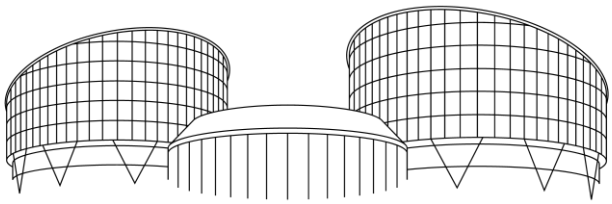

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 39678/09
L.L.
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 15 January 2013 as a Chamber composed of:

Ineta Ziemele, President,
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Paul Mahoney,
Krzysztof Wojtyczek,
Faris Vehabović, judges,

and Lawrence Early, *Section Registrar*,

Having regard to the above application lodged on 23 July 2009,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms L.L., is a British national who was born in 1991 and lives in Jersey. She was granted anonymity in the proceedings before the Court (Rule 47 § 3). She was represented before the Court by Ms C. Fogarty, a lawyer practising in Jersey. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, Foreign and Commonwealth Office. The AIRE Centre and

the Howard League for Penal Reform were jointly granted leave to submit third-party observations (Article 36 § 2 of the Convention).

A. The circumstances of the case

2. The facts of the case, as submitted by the parties, may be summarised as follows.

3. On 10 June 2008 the applicant pleaded guilty before the Jersey Youth Court to a grave and criminal assault and to the purchase or consumption of intoxicating liquor on licensed premises by a person under the age of 18 and was sentenced to a six-month probation order. On 15 July 2008 the applicant pleaded guilty before the Jersey Youth Court to being drunk and incapable on 24 June 2008 and to breaching the probation order which had been imposed on 10 June 2008. The initial probation order was revoked and she was sentenced to a further six-month probation order. On 21 November 2008 the applicant pleaded guilty before the Inferior Number of the Royal Court to a grave and criminal assault committed on 11 August 2008. On 12 December 2008 she pleaded guilty before the Inferior Number to obstructing a police officer on 29 November 2008 whilst she had been on bail.

4. On 12 December 2008, the applicant was sentenced to a total of 11 months' youth detention. She was 16 years old when the offences were committed and 17 at the time of sentencing. In giving judgment and providing the reasons for her sentence, the Deputy Bailiff of the Inferior Number stated that:

> "5. L.L., when the victim was pinned to the ground by Artois you sauntered over with your hands in your pockets and gave the victim a single firm kick to his face. This is not your first offence of violence. In June 2008, you were placed on probation by the Youth Court for another offence of grave and criminal assault. You re-offended within two weeks of that probation order by being drunk and incapable, you were given a further chance, then you were in breach of that probation order for a second time by committing this offence. Not content with that you have also re-offended whilst on bail for this offence in relation to the obstruction of the Police; so you have on three occasions re-offended whilst on probation. Again you seem to have a real problem with alcohol.
>
> 6. In mitigation we take into account your guilty plea, your difficult background as set out in the report and the fact that the report urges probation in order to address your difficulties. We also, of course, take into account your youth, you were 16 at the time and you are now 17. The Court is always reluctant to send a young woman of your age to youth detention particularly given the inadequate facilities at La Moye and the fact that you will therefore mix with adult offenders. But the Court considers that you have indeed failed signally to respond to non-custodial measures and are unable or unwilling to respond to them. We note the point your counsel has made about the comparatively short time but that was entirely a matter of choice on your part.

> Probation orders are not an easy option and if people break their probation orders by re-offending they must accept the consequences.
>
> 7. In our judgment there is no alternative for an offence of this seriousness by a person who has failed to respond to non-custodial sentences in the circumstances of the case. Furthermore, in our judgment, 6 months is simply too low for an offence which involves kicking to the face or head."

