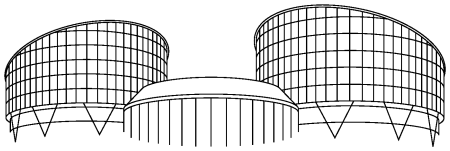

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF GOUGH v. THE UNITED KINGDOM

(Application no. 49327/11)

JUDGMENT

STRASBOURG

28 October 2014

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Gough v. the United Kingdom,

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

Ineta Ziemele, *President,*
Päivi Hirvelä,
Ledi Bianku,
Nona Tsotsoria,
Paul Mahoney,
Krzysztof Wojtyczek,
Faris Vehabović, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 7 October 2014,

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

PROCEDURE

1. The case originated in an application (no. 49327/11) 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 Stephen Peter Gough ("the applicant"), on 29 July 2011.

2. The applicant, who had been granted legal aid, was represented by Bindmans LLP, a firm of solicitors based in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, of the Foreign and Commonwealth Office.

3. The applicant alleged, in particular, that his repeated arrest, prosecution, conviction and imprisonment for being naked in public and his treatment in detention violated his rights under Articles 3, 5 § 1, 7 § 1, 8, 9 and 10 of the Convention.

4. On 25 September 2012 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1959 and lives in Eastleigh.

A. Arrest, prosecution, conviction and imprisonment

1. Background

6. The applicant adheres to a firmly held belief in the inoffensiveness of the human body. This has in turn given rise to a belief in social nudity, which he expresses by being naked in public. In 2003 he decided to walk naked from Land's End in England to John O'Groats in Scotland, earning the nickname "the naked rambler".

7. The following chronology is a summary of the details provided by the parties pertaining to the applicant's arrests, prosecutions, convictions and sentences of imprisonment since July 2003. All arrests listed were the result of nudity in public unless otherwise indicated.

(a) The first trek 2003/2004

8. The applicant began his trek at Land's End in 2003.

9. He was arrested in Scotland on five occasions between 29 July 2003 and 18 August 2003 on charges of breach of the peace (see paragraphs 100-102 below) and public indecency for being naked in public. No further action was taken in respect of the first two offences. He was released on bail in respect of the others but no further action was ultimately taken.

10. On 19 August 2003 he was arrested and detained for breach of the peace. He was released on bail on 26 August after agreeing to remain clothed. However, he was rearrested on 27 August on a charge of breach of the peace committed while on bail for being naked in public. On 3 October 2003 he was convicted at Dingwall Sheriff Court in respect of the 27 August offence and admonished. He was then released. He lodged an appeal which was later dismissed for unknown reasons.

11. Meanwhile, on 3 October 2003 following his release, he was arrested and charged with breach of the peace committed while on bail. He was remanded in custody. On 7 November 2003 he was convicted at Dingwall Sheriff Court and sentence was deferred. On 28 November 2003 a sentence of three months' imprisonment was imposed, backdated to the date of his arrest. He was released on 29 November 2003.

12. On the same day he was arrested and charged with breach of the peace committed while on bail. He was remanded in custody. Following a trial on 7 January 2004 he was convicted and sentenced to three months' imprisonment, backdated to 1 December 2003. He lodged an appeal which was later dismissed for unknown reasons. He was released on 15 January 2004 and resumed his trek.

13. All periods of detention were spent in HMP Inverness in segregation as the applicant refused to dress.

14. On 22 January 2004 the applicant completed his trek at John O'Groats and returned to his home in Eastleigh, England.

(b) The second trek 2005/2006

15. In June 2005 the applicant commenced a second trek at Land's End, intending to walk to John O'Groats.

16. On 1 September 2005 he was arrested in Scotland and charged with breach of the peace. He was detained on remand and convicted on 9 September. He was sentenced to fourteen days' imprisonment. He was released on 15 September 2005.

17. Upon leaving the prison, the applicant was arrested and charged with breach of the peace. He was released on bail.

18. On 20 September 2005 the applicant was arrested and charged with breach of the peace. He was released on bail.

19. On 3 October 2005 he was arrested and charged with breach of the peace and an offence under section 27(1)(b) of the Criminal Procedure (Scotland) Act 1995 (breach of bail conditions – see paragraph 103 below). He was detained on remand. On 21 October 2005 he was convicted in Dingwall Sheriff Court of a breach of bail conditions and sentenced to imprisonment for two months, the sentence being backdated to 4 October 2005. He was found not guilty of breach of the peace.

20. He was released on 3 November 2005 and immediately rearrested. He was charged with breach of the peace and a breach of bail conditions for being naked in public. On 15 November 2005 he appeared at Edinburgh Sheriff Court naked to be tried on the charges relating to the arrest on 3 November 2005. The Sheriff found the applicant to be in contempt of court and sentenced him to three months' imprisonment.

21. On 1 December 2005 it was decided that no further action would be taken in respect of the applicant's arrest on 20 September 2005.

22. On 19 December 2005 the applicant appeared again for trial at Edinburgh Sheriff Court but refused to wear clothes. The Sheriff again found the applicant to be in contempt and deferred the matter of sentence.

23. On 21 December 2005 the applicant was due to stand trial at Edinburgh Sheriff Court on the charges relating to the arrest on 15 September 2005. He refused to dress. The Sheriff found him to be in contempt of court. She adjourned the trial proceedings and deferred consideration of the matter of sentence for the contempt charge until 9 January 2006.

24. On 9 January 2006 the applicant's plea of not guilty to the two outstanding breach of the peace charges was accepted. He was convicted of breaching of bail conditions and admonished. Sentence was further deferred in respect of the contempt findings and the applicant was released on bail on 10 January 2006.

25. On 12 February 2006 the applicant was arrested for breach of the peace. No further action was taken.

26. On 14 February 2006 the applicant was again arrested for breach of the peace. He was released on bail.

27. On 21 February 2006 he completed his trek at John O'Groats.

28. On 1 March 2006 he entered Edinburgh Sheriff Court naked to face proceedings related to the outstanding findings of contempt of court. He was arrested and charged with breach of the peace.

29. On 2 March 2006 he appeared on those charges before the Sheriff. He was found to be in contempt of court for appearing naked in court and sentenced to two months' imprisonment. He lodged an appeal against the sentence.

30. On 15 March 2006 it was decided that no further action would be taken in respect of the applicant's arrest on 14 February 2006.

31. On 6 April 2006 the applicant was convicted of breach of the peace committed while on bail in respect of his nudity on 1 March 2006. He was sentenced to three months' imprisonment, backdated to 2 March. It appears that he was released on 14 April 2006 and returned home to Eastleigh.

32. All periods of detention except for a week from 16-23 November 2005 were spent in segregation in HMP Inverness and HMP Edinburgh because the applicant refused to wear clothes.

(c) Detention from 2006-2009

33. On 18 May 2006, during a flight from Southampton to Edinburgh to attend the appeal hearing in respect of the sentence for contempt of court, the applicant removed his clothes. Upon arrival at Edinburgh airport, he was arrested for breach of the peace and public indecency committed while on bail. He was detained on remand. On 23 June 2006 he was convicted of the charges and sentenced to four months' and two months' imprisonment respectively, to run concurrently backdated to 19 May. He lodged an appeal which was later dismissed for unknown reasons. He was released on 19 July 2006.

34. On the same day, he was arrested on a charge of breach of the peace committed while on bail and detained on remand. He was convicted on 25 August 2006 and a seven-month prison sentence was imposed. He lodged an appeal which was later dismissed for unknown reasons. He was released on 3 November 2006.

35. On the same day, he was arrested in the prison car park on a charge of breach of the peace committed while on bail. He was detained on remand. He appeared naked in court on 6 November 2006 and was found to be in contempt of court. A two-month sentence was imposed. On 13 December 2006 he was found guilty of breach of the peace in respect of the 3 November charge. He was sentenced to six months' imprisonment, backdated to 5 December. He was released on 5 March 2007.

36. Upon his release, he was rearrested on a charge of breach of the peace in the prison car park. He was detained on remand. On 9 April 2007 he was found not guilty of a charge of breach of the peace as the Sheriff was

not persuaded that he had caused any alarm or disturbance. He was subsequently released.

37. On 10 April 2007 he was arrested on a charge of breach of the peace and detained on remand. He was convicted on 9 May 2007 and sentenced to three months' imprisonment, backdated to 11 April. He lodged an appeal which was later dismissed for unknown reasons. He was released on 25 May 2007.

38. On the same day, he was arrested on a charge of breach of the peace committed while on bail and detained on remand. He was convicted on 25 June 2007 and sentenced to sixty days' imprisonment, plus fourteen days outstanding from his previous sentence. He lodged an appeal; the outcome of the appeal is not known. He was released on 31 July 2007.

39. On the same day, he was arrested on a charge of breach of the peace and detained on remand. He was convicted on 3 September 2007 and sentenced to sixty days' imprisonment, plus twenty-three days outstanding from his previous sentence. He lodged an appeal which was later dismissed for unknown reasons. He was released on 12 October 2007.

40. On the same day he was arrested and charged with breach of the peace. It appears that he was not held in custody. Three days later, on 15 October 2007, he was arrested on a charge of breach of the peace and detained on remand. A decision was made to take no further action in respect of the 12 October arrest.

