



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

FIRST SECTION

**CASE OF HAMMERTON v. THE UNITED KINGDOM**

*(Application no. 6287/10)*

JUDGMENT

STRASBOURG

17 March 2016

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Hammerton v. the United Kingdom,**

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mirjana Lazarova Trajkovska, *President*,

Linos-Alexandre Sicilianos,

Paul Mahoney,

Aleš Pejchal,

Robert Spano,

Armen Harutyunyan,

Pauliine Koskelo, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 23 February 2016,

Delivers the following judgment, which was adopted on that date:

**PROCEDURE**

1. The case originated in an application (no. 6287/10) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a British national, Mr William Hammerton (“the applicant”), on 15 December 2009.

2. The applicant was represented by Mr A. Guile, a lawyer practising in London. The United Kingdom Government (“the Government”) were represented by their Agents, Ms A. Sornarajah and Ms R. Tomlinson of the Foreign and Commonwealth Office.

3. The applicant alleged, in particular, that his committal to prison for civil contempt, and the subsequent civil proceedings by which he sought to obtain redress, violated his rights under Articles 5 and 6 of the Convention.

4. On 15 March 2012 the application was communicated to the Government.

**THE FACTS****I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1954 and lives in London.

## A. The contempt

### 1. *The contempt finding*

6. The applicant married in 1977. He separated from his wife in 2002. On 9 January 2004 he issued an application in the County Court for contact with two of his five children.

7. The applicant and his wife divorced on 27 August 2004. His legal aid certificate was withdrawn following a financial award made as part of the divorce.

8. Meanwhile the contact proceedings continued. The applicant's former wife alleged that he had harassed her and applied to the County Court for protection. On 21 December 2004 the applicant gave an undertaking to Wandsworth County Court:

“Not to contact, or communicate with, [his former wife], [her] mother or father, nor her solicitors in any way whatsoever ... except through his own solicitors.”

9. On 23 February 2005 Woolwich County Court granted the applicant's former wife an injunction which *inter alia* prevented him from using or threatening violence towards her.

10. On 6 July 2005 the applicant's former wife issued an application for him to be committed to prison for breach of the undertaking and injunction.

11. His Honour Judge Collins, sitting in the Central London Civil Justice Centre, chose to hear the applicant's application for contact and his former wife's application for him to be committed for contempt at the same time. He heard the applications on 26 and 27 July 2005.

12. The applicant was unrepresented during the proceedings before Judge Collins. His position as regards legal aid was due to be reviewed shortly after the hearing. The judge made no inquiries into why the applicant was unrepresented or whether he wanted representation.

13. On 27 July 2005 the judge made an order for indirect contact. He also committed the applicant to prison for three months because he had breached the undertaking and the order and was therefore in contempt of court.

14. The applicant contacted lawyers from prison in order to appeal his committal but, having accepted instructions, they failed to assist him. He subsequently lodged a complaint against them and received five hundred pounds sterling (“GBP”) in compensation.

15. The applicant was released on 9 September 2005, after approximately six and a half weeks' imprisonment, pursuant to provisions permitting early release.

### 2. *Appeal against the contempt finding*

16. On around 14 September 2005 the applicant lodged an appeal out of time against the finding that he had been in contempt of court. He

subsequently obtained legal aid and legal representation to pursue those proceedings.

17. On 23 March 2007 the Court of Appeal quashed both the finding of contempt and the sentence imposed. It found that the County Court's errors of procedure were grave ones. Lord Justice Moses, delivering the first judgment, began by setting out a number of well-established principles relevant to committal hearings. The need to observe the Human Rights Act 1998 (see paragraphs 50 to 55 below) was central to the practice direction on committal proceedings, which had applied to the proceedings before the County Court (see paragraph 41 below). Such proceedings concerned a "criminal charge" for the purpose of Article 6 of the Convention and the defendant therefore benefited from the right to legal assistance set out in Article 6 § 3 (c). A defendant to committal proceedings was not obliged to give evidence and enjoyed a right against self-incrimination and, referring to Article 6 § 2, the burden of proving guilt lay on the person seeking committal.

18. In the applicant's case, Moses LJ observed that these matters had not been drawn to the attention of the judge. He continued:

"11. Untutored and unassisted as the judge was, matters went wrong from the beginning. The judge noted, at the outset, that Mr Hammerton was acting in person. He made no comment about it whatever. In particular, he did not ask anything as to the circumstances in which he was unrepresented. Had he done so, he would have learnt that earlier legal representation had been withdrawn by the Legal Services Commission after he received a sum of money on his divorce ... That was the subject matter of a review panel which was due to sit two weeks later. This emerged at the outset of the cross-examination by counsel for Mrs Hammerton on the second day of the hearing."

19. Moses LJ considered that once the judge had learnt that the issue of legal aid was the subject of an imminent review panel, there was no reason why the committal hearing should not have been adjourned until the issue of legal representation had been resolved. He was of the view that the judge had been obliged to ask appropriate questions and to consider, at the very outset of the hearing, whether there should be an adjournment so as to enable the defendant to be represented. In the absence of evidence of intransigence on the part of the applicant, and he noted that there was none, there was no reason why the applicant should not be represented.

20. Moses LJ further found that the decision to hear the application for committal at the same time as the application for contact led to inescapable errors in procedure. He noted that it was for the applicant to establish his claim for contact, and for his former wife to prove breaches of the undertaking and the court order. The applicant should have been warned that he did not need to give evidence; he received no such warning.

21. Moses LJ concluded that the decision of the judge to hear both applications at the same time had placed the applicant in an impossible position, noting that there was no hint at any stage in the transcript of the

proceedings of anyone advising the applicant of his rights in respect of the committal proceedings, nor of the judge reminding himself of the different burden and standard of proof in the two applications. Further, the judge had given no explanation as to why he considered it essential to deal with both applications at the same time.

22. Finally, Moses LJ considered that the judge again fell into error at the sentencing stage. He noted that the judge never paused, even at that stage, to consider whether the applicant should have legal representation or to remind himself of the relevant principles. He observed that the judge had paid no heed to the purpose of punishment in contempt proceedings. Since he had not been represented and had never been given an opportunity to mitigate, the sentencing phase of the committal was “fatally flawed”.

23. Moses LJ then assessed whether it was necessary for the court to consider whether legal representation would have made a difference in the applicant’s case. He commented that it was almost impossible to envisage a case where such representation would not be needed, if only, as this case demonstrated, to remind a judge of the principles which applied. Even in a case where a defendant admitted every breach alleged, representation would be needed so as to assist the judge in considering the appropriate disposal. The case was certainly not one where the court would decline to take action despite a violation of Article 6. There was ample material to suggest that legal representation would have made a difference. Quite apart from the question of the appropriate sentence, there was material relevant to the facts of the breaches to which the judge’s attention ought to have been drawn.

24. Lord Justice Wall fully agreed with Moses LJ, noting:

“35. There are, of course, many cases in the books in which this court has upheld committal orders even although they have been made in proceedings which were procedurally flawed ... Provided the contemnor has had a fair trial and the order has been made on valid grounds, the existence of a defect in the committal application or in the order served will not result in it being set aside except in so far as the interests of justice require that to be done ...

36. The instant case, however, is plainly not in that category, and I am in complete agreement with Moses LJ that the defects in the process in the instant case are so serious that the interests of justice plainly require both the committal order and the consequential sentence of imprisonment to be set aside.”

25. Specifically on the question of access to legal advice, he added:

“52. ... Even more important, however, in my view is the proposition that in the absence of exceptional circumstances, it is a breach of a party’s ECHR Article 6 rights to be sent to prison for contempt of court without the benefit of legal representation. No magistrates’ court would impose a custodial sentence on an unrepresented defendant, and in my judgment, no family court should send a litigant in person to prison for contempt without first making arrangements for that litigant to be legally represented.”

## **B. The claim for damages**

26. On 20 March 2008 the applicant commenced proceedings for damages under common law for the tort of wrongful imprisonment and under the Human Rights Act 1998 (see paragraphs 50-55 below), relying on Articles 5 and 6 of the Convention. He sought an extension of time for lodging his claim.

27. On 25 February 2009 the High Court dismissed his claim and refused the extension of time. However, Mr Justice Blake made it clear that had he considered there to be merit in the claim, he would have extended time. He had therefore considered the merits of the applicant's claim.

28. Blake J noted at the outset that the Court of Appeal had identified three main errors in the applicant's case: the failure to inquire into why he was not represented and to consider whether to adjourn the committal proceedings to enable him to obtain representation; the joinder of the committal proceedings and the contact order application, which undermined the burden of proof and the applicant's right not to give evidence in the committal proceedings; and the fact that he was not given the opportunity to mitigate before sentence was passed. Blake J considered it plain from the judgment of the Court of Appeal that although it had granted no formal declaration that the committal hearing had breached the applicant's human rights, it had been of the view that it had and that had been the tenor of its findings.

29. As to the false imprisonment claim, Blake J referred to the long-standing recognition in the case-law that there was immunity from suit for a claim based on alleged errors of a circuit judge of competent jurisdiction that resulted in detention, in the absence of malice. The applicant's claim accordingly failed.

30. He considered equally hopeless the applicant's claim that any violation of an Article 6 § 1 right gave rise to a right to damages under the Human Rights Act 1998. He found that section 9(3) of the Act, which precludes damages in respect of a judicial act done in good faith, with the exception of damages required by Article 5 § 5 of the Convention (see paragraph 55 below), was inconsistent with the applicant's claim. He also referred to the fact that just satisfaction under the Convention was a matter of discretion.