5. The applicant served her sentence between 12 December 2008 and 21 July 2009 in Her Majesty's Prison La Moye. HMP La Moye is the only prison facility in Jersey and consequently accommodates every category of remand prisoner and convicted offender committed to custody by the courts. It is divided into separate units. The upper floor of the male accommodation is designated as a Young Offenders Institution. There is no separate female Young Offenders Institution and the applicant therefore served her sentence in the female wing of HMP La Moye. In January 2009 there were 17 women detained in this wing. A large proportion of the women prisoners were detained in relation to drugs offences and the applicant claims that drugs were available on the wing. She was initially placed in a cell with a 40 year-old woman sentenced to six years' imprisonment for the importation of drugs, who had been trained as a "listener" to assist and provide support to other prisoners. After one week, upon her request, she was moved to her own cell. She befriended another prisoner who was 20 years of age and requested that they share a cell. After that prisoner had served her sentence and been released, the applicant shared a cell with a 16 year-old for several weeks, then was moved to a cell on her own, again at her own request. Other prisoners were prevented from entering her cell. Between 8.45 and 11.15 a.m. and 2 to 4 p.m. the applicant did the same work as adult females, dismantling computers in a recycling workshop, and received the same pay. She had access to a gymnasium and a library. She also attended basic training courses in carpentry, art, life skills, literacy, numeracy and computing, totalling 128 hours over 27 weeks.

6. The applicant appealed against her sentence to the Superior Number of the Royal Court complaining, *inter alia*, that the purported sentence of youth detention passed by the Deputy Bailiff was in fact a sentence of imprisonment to be served in the adult women's wing of the prison and was therefore unlawful and *ultra vires*; and that her imprisonment within an adult prison was arbitrary and discriminatory, in violation of Articles 5 § 1 and 14 of the Convention. Before the Royal Court was, *inter alia*, a letter from the Governor of HMP La Moye which explained that there were very few female juvenile or young offender detainees at any one time and it would take considerable resources to offer them a reasonable quality of life in segregated accommodation.

7. On 16 February 2009, the Royal Court granted the applicant leave to appeal against her sentence. It then went on to consider and to dismiss the

appeal, for reasons set out in a judgment promulgated on 4 March 2009, which stated:

> "19. There is no question that on the face of Article 4 of the Young Offenders Law the Inferior Number had the power, subject to the proviso set out in that article, to impose a sentence of youth detention on the appellant. There was a Young Offenders Institution in existence at HMP La Moye at the time such sentence was passed. The question is whether lack of facilities at that Institution at the time the sentence was passed to take Young Female Offenders rendered the passing of the sentence unlawful.
>
> 20. In our view the legal power of the Court to pass sentence is not dependent on or affected by the way the Minister and the Prison Governor may exercise or fail to exercise their quite separate administrative powers. The ability of the Court to exercise its judicial function would be rendered wholly uncertain if it were to be otherwise. In the same way, the power of the Court to pass a sentence of imprisonment upon an adult offender is not dependent on whether the Minister has provided facilities for that offender at HMP La Moye or elsewhere or where the offender might, under the legal custody of the Prison Governor, serve that sentence.
>
> 21. The underlying policy of the Young Offenders Law may have been to separate young offenders from adult offenders, but it is not a requirement of that Law that they should be so separated for the duration of their sentences. Indeed Article 17 expressly provides to the contrary. No doubt the current lack of facilities for young female offenders and the fact that they are likely to mix with adult female offenders is something the Court may take into account in passing a sentence of Youth Detention and it is clear from the extract of the judgment of the Deputy Bailiff quoted above that the Inferior Number did take this into account. However we were not concerned here with the merits of the decision to pass a sentence of Youth Detention but whether the Inferior Number had the power in law to do so.
>
> 22. Thus we concluded that the lack of facilities for young female offenders at the Young Offenders institution at the time the appellant was sentenced to Youth Detention did not render that sentence *ultra vires* or unlawful. Whilst the appellant may be mixing with adult female offenders, the sentence she is serving remains one of youth detention and not imprisonment.
>
> 23. Any concerns the appellant may have as to the facilities at the prison and the decisions taken by the Prison Governor are matters to be addressed and any remedies available pursued separately, but they do not impact upon or detract from the power of the Court to pass the sentence of youth detention."