41. On 7 November 2007, while the applicant was on remand, his appeal against sentence for contempt of court was rejected by the Appeal Court of the High Court of Justiciary ("the Appeal Court").

42. On 15 November 2007 he was convicted in respect of the 15 October arrest. Sentence was deferred and the applicant remained in detention.

43. On 30 November 2007 the applicant was sentenced to three months' imprisonment for contempt of court in respect of a contempt finding dating back to December 2005.

44. On 4 December 2007 the applicant was sentenced to thirty days' imprisonment in respect of each of the two outstanding contempt of court rulings, to run concurrently.

45. On 18 January 2008 the applicant appeared at Edinburgh Sheriff Court in respect of the deferred sentence for the 15 November 2007 conviction. Sentence was further deferred and the applicant was released. As he emerged from court naked, he was rearrested on a breach of the peace charge and detained on remand. On 26 February 2008 he was convicted and sentenced to four months' imprisonment. He lodged an appeal which was later dismissed for unknown reasons. He was released on 7 March 2008.

46. On the same day, he was arrested on a charge of breach of the peace committed while on bail and detained on remand. He was convicted on 15 April 2008 and sentenced to twelve months' imprisonment.

47. On 23 April 2008 he was admonished in respect of the breach of the peace conviction of 15 November 2007.

48. On 14 October 2008 the applicant was released. He was arrested in the prison car park on a charge of breach of the peace and detained on remand. On 14 November 2008 the Sheriff ruled that there was no case to answer.

49. The applicant was released but was immediately rearrested on a charge of breach of the peace and detained on remand. On 18 December 2008 he was convicted at Glasgow Sheriff Court. He was sentenced to eight months' imprisonment.

50. The applicant's detention throughout this period was spent in HMP Edinburgh, HMP Barlinnie, HMP Glenochil and HMP Perth in segregation because he refused to put on clothes.

2. The June 2009 arrest

(a) The arrest

51. At around 7.45 a.m. on 18 June 2009 the applicant was released from HMP Perth. He walked out of the prison naked and was arrested, after refusing to get dressed when asked to do so by two police officers waiting some metres from the prison gates, on Edinburgh Road. He was charged in the following terms:

> "... [Y]ou ... did conduct yourself in a disorderly manner, did walk in a public place naked, refuse to wear any clothing when asked to do so, indicate that you had no intention of wearing any clothing when in public and did commit a breach of the peace."

52. He pleaded not guilty and was detained in prison on remand in segregation as he refused to dress.

(b) The trial proceedings

53. On 16 July 2009 the applicant's trial took place at Perth Sheriff Court. He chose to remain naked and represented himself. He was asked by the Sheriff if he wished the services of a lawyer but replied that he did not. He maintained his plea of not guilty. The Sheriff indicated that he risked being found in contempt of court if he failed to put on clothes. The applicant refused to dress. The Sheriff allowed him to be present in court after a screen covering the lower half of his body was hastily constructed.

(i) The evidence

54. The two police officers who had arrested the applicant gave evidence. Police Officer A described Edinburgh Road as a "major route into Perth" from the motorway. It was a "busy road" and at the material time there was a continuous flow of traffic along the road. He was firmly of the view that the applicant's nudity in a public place would cause alarm to

anyone. During cross-examination by the applicant, Police Officer A agreed that the human body was in itself decent and was not harmful or alarming. He accepted that nothing in the applicant's behaviour at the time of his arrest, other than his nakedness, gave the police any cause for concern. Police Officer B gave evidence that she considered the fact that the applicant had no clothes on in a public place to be very strange and unusual and that she was "quite shocked" by it. She explained that at the time, Edinburgh Road had been very busy with vehicular and pedestrian traffic. She had previously seen elderly people and children in the area, and there were schools and housing nearby. In cross-examination she also agreed that the human body in itself was not harmful, indecent or bad but maintained that although she had been forewarned that she would be likely to see a naked man in public she had still been shocked. She confirmed that no complaints had been received from members of the public.

55. The applicant gave evidence in his defence. When asked by the prosecution why he was wearing no clothes, he replied that he was making a stand and that "we're innocent until we do something wrong". He did not believe that he was causing harm by not wearing clothes. He said that he did not wear clothes in order to provoke a reaction: although he had not always been like that, as he had grown older he had thought more about his beliefs. When asked what he hoped to achieve by making his stand, the applicant replied that he did it because he felt that it was right and that the world changed in its own way.

(ii) The conviction and sentence

56. The Sheriff found the applicant guilty of breach of the peace and contempt of court. He considered that being naked in a public place and refusing to wear clothes in a public place was conduct that would be alarming and disturbing, in its context, to any reasonable person. In his stated case prepared in the context of the applicant's later appeal, the Sheriff explained:

> "56. ... There was no dispute on the facts of the case ... I accepted that the police officers were concerned that if the appellant did not put clothes on there was a very real likelihood of him causing fear and alarm to other members of the public ..."

57. He continued:

> "58. The position of the appellant is somewhat difficult to understand. He made it clear to the two police officers that he had no intention whatsoever of putting clothes on. He insisted on being naked in a public place. He believed that he was doing no wrong by being naked in a public place. He did not accept that he had committed an offence."

58. He noted that in questioning the police officers, the applicant had chosen not to differentiate between private and public places when it came to nakedness. He concluded:

> "60. I was entirely satisfied that the conduct of the appellant with the aggravation of his refusal to wear clothing in a public place amounted to a breach of the peace. The criteria for a breach of the peace as discussed in the case of *Smith v. Donnelly* had been met ... The evidence of the appellant did not raise a doubt in my mind. Accordingly I convicted the appellant as libelled."

59. At sentencing, the Sheriff had before him the applicant's previous convictions. According to the stated case, the applicant confirmed to the Sheriff that all previous convictions were for breach of the peace. The Sheriff's stated case continued:

> "61. ... He acknowledged that he had spent the last five years or thereby in prison for the same offence. A pattern has emerged namely that on his release from prison when he 'stepped out' of the prison gate, always naked, he was immediately arrested.
>
> 62. I asked the appellant what he was hoping to achieve by insisting on being naked in public. He talked about 'his beliefs'. I simply could not understand what he had to say in this regard. He did not appear to be waging any campaign or making a protest. He informed me that he would rather not be in prison. If he was not in prison, he would go back to live with his mother in a village in Cornwall. He had previously worked as a driver of large goods vehicles ..."

60. The Sheriff discussed sentencing options with the applicant. In his stated case he explained:

> "32. ... I enquired of him if I was minded to defer sentence for whatever reason and admit him to a bail order would he then wear clothes. After some thought the appellant stated that he would not be prepared to wear clothes ..."

61. The Sheriff's stated case concluded:

> "63. Taking all these matters into account I could see no alternative to a custodial sentence. In view of the content of the Notice of Previous Convictions I deemed it appropriate to impose the maximum of 12 months' imprisonment which I backdated to the date that he had been taken into custody."

62. A further four months' imprisonment, to run concurrently, was imposed for contempt of court.

(c) The appeal

63. The applicant sought to appeal his conviction and sentence by way of note of appeal and a draft stated case was prepared by the Sheriff in September 2009.

64. The applicant was provided with a copy of the stated case and was asked for details of any proposed changes. By letter of 5 October 2009 the applicant proposed a number of changes.

65. On 12 October 2009 a hearing was held to consider the proposed adjustments to the case stated. The applicant was brought from HMP Perth to attend the hearing and blankets were provided to facilitate his attendance. He was told that if he refused to wear clothes or make use of the blankets he would not be admitted into the court. He refused to wear clothes or to make

use of the blankets and was accordingly not permitted to attend the adjustment hearing. The hearing proceeded in his absence and his requested adjustments were considered by the Sheriff. Two adjustments were allowed and the remaining adjustments rejected.

66. Concerned that the stated case was biased, the applicant did not lodge it with the Justiciary Office. On 29 October 2009, the expiry of the applicable time-limit for lodging, his appeal was deemed abandoned.

67. The applicant spent his sentence in segregation at HMP Perth as he refused to wear clothes. On 17 December 2009 he was released from prison.

3. The December 2009 arrest

68. Minutes after his release on 17 December 2009, the applicant was arrested and charged with breach of the peace for being naked in public. He was detained on remand.

69. On 11 January 2010 he was convicted of breach of the peace. Sentence was deferred to 8 February for up-to-date psychiatric and psychological assessments.

70. On 8 February 2010 the applicant was sentenced to a term of twelve months' imprisonment plus 180 days unserved from previous sentences. He lodged an appeal; the outcome of the appeal is not known. He was kept in segregation at HMP Perth while in prison because he refused to dress.

71. He was released on 29 October 2010.

4. The October 2010 arrest

72. Minutes after his release on 29 October 2010, the applicant was arrested and charged with breach of the peace for being naked in public. He was detained on remand.

73. On 24 November 2010 he was found guilty of breach of the peace and contempt of court. On 25 November he was sentenced to 312 days' imprisonment in respect of the breach of the peace charge together with 74 days unserved from previous sentences plus 90 days for contempt of court, to be served consecutively. He was not kept in segregation while in prison at HMP Perth.

