under Article 5; and that the fact that a government minister, rather than a judge, was responsible for setting the tariff violated his rights under Article 6. Finally, he complained under Article 5 § 4 of the Convention that he had not had the opportunity to have the continuing lawfulness of his detention examined by a judicial body, such as the Parole Board.

52. The Commission declared the application (no. 24888/94) admissible on 6 March 1998 after a hearing. In its report of 4 December 1998 (former Article 31 of the Convention), it expressed the opinion, by seventeen votes to two, that there had been no violation of Article 3 of the Convention in respect of the applicant's trial; by fourteen votes to five, that there had been a violation of Article 6 in respect of the applicant's trial; by fifteen votes to four, that no separate issue arose under Article 14 in respect of the applicant's trial; by seventeen votes to two, that there had been no violation of Articles 3 or 5 § 1 in respect of the applicant's sentence; by eighteen votes to one, that there had been a violation of Article 6 in respect of the fixing of the applicant's sentence; and by eighteen votes to one, that there had been a violation of Article 5 § 4. The full text of the Commission's opinion and of the six separate opinions contained in the report is reproduced as an annex to this judgment[1].

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1. *Note by the Registry*. For practical reasons this annex will appear only with the final

FINAL SUBMISSIONS TO THE COURT

53. In his memorial and at the hearing, the applicant asked the Court to find violations of Article 3 of the Convention in respect of his trial and sentence, Article 6 § 1 in respect of his trial and the tariff-setting procedure, Article 5 § 1 in respect of the sentence of detention during Her Majesty's pleasure and Article 5 § 4 in respect of the absence of any judicial review of the continuing legality of his detention. He also asked the Court to award him the legal costs and expenses of the Strasbourg proceedings.

The Government asked the Court to declare the applicant's complaints regarding the trial inadmissible for non-exhaustion of domestic remedies and to find that there had been no violation of the applicant's Convention rights.

THE LAW

I. ISSUES UNDER THE CONVENTION RELATING TO THE TRIAL

A. The Government's preliminary objection

54. The Government submitted that the applicant's complaints under Articles 3 and 6 § 1 of the Convention concerning the trial were inadmissible since he had not exhausted domestic remedies as required by Article 35 § 1 of the Convention, which states:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

The Government pointed out that no complaint had been made on behalf of the applicant, either before or during the trial or on appeal, to the effect that he had had difficulty in understanding or participating in the proceedings or that the trial in public had amounted to inhuman and degrading treatment. They referred to the Privy Council's judgment in *Kunnath v. the State* (see paragraph 34 above) upon which, they asserted, the applicant could have relied as demonstrating that English law, like Article 6 § 1, required that a defendant be able to understand and participate in criminal proceedings against him.

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printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

55. The applicant denied that there had been available to him any effective remedy in respect of his Convention complaints. He submitted that if an application had been made to stay the criminal proceedings against him, either it would have failed because the extent of his emotional and psychological disturbance was not sufficient to satisfy the test of unfitness to plead (see paragraph 33 above) or, in the event of such an application succeeding, the prosecution would not have abandoned the case but would have sought a postponement until the applicant was fit, thus prolonging his anguish and that of his family.

56. The Commission dismissed the Government's objection at both the admissibility and merits stages of its examination, on the basis that the matters about which the applicant complained under Articles 3 and 6 § 1 resulted from the English system whereby juveniles aged ten and over with sufficient maturity to tell right from wrong are tried for murder in the Crown Court. It considered that any application on V.'s behalf claiming that this system should not be applied to him would have been unlikely to have succeeded.

57. The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the European Court for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, pp. 1210-11, §§ 65-68).

58. The applicant complains under Articles 3 and 6 § 1 of the Convention, that, *inter alia*, in view of his youth, immaturity and state of emotional disturbance, his trial in public in an adult Crown Court constituted inhuman and degrading treatment and was unfair because he was unable fully to participate. The Government rely upon the Privy Council's judgment in *Kunnath v. the State* (see paragraph 34 above) as establishing the existence of an effective remedy in respect of these complaints.

59. The Court observes that in the Kunnath case the Privy Council was concerned with the very different situation of an accused person who was

unable to participate in the criminal proceedings against him because they were conducted in a language which he did not understand. It notes the well-established rule of English criminal law that, in order to obtain a stay of proceedings, a defendant suffering from a disability such as mental illness must establish before a jury that he is "unfit to plead", that is that he lacks the intellectual capacity to understand the plea of guilty or not guilty, to instruct his solicitors and to follow the evidence (see paragraph 33 above). In addition, English law attributes criminal responsibility to children between the ages of ten and fourteen, subject, at the time of the applicant's trial, to the proviso that the prosecution had to prove beyond reasonable doubt that, at the time of the alleged offence, the child understood that his behaviour was wrong as distinct from merely naughty (see paragraph 29 above). Finally, it is the rule that children over the age of ten accused of murder, manslaughter and other serious crimes are tried in public in the Crown Court (see paragraph 30 above).

60. It is not suggested that the applicant's immaturity and level of emotional disturbance were sufficient to satisfy the test of unfitness to plead. Furthermore, the prosecution were able to rebut the *doli incapax* presumption in respect of the applicant. However, the Government have not referred the Court to any example of a case where an accused under a disability falling short of that required to establish unfitness to plead has been able to obtain a stay of criminal proceedings on the grounds that he was incapable of fully participating in them, or where a child charged with murder or another serious offence has been able to obtain a stay on the basis that trial in public in the Crown Court would cause him detriment or suffering.

61. In these circumstances, the Court does not consider that the Government have discharged the burden upon them of proving the availability to the applicant of a remedy capable of providing redress in respect of his Convention complaints and offering reasonable prospects of success.

It follows that the Court dismisses the Government's preliminary objection.

B. Article 3 of the Convention

62. The applicant submitted that his trial at Preston Crown Court amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

63. The applicant alleged that the cumulative effect of the age of criminal responsibility, the accusatorial nature of the trial, the adult

proceedings in a public court, the length of the trial, the jury of twelve adult strangers, the physical lay-out of the courtroom, the overwhelming presence of the media and public, the attacks by the public on the prison van which brought him to court and the disclosure of his identity, together with a number of other factors linked to his sentence (considered in paragraphs 93-101 below) gave rise to a breach of Article 3.

64. He submitted that, at ten years old, the age of criminal responsibility in England and Wales was low compared with almost all European countries; in the vast majority of European countries the minimum age of responsibility was thirteen or higher (see paragraph 50 above). He contended, moreover, that there was a clear developing trend in international and comparative law towards a higher age of criminal responsibility, and referred in this connection to Rule 4 of the Beijing Rules and to the recommendation by the Committee on the Rights of the Child that the United Kingdom should raise the age of criminal responsibility (see paragraphs 45 and 47 above). He accepted that it was in principle possible for a State to attribute criminal responsibility to a child as young as ten without violating that child's rights under Article 3. However, it was then incumbent on such a State to ensure that the procedures adopted for the trial and sentencing of such young children were modified to reflect their age and vulnerability.

65. The applicant reminded the Court that he was ten years old at the time he committed the offence and eleven at the time of trial, although there was psychiatric evidence that he "functioned emotionally at far younger than his chronological age" (see paragraph 11 above). In addition, he had been suffering from post-traumatic stress disorder at the time of the trial. Nonetheless, he had been subjected to the frightening and humiliating ordeal of a public trial in an adult court, which had caused him significant and lasting psychological damage (see paragraphs 17-19 above). International human rights law recognised that it was inappropriate to try juveniles in public in an adult court subject to an accusatorial procedure (see paragraphs 45-49 above).

66. The Government denied that the attribution of criminal responsibility to the applicant and his trial in public in an adult court breached his rights under Article 3.

With regard to the age of criminal responsibility, they submitted that the practice amongst the Contracting States was very varied, with ages ranging from seven in Cyprus, Ireland, Liechtenstein and Switzerland, to eighteen in a number of other States. There were no international principles laying down a specific age for criminal responsibility: Article 40 § 3 of the UN Convention required States to adopt a minimum age but imposed no specific such age. The Beijing Rules relied upon by the applicant were not binding under international law; the Preamble invited States to adopt them but left it up to States to decide whether or not to do so.

67. In any event, the Government contended that the applicant was not subjected to inhuman or degrading treatment and referred to a number of modifications introduced to the trial process to protect the applicant and prevent degrading treatment. Thus, the hearing times had been adapted, the judge had made it clear that he would adjourn at any time if either of the defendants showed signs of tiredness, the defendants were allowed to relax with their parents during breaks, and were seated in the courtroom next to their social workers in a specially raised dock to enable them to see what was going on.

68. The Commission in its report observed that there had been no intention to inflict distress or humiliation on the applicant through the trial process. Moreover, whilst there was evidence that the criminal process had caused the applicant distress, there could be no doubt that a significant part of this suffering was attributable to the fact that he had committed a horrific crime and was being brought to face the consequences. In these circumstances, there had been no violation of Article 3.

69. The Court observes at the outset that Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct (see the Chahal v. the United Kingdom judgment of 15 November 1996, *Reports* 1996-V, p. 1855, § 79). The nature of the crime committed by T. and the applicant is, therefore, immaterial to the consideration under Article 3.

70. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see, amongst many other examples, the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 39, § 100).

71. Treatment has been held by the Court to be "inhuman" because, *inter alia,* it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering, and also "degrading" because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (ibid.). The question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account (see, for example, the Raninen v. Finland judgment of 16 December 1997, *Reports* 1997-VIII, pp. 2821-22,

§ 55), but the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3.