31. As to the claim under Article 5 of the Convention, Blake J referred to this Court's judgments in the cases of *Benham v. the United Kingdom* [GC], 10 June 1996, *Reports of Judgments and Decisions* 1996-III, *Perks and Others v. the United Kingdom*, nos. 25277/94 and others, 12 October 1999 and *Lloyd and Others v. the United Kingdom*, nos. 29798/96 and others, 1 March 2005. He decided that the applicant's claim that his detention was a violation of Article 5 § 1 because any hearing in which a violation of Article 6 occurred was not in accordance with law was:

“a slightly more modest reworking of the article 6 submission that has been already considered and summarily rejected. Again I reject this reworking of the submission for similar reasons to those already given, but more particularly for the principles spelt out in the trio of Community charge cases.”

32. Blake J concluded that the applicant’s detention pursuant to the order of Judge Collins was not so gross or obvious an irregularity, within the meaning of § 115 of the Court’s judgment in *Lloyd and Others*, cited above, as to be not in accordance with the law. In reaching this conclusion, he noted, *inter alia*, that the County Court was a court of competent jurisdiction; that proper notice of the hearing and of the committal application had been given; that the record of proceedings did not appear to reveal any application by the applicant for an adjournment to seek legal representation; that there was no failure to follow a statutory prerequisite because the general requirement to observe Article 6 imposed by the Human Rights Act 1998 was not the same as a precise rule prohibiting committal unless a condition was complied with; that, similarly, the practice direction (see paragraph 41 below), which set out the need to observe the Human Rights Act, was in general terms and did not amount to a condition precedent; that the Court of Appeal, at the time of the County Court’s decision, had not made an unambiguous finding that a lack of representation at a committal hearing would always violate Article 6, although its finding in the present case meant that Article 6 might be considered a condition precedent in future cases; and that there was no hint of malice or bad faith by the judge.

33. Blake J also found that the Court of Appeal’s three principal criticisms all suggested that the County Court had erroneously exercised its judgment. Erroneous exercises of judgment did not make decisions not in accordance with law or arbitrary in the sense indicated in the Article 5 § 1 case-law.

34. Having thus concluded, Blake J explained that, had he reached the contrary conclusion, it would have been necessary to consider what the causal nexus between the unfairness and the detention resulting from the unfairness was. He accepted that where detention was in violation of Article 5 § 1 it was necessary and appropriate to visit it with a measure of damages, however modest. He found that, if the family-law applications had been separated correctly and the applicant had been represented, a finding of contempt would nevertheless have been inevitable. However, whilst custody was the more probable outcome, the length of sentence would have been significantly shorter and approximately fourteen days, so the applicant would not have served six weeks in prison. He indicated that, had a violation of Article 5 been established, he would have awarded damages in the sum of GBP 6,000, on an equitable basis.

35. The applicant sought leave to appeal out of time. On 27 August 2009 leave to appeal was refused on the papers. The judge commented that he



might consider extending time if there was a real prospect of success, but in his view the judgment would be upheld.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Contempt of court

#### 1. Legislation

36. Section 14 of the Contempt of Court Act 1981, as amended, provides in relevant part:

“(1) In any case where a court has power to commit a person to prison for contempt of court ..., the committal shall ... be for a fixed term, and that term shall not on any occasion exceed two years in the case of committal by a superior court, or one month in the case of committal by an inferior court.

...

(4A) For the purposes of the preceding provisions of this section the county court shall be treated as a superior court and not as an inferior court.”

37. Section 258(1) of the Criminal Justice Act 2003, as then in force, provided that the section applied, *inter alios*, to persons committed to prison for contempt of court. Section 258(2) of the Act provided that as soon as a person to whom the section applied had served one-half of the term for which he was committed, the Secretary of State’s duty was to release him unconditionally.

#### 2. Case-law and other relevant legal materials

##### (a) The nature of civil contempt

38. In *R v. O’Brien* [2014] UKSC 23, Lord Toulson, giving judgment on behalf of the Supreme Court, observed that English law had long recognised a distinction between “civil contempt”, which was conduct not in itself a crime but which was punishable by the court to ensure that its orders were observed, and “criminal contempt”. Lord Toulson stated:

“38. Breach of an order made (or undertaking obtained) in the course of legal proceedings may result in punishment of the person against whom the order was made (or from whom the undertaking was obtained) as a form of contempt ... However, a contempt of that kind does not constitute a criminal offence. Although the penalty contains a punitive element, its primary purpose is to make the order of the court effective. A person who commits this type of contempt does not acquire a criminal record.”

**(b) The power to commit for contempt for failure to respect an undertaking**

39. In *Roberts v. Roberts* [1990] 2 F.L.R. 111, the Court of Appeal accepted that an individual could be committed for contempt where he had failed to abide by an undertaking made to a court.

40. Subsequent cases, including *R v O'Brien* (see paragraph 38 above), have continued to accept the validity of committal for such failures.

**(c) The domestic law application of Article 6 to contempt**

(i) The 2001 Practice Direction on committal applications in family proceedings ([2001] 1 WLR 1253)

41. The practice direction, as then in force, set out that Article 6 of the Convention was to be fully applicable to family proceedings.

(ii) *Re K (Children)* [2002] EWCA Civ 1559

42. In *Re K (Children)*, the Court of Appeal was asked to consider the appeal of a mother against an order committing her to prison for contempt which was made in a hearing in which she was not represented. Lady Justice Hale (as she then was), with whom the other judges agreed, decided that the proceedings were “undoubtedly” a criminal charge for the purposes of Article 6 of the Convention and that, accordingly, the additional protections of Article 6 § 3 applied. The warrant for the appellant to go to prison was set aside.

(iii) *PG v. LMR* [2003] EWCA Civ 489

43. In *PG v. LMR*, the Court of Appeal was asked to consider the appeal of a father against a suspended committal order made by a County Court. Dame Elizabeth Butler-Sloss, as she then was, giving the judgment of the court, decided, *inter alia*, that the County Court should have ensured by granting an adjournment that the appellant had the opportunity to obtain representation and that it should have informed him that he was not compelled to give evidence. Dame Butler-Sloss decided that the County Court’s procedure had been seriously flawed and substantially unfair and set aside the committal order.

**B. Immunity of justices of the peace**

1. In *Re McC. (A Minor)* [1985] AC 528

44. In *In Re McC* the House of Lords was asked to consider whether Northern Irish magistrates were immune from liability for false imprisonment relating to their unlawful order by which they sent a fourteen-year-old boy to a training school without informing him, as required by statute, of his right to apply for legal aid. Lord Bridge, with

whom the other Law Lords agreed, decided that it was necessary to establish the meaning of acting “without jurisdiction or in excess of jurisdiction” as that term was used in the relevant Northern Irish legislation on magistrates’ immunity from liability. Only where the actions of magistrates were “without jurisdiction or in excess of jurisdiction” would there be no immunity.

45. Lord Bridge decided that the Court of Appeal of Northern Ireland’s decision that every error of law by magistrates amounted to acting without or in excess of jurisdiction so as to deprive them of immunity was incorrect. He decided that magistrates acted without or in excess of jurisdiction if (i) they acted without having jurisdiction of the cause, that is to say at the outset of the proceedings the court had no jurisdiction to entertain the proceedings at all; (ii) a statutory condition precedent to their having jurisdiction of the cause was never satisfied; or (iii) something quite exceptional occurred in the course of proceedings to oust their jurisdiction.

46. Whilst an error of law or fact in deciding a collateral issue on which jurisdiction depended or an absence of any evidence to support a conviction would not be sufficient to oust jurisdiction in the sense of (iii), if in the course of hearing a matter within their jurisdiction the justices were guilty of a gross and obvious procedural irregularity such as one justice absenting himself and relying on another to inform him of what had happened in his absence or refusing to allow a defendant to give evidence, jurisdiction would be ousted.

47. Lord Bridge also found that justices might act in excess of jurisdiction even though they had jurisdiction of the cause and tried a case impeccably if their conviction of a defendant did not provide a proper foundation in law for the subsequent sentence or order made against him.

48. Lord Bridge concluded that the justices’ failure to inform the claimant of his right to legal aid was a failure to observe a statutory condition precedent to passing sentence in the circumstances of the case and was analogous to a failure to observe a statutory condition precedent to jurisdiction of the cause.

2. *Regina v. Manchester City Magistrates’ Court, Ex parte Davies*, [1989] QB 631

49. In *Ex parte Davies* the Court of Appeal was asked to consider the appeal of three magistrates found liable in damages for unlawful imprisonment following their committal of an individual for failure to pay local taxes. The Court of Appeal, in deciding to uphold the magistrates’ liability, found that *In Re McC* (see paragraphs 44 to 48 above) applied in England and Wales.

### C. Human rights protection under domestic law

#### 1. *The Human Rights Act 1998*

50. Section 3(1) of the Human Rights Act 1998 (“the Human Rights Act”) provides that primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights so far as it is possible to do so. Section 1(1) of the Act defines “Convention rights” as the rights and fundamental freedoms set out in Articles 2 to 12 and 14 of the Convention, Articles 1 to 3 of Protocol No. 1 and Article 1 of Protocol No. 13.

51. Section 4(2) of the Human Rights Act provides that domestic courts may make a declaration of incompatibility if they are satisfied that a provision of primary legislation is incompatible with a Convention right.

52. Section 6(1) of the Human Rights Act provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Section 6(3) clarifies that “public authority” includes a court or tribunal and any person certain of whose functions are functions of a public nature.