In addition, the Royal Court found that the arguments under Articles 5 § 1 and 14 of the Convention taken together were without merit, stating:

> "In imposing a sentence of youth detention on 12 December 2008, the Court was acting lawfully, as we have found, and no issue of discrimination arose in that judicial process. If such an issue does arise, and we make no observation on that, it relates to the provision of facilities by the Minister and /or the exercise by the Prison Governor of his powers under Article 17 of the Young Offenders Law."

B. Relevant domestic law

1. The Criminal Justice (Young Offenders) (Jersey) Law 1994

8. Article 1 of the Act defines a "young offender institution" as a young offender institution provided by the Minister under Article 27 of the Prison (Jersey) Law 1957. "Youth detention" means a sentence of detention in a young offender institution imposed by virtue of Article 4(1). Article 3 provides that no court shall pass a sentence of imprisonment on any person under the age of 21. The relevant parts of Article 4 provide that:

> "(1) Subject to Article 5 and to the following provisions of this Article, where a person who is aged not less than fifteen but under twenty-one is convicted of an offence which is, in the case of a person aged twenty-one or over, punishable with imprisonment, the court may pass a sentence of detention in a young offender institution.
>
> (2) A court shall not pass a sentence of youth detention unless it considers that no other method of dealing with him is appropriate because it appears to the court that –
>
> (a) he has a history of failure to respond to non-custodial penalties and is unable or unwilling to respond to them; or
>
> (b) only a custodial sentence would be adequate to protect the public from serious harm from him; or
>
> (c) the offence or the totality of the offending is so serious that a non custodial sentence cannot be justified;
>
> and the court shall state in open court its reasons for imposing a sentence of youth detention and shall explain to the person that on his release he may be subject to a period of supervision in accordance with Article 10..."

Article 17 provides that:

> (1) Without prejudice to any other power vested in the governor of the prison, the governor may instruct that a person under 21 who is remanded in custody to a young offender institution or serving a sentence of youth detention may be transferred -
>
> (a) to a prison medical facility or to a hospital for medical treatment;
>
> (b) to the prison, either for a fixed term or for the remaining part of the person's sentence or the period of the person's remand, if the governor is of the opinion that, by reason of that person's behaviour whilst detained it is not in the person's interests or the interests of other persons there detained to continue to detain the person in the young offender institution; or
>
> (c) to the prison, either for a fixed term or for the remaining part of the person's sentence, or for the period of the person's remand, if the

governor is of the opinion that no suitable facilities exist in the young offender institution for the detention of that person.

(2) Where a person is transferred from a young offender institution under this Article, the person shall be in lawful custody during the period of the transfer and the period of transfer shall be treated for all purposes as a part of the person's sentence."

2. The Prison (Jersey) Law 1957

9. Article 27, as amended, provides that:

"(1) The Minister may provide –

(a) young offender institutions where offenders aged not less than 15 but under 21, sentenced to a term of youth detention may be detained in conditions suitable to persons of their ages and descriptions;

(b) attendance centres where male persons aged not less than 10 but under 21 may be ordered to attend in pursuance of an attendance centre order, and there be given appropriate occupation or instruction under supervision.

(3) For the purposes of paragraph (1)(b), the Minister may make arrangements with any other Minister for the use of premises which that other Minister administers."

3. The Human Rights (Jersey) Law 2000

10. Section 3 of the Human Rights (Jersey) Law 2000, which came into force on 10 December 2006, provides that in determining any question that arises in connection with a Convention right, courts and tribunals must take into account any case-law from this Court so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen. Section 7 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Under section 8 of the Act, a person who claims that a public authority has acted unlawfully within the meaning of section 7 may (a) bring proceedings against the authority in question under the 2000 Law in the Royal Court; or (b) rely on the Convention right or rights concerned in any legal proceedings.