72. The Court has considered first whether the attribution to the applicant of criminal responsibility in respect of acts committed when he was ten years old could, in itself, give rise to a violation of Article 3. In doing so, it has regard to the principle, well established in its case-law that, since the Convention is a living instrument, it is legitimate when deciding whether a certain measure is acceptable under one of its provisions to take account of the standards prevailing amongst the member States of the Council of Europe (see the Soering judgment cited above, p. 40, § 102; and also the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, and the X, Y and Z v. the United Kingdom judgment of 22 April 1997, *Reports* 1997-II).

73. In this connection, the Court observes that, at the present time, there is not yet a commonly accepted minimum age for the attribution of criminal responsibility in Europe. While most of the Contracting States have adopted an age-limit which is higher than that in force in England and Wales, other States, such as Cyprus, Ireland, Liechtenstein and Switzerland, attribute criminal responsibility from a younger age. Moreover, no clear tendency can be ascertained from examination of the relevant international texts and instruments (see paragraphs 45-46 above). Rule 4 of the Beijing Rules which, although not legally binding, might provide some indication of the existence of an international consensus, does not specify the age at which criminal responsibility should be fixed but merely invites States not to fix it too low, and Article 40 § 3 (a) of the UN Convention requires States Parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the criminal law, but contains no provision as to what that age should be.

74. The Court does not consider that there is at this stage any clear common standard amongst the member States of the Council of Europe as to the minimum age of criminal responsibility. Even if England and Wales is among the few European jurisdictions to retain a low age of criminal responsibility, the age of ten cannot be said to be so young as to differ disproportionately from the age-limit followed by other European States. The Court concludes that the attribution of criminal responsibility to the applicant does not in itself give rise to a breach of Article 3 of the Convention.

75. The second part of the applicant's complaint under Article 3 concerning the trial relates to the fact that the criminal proceedings took place over three weeks in public in an adult Crown Court with attendant formality, and that, after his conviction, his name was permitted to be published.

76. The Court notes in this connection that one of the minimum guarantees provided by Article 40 § 2 (b) of the UN Convention to children

accused of crimes is that they should have their privacy fully respected at all stages of the proceedings. Similarly, Rule 8 of the Beijing Rules states that "the juvenile's privacy shall be respected at all stages" and that "in principle, no information that may lead to the identification of a juvenile offender shall be published". Finally, the Committee of Ministers of the Council of Europe recommended in 1987 that member States should review their law and practice with a view to avoiding committing minors to adult courts where juvenile courts exist and to recognising the right of juveniles to respect for their private lives (see paragraphs 45, 46 and 49 above).

77. The Court considers that the foregoing demonstrates an international tendency in favour of the protection of the privacy of juvenile defendants, and it notes in particular that the UN Convention is binding in international law on the United Kingdom in common with all the other member States of the Council of Europe (see paragraph 46 above). Moreover, Article 6 § 1 of the Convention states that "the press and public may be excluded from all or part of the trial ... where the interests of juveniles ... so require" (see further paragraph 81 below). However, whilst the existence of such a trend is one factor to be taken into account when assessing whether the treatment of the applicant can be regarded as acceptable under the other Articles of the Convention, it cannot be determinative of the question whether the trial in public amounted to ill-treatment attaining the minimum level of severity necessary to bring it within the scope of Article 3 (see paragraph 70 above).

78. The Court recognises that the criminal proceedings against the applicant were not motivated by any intention on the part of the State authorities to humiliate him or cause him suffering. Indeed, special measures were taken to modify the Crown Court procedure in order to attenuate the rigours of an adult trial in view of the defendants' young age (see paragraph 9 above).

79. Even if there is evidence that proceedings such as those applied to the applicant could be expected to have a harmful effect on an eleven-year-old child (see paragraphs 17-19 above), the Court considers that any proceedings or inquiry to determine the circumstances of the acts committed by T. and the applicant, whether such inquiry had been carried out in public or in private, attended by the formality of the Crown Court or informally in the youth court, would have provoked in the applicant feelings of guilt, distress, anguish and fear. The psychiatric evidence shows that before the trial commenced he was suffering from the post-traumatic effects of the offence; that he cried inconsolably and found it difficult and distressing when asked to talk about what he and T. had done to the two-year-old, and that he suffered fears of punishment and terrible retribution (see paragraphs 11-12 above). Whilst the public nature of the proceedings may have exacerbated to a certain extent these feelings in the applicant, the Court is not convinced that the particular features of the trial process as applied to him caused, to a significant degree, suffering going beyond that

which would inevitably have been engendered by any attempt by the authorities to deal with the applicant following the commission by him of the offence in question (see paragraph 71 above).

80. In conclusion, therefore, the Court does not consider that the applicant's trial gave rise to a violation of Article 3 of the Convention.

C. Article 6 § 1 of the Convention

81. In addition, the applicant complained that he had been denied a fair trial in breach of Article 6 § 1 of the Convention, which states:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

82. The applicant submitted that the right to a fair trial under Article 6 § 1 of the Convention implies the right of an accused to be present so that he can participate effectively in the conduct of his case (he relied upon the Stanford v. the United Kingdom judgment of 23 February 1994, Series A no. 282-A, pp. 10-11, § 26). He referred to psychiatric and other evidence which established that the applicant was no more emotionally mature than an eight- or nine-year-old, that he did not fully attend to or understand the proceedings and that he was too traumatised and intimidated to give his own account of events, either to his lawyers, the psychiatrist who interviewed him, or to the court (see paragraphs 11-12 and 17-19 above).

83. The Government disputed that the public nature of the trial breached the applicant's rights. They emphasised that a public trial serves to protect the interests of defendants as a guarantee that proceedings will be conducted fairly and by encouraging witnesses to come forward. Moreover, hearings of grave charges should take place in open court because of the legitimate public interest in knowing what has occurred and why, and to maintain confidence in the administration of justice. They pointed out that the applicant was represented by highly experienced leading counsel and that the procedure was modified as far as possible to facilitate his understanding and participation (see paragraph 9 above).

84. The Commission expressed the view that where a child was faced with a criminal charge and the domestic system required a fact-finding procedure with a view to establishing guilt, it was essential that the child's age, level of maturity and intellectual and emotional capacities be taken into account in the procedures followed. It considered that the public trial process in an adult court with attendant publicity must be regarded in the

case of an eleven-year-old child as a severely intimidating procedure and concluded that, having regard to the applicant's age, the application of the full rigours of an adult, public trial deprived him of the opportunity to participate effectively in the determination of the criminal charges against him, in breach of Article 6 § 1.

85. The Court notes that Article 6, read as a whole, guarantees the right of an accused to participate effectively in his criminal trial (see the Stanford judgment cited above, loc. cit.).

It has not until the present time been called upon to consider how this Article 6 § 1 guarantee applies to criminal proceedings against children, and in particular whether procedures which are generally considered to safeguard the rights of adults on trial, such as publicity, should be abrogated in respect of children in order to promote their understanding and participation (but see the Nortier v. the Netherlands judgment of 24 August 1993, Series A no. 267, and particularly the separate opinions annexed thereto).

86. The Court recalls its above findings that there is not at this stage any clear common standard amongst the member States of the Council of Europe as to the minimum age of criminal responsibility and that the attribution of criminal responsibility to the applicant does not in itself give rise to a breach of Article 3 of the Convention (see paragraph 74 above). Likewise, it cannot be said that the trial on criminal charges of a child, even one as young as eleven, as such violates the fair trial guarantee under Article 6 § 1. The Court does, however, agree with the Commission that it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings.

87. It follows that, in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition. In this connection it is noteworthy that in England and Wales children charged with less serious crimes are dealt with in special youth courts, from which the general public is excluded and in relation to which there are imposed automatic reporting restrictions on the media (see paragraphs 30 and 31 above). Moreover, the Court has already referred to the international tendency towards the protection of the privacy of child defendants (see paragraph 77 above). It has considered carefully the Government's argument that public trials serve the general interest in the open administration of justice (see paragraph 83 above), and observes that, where appropriate in view of the age and other characteristics of the child and the circumstances surrounding the criminal proceedings, this general interest could be satisfied by a

modified procedure providing for selected attendance rights and judicious reporting.

88. The Court notes that the applicant's trial took place over three weeks in public in the Crown Court. Special measures were taken in view of the applicant's young age and to promote his understanding of the proceedings: for example, he had the trial procedure explained to him and was taken to see the courtroom in advance, and the hearing times were shortened so as not to tire the defendants excessively. Nonetheless, the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven, and there is evidence that certain of the modifications to the courtroom, in particular the raised dock which was designed to enable the defendants to see what was going on, had the effect of increasing the applicant's sense of discomfort during the trial, since he felt exposed to the scrutiny of the press and public. The trial generated extremely high levels of press and public interest, both inside and outside the courtroom, to the extent that the judge in his summing-up referred to the problems caused to witnesses by the blaze of publicity and asked the jury to take this into account when assessing their evidence (see paragraph 14 above).

89. There is considerable psychiatric evidence relating to the applicant's ability to participate in the proceedings. Thus, Dr Susan Bailey gave evidence during the trial in November 1993 that on each occasion when she had seen the applicant prior to the trial he had cried inconsolably and had not been able to talk about the circumstances of the offence in any useful way (see paragraph 12 above). Dr Bentovim similarly found in his report of September 1993 that the applicant was suffering from post-traumatic effects and found it very difficult and distressing to think or talk about the events in question, making it impossible to ascertain many aspects (see paragraph 11 above). Subsequent to the trial, in January 1995, the applicant told Dr Bentovim that he had been terrified of being looked at in court and had frequently found himself worrying what people were thinking about him. He had not been able to pay attention to the proceedings and had spent time counting in his head or making shapes with his shoes. Dr Bentovim considered that, in view of V.'s immaturity, it was “very doubtful” that he understood the situation and was able to give informed instruction to his lawyers (see paragraph 17 above). The report of Dr Bailey dated November 1997 also described the applicant's attempts to distract himself during the trial, his inability to listen to what was said and the distress caused to him by the public nature of the proceedings (see paragraph 18 above).