53. Section 7(1) provides that a person claiming that a public authority has acted in a manner which is unlawful pursuant to section 6(1) of the Human Rights Act, or that it proposes to act in such a manner, may bring proceedings against the public authority or rely on the Convention right(s) concerned in any legal proceedings. He may only bring proceedings or rely on the Convention right(s) if he is, or would be, a victim of the unlawful act.

54. Section 8 of the Act sets out available remedies and provides:

“(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

...

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, ...

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining–

(a) whether to award damages, ...

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.”

55. Section 9(3) limits the possibility of claiming damages where the act or failure of which an individual complains is a judicial act or failure:

“In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention.”

*2. The nature of the Convention in the domestic law of the United Kingdom*

56. In *R v. Lyons and Others* [2002] UKHL 44, Lord Hoffman stated:

“Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even though the United Kingdom is bound by international law to do so.”

57. In *In Re McKerr* [2004] UKHL 12, Lord Nicholls stated:

“26. ... I respectfully consider that some of these courts ... fell into error by failing to keep clearly in mind the distinction between (1) rights arising under the Convention and (2) rights created by the Human Rights Act by reference to the Convention. These two sets of rights now exist side by side. But there are significant differences between them. The former existed before the enactment of the Human Rights Act 1998 and they continue to exist. They are not as such part of this country’s law because the Convention does not form part of this country’s law. That is still the position. These rights, arising under the Convention, are to be contrasted with rights created by the Human Rights Act. The latter came into existence for the first time on 2 October 2000. They are part of this country’s law. The extent of these rights, created as they were by the Human Rights Act, depends upon the proper interpretation of that Act.”

58. Lord Hoffman stated:

“65. ... Although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for domestic courts, not the court in Strasbourg.”

59. Finally, in *In Re P* [2008] UKHL 38, Lord Hoffman observed:

“33. As this House affirmed in *In re McKerr* ... ‘Convention rights’ within the meaning of the 1998 Act are domestic and not international rights.”

60. Lord Mance also commented:

“128. ... The Act creates as ‘part of this country’s law’ rights in the same terms as the Convention rights, and the interpretation and impact of those new domestic rights depends upon the 1998 Act: see *In re McKerr* ...”

### **D. The effect of a violation of Article 6 on the lawfulness of a decision to detain**

61. In *Uday Ratra v. Department for Constitutional Affairs* [2004] EWCA Civ 731, which concerned a claim for damages for false imprisonment following a committal for civil contempt, Lord Justice Tuckey, giving judgment for the court, observed:

“25 ... It is clear from the decision in *Benham* itself that not every breach of Article 6 will constitute unlawfulness for the purposes of Article 5. The undecided question is whether serious breaches of Article 6 could have this effect. ...

26 ... I think this is a difficult and important issue which the courts will need to resolve in a case where it matters and with the benefit of full argument.”

## **THE LAW**

### **I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION**

62. The applicant argued that his committal to prison following the hearing in July 2005 breached his right to liberty under Article 5 § 1 of the Convention, which reads in relevant part as follows:

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

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

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

63. The Government contested that argument.

#### **A. Admissibility**

64. The Court is satisfied that the complaint raises arguable issues under Article 5 § 1 of the Convention, so that it cannot be rejected as manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. The Court further considers that the complaint is not inadmissible on any other grounds. It must therefore be declared admissible.

## B. Merits

### 1. *The parties' submissions*

#### (a) The applicant

65. The applicant argued that his detention should be considered under Article 5 § 1 (a). He observed that contempt was treated by domestic law as a criminal matter.

66. The applicant argued that, because the Human Rights Act (see paragraphs 50-55 above) incorporated Article 6 into the domestic law of the United Kingdom, any violation of Article 6 that occurred during his committal hearing automatically rendered his detention not “in accordance with a procedure prescribed by law” and therefore unlawful under Article 5 § 1. He relied on *Nakach v. the Netherlands*, no. 5379/02, §§ 40-43, 30 June 2005; *Schenkel v. the Netherlands*, no. 62015/00, 27 October 2005; and *Bik v. Russia*, no. 26321/03, 22 April 2010.

67. The applicant contended in the alternative that there had been a gross and obvious irregularity within the meaning of *Lloyd and Others*, cited above.

#### (b) The Government

68. The Government argued that the applicant's detention was covered by Article 5 § 1 (b) because he had been detained for non-compliance with an undertaking and a court order and/or the detention was to secure his compliance with the undertaking and court order. They relied on *Benham*, *Perks and Others*, and *Lloyd and Others*, all cited above.

69. In the Government's submission, violation of the applicant's Article 6 rights did not necessarily mean that his detention was unlawful for the purpose of Article 5. They relied on *Benham*, cited above, § 47 and *Lloyd and Others*, cited above, § 114. Only if a violation of Article 6 amounted to a “flagrant disregard” of the applicant's rights or led to a “gross or obvious irregularity” would the resultant deprivation of liberty be rendered unlawful.

70. The Government adopted Mr Justice Blake's conclusion that there was no irregularity and his reasons for arriving at it (see paragraphs 32-33 above).

71. Referring to *Winterwerp v. the Netherlands*, 24 October 1979, § 40, Series A no. 33, the Government contended that the Court should apply a margin of appreciation when it considered whether there had been compliance with domestic law.

72. Finally, the Government argued that the detention was not arbitrary because the County Court judge had not acted in bad faith or neglected to attempt to apply the law correctly.

## 2. *The Court's assessment*

### (a) **The applicability of Article 5 § 1 (a) and/or Article 5 § 1 (b)**

73. Article 5 § 1 contains an exhaustive list of permissible grounds of deprivation of liberty. The applicability of one ground does not necessarily preclude that of another. Detention may, depending on the circumstances, be justified under more than one sub-paragraph (see, for example, *Eriksen v. Norway*, 27 May 1997, § 76, Reports 1997-III and *Gatt v. Malta*, no. 28221/08, § 35, ECHR 2010). In *Gatt*, § 35, the Court decided that the same reasoning applied to separate limbs of the same sub-paragraph.

74. Only a narrow interpretation of the permissible grounds is consistent with the aim of Article 5 § 1, namely to ensure that no one is arbitrarily deprived of his liberty (see *Ostendorf v. Germany*, no. 15598/08, § 65, 7 March 2013).

75. In *Engel and Others v. the Netherlands*, 8 June 1976, § 68, Series A no. 22, the Court decided that Article 5 § 1 (a) did not make any distinction based on the domestic legal character of the offence of which a person had been found guilty. Accordingly, Article 5 § 1 (a) applied to any “conviction”, whether the conviction was classified as criminal or disciplinary by the internal law of the State in question (see also more recently *Galstyan v. Armenia*, no. 26986/03, § 46, 15 November 2007).

76. “Conviction” has an autonomous meaning for the purposes of Article 5 § 1 (a) (*Engel*, cited above, § 68). The Court has interpreted “conviction” as requiring both a finding of guilt after it has been established in accordance with the law that there has been an offence and the imposition of a penalty or other measure involving deprivation of liberty (see *James, Wells and Lee v. the United Kingdom*, nos. 25119/09, 57715/09 and 57877/09, § 189, 18 September 2012 and *Del Rio Prada v. Spain* [GC], no. 42750/09, § 123, ECHR 2013).

77. Under the first limb of Article 5 § 1 (b), as the Court has explained in its case-law, a person arrested or detained for “non-compliance” with a “lawful order of a court” must have had an opportunity to comply with such an order and have failed to do so (see *Beiere v. Latvia*, no. 30954/05, § 49, 29 November 2011 and *O.G. v. Latvia*, no. 66095/09, § 88, 23 September 2014).

78. As regards the aim of the detention under the first limb of Article 5 § 1 (b), the Court observes that in *Gatt*, cited above, the respondent Government’s argument in that case clearly indicated that the purpose of the relevant detention involved a punitive element (*ibid.*, § 33). In its own subsequent analysis (*ibid.*, §§ 37-44), the Court decided that the first limb applied. Accordingly, the Court accepted that punishment was a permissible aim of the detention.

79. The requirements of the second limb of Article 5 § 1 (b) were considered in detail in *Ostendorf*, cited above. Referring, *inter alia*, to *Gatt*,



cited above, § 46, the Court held that, in order to be covered by that provision, the arrest and detention had to aim at, or directly contribute to, securing the fulfilment of the obligation and not be punitive in character. If the second limb of sub-paragraph (b) could be extended to cover punishments, such punishments would be deprived of the fundamental guarantees of Article 5 § 1 (a) (*Ostendorf*, cited above, § 71).

*Application of the principles on applicability to the facts of the case*

80. Although the applicant submits that civil contempt is criminal in nature under domestic law, in the recent case of *R v. O'Brien* (see paragraph 38 above) the Supreme Court decided that civil contempt did not constitute a criminal offence as such in domestic law. The Government had also argued, in the earlier case of *Harman v. the United Kingdom*, no. 10038/82, Commission decision of 11 May 1984, DR 38, p. 53, that Ms Harman had not been convicted of a criminal offence when the domestic courts had found that she had committed a civil contempt. The Court is accordingly led to find that the County Court's decision to hold the applicant in contempt of court did not amount to a conviction in domestic law.

81. In order to decide whether Article 5 § 1 (a) applies in the present case, the Court must therefore determine whether the applicant was "convicted" within that term's autonomous meaning under the Convention (see paragraph 76 above).