4. Appeal to the Judicial Committee of the Privy Council

11. The Judicial Committee of the Privy Council is composed of Justices of the Supreme Court of the United Kingdom and other senior United Kingdom and Commonwealth judges. It is the court of final appeal for United Kingdom overseas territories and Crown dependencies, including Jersey. In criminal cases from Jersey there is no appeal as of right and

special leave from the Judicial Committee of the Privy Council is required. The current Privy Council Practice Direction on "Application for Permission to Appeal" provides that, for criminal appeals against conviction and sentence, permission will be granted only in respect of "applications where, in the opinion of the Appeal Panel, there is a risk that a serious miscarriage of justice may have occurred". Further guidance as to the type of case in which the Privy Council will intervene was set out by Lord Maugham in *Renouf v. Attorney-General for Jersey* [1936] AC 445:

> "There must be something which, in the particular case, deprives the accused of the substance of a fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into evil precedent in future ...
>
> ... In the case of misdirection, as in any other case of an alleged failure in the proper trial of a criminal case, the Board give advice to His Majesty to intervene only if there is shown to be such violation of the principles of justice that grave and substantial injustice has been done. The Board has repeatedly declined to act as a general Court of Criminal Appeal."

12. According to the information provided by the Government, in recent years special leave has been granted in four criminal cases from Jersey. The first, *Attorney General for Jersey v. Holley* [2005] UKPC 23, raised a question concerning the extent to which individual characteristics should be taken into account when assessing the reasonableness of a response to provocation in a murder case. In *Attorney General for Jersey v. Edmond O'Brien* [2006] UKPC 14, the Privy Council accepted the Attorney General's appeal, holding that the Court of Appeal of Jersey had erred in setting aside a conviction by the Royal Court on the ground that it could not be supported by the evidence, since questions of credibility were a matter for the Jurats and it was not the function of the Court of Appeal to say that the evidence of the accused should have been accepted. In *Peter Michel v. the Queen* [2009] UKPC 40, the Privy Council found that the appellant's trial had been unfair due to excessive interventions from the trial judge and quashed the conviction. Finally, in *Curtis Warren v. Attorney General for Jersey* [2011] UKPC 10, the Privy Council dismissed the appeal, which had been brought against decisions of the Jersey courts refusing to stay the proceedings on grounds of abuse of process following police misconduct in obtaining surveillance evidence.

C. Relevant international law

13. The United Nations Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution 44/25 of 20 November 1989, was ratified by the United Kingdom on 16 December 1991 but does not extend to Jersey. Article 1 defines a child as every human being below the age of eighteen

years unless, under the law applicable to the child, majority is attained later. Article 3 provides that, in all actions concerning children, the best interests of the child shall be a primary consideration. Article 37(c) provides that State Parties shall ensure that:

> "Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances..."

D. Reports regarding youth detention in Jersey

1. Report on an unannounced inspection of La Moye Prison, Jersey, 27 June – 1 July 2005 by Her Majesty's Chief Inspector of Prisons

14. The most recent report prepared by Her Majesty's Chief Inspector of Prisons, Anne Owers, concluded that HMP La Moye was "an entirely unsuitable environment for children" as very little education was available, and child protection arrangements and staff training were inadequate. In addition, no risk or vulnerability assessments of children were carried out. The report recommended that all juveniles should be held separately in the purpose-built secure unit for juveniles then being constructed on Jersey (later referred to as "the Greenfields Centre" or "Greenfields") as this would better protect them.

2. Prison Board of Visitors – Annual Report 2006

15. This report for the Ministers of Jersey set out concerns about the continuing custody of children at HMP La Moye and stated:

> "HMP La Moye is unique, at least within the prison service of England and Wales, as it is called upon to accommodate the various categories of adult male and female prisoners as well as young offenders of both sexes. Each group requires distinct facilities and whilst we have already noted the improved accommodation for the females, we must record our concern that the law requires young offenders of school age who are sentenced to youth detention to be held at La Moye. We had anticipated that Greenfields would be used for this purpose and we hope that appropriate action will be taken at the earliest opportunity for this to happen."