90. In such circumstances the Court does not consider that it was sufficient for the purposes of Article 6 § 1 that the applicant was represented by skilled and experienced lawyers. This case is different from that of Stanford (cited in paragraph 82 above), where the Court found no violation arising from the fact that the accused could not hear some of the evidence

given at trial, in view of the fact that his counsel, who could hear all that was said and was able to take his client's instructions at all times, chose for tactical reasons not to request that the accused be seated closer to the witnesses. Here, although the applicant's legal representatives were seated, as the Government put it, "within whispering distance", it is highly unlikely that the applicant would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial or, indeed, that, given his immaturity and his disturbed emotional state, he would have been capable outside the courtroom of cooperating with his lawyers and giving them information for the purposes of his defence.

91. In conclusion, the Court considers that the applicant was unable to participate effectively in the criminal proceedings against him and was, in consequence, denied a fair hearing in breach of Article 6 § 1.

D. Articles 6 § 1 and 14 of the Convention taken together

92. Before the Commission the applicant complained under Articles 6 § 1 and 14 of the Convention taken together that the attribution to him of criminal responsibility discriminated against him unfairly in comparison to a child aged younger than ten at the time of committing similar acts. However, he did not maintain this complaint before the Court, which sees no reason of its own motion to examine the issues under Article 14.

In conclusion, the Court does not consider it necessary to examine this complaint.

II. ISSUES UNDER THE CONVENTION RELATING TO THE SENTENCE

A. Article 3 of the Convention

93. The applicant argued that, in view of his age at the time of the offence, the sentence of detention during Her Majesty's pleasure was severely disproportionate and in breach of Article 3 of the Convention (see paragraph 62 above).

He relied on the element of retribution inherent in the tariff approach, on the fact that the Home Secretary had initially set a tariff of fifteen years and on the fact that, although this decision had been quashed by the House of Lords (see paragraph 26 above), no new, lower tariff had yet been set. He had thus been exposed to executive control and to a high level of delay and uncertainty regarding his future. If a lower tariff were not set, he risked transfer to a Young Offenders' Institution at the age of eighteen, and, at

twenty-one, to an adult prison. Moreover, he would be subject to recall to prison for the rest of his life (see paragraphs 36 and 39 above).

94. The Government submitted that the applicant had been convicted of an especially horrible murder and that he could not complain that he would be detained until it was safe to release him into the community, or that he might be recalled to prison if necessary for the protection of the public. It was true that during the tariff period the applicant was detained as punishment, and not solely for the purposes of public protection. However, neither Article 3 of the Convention nor Article 37 of the UN Convention prohibited the punishment of a young person for a criminal offence. They pointed out that the applicant was detained in an institution where he received education and enjoyed facilities appropriate to his age, that he had made no complaint about his present conditions of detention, and that any complaint relating to his possible transfer to a Young Offenders' Institution or to a prison was entirely speculative.

95. The Commission agreed with the Government. It referred to the Hussain v. the United Kingdom judgment of 21 February 1996 (*Reports* 1996-I), where the Court held that the sentence of detention during Her Majesty's pleasure was primarily preventative, attracting the guarantees of Article 5 § 4 (see paragraphs 115 and 119 below). It could not, therefore, be said that the applicant had forfeited his liberty for life or that his detention gave rise to a violation of Article 3.

96. The Court recalls that following the applicant's conviction for murder in November 1993 he automatically became subject to the sentence of detention during Her Majesty's pleasure. According to English law and practice, juveniles sentenced to detention during Her Majesty's pleasure must initially serve a period of detention, "the tariff", to satisfy the requirements of retribution and deterrence. Thereafter it is legitimate to continue to detain the offender only if this appears to be necessary for the protection of the public (see paragraphs 40-42 above and the Hussain judgment cited above, pp. 269-70, § 54). The applicant's tariff was initially fixed at fifteen years by the Home Secretary on 22 July 1994. However, this decision was quashed by the House of Lords on 12 June 1997 and at the date of adoption of the present judgment no new tariff has been set. The applicant makes no complaint about his current conditions of detention, although he does contend that his transfer at the age of eighteen to a Young Offenders' Institution and thereafter to an adult prison might raise issues under Article 3.

97. In assessing whether the above facts constitute ill-treatment of sufficient severity to violate Article 3 (see paragraph 70 above), the Court has regard to the fact that Article 37 of the UN Convention prohibits life imprisonment without the possibility of release in respect of offences committed by persons below the age of eighteen and provides that the detention of a child "shall be used only as a measure of last resort and for

the shortest appropriate period of time", and that Rule 17.1(b) of the Beijing Rules recommends that "[r]estrictions on the personal liberty of the juvenile shall ... be limited to the possible minimum" (see paragraphs 45-46 above).

98. The Court recalls that States have a duty under the Convention to take measures for the protection of the public from violent crime (see, for example, the A. v. the United Kingdom judgment of 23 September 1998, *Reports* 1998-VI, p. 2699, § 22, and the Osman v. the United Kingdom judgment of 28 October 1998, *Reports* 1998-VIII, p. 3159, § 115). It does not consider that the punitive element inherent in the tariff approach itself gives rise to a breach of Article 3, or that the Convention prohibits States from subjecting a child or young person convicted of a serious crime to an indeterminate sentence allowing for the offender's continued detention or recall to detention following release where necessary for the protection of the public (see the Hussain judgment cited above, p. 269, § 53).

99. The applicant has not yet reached the stage in his sentence where he is able to have the continued lawfulness of his detention reviewed with regard to the question of dangerousness and, although he has not yet been notified of any new tariff, it can be assumed that he is currently detained for the purposes of retribution and deterrence. Until a new tariff has been set, it is not possible to draw any conclusions regarding the length of punitive detention to be served by the applicant. At the time of adoption of the present judgment he has been detained for six years since his conviction in November 1993. The Court does not consider that, in all the circumstances of the case including the applicant's age and his conditions of detention, a period of punitive detention of this length can be said to amount to inhuman or degrading treatment.

100. Finally, the Court observes that it cannot be excluded, particularly in relation to a child as young as the applicant at the time of his conviction, that an unjustifiable and persistent failure to fix a tariff, leaving the detainee in uncertainty over many years as to his future, might also give rise to an issue under Article 3. In the present case, however, in view of the relatively short period of time during which no tariff has been in force and the need to seek the views, *inter alia,* of both the applicant and T. (see paragraph 28 above), no such issue arises.

101. It follows that there has been no violation of Article 3 in respect of the applicant's sentence.

B. Article 5 § 1 of the Convention

102. The applicant alleged that the sentence of detention imposed upon him was unlawful, in breach of Article 5 § 1 of the Convention, which provides:

"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;

..."

He contended that it was arbitrary to impose the same sentence – detention during Her Majesty's pleasure – on all young offenders convicted of murder, irrespective of their individual circumstances and needs. In this connection he referred to Article 37(b) of the UN Convention on the Rights of the Child and Rules 16 and 17.1(a) and (b) of the Beijing Rules (see paragraphs 45-46 above) which, *inter alia*, require that sentences of detention imposed on children be as short as possible and that sentencers have regard, as the guiding factor, to the well-being of the child.

103. The Government, with whom the Commission agreed, denied that the sentence of detention during Her Majesty's pleasure was unlawful or arbitrary, and pointed out that its purpose was to enable consideration to be given to the specific circumstances of the applicant's case, so that he would be detained only for so long as was necessary with regard to the need for punishment, rehabilitation and the protection of the community.

104. The Court observes that the applicant was detained following conviction by a competent court; in other words, his detention falls within the scope of Article 5 § 1 (a) of the Convention. There can be no question but that the sentence of detention during Her Majesty's pleasure is lawful under English law and was imposed in accordance with a procedure prescribed by law. Moreover, it cannot be said that the applicant's detention is not in conformity with the purposes of the deprivation of liberty permitted by Article 5 § 1 (a), so as to be arbitrary (see the Weeks v. the United Kingdom judgment of 2 March 1987, Series A no. 114, p. 23, § 42; and cf. the Hussain judgment cited above, p. 269, § 53, where the Court referred to the question of the lifelong detention of a juvenile as possibly raising an issue under Article 3, but not Article 5 § 1).

105. It follows that there has been no violation of Article 5 § 1 of the Convention in the present case.

C. Article 6 § 1 of the Convention

106. The applicant claimed that the fact that the tariff period was fixed by the Home Secretary rather than a tribunal meeting the requirements of Article 6 § 1 of the Convention (see paragraph 81 above) gave rise to a violation of that provision.

1. Applicability of Article 6 § 1

107. The applicant, with whom the Commission agreed, submitted that the fixing of the tariff amounted to a sentencing exercise and, as such, should attract the safeguards of Article 6 § 1. The tariff determined both the maximum period of detention to be served for the purposes of punishment and deterrence and the minimum period to be served irrespective of dangerousness. He pointed out that in the judicial review proceedings (see paragraphs 26 and 43 above) a clear majority of judges in the Court of Appeal and House of Lords had characterised the Home Secretary's role in fixing the tariff as similar to that performed by a judge in sentencing. He referred in addition to the decision of the Irish Supreme Court in *State v. O'Brien* ([1973] Irish Reports 50), that a similar provision as applied in Ireland was unconstitutional because it entrusted the executive and not the judiciary with a sentencing function in respect of children.

