



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

THIRD SECTION

CASE OF CURLEY v. THE UNITED KINGDOM

(Application no. 32340/96)

JUDGMENT

STRASBOURG

28 March 2000

FINAL

28/06/2000

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It is subject to editorial revision before its reproduction in final form in the official reports of selected judgments and decisions of the Court.

In the case of CURLEY v. the United Kingdom,

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

Mr J.-P. COSTA,
Sir Nicolas BRATZA,
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Mr W. FUHRMANN,
Mr K. JUNGWIERT,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 1 December 1998 and on 14 March 2000,

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

PROCEDURE

1. The case originated in an application (32340/96) against the United Kingdom lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”).

The applicant, Brian Curley, is a British national, born in 1961 and serving a sentence of detention during Her Majesty’s Pleasure. He was represented by Mr Simon Creighton, a lawyer practising in London, formerly for the Prisoner’s Advice Service and latterly for Bhatt Murphy Solicitors. The Government of the United Kingdom were represented by their Agent, Mr Ian Christie of the Foreign and Commonwealth Office.

The application principally concerned the applicant’s complaints that he has had no review of the lawfulness of his continued detention in compliance with Article 5 § 4 of the Convention or the possibility of obtaining compensation for a breach of that right as required by Article 5 § 5 of the Convention.

2. On 9 April 1997, the Commission decided to give notice of the application to the respondent Government and invited them to submit their observations on its admissibility and merits. The Government submitted their observations on 15 July 1997, to which the applicant replied on 26 September and 7 October 1997.

3. Following the entry into force of Protocol No. 11 to the Convention and in accordance with provisions of Article 5 § 2 thereof, the application falls to be examined by the Court.

In accordance with Rule 52 § 1 of the Rules of Court, the President of the Court, Mr. L. Wildhaber, assigned the case to the Third Section.

4. On 1 December 1998, the Court declared the application admissible and decided that it was not necessary to hold a hearing.

5. In accordance with Rule 59 § 3 the President of the Chamber invited the parties to submit memorials on the issues in the application. The Registrar received the applicants' and Government's further comments on 27 May 1999 and 17 June 1999 respectively.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. In 1979, the applicant, then aged 17, was convicted of murder and sentenced to be detained during Her Majesty's pleasure. The "tariff" part of the applicant's sentence, attributable to deterrence and punishment, was set at 8 years and expired in 1987.

7. Following the expiry of his tariff, the applicant's case was the subject of review by the Parole Board on a number of occasions. Following the fourth review in January 1991, the applicant absconded from prison. Following his recapture on 6 July 1993 it was decided that his case should be reviewed again in January 1995.

8. At this, the fifth review, which in fact took place in August 1995, the Parole Board recommended that the applicant be given a provisional release date of 12 months hence, during which time he should spend six months in a Category D open prison, followed by six months in a Pre-Release Employment Scheme Hostel.

9. The Parole Board's recommendation was not accepted by the Secretary of State who directed that the applicant be transferred to a Category D prison and his case be subject to further review in 12 months. The applicant was notified of the Secretary of State's decision and the Parole Board's recommendation by letter of 17 November 1995. By letter dated 6 December 1995, the applicant made representations against that decision. These were rejected by the Secretary of State by letter dated 2 January 1996.

10. The applicant sought leave to apply for judicial review of the Secretary of State's decision. Leave was refused by a single judge of the High Court on 26 April 1996. The applicant was advised by counsel who represented him at the hearing that there was no tenable basis for appeal against the decision refusing leave.

11. On 12 August 1996, the applicant was notified that, pursuant to interim measures introduced by the Secretary of State on 23 July 1996, the

applicant's case would be referred back to the Parole Board for review in the form of an oral hearing at which the applicant would be entitled to legal representation. That review took place on 7 February 1997 and, by letter dated 14 February 1997, the Parole Board recommended the applicant's release. The Home Secretary followed the recommendation and released the applicant on 7 May 1997.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Detention during Her Majesty's pleasure

12. English law imposes a mandatory sentence for the offence of murder in respect of offenders under the age of 18 known as *detention during Her Majesty's pleasure* (section 53(1) of the Children and Young Persons Act 1933); in respect of offenders between the age of 18 and 20 years, *custody for life* (section 8(1) of the Criminal Justice Act 1982), and in respect of offenders aged 21 and over, *life imprisonment* (section 1(1) of the Murder (Abolition of Death Penalty) Act 1967).