74. He was released on 20 July 2011.

5. The July 2011 arrest

(a) The arrest

75. Minutes after his release on 20 July 2011 at around 9 a.m., the applicant was approached by two police officers on Manson Terrace, a public road leading from HMP Perth to Edinburgh Road. The officers suggested that he put on some clothes but he refused to do so. He was

arrested him for breach of the peace and detained on remand. He appeared in court on 21 July 2011 and pleaded not guilty.

(b) The trial proceedings

76. The trial commenced on 24 August 2011. The applicant appeared in court naked and was warned by the Sheriff that if he refused to dress or to cover himself he might be held in contempt of court. He refused to put on clothes.

(i) The evidence

77. The prosecution led evidence of two police officer witnesses at trial. Their evidence was similar to that given at the 2009 trial and the applicant's cross-examination was also in similar terms and elicited similar responses (see paragraph 54 above).

78. The applicant did not give evidence in his defence. He argued that his arrest and trial violated the Convention. He relied, *inter alia*, on Article 5, arguing that there was no reasonable suspicion which would satisfy an objective observer that he had committed an offence; Article 8, arguing that his arrest was arbitrary as it was based on the subjective belief that his nakedness was offensive; Article 9, arguing that he had a strong view that there was nothing indecent about his body and that view was not being respected; Article 10, arguing that he ought to have been given the right to express his views that nakedness was not indecent in the way that he had chosen to do; and Article 14, arguing that he was being discriminated against because he had different views from the majority of people.

(ii) The conviction and sentence

79. The Sheriff found that the applicant's conduct on 20 July 2011 was severe enough to cause alarm to ordinary people; threatened serious disturbance to the community; and presented as genuinely alarming, in its context, to any reasonable person. He therefore convicted the applicant. In his stated case prepared in the context of the later appeal proceedings, the Sheriff referred to the applicant's Convention arguments and continued:

> "14. I should say that none of these arguments were developed to any extent and it was not always easy to see what [the applicant's] full argument was. I came to the conclusion that none of the articles suggested by the appellant had been contravened in the procedure ..."

80. As to the conviction handed down, he explained:

> "15. In my view there was no doubt about the facts in this case ... The question was whether the conduct amounted to a breach of the peace. I was of the view that the first part of the test was easily met by the conduct. The appellant was walking along a public street in full view of anyone passing and he was completely naked with his private parts entirely on show. Such conduct would be severe enough to cause alarm to ordinary people especially when it was being carried out in an ordinary public

street. It might be different if he had been naked somewhere in private, even in a public place which was remote or where fewer people would be congregated, but in or near one of the main streets of a busy town his appearance in that state would be alarming.

16. The question which was more troubling was whether the second part of the test was met. Would the conduct cause serious disturbance to the community? I came to the conclusion that the context in which the conduct was taking place – being naked in a brazen fashion in the public street with no attempt to cover himself and no obvious explanation or reason for the conduct – would cause serious disturbance to the community because of the reaction of ordinary people to his presence in that state in that place. That would be particularly so if the community could see that children or vulnerable old people might be present. I considered that the test was met and that the charge was proved beyond reasonable doubt. I therefore found the appellant guilty."

81. The applicant was sentenced to a term of imprisonment of 330 days for the breach of the peace and 90 days for the contempt charge, together with 237 days unspent from his previous sentence, a total of 657 days. The sentences were not backdated and they were to run consecutively. The total length of the sentence was therefore one year, nine months and eighteen days.

(c) The appeal

82. The applicant sought to appeal his conviction by way of note of appeal and a draft stated case was prepared by the Sheriff.

83. Adjustments to the stated case were proposed by both parties and a hearing was held. The applicant was not permitted to attend the hearing since he refused to wear clothes.

84. On 28 October 2011 the applicant lodged an appeal by way of case stated, relying on Articles 5, 6, 7, 8, 9, 10 and 14 of the Convention.

85. On 18 November 2011 the applicant's application for leave to appeal was considered by the first sift judge. Leave was refused for the following reasons:

"The appeal is not arguable. The Sheriff has carefully explained the reasons for arriving at his decision. There was no infringement of the appellant's rights in terms of the European Convention on Human Rights."

86. On 22 December 2011 the applicant was refused leave on the second sift. The judges found that for the reasons given by the first sift judge the appeal was not arguable.

87. The applicant was not kept in segregation while serving his sentence at HMP Perth. He was released on 17 July 2012.

6. Subsequent arrests in Scotland

88. On the same day the applicant was arrested and charged with breach of the peace. He was not held in custody. On 2 August 2012 a decision was made to take no further action.

89. Meanwhile, on 20 July 2012 he was arrested on the outskirts of Dunfermline and charged with breach of the peace. He was detained on remand and appeared at Kirkcaldy Sheriff Court in August 2012. He was convicted of breach of the peace and detained at HMP Edinburgh and HMP Kilmarnock. He was kept in segregation during his detention.

90. He was released on 5 October 2012 and headed south towards his home in Eastleigh.

B. Treatment while in prison

1. Background facts

(a) Medical treatment regarding lump on testicle

91. In April 2011 the applicant discovered a lump on his right testicle. He was examined in his cell but was required to wear clothes for external appointments. He refused to dress and subsequently made prison complaints about alleged inadequate medical treatment. When they were unsuccessful, he referred the complaints to the Scottish Ministers but on 10 August 2011 he was informed that they were not upheld. The applicant then contacted the Scottish Public Services Ombudsman ("the Ombudsman"). However, he was advised that his complaint was not one which the Ombudsman could pursue. On 8 February 2012 he was told that the lump had gone.

(b) Visits from family and friends

92. On 27 August 2011 the applicant made a prison complaint that he was not allowed visits. He was told in reply that he was permitted visits provided that he was appropriately dressed. He referred the complaint to the Internal Complaints Committee ("ICC") on 1 September 2011. He was advised on 26 September 2011 that the ICC had fully endorsed the suggestion that visits be accommodated in the segregation unit. He was told to discuss this with the relevant staff and book a visit. No visits took place.

93. On 9 November 2011 the applicant contacted the Ombudsman with a complaint that the Scottish Prison Service ("SPS") was unreasonably refusing to enable him to receive visits. By letter dated 10 January 2012 he was informed that the Ombudsman had not upheld the complaint because according to information from the SPS, he had been asked to cover his genitalia when walking from A Hall, where he was detained, to the segregation unit. He had refused to do so.

(c) General dental and medical treatment

94. On 14 September 2011 the applicant made a prison complaint about refusal of dental and general medical treatment over the previous five years while he was in detention. By reply dated 20 September 2011 he was

advised that the full range of clinical services were available to prisoners and that he was required to comply with the dress code to attend appointments. He referred the complaint to the Scottish Ministers, who did not uphold his complaint.

(d) Association with other prisoners and exercise

95. As noted above, the applicant spent much of his detention in segregation. Even when not in segregation, his ability to participate in activities and to associate with other prisoners was generally limited as long as he remained naked. He was not permitted to access the gym, for health and safety reasons. However, efforts were made to give him access to books and to explore further work or hobbies that could be conducted in his cell. Throughout his time in segregation, the applicant was reviewed regularly by health care professionals.

96. On 29 January 2012 the applicant complained to the prison authorities that he was not allowed to associate with other prisoners or to exercise. By reply dated 31 January 2012 he was told that he was not being denied association or exercise but had excluded himself from these activities by refusing to wear clothes. The applicant referred the complaint to the ICC on 2 February 2012 but the ICC decided that the current arrangements were satisfactory. It noted that if the applicant were to wear clothes, he would be permitted to associate with other prisoners. However, his choice to remain naked gave rise to serious concerns that he might be the victim of violence or unwarranted comments, and the prison had an obligation to ensure his safety.

97. In March 2012 the applicant complained to the Ombudsman that the SPS had given an unreasonable explanation for denying him access to association and exercise. By reply dated 24 May 2012 the Ombudsman informed him that his complaint had not been upheld because prison staff had confirmed that if he wore clothes, he would be able to associate with other prisoners and exercise.

2. Attempts to secure legal representation and exemption from court fees

98. The applicant contacted the Law Society of Scotland seeking details of solicitors in Edinburgh experienced in judicial review. He received a list containing the names of fourteen firms, which he duly contacted. None were willing to represent him. However, a further seven firms were recommended to him. He contacted them and was informed that none were willing to represent him.

99. He then contacted the Court of Session to request information regarding exemption from court fees, with a view to commencing judicial review proceedings without legal assistance. He was advised that as he was

a prisoner and not in receipt of any State benefits, he was not eligible for exemption from court fees.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal offences in Scotland

1. Breach of the peace

100. The leading case as to what constitutes a breach of the peace under Scots law is *Smith v. Donnelly* 2001 SLT 1007, where the Appeal Court said:

> "17. The crime of breach of the peace can be committed in a wide variety of circumstances, and, in many cases, it is a relatively minor crime. It has therefore been said, more than once, that a comprehensive definition which would cover all possible circumstances is neither possible nor desirable. Equally, in our view, it is neither possible nor desirable to derive a comprehensive definition from a close analysis of the facts of individual cases in which it has been held that a breach of the peace had been committed ... [I]t is, in our view, clear that what is required to constitute the crime is conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community ... What is required, therefore, it seems to us, is conduct which does present as genuinely alarming and disturbing, in its context, to any reasonable person.
>
> 18. That interpretation is supported by the fact that ... if there is no evidence of actual alarm, the conduct must be 'flagrant' if it is to justify a conviction. 'Flagrant' is a strong word and the use of that word points to a standard of conduct which would be alarming or seriously disturbing to any reasonable person in the particular circumstances ... We therefore conclude that the definition of the crime found in the principal authorities does meet the requirements of the Convention."