3. The Howard League for Penal Reform – Jersey Review, A review of the Jersey youth justice system, November 2008, ("the Howard League Report")

16. This report was the result of a review of the youth justice system in Jersey conducted by the Howard League for Penal Reform at the invitation of the then Minister for Health and Social Service. The report made a

variety of observations about the custody of young offenders in Jersey including, *inter alia*, the following:

> "8.4 In relation to Jersey's small population, the juvenile custody rate of the island is unacceptably high.
>
> 8.5 Jersey has a higher rate of custody than these European neighbours. The custody rate is slightly higher than England and Wales, more than 4 times that in France, and more than 100 times that in Finland.
>
> ...
>
> 8.14 On these extremely rare occasions where custody of children is unavoidable for genuine reasons of public protection, the placement should be within the secure children's home, and Jersey law should be amended to permit this to happen."

The report also referred to the two establishments in Jersey where children may be held in custody - HMP La Moye and the Greenfields Centre. It noted that the Greenfields Centre was never used to hold children sentenced to custody, but only those who were remanded in custody before trial. In relation to HMP La Moye, the report made the following comments:

> "9.11 Nonetheless, we do not believe that an adult prison is a place where children should be incarcerated. La Moye is an establishment designed for the care of adults, where typically, children are about 1% of its population. Policies and procedures are largely geared to the needs of adults.
>
> 9.12 A particular problem relates to the care of female children at La Moye. The Criminal Justice (Young Offenders) (Jersey) Law 1994 stipulates at Article 4 that a custodial sentence is "detention in a young offender's institution".
>
> 9.13 Of course, there is no young offender's institution for females and so girls are held in the adult female wing. We believe this to be in breach of Jersey law, as well as in breach of Article 37 (c) of the UNCRC. This concern of course applies to young women up to the age of 21, and not merely female children.
>
> 9.14 We agree with Her Majesty's Chief Inspector of Prisons, that La Moye is not a suitable place to care for children, and its use for the detention of children should be terminated.
>
> 9.15 We believe that the use of custody for children in Jersey should be very rare. In really exceptional cases, where custody is unavoidable, children should be held at Greenfields."

4. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Report of November 2010

17. The CPT visited Jersey in March 2010 and expressed concern about the conditions of detention of juveniles and young offenders:

"34. The CPT is concerned about the placement of juveniles in an adult prison environment. One of the cardinal principles enshrined in the United Nations Convention on the Rights of the Child and the Beijing Rules is that juveniles – that is, persons under the age of 18 – should only be deprived of their liberty as a last resort and for the shortest possible period of time. The CPT fully endorses this principle. Further, juveniles who are deprived of their liberty ought to be held in detention centres specifically designed for persons of this age, offering regimes tailored to their needs and staffed by persons trained in dealing with the young.

As a matter of principle, if, exceptionally, juveniles are held in an institution for adults, they should be accommodated separately from adults, in a distinct unit specifically designed for persons of this age, offering regimes tailored to their needs and staffed by persons trained in dealing with the young. The Committee believes that the risks inherent in juvenile prisoners sharing accommodation with adult prisoners are such that this should not occur.

The legal provisions in Jersey governing the placement of juveniles in custody are described in the section below concerning Greenfields Centre for children (see paragraph 53). At present, the only establishment in Jersey which could accommodate sentenced juveniles aged 15 to 17, and juveniles on remand who are above school-leaving age, is La Moye Prison.

The CPT recommends that steps be taken to ensure that, as far as possible, all juveniles – i.e. persons under the age of 18 – deprived of their liberty in Jersey are held in an appropriate centre for this age group, and not in prison (see also paragraph 53).

35. At the time of the visit, juvenile male inmates were held at La Moye Prison together with young offenders (aged 18 to 21) on the upper level of K Wing, separate from adult male prisoners above the age of 21. There were two male juveniles on K Wing at the time of the visit.

Female juvenile inmates, on the other hand, were accommodated on the same wing as female adult prisoners of all ages. At the time of the visit, two female juveniles were being held in H Wing.

...