108. The Government contended that Article 6 § 1 was not applicable. They reasoned that, upon being convicted of murder, the applicant was automatically subject to the sentence of detention during Her Majesty's pleasure (see paragraph 36 above), and that the fixing of the tariff was merely an aspect of the administration of the sentence already imposed by the court.

109. The Court recalls that Article 6 § 1 guarantees certain rights in respect of the "determination of ... any criminal charge ...". In criminal matters, it is clear that Article 6 § 1 covers the whole of the proceedings in issue, including appeal proceedings and the determination of sentence (see, for example, the Eckle v. Germany judgment of 15 July 1982, Series A no. 51, pp. 34-35, §§ 76-77). The Court must determine whether the tariff-setting procedure in respect of young offenders detained during Her Majesty's pleasure amounts to the fixing of a sentence and falls within the scope of Article 6 § 1.

110. In contrast to the mandatory life sentence imposed on adults convicted of murder which constitutes punishment for life, the sentence of detention during Her Majesty's pleasure is open-ended. As previously mentioned, a period of detention, "the tariff", is served to satisfy the requirements of retribution and deterrence, and thereafter it is legitimate to continue to detain the offender only if this appears to be necessary for the protection of the public (see paragraphs 40-42 above and the Hussain judgment cited above, pp. 269-70, § 54; cf. the Wynne v. the United Kingdom judgment of 18 July 1994, Series A no. 294-A, pp. 14-15, § 35). Where a juvenile sentenced to detention during Her Majesty's pleasure is not perceived to be dangerous, therefore, the tariff represents the maximum period of detention which he can be required to serve.

111. The Court considers that it follows from the foregoing, as was recognised by the House of Lords in the judicial review proceedings brought by the applicant (see paragraph 43 above), that the fixing of the

tariff amounts to a sentencing exercise. Article 6 § 1 is, accordingly, applicable to this procedure.

2. Compliance with Article 6 § 1

112. Both the applicant and the Commission were of the view that the tariff-fixing procedure had failed to comply with Article 6 § 1 in that the decision-maker was the Home Secretary rather than a court or tribunal independent of the executive. In addition the applicant pointed out that there had been no hearing and no opportunity for him to call psychiatric or other evidence, and that the Home Secretary retained a discretion to decide how much of the material before him he disclosed to the applicant.

113. The Government submitted that there were adequate safeguards to ensure that the procedure for the setting of the tariff was fair. Thus, the Secretary of State sought the views of the trial judge and the Lord Chief Justice, informed the applicant of the judges' views, and invited him to make representations as to the appropriate length of the tariff. The Secretary of State informed the applicant of the tariff fixed, and gave reasons in support of his decision. It was then open to the applicant to challenge the decision by way of judicial review.

114. The Court notes that Article 6 § 1 guarantees, *inter alia*, "a fair ... hearing ... by an independent and impartial tribunal ...". "Independent" in this context means independent of the parties to the case and also of the executive (see, amongst many other authorities, the Ringeisen v. Austria judgment of 16 July 1971, Series A no. 13, p. 39, § 95). The Home Secretary, who set the applicant's tariff, was clearly not independent of the executive, and it follows that there has been a violation of Article 6 § 1.

D. Article 5 § 4 of the Convention

115. Finally, the applicant complained that since his conviction he had had no opportunity to have the continued lawfulness of his detention determined by a judicial body. He alleged a violation of Article 5 § 4 of the Convention, which states:

> "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."

116. The applicant adopted the opinion of the Commission, which stated (in paragraph 143 of its report), that given that the only justification for an indeterminate sentence could be the protection of the public, and having regard to the fact that children aged eleven could be expected to develop physically, intellectually and emotionally, only a short tariff could be compatible with Article 5 § 4. It could not be excluded that after several years a young offender who had gained in maturity could claim that new

issues had arisen affecting the lawfulness of his continued detention. Since the applicant had been detained without review following his conviction in November 1993, there had been a violation of Article 5 § 4.

117. The Government submitted that there had been judicial review of the lawfulness of the detention in that the sentence of detention during Her Majesty's pleasure was imposed by the trial court following the applicant's conviction for murder. After the expiry of the tariff a judicial body, the Parole Board, would decide on release, in compliance with Article 5 § 4 (see paragraph 38 above). However, until the tariff period had been served, Article 5 § 4 did not confer any right to periodic review because the tariff period primarily depended on the circumstances of the offence and the consequential requirements of retribution and deterrence, factors which were not subject to change over time.

118. The Court observes at the outset that it is not its task, within the context of Article 5 of the Convention, to pronounce upon the appropriate length of detention or other sentence which should be served by a person after conviction by a competent court (see the Weeks judgment cited above, p. 26, § 50, and also paragraph 104 above). Given that the fixing of a tariff in respect of a juvenile detained during Her Majesty's pleasure amounts to the determination of a sentence (see paragraph 111 above), the Court will limit its consideration to the question whether the applicant should be able to take proceedings to have the lawfulness of his continued detention decided by a court satisfying the requirements of Article 5 § 4.

119. The Court recalls that where a national court, after convicting a person of a criminal offence, imposes a fixed sentence of imprisonment for the purposes of punishment, the supervision required by Article 5 § 4 is incorporated in that court decision (see the De Wilde, Ooms and Versyp v. Belgium judgment of 18 June 1971, Series A no. 12, pp. 40-41, § 76, and the Wynne judgment cited above, p. 15, § 36). This is not the case, however, in respect of any ensuing period of detention in which new issues affecting the lawfulness of the detention may arise (see the Weeks judgment cited above, p. 28, § 56, and the Thynne, Wilson and Gunnell v. the United Kingdom judgment of 25 October 1990, Series A no. 190-A, pp. 26-27, § 68). Thus, in the Hussain judgment (op. cit., pp. 269-70, § 54), the Court decided in respect of a young offender detained during Her Majesty's pleasure that, after the expiry of the tariff period, Article 5 § 4 required that he should be able periodically to challenge the continuing legality of his detention since its only justification could be dangerousness, a characteristic subject to change. In the Hussain case the Court was not called upon to consider the position under Article 5 § 4 prior to the expiry of the tariff (op. cit., p. 266, § 44).

120. The Court has already determined that the failure to have the applicant's tariff set by an independent tribunal within the meaning of Article 6 § 1 gives rise to a violation of that provision (see paragraph 114

above). Accordingly, given that the sentence of detention during Her Majesty's pleasure is indeterminate and that the tariff was initially set by the Home Secretary rather than the sentencing judge, it cannot be said that the supervision required by Article 5 § 4 was incorporated in the trial court's sentence (cf. the De Wilde, Ooms and Versyp judgment and the Wynne judgment cited in paragraph 119 above).

121. Moreover, the Home Secretary's decision setting the tariff was quashed by the House of Lords on 12 June 1997 and no new tariff has since been substituted. This failure to set a new tariff means that the applicant's entitlement to access to a tribunal for periodic review of the continuing lawfulness of his detention remains inchoate.

122. It follows that the applicant has been deprived, since his conviction in November 1993, of the opportunity to have the lawfulness of his detention reviewed by a judicial body in accordance with Article 5 § 4. Against this background, the Court finds a violation of that Article.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

123. Article 41 of the Convention provides:

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

A. Damage

124. The applicant did not make any claim for pecuniary or non-pecuniary damage.

B. Costs and expenses

125. In respect of the costs and expenses of the Strasbourg proceedings, the applicant claimed solicitors' costs of 7,796.34 pounds sterling (GBP) exclusive of value-added tax (VAT) and barristers' fees totalling GBP 30,000 plus VAT. In addition he claimed costs and expenses incurred in relation to the hearing before the Court of GBP 4,580.

126. The Government stated that the solicitors' costs were reasonable but submitted that the barristers' fees should be reduced to GBP 21,000.

127. The Court considers that the total costs and expenses claimed by the applicant, GBP 42,376.34, are not excessive in view of the number and difficulty of the issues in the case. However, since the applicant was not able to establish violations of Articles 3 and 5 § 1 of the Convention, it reduces the award to GBP 32,000 (see, for example, the Steel and Others v.

the United Kingdom judgment of 23 September 1998, *Reports* 1998-VII, p. 2763, § 125, and the Osman judgment cited above, p. 3173, § 168), together with any VAT which may be payable, but less the amounts already paid by way of legal aid by the Council of Europe.

C. Default interest

128. According to the information available to the Court, the statutory rate of interest applicable in England and Wales at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection;

2. *Holds* by twelve votes to five that there has been no violation of Article 3 of the Convention in respect of the applicant's trial;

3. *Holds* by sixteen votes to one that there has been a violation of Article 6 § 1 of the Convention in respect of the applicant's trial;

4. *Holds* unanimously that it is not necessary to examine the complaint under Articles 6 § 1 and 14 of the Convention taken together;

5. *Holds* by ten votes to seven that there has been no violation of Article 3 of the Convention in respect of the applicant's sentence;

6. *Holds* unanimously that there has been no violation of Article 5 § 1 of the Convention;

7. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention in respect of the setting of the applicant's tariff;

8. *Holds* unanimously that there has been a violation of Article 5 § 4 of the Convention;

9. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months, for costs and expenses, 32,000 (thirty-two thousand) pounds sterling, together with any value-added tax that may be chargeable, less 32,405 (thirty-two thousand four hundred and five)

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 7.5% shall be payable from the expiry of the above-mentioned three months until settlement.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 December 1999.

Luzius WILDHABER
President

Paul MAHONEY
Deputy Registrar

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

(a) concurring opinion of Lord Reed;

(b) partly dissenting opinion of Mr Rozakis and Mr Costa;

(c) joint partly dissenting opinion of Mr Pastor Ridruejo, Mr Ress, Mr Makarczyk, Mrs Tulkens and Mr Butkevych;

(d) partly dissenting opinion of Mr Baka.