82. As regards the first condition stated in the Court's case-law for the existence of a "conviction" within the autonomous meaning of that term under Article 5 § 1 (a), namely a finding of guilt, the Court must first decide whether an adverse finding made against an individual in proceedings which are not classified in domestic law as criminal but to which the "criminal" limb of Article 6 applies amounts to a finding of guilt. If the Court decides that question of principle in the affirmative, it must then determine whether in the instant case the Court of Appeal was correct in ruling that the "criminal" limb of Article 6 applied to civil contempt proceedings.

83. In relation to the first question, the Court observes that in *Engel*, cited above, Article 5 § 1 (a) was explained as being an autonomous provision whose requirements are not always co-extensive with those of Article 6 (*ibid.*, § 68). The Court has also consistently stressed that the exceptions permitted by Article 5 should be narrowly interpreted (see paragraph 74 above). On the other hand it cannot be overlooked that Article 5 § 1 (a) applies to any "conviction" (see paragraph 75 above).

84. In addition, as a matter of general principle, the Convention must be interpreted and applied in a manner which renders its guarantees practical and effective (see, for example, *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37 and *X v. Latvia* [GC], no. 27853/09, § 94, ECHR 2013). Furthermore, the Convention must be read as a whole and interpreted in such a way as to

promote internal consistency and harmony between its various provisions (see *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, pp. 30-31, § 68 and *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X).

85. In light of these principles, and giving a linguistically harmonious interpretation to the expressions “criminal charge” and “criminal offence” in Article 6 and “conviction” in Article 5 § 1 (a), the Court concludes, firstly, that, when a domestic court finds against an individual in proceedings which, although classified in domestic law as civil, fall under the criminal limb of Article 6, there has been the “determination of a criminal charge” in the sense of Article 6; and, secondly, that that determination amounts to a finding of guilt for the purposes of the application of Article 5 § 1 (a).

86. As to the particular facts of the instant case, on the basis of all the material before it and having regard to its case-law (for example, *Engel*, cited above, §§ 82-83 and *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, §§ 82-86, ECHR 2003-X), the Court sees no reason to depart from the Court of Appeal’s conclusion on the applicability of the “criminal” limb of Article 6 to the family-law County Court proceedings in which the applicant was found to have committed a civil contempt of court.

87. As regards the second condition stated under the Court’s case-law for the existence of a “conviction” in the autonomous meaning of that term under Article 5 § 1 (a), the applicant’s sentence of three months’ imprisonment must clearly be taken to constitute a penalty involving a deprivation of liberty.

88. Accordingly, the Court is satisfied that the County Court’s finding that the applicant had committed civil contempt was a “conviction” and that Article 5 § 1 (a) is applicable.

89. The applicant gave an undertaking to the County Court that he would not act in various ways including, *inter alia*, contacting or communicating with his ex-wife. The County Court also made an order requiring him, *inter alia*, not to use or threaten violence against his ex-wife. Given the nature of undertakings in domestic law (see paragraphs 39-40 above), there is no reason to distinguish between orders made by courts and undertakings given by individuals and accepted by those courts for the purposes of Article 5 § 1 (b).

90. The County Court’s finding that the applicant had committed a civil contempt expressly related to his failure to abide by a court order, as well as an undertaking which had been accepted by the court. Accordingly, the Court finds that the first limb of Article 5 § 1 (b) (the lawful detention of a person for non-compliance with the lawful order of a court) is applicable to the applicant’s detention.

91. In light of its clear case-law that deprivation of liberty to which the second limb of Article 5 § 1 (b) applies cannot have punishment as one of

its aims, the Court finds that, because civil contempt includes punishment as one of its aims, the second limb of Article 5 § 1 (b) (the lawful detention of a person in order to secure the fulfilment of an obligation prescribed by law) is not applicable to the applicant's detention.

**(b) General principles relating to Article 5 § 1**

92. The object and the purpose of Article 5 § 1 are to ensure that no-one is dispossessed of his liberty in an arbitrary fashion (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 66, 29 January 2008 and *James, Wells and Lee*, cited above, § 187).

*(i) "Lawfulness" of the detention*

93. The starting points for the requirement linked to the "lawfulness" of the detention are the introductory phrase to Article 5 § 1 "in accordance with a procedure prescribed by law" and the use of the adjective "lawful" in the subsequent, exhaustive list of permissible instances of deprivation of liberty in sub-paragraphs (a) to (f).

94. The Court recalls the general principles which the Grand Chamber set out at paragraph 72-75 of *Mooren*, cited above:

"72. Where the 'lawfulness' of detention is in issue ... the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. ...

73. Although it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention and the Court can and should therefore review whether this law has been complied with ...

74. However, the Court has clarified ... that not every fault discovered in a detention order renders the underlying detention as such unlawful for the purposes of Article 5 § 1. A period of detention is, in principle, 'lawful' if it is based on a court order. A subsequent finding of a superior domestic court that a lower court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention ....

75. In its more recent case-law, the Court, referring to a comparable distinction made under English law ..., further specified the circumstances under which the detention remained lawful in the said underlying period for the purposes of Article 5 § 1: For the assessment of compliance with Article 5 § 1 of the Convention a basic distinction has to be made between ex facie invalid detention orders – for example, given by a court in excess of jurisdiction ... – and detention orders which are prima facie valid and effective unless and until they have been overturned by a higher court (ibid.). A detention order must be considered as ex facie invalid if the flaw in the order amounted to a 'gross and obvious irregularity' in the exceptional sense indicated by the Court's case-law .... Accordingly, unless they constitute a gross and obvious irregularity, defects in a detention order may be remedied by the domestic appeal courts in the course of judicial review proceedings."

95. As regards the question whether a detention order is ex facie invalid, as referred to by the Grand Chamber in *Mooren*, § 75, the Grand Chamber

in its earlier decision in *Benham*, § 46, applied the test set out by the House of Lords in *Re McC* for determining whether a decision was “without or in excess of jurisdiction” (see paragraph 45 above and *Benham*, § 25).

96. The Court confirmed the continuing relevance of that test in subsequent community-charge and fines cases which came before it, including, *inter alia*, *Perks and Others*, cited above; *Lloyd and Others* (dec.), nos. 29798/96 and others, 21 October 2003; and *Lloyd and Others*, cited above.

(ii) *Arbitrariness*

97. The Court would recall the general principles which are set out at paragraphs 67-71 in *Saadi v. the United Kingdom* [GC], no. 13229/03, ECHR 2008, and which were affirmed by the Grand Chamber in *Mooren*, cited above, §§ 77-81:

“67. ... Article 5 § 1 requires in addition [to compliance with national law] that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness ... It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of ‘arbitrariness’ in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.

68. ... It is moreover clear from the case-law that the notion of arbitrariness in the context of Article 5 varies to a certain extent depending on the type of detention involved (see further below).

69. One general principle established in the case-law is that detention will be ‘arbitrary’ where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities ... The condition that there be no arbitrariness further demands that both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1 ... There must in addition be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention ...

70. The notion of arbitrariness in the contexts of sub-paragraphs (b), (d) and (e) also includes an assessment whether detention was necessary to achieve the stated aim. ...

71. The Court applies a different approach towards the principle that there should be no arbitrariness in cases of detention under Article 5 § 1 (a), where, in the absence of bad faith or one of the other grounds set out in paragraph 69 above, as long as the detention follows and has a sufficient causal connection with a lawful conviction, the decision to impose a sentence of detention and the length of that sentence are matters for the national authorities rather than for the Court under Article 5 § 1 ...”

(iii) *Flagrant denial of justice*

98. The requirement of Article 5 § 1 (a) that a person be “lawfully” detained after “conviction by a competent court” does not imply that the Court has to subject the proceedings leading to that conviction to a comprehensive scrutiny and verify whether they have fully complied with

all the requirements of Article 6 of the Convention (see *Drozd and Janousek v. France and Spain*, 26 June 1992, § 110, Series A no. 240 and more recently *Stoichkov v. Bulgaria*, no. 9808/02, § 51, 24 March 2005). However, the Court has also held that if a “conviction” was the result of proceedings which were a “flagrant denial of justice”, that is to say were “manifestly contrary to the provisions of Article 6 or the principles embodied therein”, the resulting deprivation of liberty would not be justified under Article 5 § 1 (a) (see *Drozd and Janousek*, cited above, § 110 and, more recently, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 461, ECHR 2004 VII).

99. The “flagrant denial of justice” test is a stringent one. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures that result in a breach of Article 6 of the Convention. What is required is a breach of the principles of fair trial that is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article (see *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, § 260, 17 January 2012 and *Tsonyo Tsonev v. Bulgaria* (no. 3), no. 21124/04, § 59, 16 October 2012). Under Article 5 § 1 (a), it is the detention of the person concerned, and not the person’s conviction, which has to be lawful. Only if the violation of Article 6 could be said to amount to a “flagrant denial of justice”, would Article 5 § 1 (a) be violated (see *Radu v. Germany*, no. 20084/07, § 88, 16 May 2013). As the purpose of Article 5 is to protect the individual from arbitrariness, a conviction cannot be the result of a flagrant denial of justice (*Ilaşcu and Others*, cited above, § 461).

**(c) Application of the principles to the facts of the case**

*(i) Preliminary considerations*

100. The Court has already rejected the applicant’s argument that every Article 6 violation results in a violation of Article 5 § 1, both expressly (*Tsonyo Tsonev*, cited above, § 58-59) and implicitly (see, for example, *Benham* and *Perks*, both cited above). Domestically, in *Uday Ratra v. Department for Constitutional Affairs* (see paragraph 61 above), the Court of Appeal made a finding to the same effect.