36. In terms of regime, juveniles held at La Moye Prison did not benefit from substantially different arrangements compared to other inmates. They had access to the exercise yard for two half-hour periods per day; in addition, male juveniles together with young offenders had access to one hour of football per week. They were engaged in work, such as cleaning, and could follow courses in recycling, carpentry or bricklaying for up to four and a half hours per day. As with other inmates, they could follow educational courses, including tuition once per week; this is clearly insufficient for juveniles. They also benefited from the same conditions as regards visiting and other contacts with the outside world. Further, juveniles could be subject to segregation in much the same manner as adult inmates. Moreover, staff assigned to the custody of juveniles, whether in blocks H or K, were not specifically trained to deal with young persons, and told the delegation of the difficulties they experienced in this respect.

This situation is far from ideal. The CPT acknowledges the difficulty in making adequate arrangements for the detention of a small number of juveniles. Nevertheless, as indicated in paragraph 34 above, the CPT considers that it is far preferable for juveniles to be held in specially designed detention centres.

37. For as long as juveniles continue to be held at La Moye Prison, **the CPT recommends that particular attention be paid to their education (including physical education) and to offering them a wide range of opportunities to develop their life skills whilst accommodated in the establishment.**

Further, particular care should be taken to ensure that juveniles are accommodated separately from other prisoners. If the effect of such a separation would be to isolate a juvenile prisoner, he/she should be offered opportunities to participate in out-of-cell activities with adults, under appropriate supervision by staff – the juvenile should not be left locked up alone in a cell for extended periods of time. A juvenile of one sex should be able to associate with a juvenile of another sex, subject to a proper risk assessment. The situation of female juveniles at La Moye Prison, who are held together with female inmates of all ages, is not appropriate. On the other hand, the CPT acknowledges that holding juveniles and young adults together, as is the current situation for male juveniles at La Moye Prison, can be beneficial to the young persons involved, but it requires careful management to prevent the emergence of negative behaviour such as domination and exploitation, including violence.

Moreover, it is essential that staff working with juveniles be provided with the necessary training and that the team be of mixed gender. More generally, the policy of treating 17-year-olds as adults should also be reviewed in the light of the provision of the United Nations Convention on the Rights of the Child (see paragraph 20 above).

The CPT recommends that the Jersey authorities take the necessary steps in the light of the above remarks. ...”

COMPLAINTS

18. The applicant complained under Article 5 § 1 of the Convention that her detention in HMP La Moye between 12 December 2008 and 21 July 2009 was unlawful, since she was sentenced to serve a sentence of youth detention in an adult prison. She also complained under Article 14 taken in conjunction with Article 5 § 1 that she was discriminated against on the grounds of her sex, as female young offenders were not provided with a segregated institution where they could serve their sentence of youth detention, while such institutions were provided for male young offenders.

THE LAW

19. In her application to this Court, as in her appeal against sentence before the national court, the applicant characterised her complaint that her sentence was to be served in the adult women's wing of HMP La Moye, rather than in a specialist juvenile facility, as raising an issue under Article 5 § 1 of the Convention, which provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> ...
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision ..."

The applicant also complained that her detention in an adult wing was discriminatory, in breach of Article 14, which states:

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

The applicant emphasised in her observations that her complaint was not directed at the specific conditions of her detention; nor was it directed at the national courts' decision to sentence her to a custodial sentence as such. In her view, the domestic court acted *ultra vires* in imposing the sentence of youth detention, knowing that she would be detained in an adult prison. The detention was, therefore, unlawful under Article 5 § 1.

20. The Court notes in this respect that its case-law under Article 5 § 1 provides that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f), be "lawful". Where the "lawfulness" of detention is in issue, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, ECHR 2008). In order to avoid arbitrariness, there must *inter alia* be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention (see *Saadi v. the United Kingdom* [GC], cited above, § 69, where the Court referred as examples to *Bouamar v. Belgium*, judgment of 29 February 1988, Series A

no. 129; *Aerts v. Belgium*, judgment of 30 July 1998, Reports 1998-V, § 46; and *Enhorn v. Sweden*, no. 56529/00, § 42, ECHR 2005-I).