L.W.
P.J.M.

CONCURRING OPINION OF Lord REED

I have voted with the majority of the Court in relation to each of the issues raised in this case, and wish only to add my own observations in relation to the issues raised under Articles 3 and 6 of the Convention.

The murder of James Bulger by the applicant and T. (the applicant in case no. 24724/94) was an appalling act. James was two years old. The grief of his parents, who took part in the proceedings before the Court, is inexpressible. The fact that the applicant and T. were themselves only ten years old at the time of the murder makes it particularly disturbing. Other aspects of the murder, such as the abduction of James from his mother, the brutal nature of the killing, and the severing of James's body, provoke shock and revulsion. The video pictures which showed the applicant and T. abducting James, and leading this defenceless little boy to his death, brought the events before his parents, and before the public, with a haunting clarity. In these circumstances it is unsurprising that the case has given rise to great public concern and has received a high level of publicity.

However dreadful a crime may be, the person accused of committing it has certain rights, including the right to a fair trial. That right is protected by English law, and it is also guaranteed by Article 6 of the Convention. Article 3 of the Convention in addition requires that no person – even someone accused or convicted of a dreadful crime – shall be subjected to inhuman or degrading treatment. The requirements of the Convention have long been accepted by the United Kingdom. The issue which this Court has to determine is whether the applicant has been treated in accordance with those requirements.

Children who commit crimes present a problem to any system of criminal justice, because they are less mature than adults. Even children who may appear to be lacking in innocence or vulnerability are nevertheless evolving, psychologically as well as physically, towards the maturity of adulthood. One consequent difficulty lies in deciding whether children are sufficiently mature to be held responsible for their actions under the criminal law. If children are held criminally responsible, they then have to be tried; but ordinary trial procedure will not be appropriate if a child is too immature for such procedure to provide him with a fair trial. If children are tried and convicted, they then have to be sentenced; but it will not be appropriate to sentence them in the same way as an adult, if their immaturity has the consequence that they were less culpable or that reformative measures are more likely to be effective. All of these problematical aspects of the treatment of children in the criminal justice system – the age of responsibility, the trial procedure and sentencing – are raised in the present case.

I propose to consider first the issues arising under Article 3 and Article 6 § 1 in relation to the trial, before considering the issues arising in relation to the sentencing process.

As the Court has observed, Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It is for that reason that it constitutes an absolute prohibition: "no one" is to be subjected to inhuman or degrading treatment. The revulsion provoked by James's murder cannot therefore justify any inhuman or degrading treatment of those responsible for his death. The only issue under Article 3 is whether the treatment of the applicant was in fact inhuman or degrading.

The expressions "inhuman" and "degrading" in Article 3 of the Convention should be given their ordinary meaning (see the Campbell and Cosans v. the United Kingdom judgment of 25 February 1982, Series A no. 48, pp. 13-14, § 30). Giving the expressions their ordinary meaning, an assessment of whether a given form of treatment is inhuman or degrading depends upon the application of standards. Since the Convention is a living instrument, the relevant standards must be those prevailing from time to time amongst the member States of the Council of Europe. This is in accordance with the general principle, well established in the Court's case-law, that it is legitimate when deciding whether a certain measure is acceptable under one of the provisions of the Convention to take account of the standards prevailing amongst the member States.

In order for treatment to fall within the scope of Article 3, it must be "ill-treatment" which attains a minimum level of severity (see, for example, the Raninen v. Finland judgment of 16 December 1997, *Reports of Judgments and Decisions* 1997-VIII, pp. 2821-22; § 55). The assessment of this minimum depends on all the circumstances of the case (ibid). In addition to the objective nature of the treatment and its effects on the person subjected to it, the purpose of the authority which was responsible for the treatment is also relevant in determining whether it is prohibited by Article 3 (see, for example, the Abdulaziz, Cabales and Balkandali v. the United Kingdom judgment of 28 May 1985, Series A no. 94, p. 42, § 91; the Herczegfalvy v. Austria judgment of 24 September 1992, Series A no. 244, pp. 25-26, § 82; and the Raninen judgment cited above, loc. cit.). In order for treatment to be inhuman or degrading, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment (see the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 39, § 100).

In submitting that the trial amounted to inhuman and degrading treatment, the applicant relied particularly upon the age of criminal responsibility, the fact that the trial was held in public in the Crown Court over a period of three weeks and the fact that his name was permitted to be published after his conviction, together with a number of factors relating to his sentence which I shall consider below.

The effect upon a child of attributing criminal responsibility to him will depend primarily upon the nature of the trial procedure and sentences applicable to such a child under domestic law. The attribution of criminal responsibility cannot in itself give rise to an issue under Article 3 of the Convention unless it inevitably constitutes or results in ill-treatment attaining the necessary minimum level of severity. That matter has to be considered in accordance with prevailing standards amongst the member States.

Although in most of the member States criminal responsibility would not be attributed to a child of ten, there is no common approach to the attribution of criminal responsibility. The practice is very varied, with ages ranging from seven in a number of member States to eighteen in a number of others. Nor does any specific guidance emerge from the various international texts and instruments to which the Court was referred. In those circumstances, although the minimum age in England and Wales is towards the lower end of the range, it cannot be said to be out of line with any prevailing standard. Moreover, the purpose of attributing criminal responsibility to a child of a given age is not to cause that child suffering or humiliation, but to reflect a consensus in the society in question as to the appropriate age at which a child is sufficiently mature to be held criminally responsible for his or her conduct. Since perceptions of childhood reflect social, cultural and historical circumstances, and are subject to change over time, it is unsurprising that different States should have different ages of responsibility. So far as England and Wales are concerned, the present age of criminal responsibility was fixed by Parliament in 1963 and was endorsed by the House of Commons Select Committee on Home Affairs, in its Report on Juvenile Offending, in 1993. It accordingly enjoys democratic legitimacy. In addition, although the attribution of criminal responsibility to a child of ten will have consequences which may cause distress to the child concerned, it is necessary to bear in mind that the treatment of a child who has behaved in the same way in a State with a higher age of criminal responsibility may also cause distress. Whether a child who has intentionally killed another child is regarded as criminally responsible or not, any society is likely to require some form of inquiry to establish whether the child has in fact behaved in the manner alleged and, if so, some form of measures for the protection of the public and the care and treatment of the child in question. For all these reasons, I conclude that the attribution of criminal responsibility to the applicant did not in itself amount to inhuman or degrading treatment within the meaning of Article 3 of the Convention.

The next question is whether the trial of the applicant in public in the Crown Court amounted to inhuman or degrading treatment. Any trial is liable to cause mental suffering and feelings of humiliation to be experienced by the person on trial. Nevertheless, a trial could not ordinarily

be described as inhuman or degrading treatment since it is a legitimate form of procedure according to prevailing standards. This is so even if the trial is lengthy and is held in public with a high level of formality. The critical issue is therefore whether the age of the applicant rendered such a trial inhuman or degrading.

If it was legitimate under Article 3 of the Convention to attribute criminal responsibility to the applicant, it follows that a trial was also legitimate under Article 3, notwithstanding that any form of trial would be liable to cause distress to the child involved. The form of trial procedure applied to the applicant was that which was applicable in England and Wales to any child accused of such a serious offence, under legislation enacted by Parliament in 1980. Although the length of the trial was relied on by the applicant, there was no suggestion that it was longer than was necessary to establish the facts in question. It has to be borne in mind that the applicant pleaded not guilty and benefited from a presumption of innocence, and that his guilt had to be established by leading sufficient evidence to satisfy the jury beyond reasonable doubt. The fact that the trial was held in public appears to me to raise a more serious issue. For the trial of an eleven-year-old child to be open to the general public and to be reported without restriction is regarded as generally inappropriate in the United Kingdom as in other member States. For the trial to take place in a court packed with members of the public and representatives of the media, and with a hostile crowd and numerous photographers outside, would naturally give rise to particular concern. Nevertheless, it has to be borne in mind that whether a legal system requires a child to be tried in public or in private reflects the way in which a balance is drawn between countervailing, and incommensurable, values. On the one hand, the importance attached to safeguarding the well-being and future of young children who have offended, and promoting their rehabilitation and reintegration into society, point towards holding their trials in private. On the other hand, the public interest (and that of the defendant) in the open administration of justice, and the public interest in freedom of information, point towards holding trials in public. The balance struck by Parliament between these competing considerations required the great majority of child offenders to be tried in youth courts, from which the general public are excluded and in which there are automatic restrictions on publicity, but required children accused of the most serious offences to be tried in public in the Crown Court. That being the system in place, an exceptionally dreadful case, such as that of James's murder, would inevitably attract the public and the media in large numbers. Although the balance, as I have described it, was struck differently in England and Wales from in most of the member States, and as a consequence the treatment in England and Wales of children accused of very serious offences was in that respect less weighted towards their welfare than the treatment of such children in most other member States, that was

not because of any indifference towards their welfare, or any lack of respect for human dignity, let alone any intention to cause suffering or humiliation; but rather because the other important considerations which I have mentioned were considered on balance to require a public trial in such cases. In these circumstances, it does not appear to me that the holding of a public trial, even under the conditions which prevailed in the present case, can fairly be described as "inhuman" or "degrading". It is also necessary to remember that, although there is evidence (which I discuss later) that the applicant experienced considerable distress, the evidence indicates that that distress is not solely attributable to the public nature of the trial, but was also the result of guilt, remorse and anxiety about the inevitable consequences of his involvement in James's murder. In all these circumstances, the trial procedure cannot in my opinion properly be described as "inhuman" or "degrading" according to prevailing standards.