101. The applicant has argued that because Article 6 forms part of domestic law, and the County Court violated that Article in the process of committing him for contempt, his detention was not in accordance with law. However, although Article 6 forms part of domestic law to the extent set out by the House of Lords in *R v Lyons* and subsequent cases (see paragraphs 56-60 above), it is clear from the Grand Chamber’s decision in *Mooren*, cited above, that non-observance of a substantive or procedural rule is necessary but not sufficient for finding a violation of Article 5 § 1. The nature of that non-observance is also of critical importance.

102. It is clear from the Grand Chamber’s decision in *Mooren* that it is only where non-observance of a substantive or procedural rule results in a detention order which is ex facie invalid that the order will not be “lawful”. The Court therefore considers that the applicant’s first argument can be characterised as being that the detention order in his case was ex facie invalid in the meaning of that term in the Court’s case-law.

103. The applicant’s second argument, that the County Court actions amounted to a gross and obvious irregularity, is actually a facet of his first argument that his detention did not comply with national law. The Court will therefore consider both arguments together.

104. In adopting this approach the Court takes note of the following points. First, the test for whether an action is without or in excess of jurisdiction set out in *In Re McC*, and the Court’s application of that test in the community-charge and fines cases, related to Magistrates’ Courts and not, as in the applicant’s case, the County Court. However, it is clear from their application by the Court, including in *Mooren*, cited above, that the principles set out in *Benham*, cited above, are now of general relevance to the question of “lawfulness” and not confined to the specific context of immunity of justices of the peace. Furthermore, neither the applicant nor the Government have disputed the applicability of those principles in the current case and Blake J, when considering the applicant’s claim for compensation in the High Court, accepted that the relevant test was that set out in *Benham* (see paragraphs 31 and 32 above).

105. Secondly, insofar as the Government argued that a margin of appreciation should apply during the assessment of compliance with domestic law, the Court has consistently acknowledged that it is for the national courts to interpret and apply domestic law in the first place and that it is the Court’s task to exercise a certain power of review.

*(ii) Application to the instant case*

106. The Court will first consider whether the applicant’s detention was justified under Article 5 § 1 (a).

*(a) Compliance with national law*

107. As it did in *Yefimenko v. Russia*, no. 152/04, § 104, 12 February 2013, the Court will apply the principles set out in *Mooren* by the Grand Chamber, which have been considered in paragraphs 95-96 and 100-104 above. It is for the national authorities, particularly the domestic courts, to apply and interpret domestic law in the first place and for the Court to exercise a certain power of review (see *Benham*, cited above, § 41 and *Mooren*, cited above, § 73).

108. The applicant has not argued that the County Court did not have jurisdiction of the cause. Neither the Court of Appeal nor the High Court made such a finding. The Court therefore accepts that the County Court

enjoyed jurisdiction of the cause when it committed the applicant for contempt.

109. There is nothing in the judgment of the Court of Appeal in the present case which indicates that that court considered that compliance with the requirements of Article 6 in the conduct of the County Court proceedings had the status of an essential condition precedent for the very existence of jurisdiction in the first place. Nor did the High Court make such a finding. The applicant has not referred to any domestic case-law which clearly establishes that compliance with Article 6 in the conduct of civil contempt-of-court proceedings by a family-law court enjoys such a status and which the High Court failed to consider.

110. Therefore, the Court accepts that the County Court did not fail to observe a condition precedent for the exercise of its civil-contempt jurisdiction.

111. The Court observes that, in the present case, not only did the Court of Appeal review the County Court's committal of the applicant and decide to quash it because of the procedural flaws during his hearing, but the High Court specifically examined the question whether the County Court's decision was in excess of its jurisdiction.

112. In contrast to other applications in which the Court has been required to decide for itself, in light of the circumstances of the case, whether there has been a gross and obvious irregularity, the Court considers, given the detailed scrutiny embracing the Convention and its case-law, which the High Court gave to the applicant's claim, that its role in the present case is a subsidiary one and limited to exercising a power of review over the domestic courts' decisions.

113. The Court accepts that an appeal court's decision to quash a detention order, as happened in the present case, is an important factor in deciding whether flaws in a detention order amount to a gross and obvious irregularity. However, the fact that a detention order is quashed is not determinative because only *ex facie* invalid detention orders can be said not to comply with the requirement of "lawfulness" under Article 5 § 1 (*Mooren*, cited above, § 75).

114. In the community-charge and fines cases the Court held that a violation of Article 6 on account of a lack of representation, taken on its own, was not such as to render the ensuing detention "unlawful" for the purposes of Article 5 § 1. The Court has taken a similar approach to other procedural flaws (see, for example, *Mooren*, cited above, §§ 82-89 and *Hađi v. Croatia*, no. 42998/08, § 30, 1 July 2010). By contrast in *Niyazov v. Russia*, no. 27843/11, § 180, 16 October 2012, the first instance court's failure to establish the facts in their entirety, taken together with a failure to give reasons and specify time-limits, as well as the applicant's inability to participate in the proceedings because he was neither represented nor

provided with appropriate translations, was held to amount to a gross and obvious irregularity.

115. It is clear from the Court’s case-law, including the cases cited immediately above, that the “gross-and-obvious-irregularity” test is a stringent one. In that regard it resembles the “flagrant-denial-of-justice” test (see paragraphs 98-99 above).

116. The present case is distinguishable from *Nakach* and *Schenkel*, both cited above, in which there was clear domestic case-law that failure to make a record of proceedings rendered a trial court’s decision null and void.

117. Having reviewed all the material before it, in particular the reasons given by the High Court (see paragraphs 32-33 above), and having regard to its case-law and the matters set out above, the Court concludes that there was no gross and obvious irregularity in the present case.

*(β) Arbitrariness and flagrant denial of justice*

118. The Court considers that the question whether the applicant’s detention was arbitrary includes the issue whether the committal hearing amounted to a flagrant denial of justice (see *Ilaşcu and Others*, cited above, § 461).

119. While the Court of Appeal rightly accepted that the failure to ensure that the applicant had access to a lawyer was a violation of Article 6, the Court does not consider that such a violation is comparable to any of the situations listed at *Tsonyo Tsonev*, cited above, § 59. To find otherwise would come close to removing the distinction between a violation of Article 6 and a flagrant denial of justice, if it did not actually do so. The Court also observes that the applicant in *Tsonyo Tsonev* complained about a lack of representation and that, although the Court found that there had been a violation of Article 6, it did not accept that there had been a flagrant denial of justice. It cannot therefore be said that the violation of Article 6 in the present case went beyond a mere irregularity or lack of safeguards in the trial process and amounted to “a nullification, or destruction of the very essence, of the right guaranteed by that Article” (see paragraph 99 above). Accordingly, the Court finds that the violation of Article 6 in the present case did not amount to a flagrant denial of justice.

120. The Court is satisfied that the applicant’s committal to prison was not rendered arbitrary for any other reason. It follows that the applicant’s detention was justified under Article 5 § 1 (a) of the Convention. Owing to the Court’s decision in respect of Article 5 § 1 (a), set out above, it is not necessary to examine the Government’s arguments relating to Article 5 § 1 (b).

121. There has therefore been no violation of Article 5 § 1.



## II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

122. The applicant submitted that he should have received damages for the violation of Article 6 §§ 1 and 3 (c) which had occurred as a result of his not having been represented during the hearing in the County Court in July 2005. He also argued that owing to the existence of section 9(3) of the Human Rights Act (which precludes damages in respect of a judicial act done in good faith, with the exception of damages required by Article 5 § 5 of the Convention - see paragraph 55 above) the state of domestic law violated Article 6. Article 6 §§ 1 and 3 (c) reads as follows:

“1. In the determination of his civil rights and obligations or 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.

...

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

...

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

123. The Government contested those arguments.

### A. Admissibility

#### 1. *Exhaustion of domestic remedies*

##### (a) **The parties’ submissions**

124. According to the Government, the applicant had not exhausted his complaint that the state of domestic law violated Article 6. He could have requested the domestic courts to use section 3(1) of the Human Rights Act (see paragraph 50 above) to interpret section 9(3) of the Human Rights Act consistently with Article 6 of the Convention or to make a declaration of incompatibility in accordance with section 4(2) of the Human Rights Act (see paragraph 51 above).

125. The applicant argued that he had requested the High Court to make a declaration of incompatibility in relation to section 9(3) of the 1998 Act. Blake J had not ruled on his request because the judge had, in any event, found that a declaration that his human rights had been violated (see paragraph 28 above) was sufficient redress.

##### (b) **The Court’s assessment**

126. The applicant claimed damages before the High Court for the violation of Article 6 which had occurred in the civil-contempt-of-court proceedings before the County Court. Accordingly, the Court accepts that

he exhausted domestic remedies in relation to his complaint of violation of Article 6 as such, that is to say, violation on account of his lack of legal representation before the County Court.

127. As regards the applicant's complaint concerning the state of domestic law, the Court considers that the complaint is directed against the absence of an effective remedy in the law to provide redress for his Article 6 complaint concerning the lack of legal representation. In these circumstances, the former complaint, and the Government's objection as to exhaustion of domestic remedies, fall to be considered in the context of the Court's examination of the alleged violation of Article 13 of the Convention (see paragraphs 144 to 152 below).