21. The Government raised a preliminary objection to the application, claiming that it was inadmissible for non-exhaustion of domestic remedies. They submitted that, if the applicant considered that the Royal Court was wrong in deciding that her sentence was lawful and compatible with her Convention rights, she should have applied to the Judicial Committee of the Privy Council for special leave to appeal. The Government accepted that the Privy Council did not act as a general court of appeal, but reasoned that an allegation that the Royal Court was consistently imposing unlawful sentences of detention on female young offenders was clearly exceptional and sufficiently serious to constitute a "serious miscarriage of justice" for the purposes of an application for permission to appeal. By way of example, the Government provided details of four criminal appeals from Jersey which had been considered by the Privy Council in recent years, each raising a different issue of substantive or procedural law (see paragraph 12 above). In addition, the Government contended that any concerns on the part of the applicant about discrimination in relation to her conditions of detention and the appropriateness of the facilities available to her at HMP La Moye could have been raised in civil proceedings against the Prison Board and/or the Minister for Home Affairs under the Human Rights (Jersey) Law 2000, as indicated by the Royal Court in its judgment (see paragraph 23 of the Royal Court's judgment, set out in paragraph 7 above; see also paragraph 10 above).

22. The applicant responded that the jurisdiction of the Privy Council was rare and exceptional, with a high threshold for granting permission. Her legal representatives considered that they would be highly unlikely to be granted permission to appeal and, even if granted permission, highly unlikely to be successful on appeal. In response to the argument that she could have brought a civil claim, she emphasised that her challenge was not to the specific conditions in the prison, but instead to the lawfulness of the sentence passed. Article 10 of the Human Rights (Jersey) Law 2000 specifically curtailed the avenues through which a breach of Convention rights arising from a judicial act could be pursued. In this case, it was clear that the only forum in which the sentence could be challenged as incompatible with Convention rights was the appeal against sentence. It would not have been possible for a civil court to quash the sentence; nor could a civil court have provided effective mandatory relief, involving the provision of appropriate juvenile facilities for the applicant before the expiry of her 11-month sentence. Moreover, she considered that, following the rejection of her criminal appeal, a civil claim based on Articles 14 and 5 of the Convention would inevitably have been rejected by the Jersey courts, in particular given the close links between government officials, criminal and civil judges on the island.

23. The Court recalls the requirements of the rule of exhaustion of domestic remedies summarised in its judgment in *Selmouni v. France* ([GC], no. 25803/94, §§ 74-77, ECHR 1999 V):

> "74. The Court points out that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions ... . Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right through their own legal system. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights ... . Thus the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic body, and in compliance with the formal requirements and time-limits laid down in domestic law ... .
>
> 75. However, the only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied ... . In addition, according to the 'generally recognised principles of international law', there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal ... .
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> 76. Article 35 provides for 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 (see the *Akdivar and Others* judgment cited above, p. 1211, § 68). One such reason may be constituted by the national authorities' remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what they have done in response to the scale and seriousness of the matters complained of (ibid.).... .
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> 77. The Court would emphasise that the application of this rule must make due allowance for the [Convention] context. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism ... . It has further recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case ... . This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of

> the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants ... .”

24. When deciding whether or not an applicant should be required to exhaust a particular remedy, the Court has held that mere doubts on his part as to its effectiveness will not absolve him from attempting it. However, an applicant is not required to use a remedy which, “according to settled legal opinion existing at the relevant time”, offers no reasonable prospects of providing redress for his complaint (see *Fox v. the United Kingdom* (dec.), no. 61319/09, 20 March 2012). Where the existence of an effective remedy has been established by the respondent Government, the threshold for a “special circumstances” dispensation from the obligation to exhaust it is high (see *D. v. Ireland* (dec.), no. 26499/02, §§ 89 and 91, 28 June 2006; see also *Cyprus v. Turkey* [GC], no. 25781/94, § 352, ECHR 2001-IV; and *Van Oosterwijck v. Belgium*, 6 November 1980, § 38, Series A no. 40).