101. In *Her Majesty's Advocate v. Harris* [2010] HCJAC 102, the Appeal Court, citing *Smith*, emphasised that it was now clear that the crime of breach of the peace involved two elements: conduct (1) severe enough to cause alarm to ordinary people and (2) which threatened serious disturbance to the community.

102. The maximum sentence for a breach of the peace depends upon the court in which the offence is tried. When prosecuted in summary proceedings in the Sheriff Court, the maximum sentence is a fine of up to five thousand pounds sterling or imprisonment of one year.

2. Breach of bail conditions

103. Pursuant to section 27(1)(b) of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"), it is an offence to fail, without reasonable excuse, to comply with any condition imposed on bail. Section 27(2)

provides that a person guilty of an offence under section 27(1) is liable to a fine or to imprisonment for up to twelve months.

3. Contempt of court

104. In *HM Advocate v. Airs* 1975 JC 64 contempt of court was described as:

> "conduct which challenges or affronts the authority of the court or the supremacy of the law itself."

105. Every court in Scotland has the inherent power to punish persons who are in contempt of it. Where contempt occurs in the court itself, it may be dealt with immediately by the judge without a prior formal charge.

106. Pursuant to section 15(2) of the Contempt of Court Act 1981, contempt of court in summary proceedings before a Sheriff is punishable by a fine or imprisonment for up to three months.

B. Criminal proceedings in Scotland

1. The decision to prosecute

107. In Scotland, the decision whether to prosecute an individual is taken by the Crown Office. The Crown Office is wholly independent of the police and is under the responsibility of the Scottish Law Officers (the Lord Advocate and the Solicitor General).

108. There are two forms of criminal procedure in Scotland. The most serious crimes are tried under "solemn procedure" on indictment. Determinations of fact in such cases are made by a jury. Less serious crimes are tried under "summary procedure" by a judge sitting without a jury.

2. The determination of the sentence in summary proceedings

109. In summary proceedings, the Sheriff determines the sentence to be imposed on a person found guilty. He is required to take into account a number of considerations including: the offender's personal circumstances; his criminal record or lack thereof; the circumstances of the offence; the age of the offender (if under 21); the absence of any previous custodial sentence; any guidance issued by the High Court; any plea of guilty; and any time spent in custody awaiting trial. The court may decide that it is sufficient to admonish a person found guilty. Typically, this may be done where the case concerns a first offence or is minor or there are other extenuating circumstances.

3. The procedure for appeal in summary proceedings

110. Section 175 of the 1995 Act provides for the possibility of lodging an appeal against conviction in summary proceedings. Section 175(2) stipulates that leave is required.

111. Pursuant to section 176(1), any appeal against conviction must be by way of case stated. The presiding judge at the trial must prepare a draft stated case and provide a copy to the appellant. The stated case sets out the matters competent for review by the High Court, the facts proved in the case, any points of law decided and the reasons for the decision. Parties to the proceedings may propose adjustments to the stated case. If adjustments are proposed, the judge must arrange a date for a hearing for the purpose of considering proposed adjustments. Once the case stated has been finalised, a copy is sent to the appellant, who must lodge it with the Clerk of Justiciary within one week of receipt. If he fails to do so, the appeal will be deemed abandoned.

112. Under sections 180 and 187 of the 1995 Act, the decision whether to grant leave to appeal against conviction or sentence is made by a judge of the High Court who, if he considers that there are arguable grounds of appeal, must grant leave to appeal and make such comments in writing as he considers appropriate. In any other case, the judge must refuse leave to appeal and give reasons in writing for the refusal.

C. Prison Rules and Directions

113. The Prison Rules are contained in secondary legislation. At the relevant time the rules were set out in the Prisons and Young Offenders Institutions (Scotland) Rules 2006 ("the Prison Rules 2006"). From 1 November 2011, the relevant rules were the Prisons and Young Offenders Institutions (Scotland) Rules 2011 ("the Prison Rules 2011"). There is no material difference between the two sets of rules in so far as they applied to the applicant. The references below are to the 2006 Rules.

1. Rules on segregation

114. Rule 94(1) of the Prison Rules 2006 provided that a prisoner could be removed from association with other prisoners for the purpose of maintaining good order or discipline; protecting the interests of any prisoner; and ensuring the safety of others.

115. Pursuant to Rule 94(4), a segregation order had to specify the nature of the removal from association and the reasons for making the order. Segregation was limited to a maximum of 72 hours unless an extension had been authorised specifically by the Scottish Ministers for a further month at a time (see Rule 94(5) and (6)). A prisoner was entitled to receive the reasons for his segregation and to make representations to the Scottish

Ministers in respect of any application to extend segregation beyond 72 hours.

116. Rule 94(7) provided that the prison governor was obliged to cancel a segregation order if he was advised by a medical officer that it was appropriate to do so on health or welfare grounds. Pursuant to Rule 94(10), where a prisoner was removed from association, a medical officer was required to visit the prisoner as soon as practicable and thereafter as often as is necessary but at least once in every seven days.

117. Similar provisions appear in Rule 95 of the Prison Rules 2011.

2. Rules on medical care

118. Part 5 of the Prison Rules 2006 addressed health and welfare issues. Rule 32 provided that the Scottish Ministers were required to make arrangements for the provision at every prison of appropriate medical services and facilities for the maintenance of good health, the prevention of illness, the care of prisoners suffering from illness or the aftercare of such prisoners.

119. Rule 33 provided that a medical officer had to attend prisoners who complained of illness at such times, and with such frequency, as the medical officer judged necessary in the circumstances. The Governor was obliged, without delay, to bring to the attention of a medical officer any prisoner whose physical or mental condition appeared to require attention (Rule 34). Rule 35 made provision for a medical officer to make arrangements for consultation of specialists.

120. Similar provisions can be found in Part 5 of the Prison Rules 2011.

121. The Prison Rules are supplemented in this respect by the Health Board Provision of Healthcare in Prisons (Scotland) Directions 2011.

3. Rules on general daily life

122. Further general obligations are set out in the Prison Rules. These include the provision of reasonable assistance and facilities to develop relationships with family and friends; facilitation of the practice of a prisoner's religion or belief within the prison; enabling visits to the prisoners; provision of purposeful activities (including work, education, counselling and vocational training); daily opportunity to exercise and spend time in the open air; and provision of reasonable facilities and opportunities to participate in recreational activities outwith normal working hours.

III. COMPARATIVE LAW MATERIALS

123. The Court requested the parties to provide comparative information concerning the approach of other member States of the Council of Europe to

nudity in public. The Government submitted information on the law and practice in nineteen of the forty-six other member States.

124. It appears from the data provided that of the nineteen States surveyed, only the Netherlands expressly criminalises public nudity. It is punishable by the imposition of an administrative fine.

125. Other States (Andorra, Belgium, France, Germany and Switzerland) appear to penalise "exhibitionism", but the term is rarely defined. It seems that sanctions vary but the data provided in this respect are incomplete.

126. According to the data, a number of States have some form of public decency, public order or public peace legislation that might extend to prohibiting public nudity (Belgium, Croatia, the Czech Republic, Denmark, Estonia, Germany, Greece, Italy, Lithuania, the Netherlands, San Marino, Poland, Romania, Russia, Slovenia, Sweden and Switzerland). While sentencing information has not been provided for some of the States (Denmark, Estonia and Russia), it appears that sentencing powers generally vary from the imposition of fines only (the Czech Republic, Germany, Slovenia, Sweden and Switzerland) to the possibility of imprisonment (Belgium, Croatia, Greece, Italy, Lithuania, the Netherlands, Poland, Romania and San Marino).

THE LAW

I. THE APPLICANT'S REPEATED ARREST, PROSECUTION, CONVICTION AND IMPRISONMENT

127. The applicant complained about his repeated arrest, prosecution, conviction and imprisonment for being naked in public. In his first letter he invoked Articles 5, 6, 7, 8, 9, 10, 13 and 14 of the Convention as well as Articles 2 and 4 of Protocol No. 7.

A. Compliance with Article 35 § 1

1. The parties' submissions

(a) The Government

128. The Government alleged that in respect of this complaint the applicant had failed to comply with Article 35 § 1, which provides:

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

129. First, the Government argued that each arrest and conviction was a separate incident which could not be viewed as a continuing situation. They emphasised that there was no policy on the part of the police or the prosecuting authorities as regards public nudity and their response to the applicant's repetition of discrete instances of criminal conduct did not make that conduct "continuing". They noted that in his first letter the applicant had complained about his 18 June 2009 arrest and subsequent conviction only. Although he had later referred to his July 2011 arrest and subsequent conviction, the Government were of the view that he had not specifically complained about that arrest and conviction. They therefore contended that the complaint had been lodged outside the six-month time-limit stipulated in Article 35 § 1 of the Convention.