The disclosure of the applicant's identity, following his conviction, was in accordance with English law and practice in such circumstances. It was submitted on behalf of the applicant that such disclosure was inappropriate having regard to a number of international texts, including in particular Article 40 § 2 (b) of the United Nations Convention on the Rights of the Child. It does not appear to me to be necessary to determine whether the disclosure was consistent with Article 40 § 2 (b) (the interpretation of which was in dispute before the Court) or the other texts in question, since any distress or humiliation attributable to that specific aspect of the applicant's treatment cannot in any event, in my opinion, be regarded as attaining the minimum level of severity necessary, according to prevailing standards, to bring it within the scope of Article 3 of the Convention.

I consider next the issues arising under Article 6 § 1 in relation to the trial. The applicant relied on the principle that the right to a fair trial under Article 6 § 1 of the Convention includes the right of the accused to participate effectively in the conduct of his case (see the Stanford v. the United Kingdom judgment of 23 February 1994, Series A no. 282-A, pp. 10-11, § 26). It was submitted that the applicant was unable to understand the proceedings, or to give his own account of events to his lawyers or to the court, principally because the trial was held under conditions which were inappropriate, in a variety of respects, for a child of that age. It should be understood that this complaint does not turn on the question whether the applicant was guilty or innocent: it is obviously essential that all children accused of such a serious offence should be tried under conditions which give them an adequate opportunity to establish their innocence, or alternatively to establish any mitigating circumstances.

The Court has rarely been required to consider the application of Article 6 to cases involving children accused of criminal offences. Article 6 itself, however, permits the exclusion of the public from all or part of a trial where the interests of juveniles so require, derogating from the general

principle that trials must be held in public, and recognising that the interests of the child on trial are a relevant and important consideration. There is on the other hand nothing in Article 6 to indicate that there can be any derogation, in cases involving children, from the principle that the trial process should provide for the effective participation of the accused, who must be able to follow the proceedings and to give instructions where necessary to his lawyer. In order for that principle to be respected in cases involving children, however, the conditions under which the trial is held (including the procedure followed) have to be such as will permit such participation, taking into account the age, level of maturity and intellectual and emotional capacity of the child concerned. This interpretation of Article 6 is also in accordance with developments in international law: a number of relevant texts, including treaties accepted as binding by the United Kingdom and other member States (such as the United Nations Convention on the Rights of the Child, Article 40, and the International Covenant on Civil and Political Rights, Article 14 § 4), require child offenders to be treated in a manner which takes account of their age and the desirability of promoting their rehabilitation.

There are thus special considerations relevant to cases where children are accused of criminal offences. There are, however, different ways in which they can be taken into account. In practice, there is a wide variation in the ways in which different member States organise their systems of criminal justice so as to protect the interests of the individual child and the wider public interest. Even within any particular system, it may well be difficult to decide in an individual case what measures are appropriate, bearing in mind such factors as the maturity of the child in question, his position in relation to the charge against him and the type of sanction which may be imposed. In these circumstances, Article 6 must in my opinion be interpreted as giving the authorities of member States a margin of appreciation as to their procedure for dealing with children accused of crime (as was recognised in the Nortier v. the Netherlands judgment of 24 August 1993, Series A no. 267, particularly in the separate opinions).

Nevertheless, however wide the margin of appreciation may be, it is paramount that an accused, whether an adult or a child, should receive a fair trial. If a child is to be held accountable to the criminal law, then he must enjoy the same right as an adult to understand what is happening at the trial and to play an active role in his defence. It has to be acknowledged that there are inevitable limitations to the participation which can be expected of a child in legal proceedings, whatever form those proceedings may take, since the understanding and maturity of a child are unlikely to equal those of an adult. Nevertheless, the trial process must enable him to participate to the extent which could reasonably be expected of a child.

In the present case, English law required that the applicant be tried in the Crown Court, which is also the court used for the trial of adults accused of

serious offences. The setting was highly formal. The applicant and T. sat in a specially raised dock in the centre of the court, separated from their parents. The judge was raised on a dais. There was a jury of twelve adults. The judge and counsel wore the customary court dress. The court itself appears to have been a large and imposing room. The public benches were filled with members of the public and representatives of the media. This was in my opinion a setting which, in itself, a child of eleven would be likely to find intimidating, whether he was involved as a witness or as a defendant.

The problem was, however, exacerbated in the present case by the charged atmosphere in which the trial was conducted. The date and location of the trial being a matter of public knowledge, and the case being one of exceptional notoriety, hostile crowds gathered outside the court and behaved in an intimidating manner, on one occasion attacking the van in which the applicant was being transported. I also note that, in his summing-up, the trial judge instructed the jury to bear in mind, in assessing the evidence, that witnesses arrived in court in a blaze of publicity and that many faced a bevy of photographers; that they had to give evidence in a large court packed with people; and that not surprisingly several of them were overcome with emotion and some had difficulty in speaking audibly. It seems to me that a child of eleven, who was the primary focus of this attention (and hostility), would be likely to find it even more difficult to cope with, and that it would be likely to affect to a material degree his ability to follow the evidence and to give evidence himself.

There is evidence before the Court that the applicant was in fact unable to follow most of the trial proceedings or to participate effectively in the conduct of his defence, and that it is unlikely that he could have given evidence in his own defence. I refer in particular to the evidence given at the trial by Dr Susan Bailey, a consultant psychiatrist at the Home Office; to her report dated 4 November 1997; to the report dated 31 January 1995 by Dr Arnon Bentovim, a consultant psychiatrist at Great Ormond Street Hospital for Children; and to the report dated 11 February 1998 by Sir Michael Rutter, Professor of Child Psychiatry at the Institute of Psychiatry, University of London. These are supported by documents emanating from the solicitor and junior counsel who acted for the applicant at the trial, and from the applicant's mother. As I have mentioned, it appears from their evidence that the applicant's problems were not entirely due to the conditions under which the trial was held: as one might expect, he was traumatised by James's murder and had strong feelings of guilt, remorse and fear of retribution. At the same time, it appears from that evidence that his difficulties in coping with the trial were also due, to a significant extent, to the conditions under which the trial was held: above all, he appears to have been intimidated by the crowds and television cameras outside the court, and by his exposure to the gaze of the public inside the court. This is not surprising, particularly when these are the same features as the trial judge

drew to the jury's attention as causing adult witnesses to be overcome with emotion.

The Government on the other hand emphasised that, within the constraints of the system within which the trial was held, a great deal was done to assist the applicant in coping with the experience. That is perfectly true, and it is proper that it should be recognised. As counsel for T. expressly acknowledged in his submissions to the Court, the trial judge in particular did his best to ensure that the trial was held in a manner befitting an eleven year-old. The court day was shortened to reflect the school day. Each day was divided into hourly sessions separated by an interval, during which the applicant could spend time with his parents and social workers in an area allocated for that purpose. The applicant was accompanied in the dock by a social worker, and his parents were seated close by. Further steps were taken by the social services department, prior to the trial, to ensure that the applicant was familiar with the courtroom, court procedure and court personnel. These measures are likely to have mitigated the difficulties which the applicant would otherwise have experienced. Nevertheless, a trial held under the conditions which I have described could be expected to remain a highly intimidating experience for most eleven-year-old children.

The Government also emphasised the importance of a public trial, open to the press and to the general public, in order to maintain public confidence in the administration of justice and to respect the legitimate public interest in ascertaining the circumstances which had led to the killing of a young child. I of course accept that trials must in general be held in public, for the reasons which I have just summarised: that is clear from Article 6 itself. Nevertheless, Article 6 also makes it clear that that principle is not absolute. It can be derogated from where the interests of juveniles so require, as English law indeed recognises in the procedures followed in the youth courts. It can also be derogated from where publicity would prejudice the interests of justice, as English law also recognises. If the holding of a public trial is incompatible with the holding of a fair trial, it is the latter which must take priority. It also has to be borne in mind that it is possible to restrict attendance rights and reporting rights to the extent necessary to protect other legitimate interests without necessarily excluding such rights altogether (as English law recognises, for example in its treatment of child witnesses).

I have accordingly come to the conclusion that the conditions under which the applicant was tried, considered as a whole, were incompatible with his effective participation in the determination of the charge against him. In consequence, there has in my opinion been a violation of Article 6 of the Convention.

In submitting that the sentence imposed upon him constituted inhuman treatment contrary to Article 3 of the Convention, the applicant relied on the element of retribution inherent in the tariff approach; the lifelong possibility

of recall to detention following release on licence; the length of the tariff of fifteen years originally imposed; the length of time which he has already served; the risk that he may be transferred to a Young Offenders' Institution and thereafter to an adult prison; and the delay in fixing a new tariff.

The Court has already accepted that the sentence of detention during Her Majesty's pleasure, in the case of young persons convicted of serious crimes, contains a punitive element (see the Hussain v. the United Kingdom judgment of 21 February 1996, *Reports* 1996-I, pp. 269-70, §§ 53-54). The existence of a punitive element cannot in itself be regarded as inhuman treatment, given that the attribution of criminal responsibility to the child in question is acceptable. The nature and severity of any punishment may on the other hand give rise to an issue under Article 3.

It is also necessary to recall that States have a duty under the Convention to take measures for the protection of the public from violent crime. Article 3 of the Convention cannot therefore have the effect of prohibiting States from imposing on a child convicted of a serious crime of violence a sentence which allows for his continued detention, or his recall to detention following release, where that is necessary for the protection of the public.

In considering whether the length of the original tariff, and the length of time already served by the applicant, are compatible with Article 3, it is appropriate to have regard to the United Nations Convention on the Rights of the Child, which is accepted by all of the member States, including the United Kingdom. Article 3 § 1 of that Convention requires that in all actions concerning children the best interests of the child shall be a primary consideration. Article 40 § 1 requires the child offender to be treated in a manner which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. These general requirements are reflected in Article 37(b) of the United Nations Convention, which requires that the imprisonment of a child be used only as a measure of last resort and for the shortest appropriate period of time.