## 2. "Victim" status

### (a) The parties' submissions

#### (i) The Government

128. The Government argued that an applicant ceased to be a "victim" within the meaning of Article 34 of the Convention if the authorities acknowledged, at least in substance, a violation of a protected right and provided appropriate and sufficient redress. As regards acknowledgment of a violation, the Government pointed to the findings of the Court of Appeal in 2007 and the High Court in 2009. The Government submitted that a finding of a violation was itself appropriate and sufficient redress. They relied on *Benham, Perks and Others*, and *Lloyd and Others*, all cited above.

129. The Government further argued that no part of the applicant's imprisonment was caused by the violation of his Article 6 rights. They disagreed with his argument that it was likely that he would have been detained for a shorter period if he had been represented. They observed that following a finding of contempt it was for the trial judge to decide on sentence length. They therefore argued that it was impossible to say, with the required amount of confidence, how long the applicant would have been detained. The Government argued that he could have immediately appealed against his sentence and that the Court of Appeal could have granted him bail and/or expedited his case if he had done so. He had had access to legal representation in detention but had failed to appeal until after his sentence had been served. This fundamentally undermined the "chain of causation" flowing from the violation of Article 6. Finally, the Government observed that the applicant had received GBP 500 in compensation as a result of the failings of the lawyers he initially instructed (paragraph 14 above).

#### (ii) The applicant

130. The applicant argued that, although the domestic courts had acknowledged that there had been a violation of Article 6, he remained a

victim of the violation because the High Court had decided not to award any damages.

**(b) The Court's assessment**

131. The Court reiterates that an applicant is deprived of his or her status as a "victim" within the meaning of Article 34 of the Convention if the national authorities have acknowledged, either expressly or in substance, and then afforded appropriate and sufficient redress for, a breach of the Convention (see, for example, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 178-193, ECHR 2006-V).

132. As regards the first condition, namely the acknowledgement of a violation of the Convention, the Court considers that the findings of both the Court of Appeal and the High Court amounted to an acknowledgment that there had been a violation of Article 6 of the Convention. In particular, the Court of Appeal decided to quash the decision of the County Court because the applicant had not been represented. In *Sakhnovskiy v. Russia*, no. 21272/03, § 35, 5 February 2009 the Court held that such a decision amounted to an acknowledgment that there had been a violation of Article 6. Accordingly, the Court finds that the domestic authorities in the present case have acknowledged a violation of Article 6 § 1 taken together with Article 6 § 3 (c).

133. The Court must therefore ascertain whether the applicant was afforded appropriate redress in the circumstances of the present case.

134. As regards awards of non-pecuniary damages for violations of Article 6, it is well established in the Court's case-law that the Court itself will not speculate as to what the outcome of the relevant proceedings might have been had there been no breach of the procedural guarantees of that provision (see, for example, *Ezeh and Connors*, cited above, §§ 141-143, ECHR 2003-X; and *Lloyd and Others*, cited above, § 153). However, if the Court finds special features in the case, amounting to a "real loss of opportunity", it may award such damages (see, for example, *Goddi v. Italy*, 9 April 1984, § 35, Series A no. 76 and more recently *Whitfield and Others v. the United Kingdom*, nos. 46387/99, 48906/99, 57410/00 and 57419/00, §§ 57-60, 12 April 2005).

135. The Court observes that the Court of Appeal quashed the County Court's finding of contempt. In the course of doing so, the Court of Appeal found that the case was not one where it could decline to take action despite a violation of Article 6 and there was ample material to suggest representation would have made a difference (see paragraph 23 above). In the subsequent damages claim, the High Court accepted that the applicant would have served a significantly shorter prison sentence had he been represented and took the view that he would have been given a two-week prison sentence and not the three-month sentence he actually received. He

would therefore have served one week in prison instead of six (see paragraph 34 above).

136. In light of the High Court’s additional findings that a committal for contempt was inevitable and a prison sentence more likely than not (see paragraph 34 above), it would be speculative to determine that the applicant would not have been imprisoned but for the lack of representation. However, the Court is satisfied that a significantly shorter sentence would have been imposed if the applicant’s Article 6 rights had been respected.

137. The Court accordingly does not accept that the acknowledgment by the domestic courts of the violation of the applicant’s rights under Article 6 by reason of his lack of representation at the contempt-of-court committal hearing is capable, on its own, of affording adequate reparation for the actual and likewise acknowledged prejudice in terms of lengthened imprisonment which, in the circumstances, that violation must be taken to have caused. Accordingly, the Court finds that the applicant can still claim to be a “victim” insofar as he did not receive any redress in the form of financial compensation. Therefore, the Government’s objection must be dismissed.

### *3. Conclusion on admissibility*

138. The Court is satisfied that the application raises arguable issues under Article 6 § 1 and Article 6 § 3 (c) of the Convention, so that it cannot be rejected as manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. The Court further considers that the application is not inadmissible on any other grounds. It must therefore be declared admissible.

## **B. Merits**

### *1. The parties’ submissions*

#### **(a) The applicant**

139. The applicant argued that the Article 6 violation had not been resolved because of the domestic courts’ failure to award him financial compensation.

#### **(b) The Government**

140. The Government acknowledged that a violation of Article 6 had occurred. However, they argued that the applicant had received adequate redress for the reasons set out above (see paragraphs 128-129).

## 2. *The Court's assessment*

141. The Court has accepted that the findings of both the Court of Appeal and the High Court amounted to an acknowledgment that there had been a violation of Article 6 § 1 and Article 6 § 3 (c) (see paragraph 132 above).

142. The Court notes its consistent case-law that where proceedings before a court fall within the criminal limb of Article 6 § 1 and within Article 6 § 3 (c) of the Convention, and a deprivation of liberty is at stake, the interests of justice in principle call for legal representation (see *Benham*, cited above, § 61; and *Lloyd and Others*, cited above, § 134).

143. The Court therefore sees no reason to dispute the finding of the domestic courts, and the Government's acceptance, that a violation of Article 6 occurred at the committal hearing. As the applicant continues to be a "victim" within the meaning of Article 34 of the Convention (see paragraphs 131-137 above), the Court confirms that there has been a violation of Article 6 of the Convention in respect of the applicant's lack of representation during his committal hearing.

## III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

144. The applicant argued that the failure to provide him with a remedy affording financial compensation for the violation of Article 6 in relation to his committal hearing amounted to a violation of the right to an effective remedy, as required by Article 13 of the Convention, which reads as follows:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

145. The Government contested that argument.

### A. Admissibility

146. As noted above, the Government argued that the applicant should have requested the domestic courts to read section 9(3) of the Human Rights Act in a manner compatible with the Convention or should have sought a declaration of incompatibility (see paragraph 124 above). The Court is not convinced by this argument. First, the applicant pursued court proceedings in order to establish that there had been a violation of his Article 6 rights and to seek damages. The onus was on the domestic courts, having accepted that a violation of Article 6 had occurred, to afford appropriate redress including, if necessary, compensation as requested by the applicant. It was not for the applicant to present to the domestic court arguments as to how the respondent State might comply with its obligation, which followed from

the finding of a breach of Article 6, to provide appropriate redress. Secondly, the Human Rights Act excludes from the scope of “Convention rights” the right to an effective remedy guaranteed by Article 13 (see paragraph 50 above). It was therefore not open to the applicant to argue that section 9(3) ought to be read in a manner compatible with that Article or to seek a declaration of incompatibility. The Government’s objection as to non-exhaustion of remedies is accordingly dismissed.

147. The Court considers that, since the applicant’s claim of violation of Article 6 of the Convention is evidently an arguable one, the complaint under Article 13 as to the lack of an effective domestic remedy must be declared admissible.

## **B. Merits**

### *1. The parties’ submissions*

#### **(a) The applicant**

148. In the applicant’s submission, there was a violation of Article 13 for the same reasons that he retained “victim” status within the meaning of Article 34 of the Convention for the purpose of his complaint under Article 6.

#### **(b) The Government**

149. The Government maintained that the applicant’s right to appeal to the Court of Appeal and that court’s finding of a violation of Article 6 furnished an effective remedy. The Government relied in particular on *Benham*, § 68; *Perks*, § 82; and *Beet*, § 48-50, all cited above. The Government also pointed to the applicant’s failure to exercise his right of appeal in a timely fashion (see paragraph 129 above).

### *2. The Court’s assessment*

150. Article 13 does not guarantee a remedy allowing a Contracting State’s laws, as such, to be challenged before a national authority on the ground of being contrary to the Convention or to equivalent domestic legal norms (see, among other authorities, *James and Others v. the United Kingdom*, 21 February 1986, § 85, Series A no. 98). Accordingly there is no issue under Article 13 insofar as the applicant’s argument is that he ought to have had some effective remedy available to him for challenging section 9(3) of the Human Rights Act, which limits the possibility of claiming damages where the act or failure of which an individual complains is a judicial one (see paragraph 55 above).

151. As regards the applicant’s argument that, in order to receive sufficient and appropriate redress for the violation of Article 6 in his case,

the domestic courts should have awarded him financial compensation, the Court considers that it has examined that issue under the head of “victim” status in relation to the complaint under Article 6 (see paragraphs 131 to 137 above).

152. The Court has held that the applicant can still claim to be a “victim” of a violation of Article 6 insofar as he did not receive any redress in the form of financial compensation for the prejudice caused to him by that violation, namely a lengthened deprivation of liberty (see paragraphs 136 to 137 above). Translating that finding into the terms of Article 13, the Court cannot but conclude that the domestic remedies available to the applicant in relation to his complaint under Article 6 were not fully “effective” for the purposes of Article 13, since they were not capable of affording adequate redress for the prejudice suffered by him in the form of the lengthened deprivation of liberty caused by the absence of legal representation in his case. There has accordingly been a violation of Article 13 in the present case.

#### IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

153. The applicant also complained of a violation of Article 14 taken with Articles 5 and 6. Having regard to all the material in its possession, and in so far as these complaints fall within the Court’s jurisdiction, it finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set forth in the Convention or its Protocols. It follows that these complaints must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

#### V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

154. The Court, while rejecting the applicant’s claims under Article 5, has found a violation of Article 6 § 1, taken in conjunction with Article 6 § 3 (c), by reason of the applicant’s lack of representation during his civil-contempt-of-court hearing and a violation of Article 13, by reason of the inability of the domestic courts to award financial compensation to the applicant for the prejudice caused by that violation of Article 6.

155. The applicant sought just satisfaction for non-pecuniary damage and costs and expenses under Article 41 of the Convention, which 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. Non-pecuniary damage**

156. The applicant claimed GBP 7,500 in respect of non-pecuniary damage. He argued that the domestic courts had found a “clear causal link” between the County Court’s failure to act compatibly with Article 6 and his detention for six weeks instead of one week. The High Court had decided that, if it had found that his Article 5 rights had been violated, it would have awarded him the sum of GBP 6,000. He argued that any award should be uprated to account for inflation and because he had been forced to make an application to the Court in order to secure a remedy.

157. The Government argued that a finding of a violation would be sufficient to afford the applicant just satisfaction.

158. The Court has already decided (see paragraph 137 above) that financial compensation was in principle necessary at the national level to afford the applicant adequate redress for the acknowledged violation of Article 6. It therefore remains only to decide the correct level of the financial compensation to be awarded under Article 41 of the Convention.

159. The Court notes that when Blake J examined what he would have awarded the applicant had he decided that there had been a violation of Article 5 § 1, he found that GBP 6,000 would have been appropriate redress (see paragraph 34 above).

160. The Court does not attach any decisive weight to the fact that, instead of lodging an appeal immediately following the making of the committal order by the County Court judge, as he could have done, the applicant waited until he was released from prison to do so (see paragraphs 14 to 16 above). This is because in the context of Article 41 of the Convention it is also relevant that he was unrepresented and not legally advised at the committal hearing. The lawyers whom he contacted from prison failed to assist him properly. While he received GBP 500 from those lawyers in compensation for their failure to assist (see paragraph 14 above), that compensation does not, in the Court’s opinion, remove the “necessity” under Article 41 of the Convention to afford him “just satisfaction” as reparation for the prejudice caused to him by the violation of Article 6 § 1, taken in conjunction with Article 6 § 3(c). It follows from the Court’s conclusion on “victim” status (see paragraph 137 above) that the additional, unjustified five weeks’ deprivation of liberty, which the High Court was satisfied had occurred in the applicant’s case on account of the procedural shortcomings before the County Court (see paragraph 34 above), gave rise to prejudice which was not sufficiently compensated by the domestic courts’ acknowledgement of a violation of Article 6 of the Convention. There are



no exceptional reasons (see *Piper v. the United Kingdom*, no. 44547/10, § 73, 21 April 2015) to hold that the finding by this Court of a violation of Article 6 would in its turn in itself constitute adequate “just satisfaction” for the purposes of Article 41 in relation to those five additional weeks of imprisonment.

161. As regards its finding of a violation of Article 13, the Court accepts that the lack of a fully “effective” domestic remedy, which prompted the applicant to lodge an application under the Convention in order to obtain adequate redress, was liable to have caused him some frustration.

162. Making its assessment on an equitable basis, the Court awards the applicant EUR 8,400, plus any tax that may be chargeable, in respect of the two violations found.

## **B. Costs and expenses**

163. The applicant also claimed GBP 13,244.21 for the costs incurred before the Court, inclusive of VAT.

164. The Government argued that the sums charged by counsel were excessive, both as to the number of hours billed and the applicable rate. In particular, the Government argued that counsel should only be reimbursed at the rate (GBP 120 per hour) which he would have been paid had he been acting for the Government as a member of the Attorney General’s A Panel of counsel who undertake civil and European Union-related legal work. Finally, the Government argued that the Court should, unless it finds for the applicant on all his complaints, reduce the amount of costs awarded to reflect his partial success.

165. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only insofar as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see *Kingsley v. the United Kingdom* [GC], no. 35605/97, § 49, ECHR 2002-IV).

166. As to the number of hours billed, the Court accepts the Government’s argument that it is too high because a number of the issues had already been aired before the national courts, which should have reduced the time needed by both counsel and the applicant’s solicitors for the preparation of the case. The Court finds that the rate at which counsel was paid appears to be reasonable. Finally, the Court observes that it has rejected the applicant’s main argument that Article 5 had been violated.

167. Regard being had to the documents in its possession and the above factors, the Court considers it reasonable to award the sum of EUR 6,000 covering costs for the proceedings before the Court, inclusive of any tax that may be chargeable.

### C. Default interest

168. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

### FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaints under Articles 5, 6 and 13 concerning the applicant's committal for civil contempt admissible and the remainder of the application inadmissible;
2. *Holds*, by four votes to three, that there has been no violation of Article 5 § 1 of the Convention;
3. *Holds*, unanimously, that there has been a violation of Article 6 § 1 read in conjunction with Article 6 § 3 (c) of the Convention;
4. *Holds*, unanimously, that there has been a violation of Article 13 of the Convention;
5. *Holds*, unanimously,
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
    - (i) EUR 8,400 (eight thousand four hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
    - (ii) EUR 6,000 (six thousand euros), inclusive of any tax that may be chargeable to the applicant, in respect of costs and expenses;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 March 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach  
Deputy Registrar

Mirjana Lazarova Trajkovska  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint partly dissenting opinion of Judges Sicilianos, Spano and Harutyunyan is annexed to this judgment.

M.L.T.  
A.M.W.

## JOINT PARTLY DISSENTING OPINION OF JUDGES SICILIANOS, SPANO AND HARUTYUNYAN

### I.

1. On 26 and 27 July 2005 the applicant appeared before a family court judge in the context of proceedings on the basis of his application for contact with two of his five children. The judge decided to hear at the same time an application by his wife for the applicant to be committed for contempt of court. The applicant, thus facing the real possibility of being sent to prison, was not represented by a lawyer and the judge made no inquiries into why the applicant was unrepresented or whether he wanted representation. The applicant was clearly unable to plead effectively against the application to detain him. This notwithstanding, the judge made an order depriving the applicant of his liberty by committing him to prison for three months because he had breached an undertaking not to contact his wife and family members, as well as an injunction preventing him from using or threatening violence towards his wife. On appeal against the contempt finding, the Court of Appeal, unsurprisingly, quashed both the finding of contempt and the sentence imposed.

2. The majority find that notwithstanding this turn of events, the applicant's detention order was lawful under Article 5 § 1 (a) of the Convention and not arbitrary. Taking firstly account of the fact that the Government do not directly or indirectly invoke Article 5 § 1 (a) of the Convention as a basis for the detention and, secondly, bearing in mind the findings of the Court of Appeal, we respectfully dissent from the majority's findings that there has been no violation of Article 5 § 1 in the applicant's case.

### II.

3. The nature and formulation of Article 5 § 1, presenting an exhaustive list of permissible exceptions to the general rule that a person should not be deprived of his liberty, requires that the Government invoke a particular basis under one or more of the subparagraphs of that provision in support of its claim that a particular detention order was lawful. It is not for this Court to examine, *proprio motu*, a complaint under Article 5 on the basis of a particular justification provided by that provision not invoked, directly or indirectly, by the defendant Government. Thus, in the case of *Beiere v. Latvia* (no. 30954/05, § 53, 29 November 2011), the Court found that "the deprivation of the applicant's liberty was not ordered in accordance with Article 5 § 1 (b) of the Convention". The Court then concluded that as the Government "[had] not argued that it was justified by any of the remaining subparagraphs of Article 5 § 1, [there had] been a violation of Article 5 § 1". It also goes without saying that the Court cannot ascribe to

the applicant the intention to assist the Government in this endeavour by relying on his pleadings in this regard, thus basing its examination of the applicant's complaint on a subparagraph of Article 5 § 1 only invoked by the applicant and not the Government.

4. It follows that if the Government rely on a particular subparagraph of Article 5 § 1 before this Court in their defence against a complaint of unlawful deprivation of liberty, the Court's examination is limited to reviewing the Government's pleaded justification. However, that is not what happened in the present case.

5. As stated in paragraph 68 of the judgment, the Government argued that the applicant's detention was covered by Article 5 § 1 (b) of the Convention because he was detained for non-compliance with an undertaking and a court order and/or the detention was to secure compliance with the undertaking and court order. Article 5 § 1 (a), ultimately found by the majority to provide acceptable justification for the applicant's detention, is not invoked by the Government, but is referred to only by the applicant in his pleadings.

6. One may ask why this distinction matters. The reasons are twofold. Firstly, as explained in more detail below (see paragraph 12), it is the settled case-law of the Court that the notion of arbitrariness in the context of Article 5 "varies to a certain extent depending on the type of detention involved" (*Saadi v. the United Kingdom* ([GC], no. 13229/03, ECHR 2008). Secondly, Article 5 § 1 (a) forms in substance the applicable exception to all deprivations of liberty in the form of prison sentences for criminal acts falling under Article 6 of the Convention. Since the Court is not an appeal court against decisions of national courts, it will not substitute its own views on the appropriateness of a sentence for those national authorities. However, Article 5 § 1 (b) is different. In the assessment of whether a detention order is arbitrary, the first limb, which is clearly applicable in the present case, requires a strict assessment of the necessity of the detention for a particular and well-defined aim, that is to say to secure compliance with a lawful order of a court which may or may not be a criminal act under domestic law. The same applies in principle to those detentions that are justified under Articles 5 § 1 (d), (e) and (f).