130. Second, the Government argued that the applicant had failed to exhaust domestic remedies. While he had initiated an appeal by stated case, he had abandoned it on the unsupported allegation that the stated case was biased. According to the Government, this was not a credible or acceptable basis to decline to bring his conviction under review by the competent domestic court.

(b) The applicant

131. The applicant reiterated that he had been repeatedly prosecuted and punished for public nudity and did not accept that his complaints had been lodged out of time. Relying on *McFeeley and Others v. the United Kingdom*, no. 8317/78, Commission decision of 15 May 1980, Decisions and Reports (DR), 20, p. 44, he maintained that his case concerned a permanent state of affairs which was still continuing and that the question of the six-month rule could only arise after the state of affairs had ceased.

132. He further maintained that he had exhausted all domestic remedies available to him. He had appealed his August 2011 conviction by case stated, invoking arguments under the Convention, and was refused leave to appeal at the first and second sifts in December 2011. There was no further avenue of appeal under Scots law. In these circumstances, there was no prospect of obtaining damages.

2. The Court's assessment

(a) The six-month rule

133. The object of the six-month time-limit under Article 35 § 1 is to promote legal certainty, by ensuring that cases raising issues under the Convention are dealt with in a reasonable time and that past decisions are not continually open to challenge. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. However, it has been said that the six-month time-limit does not apply as such to continuing situations because, if there is a situation of

ongoing breach, the time-limit in effect starts afresh each day and it is only once the situation ceases that the final period of six months will run to its end (*Chiragov and Others v. Armenia* [GC] (dec.), no. 13216/05, § 126, 14 December 2011).

134. In the present case, each arrest, with the ensuing prosecution, conviction and sentence of imprisonment, was a discrete incident which followed directly upon the applicant's appearance naked in public on different occasions. As the Government pointed out and as is evident from the facts as outlined, the applicant has enjoyed periods of liberty between his periods of detention, even if sometimes only for a few minutes. Accordingly, while the cycle of release and rearrest can be said to constitute a pattern, it cannot be viewed as a continuing situation within the meaning of the Court's case-law (compare and contrast *McFeeley and Others*, cited above, § 24*)*. The six-month period therefore began to run in respect of each conviction from the date of the final domestic decision in the case.

135. In his first letter to the Court, dated 29 July 2011, the applicant complained about his arrest in June 2009, his subsequent conviction and the appeal proceedings. His appeal in respect of that conviction was abandoned on 29 October 2009. Had his complaint been directed solely at that conviction, it would have been lodged outside the six-month time-period allowed by Article 35 § 1.

136. However, in his subsequent application form, dated 20 December 2011, he complained that his "repeated conviction and imprisonment for the offence of breach of the peace owing to his refusal to wear clothes in public" amounted to a violation of the Convention. He set out details of his arrest on 20 July 2011 and conviction on 24 August 2011, with reference to his pending appeal. The Court is therefore satisfied that he also complained about his 2011 arrest and conviction, in the wider context of a pattern of prosecutions and convictions for being naked in public. Leave to appeal in respect of the July 2011 conviction was refused on 22 December 2011. The applicant having first notified the Court of this complaint on 20 December 2011, he has therefore complied with the six-month time-limit in this respect.

(b) Non-exhaustion of domestic remedies

137. It is primordial that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It cannot, and must not, usurp the role of Contracting States whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is therefore an indispensable part of the functioning of this system of protection. States are dispensed from answering before an

international body for their acts before they have had an opportunity to put matters right through their own legal system and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system (see, amongst many authorities, *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996‑IV; and *Blatchford v. the United Kingdom* (dec.), no. 14447/06, 22 June 2010).

138. As stipulated in its *Akdivar* judgment (cited above, §§ 66-67), normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness.

139. As the Court also held in *Akdivar* (cited above, § 68), in the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement.

140. Finally, the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up and that it must therefore be applied with some degree of flexibility and without excessive formalism (see *Akdivar*, cited above, § 69).

141. It is apparent that the applicant sought to appeal his 2011 conviction by way of case stated (see paragraphs 84 above). In his appeal, he invoked Articles 5, 6, 7, 8, 9, 10 and 14 of the Convention. Permission to appeal was refused on the second sift on 22 December 2011 (see paragraph 86 above). The applicant has accordingly exhausted available domestic remedies in respect of his complaint.

(c) Conclusion on compliance with Article 35 § 1 of the Convention

142. In conclusion, the applicant has satisfied the requirements of Article 35 § 1 of the Convention in respect of his complaint about his 2011 arrest, prosecution, conviction and imprisonment, as one incident in a pattern of arrests, prosecutions and convictions over a number of years which was continuing at the time that he lodged his application. The relevance of this broader context will be discussed further in the

examination of the admissibility and merits of his individual complaints, below.

B. The alleged violations of Articles 5 § 1 and 7 § 1 of the Convention

143. As noted above, in his first letter the applicant invoked Articles 5 § 1 (guaranteeing the right to liberty and security) and 7 § 1 (prohibiting punishment without law) in respect of his repeated arrest, prosecution, conviction and sentence, without providing further details of the precise nature of the complaints. He did not reiterate these complaints in the application form subsequently lodged by his solicitors. Although the Court sought written observations on the complaints under these Articles from the parties, the applicant did not subsequently make any relevant written submissions.

144. The applicant, who was legally represented, chose not to pursue the complaints either in his application form or in his written submissions. In the circumstances, the Court sees no reason to examine the complaints.

C. The alleged violation of Article 10 of the Convention

145. Article 10 of the Convention provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

1 Scope of the complaint

146. As noted above, while citing two particular instances of arrest and conviction, the applicant clearly complained about his repeated arrest, prosecution, conviction and imprisonment for the offence of breach of the peace owing to his refusal to wear clothes in public. Although the Court has concluded that this did not amount to a continuing situation for the purposes of the six-month rule in Article 35 § 1 of the Convention, it did accept that the incidents formed part of a pattern of arrests, prosecutions, convictions and sentences of imprisonment for being naked in public (see paragraph 142 above). It would be artificial to ignore this wider pattern when considering the compliance of the measures with the applicant's Article 10 rights, since

it is precisely their repeated nature which has led to the applicant's detention for a number of years. The Court will therefore examine the compatibility of the applicant's 2011 arrest, prosecution, conviction and imprisonment with Article 10 of the Convention in the light of the pattern of prior and subsequent such incidents.

2. Applicability of Article 10 and the admissibility of the complaint

147. The applicant argued that public nudity was a clear form of expression within the meaning of Article 10 of the Convention. The term "expression" had been widely construed by the Court to cover various different forms of expression, including expression in words, in pictures, by video and through conduct intended to convey an idea or information. In his case, the decision not to wear clothes was a direct expression of his principled views on the human body. His complaint therefore fell within the scope of Article 10 of the Convention.

148. The Government responded that there had been no restriction placed on the applicant in this regard and that he was free to advocate his views. They did not accept that wearing no clothes constituted freedom of expression or that the requirement to wear clothes in certain contexts prevented freedom of expression.

149. The protection of Article 10 extends not only to the substance of the ideas and information expressed but also to the form in which they are conveyed (*Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298). The Court accepts that the right to freedom of expression may include the right for a person to express his ideas through his mode of dress or his conduct (see, respectively, *Stevens v. the United Kingdom*, no. 11674/85, Commission decision of 3 March 1986, DR 46, p. 245, and *Kara v. the United Kingdom*, no. 36528/97, Commission decision of 22 October 1998, unreported; and *Smith and Grady v. the United Kingdom* (dec.), nos. 33985/96 and 33986/96, 23 February 1999). In *Donaldson v. the United Kingdom* (dec.), no. 56975/09, § 20, 25 January 2011, it found that the applicant's decision to wear an Easter lily (a symbol to commemorate the Irish republican combatants who died during, or were executed after, the 1916 Easter Rising in Ireland) had to be regarded as a way of expressing his political views (see also *Vajnai v. Hungary*, no. 33629/06, § 29, ECHR 2008). In *Steel and Others v. the United Kingdom*, 23 September 1998, § 92, *Reports* 1998‑VII, the Court held that protests, which took the form of physically impeding the activities of which the applicants disapproved, constituted expressions of opinion within the meaning of Article 10 (see also *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 28, ECHR 1999‑VIII).

150. In the present case, the applicant has chosen to be naked in public in order to give expression to his opinion as to the inoffensive nature of the

human body (see paragraphs 55 and 147 above). The Court is therefore satisfied that the applicant's public nudity can be seen as a form of expression which falls within the ambit of Article 10 of the Convention and that his arrest, prosecution, conviction and detention constituted repressive measures taken in reaction to that form of expression of his opinions by the applicant. There has therefore been an interference with his exercise of his right to freedom of expression.

151. In view of the submissions of the parties, the Court considers that the complaint raises complex and serious issues under Article 10 of the Convention which cannot be dismissed as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established and it must therefore be declared admissible.

3. Merits of the complaint

152. An interference with the right to freedom of expression can only be justified under Article 10 § 2 if it is prescribed by law, pursues one of more of the legitimate aims to which Article 10 § 2 refers and is necessary in a democratic society in order to achieve any such aim.

(a) Prescribed by law

(i) The parties' submissions

153. The applicant argued his criminal prosecution for public nudity was not prescribed by law. He did not expand upon this submission.