25. The Court must determine whether the present applicant did everything that could reasonably be expected of her to exhaust domestic remedies. The Government submitted that she should have sought leave to appeal from the Judicial Committee of the Privy Council. The applicant did not contend that this remedy was not “accessible” or “capable of providing redress” (see § 76 of *Selmouni*, cited in paragraph 23 above). There was, however, dispute between the parties as to whether such an application “offered reasonable prospects of success”.

26. It is true that in criminal cases leave is required to appeal to the Privy Council against conviction or sentence, and will be granted only where there is judged to be a risk of there having occurred a serious miscarriage of justice (see paragraph 11 above). However, as the Government pointed out, between 2005 and 2011 the Privy Council heard appeals in four criminal cases from the relatively small jurisdiction of Jersey (see paragraph 12 above). In the Court’s view, the issues raised by each of those four cases do not appear significantly more serious in terms of criminal justice than those raised in the applicant’s case. As the Government reasoned, the claims made by the applicant in her appeal against sentence could well be regarded as exceptionally important. The grounds of appeal pointed to a miscarriage of criminal justice going beyond the facts of her particular case and applying equally to all juvenile females sentenced to youth detention in Jersey. Moreover, they raised questions as to the conformity of the domestic criminal justice system with the Convention. These were questions which the Judicial Committee of the Privy Council, which is principally composed of Justices from the Supreme Court of the United Kingdom, with extensive experience of Convention issues, was well placed to address.

27. From the material provided by the applicant, it does not appear that she or her advisors gave any consideration at the relevant time to the possibility of bringing an appeal to the Privy Council. She has not established in her pleadings before the Court that “settled legal opinion

existing at the relevant time" suggested that an application by her for special leave to appeal would have had no prospects of success. In the circumstances, the Court does not consider that the doubts on the part of the applicant's legal representatives as to her chances of success before the Privy Council, expressed in written form apparently only after the Government raised the issue in the present proceedings, absolved her from any attempt to apply to it for leave to appeal at the relevant time.

28. In addition, the Court notes that, under section 8 of the Human Rights (Jersey) Law 2000, any person who claims that a public authority has acted in a way which is incompatible with a Convention right may bring proceedings in the Royal Court (see paragraph 10 above). The applicant contended that a civil claim would have been inappropriate, since her complaint was not directed to the specific conditions of detention at HMP La Moye but was instead a challenge to the lawfulness of the domestic courts' imposing and upholding a custodial sentence in circumstances where it was inevitable that she would be detained in an adult wing of the prison. Nonetheless, in the Court's view the applicant's Convention complaints could alternatively have been couched in terms of the failure of the prison authorities to provide a place in a detention facility appropriate for a young offender. It is also significant that the Royal Court, when considering the applicant's Convention complaints, observed that, if any issue of discrimination arose in her case, it related to the provision of facilities by the relevant Government Minister and/or the exercise of powers by the Prison Governor, matters which could be pursued separately in civil proceedings (see paragraph 7 above). Such an action would have enabled her to ventilate before the domestic courts the Convention complaints that she is seeking to have decided by this Court. Although in the applicant's submission the domestic courts considering a civil claim for damages would not have had power to provide her with mandatory relief, thereby bringing about the end of her detention in the adult wing of HMP La Moye, it is noteworthy that her application to this Court was not lodged until after her release from detention. A domestic civil claim would have enabled her to claim the same type of *ex post facto* relief that she is claiming before this Court. Finally, the Court notes that the applicant has not provided any evidence to support her suggestion that the civil courts in Jersey would not have dealt with her claim in an independent and impartial manner or that there were special circumstances which absolved her from the requirement to exhaust domestic remedies (see *Selmouni*, cited above, § 76; compare, for example, *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports of Judgments and Decisions* 1996-IV).

29. It follows that this application must be rejected under Article 35 §§ 1 and 4 of the Convention on the grounds of a failure to exhaust domestic remedies.

For these reasons, the Court unanimously

Declares the application inadmissible.

Lawrence Early Registrar	Ineta Ziemele President