As was observed in the judicial review proceedings brought by the applicant (*R. v. Secretary of State for the Home Department, ex parte V. and T.* [1998] Appeal Cases 407, 499), the original tariff appears to have been fixed without regard to the requirements imposed by Articles 3 § 1 and 40 § 1 of the United Nations Convention. That tariff was, however, quashed. Although there is evidence that the applicant was distressed on learning of the original tariff, a child of that age would also be likely to be distressed by a tariff fixed in accordance with the United Nations Convention, or for that matter by the prospect of a lengthy period of detention for non-punitive purposes.

The imposition of the original tariff cannot therefore in my opinion be regarded as ill-treatment attaining the minimum level of severity required by Article 3 of the Convention.

Since his conviction in November 1993 the applicant has been detained for six years, at the time of adoption of the present judgment. He has been detained under conditions which have taken into account his age and the desirability of promoting his reintegration and his assuming a constructive role in society. He makes no complaint about the conditions under which he has been detained. Bearing in mind all the circumstances of the case (including the gravity of the applicant's conduct), this period of detention cannot in my opinion be said to amount to inhuman treatment.

Whether the applicant is transferred in the future to a Young Offenders' Institution, or eventually to an adult prison, will depend upon a number of factors. A new tariff has yet to be set: it is impossible at present to assess how long it may be. Any detention beyond the tariff period will depend on an assessment of the risk to the safety of the public. The location and conditions of any future detention, and their impact upon the applicant, are equally speculative at the present time. In these circumstances, it is impossible to make any findings as to whether such detention would constitute a violation of Article 3.

The delay in fixing a new tariff was attributed by the Government to a number of factors. The decision of the House of Lords in June 1997 had required the Secretary of State to reconsider the policy to be followed in fixing a tariff, resulting in the announcement of the new policy in November 1997. The Secretary of State had then sought representations from T. and the applicant: the applicant's representations had been submitted in June 1998, but those on behalf of T. were still awaited. The Secretary of State also required a variety of reports on the progress and development of T. and the applicant, which had been received in August 1999. The proceedings before the Commission and the Court had also raised the question whether the tariff could be fixed by the Home Secretary without a violation of Article 6 § 1. In these circumstances, I do not consider that the delay in fixing a tariff gives rise at the present time to any issue under Article 3.

In relation to Article 6 § 1, the applicant submitted that the fixing of the tariff was in substance a sentencing function, and therefore a function which must be carried out by a court or tribunal rather than by the Secretary of State. The Government, on the other hand, submitted that the fixing of the tariff was not part of the sentence of the court, but merely an aspect of the administration of the court's sentence.

Article 6 § 1 of the Convention requires any criminal charge to be determined by an independent and impartial tribunal. The determination of a criminal charge includes the sentencing of a person who has been convicted (see the Eckle v. Germany judgment of 15 July 1982, Series A no. 51, pp. 34-35, §§ 76-77). The formal sentence imposed under English law upon a child convicted of murder does not determine in any respect the period during which the child is to be deprived of his liberty. The tariff fixed by the Secretary of State, on the other hand, determines (subject to review, under

the policy announced in November 1997) any minimum period of detention to be served before release can be considered. The tariff is punitive in character: the Secretary of State indeed described his function, in his statement of 10 November 1997, as "deciding what punishment is required". Deciding what punishment is required in respect of a person convicted of a criminal offence is in my opinion a sentencing exercise, as the Appellate Committee of the House of Lords recognised in the proceedings brought by the applicant. It follows that Article 6 § 1 is applicable to the fixing of the tariff. The tariff must therefore be fixed by "an independent and impartial tribunal". Since the Secretary of State is not independent of the executive, the fixing of the applicant's tariff by the Secretary of State violated Article 6 § 1.

In relation to the issues arising under Article 5 § 1, Article 5 § 4 and Article 41 of the Convention, I agree with the judgment of the Court and have nothing to add.

PARTLY DISSENTING OPINION OF JUDGES ROZAKIS AND COSTA

(*Translation*)

We voted with the majority on all points except one, namely the complaint under Article 3 of the Convention concerning the sentence imposed on the applicants. We consider that this complaint is well-founded.

As the judgment states, the two offenders were ten years old when they committed the crime. They were just over eleven when they were found guilty and sentenced to be detained "during Her Majesty's pleasure". The "tariff" portion of the sentence was first fixed at fifteen years by the Home Secretary on 22 July 1994. The murderers were then twelve. It should be noted that the judge who sentenced them had recommended a tariff of eight years, and the Lord Chief Justice one of ten years. The Home Secretary's decision was taken after he had received letters and petitions calling for a very high tariff or life imprisonment (see paragraph 22 of the judgment).

When that decision was set aside, three years later, by the House of Lords, the Home Secretary informed Parliament that he would review the tariff originally set in the light of the offenders' progress and development (see paragraph 27 of the judgment), but to date no new decision has been taken.

In a case as exceptional as this one it is extremely difficult to trace the dividing line between what is "inhuman and degrading" within the meaning of Article 3 and what is not. In our opinion, the crucial factor for that assessment must be the murderers' extreme youth and immaturity at the time when they committed their crime. They were ten years old; they are now seventeen and still do not know how much of their sentence they will have to serve to satisfy the requirements of retribution and deterrence. That uncertainty, which the two applicants have lived with since the day they were sentenced, that is for more than six years, has obviously caused them considerable distress. But the decisive point is that the applicants, who are now not far from adulthood, were still only young children when they committed the offences, when they were arrested and detained pending trial and when they were convicted and detained.

Can it be contended that this transformation, which has to do with their age, should have no bearing on the decision to be taken concerning the length, and consequently the end, of the tariff period? Or that such a decision can be the same as would be taken in respect of adult murderers? We do not think so. Admittedly, the majority held that there had been no violation because they considered that a term of six years' imprisonment did not constitute inhuman and degrading treatment (see paragraph 99 of the judgment). But in doing so they assessed only the period of time which has *objectively* elapsed to date. They did not take account of the Home

Secretary's initial decision fixing the length of the applicants' sentence at fifteen years, which, according to Dr Bentovim "devastated" V. (see paragraph 24 of the judgment), or, above all, of the total uncertainty about what term they must serve that they have been in for two and a half years since the House of Lords' decision, and of the fact that there is no guarantee that the Home Secretary will come to a new decision in the near future. For all these reasons, we think that although the conditions in which the applicants' trial took place did not breach Article 3 of the Convention, there was a violation of Article 3 on account of their sentence.

JOINT PARTLY DISSENTING OPINION OF JUDGES PASTOR RIDRUEJO, RESS, MAKARCZYK, TULKENS AND BUTKEVYCH

In our view the applicants' trial and their sentence taken together amounted to inhuman and degrading treatment contrary to Article 3 of the Convention.

The combination in this case of (i) treating children of ten years of age as criminally responsible, (ii) prosecuting them at the age of eleven in an adult court, and (iii) subjecting them to an indeterminate sentence, reached a substantial level of mental and physical suffering. Bringing the whole weight of the adult criminal processes to bear on children as young as eleven is, in our view, a relic of times where the effect of the trial process and sentencing on a child's physical and psychological condition and development as a human being was scarcely considered, if at all.

Article 3 guarantees an absolute right to protection against inhuman and degrading treatment. Its focus is the suffering and the humiliation a person is subjected to. There is no reason to presume that the minimum level of suffering qualifying as ill-treatment cannot be inflicted by a court exercising its lawful authority in the course of a trial, especially where, for a number of reasons, that trial amounts to a public humiliation. We fully agree with the Court that the purpose of the criminal proceedings brought against the applicants was not in any respect to humiliate or cause suffering to them. However, contrary to the Court's assessment, we are of the view that the suffering or humiliation of the person is wholly independent of whether or not the State authorities acted with the intention of humiliating the person, or causing suffering. It seems to us that the authorities' principal reason for bringing these proceedings against children of eleven years of age was retribution, rather than humiliation. However, vengeance is not a form of justice and in particular vengeance against children in a civilised society should be completely excluded. We would emphasise that for Article 3 what counts is not the subjective element (motive or purpose) on the part of the State, but the objective effect on the persons involved.

By splitting up the “treatment” into separate phases, i.e. the trial itself and the sentencing, the majority loses sight of the effect which the treatment in this case must have had on the children's physical well-being and psychological balance. We do not see how the trial as such and the sentencing consequent on the outcome can properly be separated. Furthermore, considering the age of criminal responsibility in isolation from the trial process in an adult court is a further factor which is likely to lead to a distortion of the role of Article 3 of the Convention taken together with Article 1, that is, to secure effective protection against suffering and degrading treatment. The very low age of criminal responsibility has always

to be linked with the possibility of adult trial proceedings. That is why the vast majority of Contracting States have eschewed such a very low age of criminal responsibility.

1. As far as the age of criminal responsibility is concerned, we do not accept the conclusion of the Court that no clear tendency can be ascertained from developments amongst European States and from international instruments. Only four Contracting States out of forty-one are prepared to find criminal responsibility at an age as low as, or lower than, that applicable in England and Wales. We have no doubt that there is a general standard amongst the member States of the Council of Europe under which there is a system of relative criminal responsibility beginning at the age of thirteen or fourteen – with special court proceedings for juveniles – and providing for full criminal responsibility at the age of eighteen or above. Where children aged from ten to about thirteen or fourteen have committed crimes, educational measures are imposed to try to integrate the young offender into society. Even if Rule 4 of the Beijing Rules does not specify a minimum age of criminal responsibility, the very warning that the age should not be fixed too low indicates that criminal responsibility and maturity are related concepts. It is clearly the view of the vast majority of the Contracting States that this kind of maturity is not present in children below the age of thirteen or fourteen. In the present case, we are struck by the paradox that, whereas the applicants were deemed to have sufficient discrimination to engage their criminal responsibility, a play area was made available for them to use during adjournments.