154. The Government contended that the interference was prescribed by law. They noted that the various measures were taken on the basis of domestic law. It was not the role of this Court to consider whether the domestic law had been correctly applied to the applicant and whether he had been correctly convicted.

(ii) The Court's assessment

155. The applicant failed, in the context of his written submissions under Article 10, to explain the nature of his challenge to the legality of the measures taken against him. Having regard to the Court's finding in *Lucas v. the United Kingdom* (dec.), no. 39013/02. 18 March 2003, that the definition of the offence of breach of the peace as stipulated in *Smith v. Donnelly* (see paragraph 100 above) was sufficiently precise to provide reasonable foreseeability of the actions which might fall within the remit of the offence, the Court is satisfied that the interference in the present case both had a sufficient legal basis in domestic law and was "prescribed by law" in the wider sense of having the quality required of "law" in a democratic society.

(b) In pursuit of a legitimate aim

(i) The parties' submissions

156. The applicant contended that his arrest, prosecution, conviction and imprisonment were not in pursuit of any of the stated aims listed in Article 8 § 2. He did not elaborate on this submission.

157. The Government argued that the measures pursued the aim of preventing disorder and crime by preventing breaches of the peace in public.

(ii) The Court's assessment

158. Having regard to all the circumstances surrounding the actions of the applicant and the police, the Court accepts that the measures aimed to prevent disorder and crime. However, the parties did not make detailed submissions identifying more clearly the precise nature of the disorder and crime which the measures were taken to prevent. It is clear that in a straightforward sense, the measures were designed to prevent the applicant's committing breach of the peace through causing offence to and alarming other members of the public by confronting them with his naked state in public. However, the applicant's arrest, prosecution, conviction and imprisonment can be seen to have pursued the broader aim of seeking to ensure respect for the law in general, and thereby preventing the crime and disorder which would potentially ensue were the applicant permitted to continually and persistently flout the law with impunity because of his own personal, albeit sincerely held, opinion on nudity.

(c) Necessary in a democratic society

(i) The parties' submissions

(α) The applicant

159. The applicant argued that there was no pressing social need to justify the restrictions on public nudity or that, if there was, such restrictions were not proportionate to that need.

160. In the applicant's view, the responses of other Council of Europe States to public nudity (see paragraphs 123-126 above) reinforced his submission as to the disproportionality of his repeated arrest and imprisonment in the absence of any suggestion that he intended to cause harassment or disturbance to the public. A significant majority of States either did not treat public nudity as a criminal offence or treated it as a minor misdemeanour susceptible to a fine or a short period of imprisonment. This was to be contrasted with his situation, where he had served almost seven years in prison for public nudity following a pattern of arrest, prosecution, conviction, imprisonment, release and immediate

re-arrest. He therefore invited the Court to find a violation of Article 10 of the Convention.

(β) *The Government*

161. The Government argued that defining the scope of the crime of breach of the peace was peculiarly sensitive to the *mores* of individual States. As regards the responses of other States to public nudity, they emphasised that the period which the applicant had spent in prison was not the result of a one-off offence attracting a response by the authorities which was out of step with other Council of Europe States. One-off offences of the nature at issue in the present case also attracted minor responses from the prosecuting authorities in the United Kingdom. The applicant's imprisonment, on the other hand, arose from his repeat offending. In an area of criminal policy where there was a divergence of views among the Council of Europe member States, such as in the present case, a particularly wide margin of appreciation applied.

162. The Government maintained that any interference was justified and proportionate. It was confined to preventing certain conduct by reason of its adverse impact, or potentially adverse impact, on others and on the public order, in a public context. They further emphasised that any person who exercised freedom of expression undertook duties and responsibilities that included the obligation to avoid expressions which were offensive to others and which did not contribute to any form of public debate capable of furthering progress in human affairs. The Government were of the view that the applicant had failed to act consistently with this principle.

163. Finally, they pointed out that the applicant was not tried for every offence alleged; that not every trial resulted in a conviction; and that not every conviction resulted in a term of imprisonment. As far as the forty-two offences for which he was arrested in Scotland in the nine-year period between July 2003 and July 2012 were concerned, the Crown decided not to initiate proceedings in respect of twelve. The applicant was acquitted in respect of three offences on a finding of not guilty, on the acceptance of a no case to answer submission and on the acceptance of a not guilty plea, respectively. In respect of the remaining twenty-seven offences of which he was convicted, the applicant was admonished on three occasions. A term of imprisonment of three months had only been imposed after the seventh occurrence of a breach of the peace. It was also relevant that the Sheriff had specifically raised the possibility of a deferred sentence with the applicant following his conviction in July 2009 if he agreed to wear clothes, but the applicant had refused to agree (see paragraph 60 above).

(ii) The Court's assessment

(α) General principles

164. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to Article 10 § 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society' (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24; *Donaldson*, cited above, § 27; *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 100, ECHR 2013 (extracts)).

165. This freedom is subject to exceptions pursuant to Article 10 § 2, which must be construed strictly: the need for any restrictions must be established convincingly. The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10 (see *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 48, 13 July 2012; and *Animal Defenders International*, cited above, § 100).

166. The breadth of the margin of appreciation to be afforded depends on a number of factors. The national authorities enjoy a wide margin of appreciation in matters of morals, since there is no uniform European conception of morals. Accordingly State authorities are in principle better placed than the international judge to give an opinion on the exact content of the requirements of morals as well as on the necessity of measures intended to meet them (see *Handyside*, cited above, § 48; and *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, § 68, Series A no. 246-A). A narrow margin of appreciation applies in respect of debates on questions of public interest and the freedom of expression enjoyed by the press when exercising its vital role as a public watchdog (*Animal Defenders International*, cited above, § 102). While they do not benefit from the special protection afforded to the press, even small and informal campaign groups must be able to carry on their activities effectively. There exists a strong public interest in enabling such groups and individuals, outside the mainstream, to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment (*Steel and Morris v. the United Kingdom*, no. 68416/01, § 89,

ECHR 2005-II and, *mutatis mutandis*, *Bowman v. the United Kingdom*, 19 February 1998, Reports 1998‑I).

167. It must also be borne in mind that, by virtue of the express terms of paragraph 2 of Article 10, whoever exercises his freedom of expression undertakes duties and responsibilities, the scope of which depends on his situation and the technical means he uses. These duties and responsibilities must be taken into account in the Court's assessment of the necessity of the measure (see *Handyside*, cited above, § 49; and *Hachette Filipacchi Associés v. France*, no. 71111/01, § 42, 14 June 2007). The Court has previously found that, in the context of religious opinions and beliefs, such duties and responsibilities may include an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs. This being so, it said, it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that the penalty imposed be proportionate to the legitimate aim pursued (see *Otto-Preminger-Institut v. Austria*, 20 September 1994, § 49, Series A no. 295-A).

168. However, although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position (see *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 112, ECHR 1999-III; *Leyla Şahin* [GC], cited above, § 108; and *Bayatyan v. Armenia* ([GC], no. 23459/03, § 126, 7 July 2011). Pluralism and democracy must be based on dialogue and a spirit of compromise, necessarily entailing various concessions on the part of individuals or groups of individuals, which are justified in order to maintain and promote the ideals and values of a democratic society (see *Leyla Şahin* [GC], cited above, § 108; and *Tănase v. Moldova* [GC], no. 7/08, § 178, ECHR 2010). Respect by the State of the views of a minority by tolerating conduct which is not *per se* incompatible with the values of a democratic society or wholly outside the norms of conduct of such a society, far from creating unjust inequalities or discrimination, ensures cohesive and stable pluralism and promotes harmony and tolerance in society (see, *mutatis mutandis*, *Bayatyan*, cited above, § 126).

169. Finally, in assessing the proportionality of a restriction on freedom of expression, the nature and severity of the penalties imposed are factors to be taken into account (see *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999‑IV; *Tammer v. Estonia*, no. 41205/98, § 69, ECHR 2001‑I; and *Skałka v. Poland*, no. 43425/98, § 38, 27 May 2003).

170. The Court will, in light of all of the above considerations, assess whether the reasons relied on by the competent national authorities, notably the courts, to justify the measures were both "relevant" and "sufficient" and whether the resultant interference was proportionate to the legitimate aim pursued. In this respect, the Court reiterates that it is not its task to take the place of the national authorities but it must review, in the light of the case as a whole, those authorities' decisions taken pursuant to their margin of appreciation (*Animal Defenders International*, cited above, § 105). In conducting its review, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and that they based their decisions on an acceptable assessment of the relevant facts (see *Donaldson*, cited above, 26).

(β) Application of the general principles to the facts of the case

171. The present case concerns the applicant's 2011 arrest, prosecution, conviction and imprisonment for the offence of breach of the peace on account of his appearing naked in public, in the context of a pattern of previous such measures.

172. The Court is prepared to accept that the extent to which, and the circumstances in which, public nudity is acceptable in a modern society is a matter of public interest. The fact that the applicant's views on public nudity are shared by very few people is not, of itself, conclusive of the issue now before the Court (see, *mutatis mutandis*, *Young, James and Webster v. the United Kingdom*, 13 August 1981, § 63, Series A no. 44). As an individual intent on achieving greater acceptance of public nudity, the applicant is entitled to seek to initiate such a debate and there is a public interest in allowing him to do so. However, the issue of public nudity also raises moral and public-order considerations. The comparative data supplied by the Government show that even in the small number of States surveyed, the responses of the law and of the authorities to public nudity are far from uniform. In these circumstances, the applicable margin of appreciation in reacting to instances of public nudity, as opposed to regulating mere statements or arguments on the subject, is a wide one.