7. In short, by proceeding on the basis that both Articles 5 § 1 (a) and (b) were applicable in the present case, and accepting that the applicant's detention was justified under the former without the Government invoking this exception in its pleadings, the majority have in our view subjected the applicant's complaint to a less stringent examination of lawfulness than was required by the Government's stated justification for his deprivation of liberty. Applying Article 5 § 1 (b) would have led to the opposite conclusion, a finding of a violation in the applicant's case, as we will now explain.

## III.

8. The relevant principles governing the assessment of “lawfulness” and the notion of “arbitrary detention” under Article 5 § 1 were set out in the Court’s Grand Chamber judgment in *Mooren v Germany* ([GC], no. 11364/03, §§ 72-75 and 77-81).

9. In *Mooren*, cited above, the Court recalled that where the “lawfulness” of detention is in issue, including the question whether “a procedure prescribed by law” has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see § 72).

10. Although it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention and the Court can and should therefore review whether this law has been complied with. However, the Court has explained that not every fault discovered in a detention order renders the underlying detention unlawful as such for the purposes of Article 5 § 1. A period of detention is, in principle, “lawful” if it is based on a court order. A subsequent finding of a superior domestic court that a lower court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention (see *Mooren*, cited above, §§ 73-74).

11. The Court then went on to further specify the circumstances under which the detention remained lawful in the said intervening period for the purposes of Article 5 § 1: for the assessment of compliance with Article 5 § 1 of the Convention, a basic distinction has to be made between *ex facie* invalid detention orders – for example, given by a court in excess of jurisdiction or where the interested party did not have proper notice of the hearing – and detention orders which are *prima facie* valid and effective unless and until they have been overturned by a higher court. A detention order must be considered as *ex facie* invalid if the flaw in the order amounted to a “gross and obvious irregularity” in the exceptional sense indicated by the Court’s case-law. Accordingly, unless they constitute a *gross and obvious irregularity*, defects in a detention order may be remedied by the domestic appeal courts in the course of judicial review proceedings (see § 75).

12. As regards the principles governing the notion of arbitrariness, the Court in *Mooren* referred, *inter alia*, to §§ 67-68 of the Court’s judgment in *Saadi v. the United Kingdom*, cited above, where the Grand Chamber held that in the light of the purpose of Article 5 § 1, the provision requires arbitrariness review “in addition to compliance with national law”. The notion of arbitrariness in the context of Article 5 “varies to a certain extent

depending on the type of detention involved”. Importantly for the present case, the Court in Saadi held as follows (see § 69):

“The condition that there be no arbitrariness further demands that both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant subparagraph of Article 5 § 1.”

13. In the light of the general principles stated above, the questions that arise in the present case are firstly whether the procedural defects in the course of the committal proceedings, in which the applicant was detained for three months, constituted *gross and obvious irregularities* within the meaning of *Mooren*. As arbitrariness review under Article 5 § 1 is required in addition to compliance with national law, it must secondly be determined whether the order to commit the applicant “genuinely conformed with the purpose of the restriction under Article 5 § 1 (b)” even assuming that the procedural defects did not attain the level required by *Mooren*. Lastly, before proceeding with our examination on this basis, we observe that in the application of these principles, we, like the majority (see paragraph 74 of the judgment), will take into account the well-settled principle in the Court’s case-law that only a narrow interpretation of the permissible grounds under Article 5 § 1 is consistent with the aim of this provision, namely to ensure that no one is arbitrarily deprived of his liberty. It is therefore for the Government to convincingly demonstrate that a permissible ground for restricting the applicant’s liberty existed on the particular facts of the case.

#### IV.

14. We shall begin by examining whether the detention order was in compliance with national law, applying the “gross and obvious irregularity test” under *Mooren* (see paragraph 11 above).

15. As is necessary in cases of this nature, the inquiry must begin with the domestic courts’ findings on issues of lawfulness for the purposes of domestic law, both substantive and procedural, in the present case the Court of Appeal’s judgment quashing both the finding of contempt and the sentence imposed (see paragraphs 16-25 of the judgment). Lord Justice Moses’s analysis can be summarised as follows:

*Firstly*, he held that there was “no reason why the applicant should not [have been] represented” (paragraph 19).

*Secondly*, “the decision to hear the application for committal at the same time as the application for contact led to inescapable errors in procedure” and “placed the applicant in an impossible position” (paragraphs 20-21).

*Thirdly*, and most importantly in our view, the family court judge “paid no heed to the purpose of punishment in contempt proceedings” and since the applicant had not been represented and had never been given an opportunity to mitigate, the sentencing phase of the committal was “fatally flawed” (paragraph 22).

*Fourthly*, Lord Justice Moses made a causal connection between the lack of legal representation and the outcome stating that there was “ample material to suggest that legal representation would have made a difference” as there was “material relevant to the facts of the breaches to which the judge’s attention ought to have been drawn” (paragraph 23).

16. We also note that Lord Justice Wall, in a concurring opinion, agreeing with his colleague in the Court of Appeal, summed up the analysis by declaring that “the defects in the process” were considered “so serious” that the “interests of justice” required both the committal order and the consequential sentence of imprisonment to be set aside (see paragraph 24).

17. It is true that the Court of Appeal did not explicitly refer to or rely on Article 5 in its examination of the applicant’s appeal against the contempt finding but only referred to Article 6 and the applicant’s right to legal assistance under Article 6 § 3 (c) and Article 6 § 2 on the burden of proof. Therefore, the judgment cannot be read as necessarily concluding that the detention order was *ex facie* invalid in the light of the *gross and obvious irregularity test* under *Mooren*, cited above. Nevertheless, we consider it self-evident that the findings of the domestic court, which, in and of themselves, cast serious doubt on the lawfulness of the applicant’s detention, must be given substantial weight in our independent examination of whether the detention order was lawful for the purposes of Article 5 § 1 (b).

18. Drawing on the Court of Appeal’s characterisation of the procedural defects in the applicant’s case, we firstly emphasise that although he faced being sent to prison, he was not assisted by a lawyer, a right which he clearly had under domestic law as interpreted by the Court of Appeal. According to Lord Justice Moses this procedural defect had very detrimental consequences for the ability of the applicant to be able to defend himself in any meaningful sense. We note that in *Mooren*, cited above, § 75, one of the examples given by the Grand Chamber of where a detention order might be *ex facie* invalid, due to a gross and obvious irregularity in the proceedings, is “where the interested party did not have proper notice of the hearing”. In our view, and here we fully share the characterisation given to the proceedings by the Court of Appeal, although the applicant was given notice to appear and attended the hearing, he was firstly put in an “impossible position” by having on the one hand to make representations in the contact proceedings and on the other to defend himself without any legal knowledge against the application for committal. Secondly, he was incapable, owing to his lack of legal assistance, to draw the judge’s attention to “material relevant to the facts of the breaches”, the actual charges upon which the committal order was based, and thirdly to make any arguments against the actual prison sentence, Lord Justice Moses characterising this phase of the proceedings as “fatally flawed”.



19. In other words, we do not see that there is a fundamental difference between the nature, scope and consequences of these very serious procedural defects in the committal proceedings, manifested in the applicant's complete lack of any meaningful ability to defend himself in the absence of a lawyer, and the Grand Chamber's explicit recognition in *Mooren* that a simple lack of notice to appear at all would constitute a gross and obvious irregularity having the effect that a detention order must be considered *ex facie* invalid and thus not lawful for the purposes of Article 5 § 1. Indeed, for the purposes of the requirements of lawfulness under this provision, and taking account of the nature of the elements to be determined under Article 5 § 1 (b), by proceeding with committing the applicant to prison without giving him any real and effective opportunity of defending himself against the committal order with the assistance of a lawyer, the procedural defects were not materially different in their overall scope and consequences from a situation where the applicant would have simply been committed to prison without having been notified of the dates of the hearings.

20. In sum, we conclude that the committal proceedings in the present case were so infected with manifest and grave procedural errors that the detention order must be considered to have been *ex facie* invalid within the meaning of the Grand Chamber judgment in *Mooren*, cited above, and the applicant's detention was thus not lawful under Article 5 § 1.

21. We note that even assuming that the procedural defects in question were not considered to amount to gross and obvious irregularities under *Mooren*, it is clear in our view that the committal order cannot, in any event, survive the test of arbitrariness as formulated in *Saadi*, cited above, § 69, and confirmed in *Mooren*. We recall the principle as enunciated in *Saadi* that "the condition that there be no arbitrariness further demands that both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant subparagraph of Article 5 § 1".

22. Applying this test of arbitrariness in the context of Article 5 § 1 (b) to the facts of the present case, it suffices, in our view, to recall that in the appeal proceedings against the contempt finding, the Court of Appeal found that the family court judge had "paid no heed to the purpose of punishment in contempt proceedings" and the sentencing phase had thus been "fatally flawed". That finding at domestic level is, for present purposes, decisive for us in also concluding that the Government have not convincingly demonstrated that the order to detain the applicant, Mr Hammerton, genuinely conformed with the purpose of Article 5 § 1 (b) to secure compliance with the lawful order of a court.