2. As far as the trial is concerned, the Court recognises that there is an international tendency in favour of the protection of the privacy of juvenile defendants. It nevertheless finds that a lack of privacy cannot be decisive for the question whether the trial in public amounted to treatment attaining the minimum level of severity necessary to bring it within the scope of Article 3 of the Convention (see paragraph 77 of the judgment). According to Article 40 of the United Nations Convention on the Rights of the Child, privacy has to be "fully respected at all stages of the proceedings", and it is a crucial element in minimising the suffering and humiliation of children. Although the United Nations Convention is binding on the United Kingdom, English law nevertheless allows lengthy criminal proceedings to be held in public in an adult court with all the attendant formality. Even if the trial judge did take certain steps to limit the impact of the trial on the children, for children of this age in an already disturbed emotional state the experience of the trial must have been unbearable. The children were seated on a platform where they could be seen by the public and the press, and there is evidence that they found the public nature of the trial especially difficult to cope with, in particular since they perceived the public as hostile: on one occasion the van that brought them to court was attacked and by the time of the trial there had already been a virulent press campaign

which prompted their representatives to apply to the judge for a stay of proceedings. Before this audience of members of the public and journalists the applicants had to begin the process of coming to terms with the crimes which they had committed. They had to listen to the witnesses' accounts of the events of the day in question and the tapes of their own interviews with the police. They had to hear the jury's verdict of guilty and the judge passing the sentence. At the end of this public exposure they were informed that the judge had decided to lift the ban on the publication of their names. We have no doubt that such proceedings could be expected to produce a lasting harmful effect on an eleven-year-old child, and a high level of suffering. Thus, Sir Michael Rutter in his report on V. dated February 1998 expressed the opinion, *inter alia*, that the holding of a trial in public and the negative public reaction could potentially be damaging to a child of his age (see paragraph 19 of the judgment).

Besides the *nature* of the treatment, its *effect* on the children is a further relevant criterion in connection with Article 3. The applicant V. cried throughout most of the trial. The applicants' therapists have stated that the effect of the trial and the impact on their families and attacks and other reprisals by members of the public and fellow prisoners are, to this day, hampering the applicants' progress in coming to terms with what they have done and what has happened to them. We cannot accept that "any proceedings or inquiry to determine the circumstances of the acts committed by T. and [V.], whether such inquiry had been carried out in public or in private, ... would have provoked in the applicant[s] feelings of guilt, distress, anguish and fear" (see paragraph 79 of the judgment).

According to the psychiatric evidence relating to the effects of the trial process on the children, both showed signs of post-traumatic stress disorder. There is furthermore evidence showing that V. was distressed and frightened by the trial and that these effects lasted a year or more. Thus, Dr Bentovim in January 1995 reported that V. described a sense of shock at seeing the public let in to the courtroom, a terror at being looked at and considerable distress when his name and photograph were published. At the time of the doctor's examination, V. was suffering from a high level of fear that he would be attacked and punished. In her report of November 1997 Dr Bailey found that it took V. twelve months to get over the trial and that he still thought about it every night. She reported that he had been most scared at the first hearing at the magistrates' court, and that after the first three days in the Crown Court he had felt better because he had stopped listening.

Even if the evidence that V. experienced a high level of intense suffering at the time of the trial is clearer than for T., it can be concluded that this kind of trial caused suffering and humiliation to both children at a level which went beyond the needs of "any proceedings or inquiry to determine

the circumstances of the acts committed" and which reached the minimum level of inhuman and degrading treatment.

3. As far as the sentence is concerned, an important element to be taken into account in relation to Article 3 is the sentence of detention during Her Majesty's pleasure, i.e. for an indefinite period. This sentencing entailed an enormous amount of uncertainty and anxiety for the two children. It is questionable whether the Convention allows States to subject an eleven-year-old child to an indeterminate sentence on conviction, but the special duty of care on States to ensure that children are not subjected to inhuman treatment obliges the State to reduce the uncertainty as far as possible. After the trial judge had recommended a tariff of eight years, the Lord Chief Justice made a recommendation of ten years. Then the Home Secretary who had received, *inter alia*, a petition signed by 278,300 people expressing the view that the applicants should never be released set their tariffs at fifteen years. It is difficult to imagine how a child could conceive of such a sentence, but the reaction of V. that he feared that he would never be released comes as no surprise. This tariff was itself quashed by the House of Lords and no new tariff has been set. So the uncertainty remains. The Court, in our view, has only taken into account (see paragraph 99 of the judgment) the fact that both children have now been detained for six years, finding it impossible to draw any conclusion regarding the compatibility with Article 3 until a new tariff has been set. But the problem lies in the very passing of a sentence of an indefinite nature: the uncertainty and anxiety for persons as vulnerable as children inevitably add another element of suffering.

In conclusion, for us, the public nature of the trial not only contributed to the inhuman but also to the degrading treatment, and the fact that the applicants were tried in accordance with the same criminal procedure as adults and sentenced without sufficient account being taken of the fact that they were children must be qualified as inhuman.

It is no answer to a complaint under Article 3 to find a violation of Article 6 § 1. The Articles have different aims and objects of protection. Article 3 prohibits suffering and humiliation, whilst Article 6 in this case guarantees effective participation in the trial. By focusing mainly on the possibility for children of eleven to participate effectively in an adult Crown Court procedure, the majority of the Court has in our view failed sufficiently to address the suffering and humiliation which such a procedure inevitably entails for children. In the present case the Crown Court certainly did everything it could; it was the system within which it had to operate, taken as a whole, both in principle and in practice, which gave rise to a breach of Article 3 of the Convention.

We are fully aware of the terrible character of the crime committed, and we have had regard to the written comments filed by the parents of the murdered child. Articles 2 and 3 impose a positive obligation on States to protect victims against crimes of violence by providing effective deterrence.

However, in circumstances such as those at issue here, where the offenders were themselves children at the time of the crime and trial, we do not consider that the positive obligation under Article 3 in respect of the victims of an offence can justify the suspension of the rights of the offender. We think that the most effective way to acknowledge the suffering of victims and to protect society is to respect the most fundamental and absolute rights of offenders, especially – and above all – where those offenders are eleven-year-old children.

PARTLY DISSENTING OPINION OF JUDGE BAKA

While I fully share the view of the majority of the Court that there has been no violation of Article 3, I have concluded that the applicant had a fair trial in the instant case for the following reasons.

Article 6 § 1 of the Convention embodies the general rule that justice should be administered in public in a way which affords the accused the full possibility to participate effectively in the conduct of his or her case. This rule is subject to the proviso that "the press and the public may be excluded from all or part of the trial ... where the interests of juveniles ... so require". Neither the text of Article 6 § 1 nor its interpretation in the case-law, however, goes so far as to require that a child charged with a criminal offence should always be tried either by a juvenile court or by an adult court in private. It follows that the mere fact of subjecting a child to a public trial in an adult court does not in itself amount to a denial of a fair hearing under Article 6 § 1 of the Convention.

The majority of the Court relied heavily on the argument that the applicant's public trial in the Crown Court in the present case was "intimidating for a child of eleven" and that "in the tense courtroom and under public scrutiny" the applicant was unable to participate effectively in the criminal proceedings against him.

I am of the opinion that any (public or in camera) trial of a serious criminal charge almost inevitably causes strong feelings of anxiety, fear and distress as a result of the fact that the accused person has to face – sometimes for the first time – the serious consequences of the acts committed. I also accept that these natural feelings could limit, wholly or partly, the accused person's (adult or child) ability to participate actively in the criminal proceedings against him or her. Even admitting that this is potentially more so in the case of a child, would this subjective feeling and its possible handicapping impact on his or her actions during the trial be enough to ground a finding that the criminal proceedings against him were unfair? I do not think so. To hold otherwise would require examination of the actual effect of these subjective factors on how the child behaved at the trial and on whether the child was able to contribute efficaciously to his or her defence. Moreover, it would also have to be shown that the child was prevented from active participation in the conduct of his or her case not because of the almost automatic and natural psychological consequences of a criminal trial, but more specifically by reason of the public nature of the proceedings. I think that this goes too far.

In the present case the authorities took a series of special measures designed to ensure that the accused boys could participate adequately in the trial. These measures included familiarising them with the courtroom, an explanation of the procedure, a shortened court day with regular break

intervals corresponding to the normal school schedule and the presence of social workers prior to and during proceedings. The trial judge also made it clear that he would adjourn whenever the social workers or defence lawyers told him that one of the defendants was showing signs of tiredness or stress.

Under these circumstances, when the ordinary court procedure had been tailored to take into account his young age, it is difficult to say that the applicant did not receive a fair trial under Article 6. If the applicant was unable to participate effectively in the proceedings, it was not because his case was tried publicly by an adult court but rather because his position objectively was not significantly different from that of accused persons who are lacking legal knowledge, suffering mental disease or of low intelligence, such that they can be said to be subjects of the criminal process rather than active participants in it. In this situation, fairness of a criminal trial cannot mean much more than ensuring that the child is defended adequately by highly trained professional counsel and that the necessary facilities for the defence are fully provided – as they were in the present case. In terms of fairness of criminal proceedings, it is rather illusory to expect that a child of this age could give any legally relevant instruction to his or her lawyer in order to facilitate his or her defence.

On the above basis, I found no breach of Article 6 § 1 as regards the fairness of the trial.