173. Turning to examine the approach to manifestations of public nudity in Scotland, the police and the Crown Office had discretion in deciding how to respond to such incidents, as demonstrated by the applicant's own case. The measures taken against him were not the result of any blanket prohibition: each incident was considered on its facts and in light of the applicant's own history of offending. Following his early arrests, he was generally released with no further action being pursued (see paragraphs 8 to 31 above). On the occasions when he was prosecuted, the courts demonstrated a similarly individualised approach. The applicant was only convicted after it had established at trial, on the basis of evidence as to his conduct in a particularly public place, that the offence of breach of the peace had been made out, namely that he had caused alarm to other people and serious disturbance to the community (see paragraph 101 above) On one occasion the Sheriff found on the prosecution evidence that there was no case to answer and three times the applicant

was found not guilty, either following acceptance of a not guilty plea or after a trial of the facts (see paragraphs 19, 24, 36 and 48 above). Following the applicant's 2011 trial, at which he also appeared naked (see paragraph 76 above), the Sheriff was satisfied that the applicant's appearance naked on a public road outside HMP Perth was sufficiently severe to cause alarm to ordinary people and serious disturbance to the community (see paragraph

80 above). Although the applicant could have avoided arrest outside HMP Perth by complying with the police officers' request that he put on clothes, he refused to do so (see paragraph 75 above). The Sheriff commented that had the applicant appeared naked in a more remote place or in a place where fewer people would be congregated, rather than "in or near one of the main streets of a busy town", he might have reached a different conclusion (see paragraph

80 above).

174. As to the severity of the sanctions, it is noteworthy that after his early convictions the applicant was either admonished (see paragraph 10 above) or received short sentences of imprisonment of between two weeks and three months (see, for example, paragraphs 11, 16 and 31 above). It was only after a number of convictions for public nudity that the courts began to impose more substantial custodial sentences on the applicant. Even then, efforts were made to reach a less severe penalty. When sentencing the applicant for breach of the peace in 2009, the Sheriff explored the possibility of a non-custodial sentence if the applicant would agree to wear clothes, and only imposed a one-year sentence when the applicant refused to accept a condition of remaining clothed (see paragraph 60-61 above). By the time of his 2011 conviction and sentence of 330 days, together with a requirement to serve in addition 237 days outstanding for a previous sentence (see paragraph 81 above), he had been arrested over thirty times for public nudity and convicted almost twenty times. In assessing the proportionality of the penalty imposed, the Court is therefore not concerned with the respondent State's response to an individual incident of public nudity but with its response to the applicant's persistent public nudity and his wilful and contumacious refusal to obey the law over a number of years (see for example the Sheriff's comments as to sentence in respect of the June 2009 conviction at paragraphs 60-61 above).

175. It is true that by the time that the 2011 sentence was imposed, the applicant had already served a cumulative total of five years and three months in detention since 18 May 2006, on remand pending fifteen criminal prosecutions and post-conviction pursuant to twelve sentences of imprisonment, with only four days' spent at liberty during that period. At the point at which he subsequently left Scotland on 9 October 2012, he had spent almost six and a half consecutive years in prison with less than a dozen days at liberty throughout the entire period. The cumulative period of imprisonment in Scotland since 2003 for the repeated instances of his refusal to dress in public stands at over seven years. While the penalty imposed for each individual offence, taken on its own, is not such as to raise

an issue under Article 10 in terms of lack of proportionality, the cumulative impact on the applicant of the measures taken by the respondent State, which was undeniably severe, is otherwise. However, the applicant's own responsibility for the convictions and the sentences imposed cannot be ignored. In exercising his right to freedom of expression, he was in principle under a general duty to respect the country's laws and to pursue his desire to bring about legislative or societal change in accordance with them (see, *mutatis mutandis*, *Tănase*, cited above, § 167). Many other avenues for the expression of his opinion on nudity or for initiating a public debate on the subject were open to the applicant. He was also under a duty, particularly in light of the fact that he was asking for tolerance in respect of his own conduct, to demonstrate tolerance of and sensibility to the views of other members of the public. However, the applicant appears to reject any suggestion that acceptance of public nudity may vary depending on the nature of the location and the presence of other members of the public. Without any demonstration of sensibility to the views of others and the behaviour that they might consider offensive, he insists upon his right to appear naked at all times and in all places, including in the courts, in the communal areas of prisons and on aeroplanes (see, for example, paragraphs 22, 29, 33, 53, 76 and 93 above).

176. The applicant's case is troubling, since his intransigence has led to his spending a substantial period of time in prison for what is – in itself – usually a relatively trivial offence (see paragraph 100 above). However, the applicant's imprisonment is the consequence of his repeated violation of the criminal law in full knowledge of the consequences, through conduct which he knew full well not only goes against the standards of accepted public behaviour in any modern democratic society but also is liable to be alarming and morally and otherwise offensive to other, unwarned members of the public going about their ordinary business. Having regard to the considerations set out above and to the wide margin of appreciation, the Court finds that the reasons for the measures adopted by the police, the prosecuting authorities and the courts, and in particular those adopted in respect of his arrest in 2011, were "relevant and sufficient" and that the measures met a pressing social need in response to repeated anti-social conduct by the applicant. It cannot be said that the repressive measures taken in reaction to the particular, repeated form of expression chosen by the applicant to communicate his opinion on nudity were, even if considered cumulatively, disproportionate to the legitimate aim being pursued, namely the prevention of disorder and crime. In particular, Article 10 does not go so far as to enable individuals, even those sincerely convinced of the virtue of their own beliefs, to repeatedly impose their antisocial conduct on other, unwilling members of society and then to claim a disproportionate interference with the exercise of their freedom of expression when the State, in the performance of its duty to protect the public from public nuisances,

enforces the law in respect of such deliberately repetitive antisocial conduct. Even though, cumulatively, the penalties imposed on the applicant undoubtedly did entail serious consequences for him, the Court cannot find in the circumstances of his case, having regard in particular to his own responsibility for his plight, that the public authorities in Scotland unjustifiably interfered with his exercise of freedom of expression. Accordingly, no violation of Article 10 of the Convention has been established.

D. The alleged violation of Article 8 of the Convention

177. Article 8 of the Convention provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. The parties' submissions

178. The applicant contended that restrictions pertaining to a person's mode of personal presentation were a function of personal identity and an exercise of personal autonomy. As such, any restrictions or the imposition of sanctions to compel a particular mode of personal presentation constituted an interference with the right to respect for private life.

179. He argued that his criminal prosecution for public nudity was not "in accordance with the law" and that his arrest, prosecution, conviction and imprisonment were not in pursuit of any of the stated aims listed in Article 8 § 2. He did not elaborate on these submissions. Relying on his submissions in respect of Article 10, he invited the Court to find a violation of Article 8 of the Convention.

180. The Government argued that the rights guaranteed by Article 8 did not extend to matters concerning personal appearance; nor did they extend to acts done publicly or in a sense done for a public purpose. They emphasised that Article 8 did not cover every opportunity to establish and develop relationships (citing *Friend and Others v. the United Kingdom* (dec.), no. 16072/06, 24 November 2009). They further contended that Article 8 did not have the effect of protecting conduct which would otherwise be considered criminal. Accordingly, they concluded that the criminal law of breach of the peace did not impinge on the sphere private to the applicant.

181. In the event that Article 8 was found to be applicable, the Government contended that the interference was in accordance with the law

and pursued the aims of prevention of breach of the peace or of crime and disorder and the protection of the applicant. They maintained that the measures taken against the applicant were both necessary and proportionate and referred again to the wide margin of appreciation applicable in the field of morals.

2. The Court's assessment

182. The concept of "private life" is broad in scope and not susceptible of exhaustive definition. In general terms, it secures to the individual a sphere within which he can freely pursue the development and fulfilment of his personality (see *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 43, ECHR 2004-VIII; and *Shtukaturov v. Russia*, no. 44009/05, § 83, ECHR 2008). In *S.A.S. v. France* [GC], no. 43835/11, § 107, 1 July 2014, the Grand Chamber stated that personal choices as to an individual's desired appearance, whether in public or in private places, relate to the expression of his personality and thus fall within the notion of private life. The notion of private life also protects a right to identity and to establish and develop relationships with other human beings and the outside world. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" (see *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 56, ECHR 2001-IX; *Peck v. the United Kingdom*, no. 44647/98, § 57, ECHR 2003-I; *Perry v. the United Kingdom*, no. 63737/00, § 36, ECHR 2003‑IX (extracts); and *Gillan and Quinton v. the United Kingdom*, no. 4158/05, § 61, ECHR 2010 (extracts)).

183. On the other hand, not every activity that a person might seek to engage in with other human beings in order to establish and develop relationships will be protected by Article 8: it will not, for example, protect interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the action or inaction of a State and a person's private life (see *Friend and Others*, cited above, § 41). However, the fact that behaviour is prohibited by the criminal law is not sufficient to bring it outside the scope of "private life" (see *A.D.T. v. the United Kingdom*, no. 35765/97, § 23, ECHR 2000-IX; and *Pay v. the United Kingdom* (dec.). no. 32792/05, 16 September 2003). Finally, the notion of personal autonomy is an important principle underlying the interpretation of the guarantee afforded by Article 8, (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III; and *Gillan and Quinton*, cited above, § 61).

184. The applicant, by deliberately and consistently appearing naked in very public places such as urban centres, courtrooms and the communal parts of prisons, was intent on making a public statement of his belief in the inoffensive nature of the human body. The Court has found that his conduct amounted to a form of expression protected by Article 10 (see

paragraph 150). It has previously indicated that a distinction must be drawn between carrying out an activity for personal fulfilment and carrying out the same activity for a public purpose, where one cannot be said to be acting for personal fulfilment alone (see *Friend and Others*, cited above, § 42). Furthermore, as concerns in particular an individual's personal choices as to his desired appearance in public (as referred to in *S.A.S.*, cited above), on analogy with the applicability of Article 9 of the Convention to religious beliefs (text of Article 9 cited below at paragraph 185), Article 8 cannot be taken to protect every conceivable personal choice in that domain: there must presumably be a *de minimis* level of seriousness as to the choice of desired appearance in question (see, *mutatis mutandis*, in relation to Article 9, *Bayatyan*, cited above, § 110; and *Eweida and Others v. the United Kingdom*, no. 48420/10, § 81, ECHR 2013 (extracts)). Whether the requisite level of seriousness has been reached in relation to the applicant's choice to appear fully naked on all occasions in all public places without distinction may be doubted, having regard to the absence of support for such a choice in any known democratic society in the world. In any event, however, even if Article 8 were to be taken to be applicable to the circumstances of the present case, the Court is satisfied that those circumstances are not such as to disclose a violation of that provision on the part of the public authorities in Scotland. In sum, any interference with the applicant's right to respect for his private life was justified under Article 8 § 2 for essentially the same reasons given by the Court in the context of its analysis of the applicant's complaint under Article 10 of the Convention (see paragraphs 171-176 above).

E. The alleged violation of Article 9 of the Convention

185. Article 9 of the Convention provides:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

186. The applicant made no submissions on the applicability of Article 9 of the Convention.

187. The Government noted that the applicant had not elaborated on his claim under Article 9 of the Convention and contended in particular that he had not presented his views as a "belief" which attracted Article 9 protection. They challenged whether his views satisfied the requirements of

cogency and seriousness. Even if there was a belief, there was no manifestation attracting the protection of Article 9.

188. The applicant failed to make submissions as to the applicability of Article 9 to the case. On the basis of the material before it, the Court finds that he has not shown that his belief met the necessary requirements of cogency, seriousness, cohesion and importance to fall within the scope of Article 9 of the Convention (see *Bayatyan*, cited above, § 110; and *Eweida and Others*, cited above, § 81). This complaint must accordingly be declared inadmissible as incompatible *ratione materiae* with the provisions of the Convention pursuant to Article 35 §§ 3 (a) and 4.

F. Other complaints

189. The applicant also complained under Article 6 § 3 (c) that he was not permitted to attend an adjustments hearing in respect of his stated case in October 2009. He further invoked Articles 13 and 14 and Articles 2 and 4 of Protocol No. 7. On 20 May 2013 he invoked for the first time Article 3, arguing that the sentences imposed on him were individually and cumulatively grossly disproportionate.

190. Having regard to all the material in its possession and in so far as these complaints fall within the Court's competence, it finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

II. TREATMENT IN DETENTION

191. The applicant complained of a violation of Articles 3, 8, 9, 10, 13 and 14 as a result of his treatment while in detention, referring to: (i) the failure to provide dental and optical treatment; (ii) the failure to provide medical treatment regarding a lump on his testicle; (iii) his segregation from other prisoners and the failure to allow him to exercise; and (iv) the denial of visits from family and friends.

A. Compliance with Article 35 § 1 of the Convention

1. The parties' submissions

(a) The Government

192. The Government contested the admissibility of the applicant's complaint concerning his treatment in detention. They contended that he had on 12 April 2012 impermissibly extended his original complaint to

include matters relating to his detention. They further argued that there was no evidence of any continuing conduct such as to elide the application of the six-month time-limit. They argued that there was no policy on the part of the prison authorities as regards the conditions of the applicant's detention, whether in relation to segregation, exercise or access to medical treatment. This was borne out by the applicant's different experiences in different prisons and even in the same prison over time.

193. The Government also submitted that the applicant had failed to exhaust domestic remedies. The Prison Rules embodied and promoted respect for some of the very Convention rights which the applicant claimed had been breached. There was a clear and accessible internal procedure for making complaints. If he remained dissatisfied, he could have sought judicial review. However, at no point did the applicant make a claim for damages in respect of the alleged Convention violations, either by way of judicial review proceedings or through an ordinary action in the Sheriff Court. There had been successful judicial review actions brought by prisoners about the features of the very regime of segregation to which the applicant was subjected and about conditions of detention. Judicial review was a flexible and quick procedure in which the applicant could have advanced all claims for a breach of his Convention rights and sought damages.

194. They considered the applicant's reasons for not pursuing a judicial review claim (see paragraphs 195-196 below) not to be credible and argued that he had not done all that could reasonably be expected of him to exhaust domestic remedies. The applicant had not been held in total isolation and had enjoyed access to the telephone and to postal services. It was not sufficient that he had made several telephone calls. He had not indicated that he had sought other sources of assistance, including contacting the Citizen's Advice Bureaux or the Faculty of Advocates Free Representation Unit. Nor had he suggested that he had made an application for advice and assistance, the form of legal assistance available to assist in identifying whether there were grounds for legal action, or for legal aid. In any event, they considered that lack of financial means did not absolve an applicant from making some attempt to take legal proceedings.

(b) The applicant

195. The applicant explained that he had pursued his complaints within the SPS internal complaints procedure on numerous occasions. He had also applied to the Ombudsman more than once. His complaints were rejected. He had sought legal representation to challenge his detention in judicial review proceedings but was unable to do so. He had contacted solicitors on a list provided to him by the prison authorities but was unsuccessful. Pursuant to rules on legal advice and assistance, to which the Government referred, the maximum fee for solicitors was GBP 35. This was often

insufficient to cover the basis expenses of a prison visit, let alone remuneration for the legal advice provided.

196. As for the possibility of commencing judicial review proceedings, in person, the applicant emphasised that this would have required knowledge of a specialised area of Scots administrative law and procedure as well as an ability to sift and analyse documents and evidence. The applicant, as a serving prisoner, had limited or no access to the kind of legal, administrative or technical resources necessary for this task. Nor did he have the legal expertise or knowledge required. He could not, he argued, be expected to know all the finer points of judicial proceedings and the absence of legal assistance meant that he was not in a position to pursue a remedy which might have been theoretically open to him.

2. The Court's assessment

(a) Six-month rule

197. By letter dated 8 February 2012 the applicant first complained to this Court about his treatment while in prison. Relevant prior complaints had been rejected by the domestic authorities less than six months before the date on which he first complained about his conditions of detention. The applicant has therefore lodged his complaint within the six months provided for in Article 35 § 1 of the Convention.

(b) Non-exhaustion

198. The applicant did not dispute that judicial review proceedings were in principle effective and would have offered reasonable prospects of success in respect of his complaints concerning his treatment in detention. The Government have therefore satisfied the burden of proof of showing the availability of a remedy which was an effective one available in theory and in practice at the relevant time (see paragraph 139 above).

199. The applicant must accordingly establish that judicial review proceedings were inadequate and ineffective in the particular circumstances of his case or that there existed special circumstances absolving him or her from the requirement to exhaust (see paragraph 139 above). The Government did not contest the applicant's submission that he sought assistance from the Law Society of Scotland and subsequently contacted a number of solicitors, all of whom declined to act for him. It is therefore clear that the applicant took some steps to pursue domestic remedies which were available. However, it is noteworthy that on 28 September 2011, only two months after the applicant had lodged his case with this Court while in prison by the submission of a letter of introduction which he had himself prepared, Bindmans solicitors contacted the Court to confirm that they had been recently instructed by the applicant to represent him. The applicant has not explained how he was successful in obtaining representation for his case

before this Court, having been unsuccessful in obtaining Scottish legal assistance for judicial review proceedings in the Court of Session. Nor has he explained why Bindmans were unable to arrange for the commencement of judicial review proceedings on his behalf at that time. Indeed, by 8 February 2012, when he first informed the Court of his complaints about his treatment in detention, he had already enjoyed legal representation from Bindmans for over four months.

200. In the circumstances the Court concludes that the applicant has not discharged the burden upon him to demonstrate that the remedy offered by judicial review was ineffective or that there were special circumstances which exempted him from pursuing it. He has accordingly failed to exhaust domestic remedies in respect of his complaint about his treatment in detention. It must therefore be rejected pursuant to Article 35 §§ 1 and 4.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Articles 8 and 10 concerning the applicant's arrest, prosecution, conviction and imprisonment admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 10 of the Convention;

3. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 28 October 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Ineta Ziemele
Deputy Registrar	President