13. Mandatory life sentences are fixed by law, in contrast to discretionary life sentences which can be imposed at the discretion of the trial judge on persons convicted of certain violent or sexual offences (e.g. manslaughter, rape or robbery). The principles underlying the imposition of a discretionary life sentence are:

- i. that the offence is grave, and
- ii. that there are exceptional circumstances which demonstrate that the offender is a danger to the public and that it is not possible to say when the danger will subside.

14. Discretionary life sentences are indeterminate in order that "the prisoner's progress may be monitored ... so that he will be kept in custody so long as public safety may be jeopardised by his being let loose at large" (R v. Wilkinson [1983] 5 Cr. App. Rep. 105, p. 108).

B. Categorisation of detention "during Her Majesty's pleasure"

15. The notion of detention during Her Majesty's pleasure had its origins in an Act of 1800 for "the safe custody of insane persons charged with offence". Section 1 provided that defendants acquitted of a charge of murder, treason or felony on the grounds of insanity at the time of the offence were to be detained in "strict custody until His Majesty's pleasure" and described their custody as being "during His <Majesty's> pleasure".

16. In 1908, detention during His Majesty's pleasure was introduced in respect of offenders aged ten to sixteen and then extended to cover those

under eighteen in 1933. The provision in force at present is Section 53 (1) of the Children and Young Persons Act 1933 (as amended) which provides:

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

17. In the case of *ex parte* Prem Singh on 20 April 1993, Evans LJ in the Divisional Court held as follows in respect of detention during Her Majesty’s pleasure:

“At the time of sentencing, the detention orders under section 53 were mandatory. It is indeed the statutory equivalent for young persons of the mandatory life sentence for murder. But the sentence itself is closer in substance to the discretionary sentence of which part is punitive (retribution and deterrence) and the balance justified only by the interests of public safety when the test of dangerousness is satisfied. The fact that the mandatory life prisoner may be given similar rights as regards release on licence does not alter the fact that the mandatory life sentence is justifiable as punishment for the whole of its period: see *R. v. Secretary of State, ex. p. Doody & others* [1993] Q.B. 157 and *Wynne v. UK* (E.C.H.R. 1st December 1992). The order for detention under section 53 is by its terms both discretionary and indeterminate: it provides for detention ‘during Her Majesty’s pleasure’. (Section 53(4) which expressly authorised the Secretary of State to discharge the detainee on licence ‘at any time’ was repealed by the Parole Board provisions of the Criminal Justice Act 1967, but this does not, in my judgment, alter the nature of the sentence in any material respect.) I would decide the present case on the narrow ground that, notwithstanding Home Office and Parole Board practice, the applicant should be regarded as equivalent to a discretionary life prisoner for the purpose of deciding whether Wilson rather than Payne governs his case.”

18. The Divisional Court accordingly held that the applicant in that case, who was detained during Her Majesty’s pleasure, should be afforded the same opportunity, as would be given a discretionary life prisoner, to see the material before the Parole Board when it decided upon whether he should be released after his recall to prison on revocation of his licence.

C. Release on licence and revocation of licences

19. Persons sentenced to mandatory and discretionary life imprisonment, custody for life and those detained during Her Majesty’s pleasure have a “tariff” set in relation to the period of imprisonment they should serve in order to satisfy the requirements of retribution and deterrence. After the expiry of the tariff, the prisoner becomes eligible for release on licence. Applicable provisions and practice in respect of the fixing of the tariff and release on licence have been subject to change in recent years, in particular,

following the coming into force on 1 October 1992 of the Criminal Justice Act 1991.

20. Under the relevant provisions of the Criminal Justice Act 1967, the regime applying to the release of discretionary and mandatory life prisoners was the same. Section 61(1) of the 1967 Act provided *inter alia* that:

“The Secretary of State may, if recommended to do so by the Parole Board, release on licence a person serving a sentence of imprisonment for life or custody for life or a person detained under section 53 of the Children and Young Persons Act 1933 (young offenders convicted of grave crimes), but shall not do so in the case of a person sentenced to imprisonment for life or custody for life or to detention during Her Majesty’s pleasure or for life except after consultation with the Lord Chief Justice of England and the trial judge if available.”

21. The 1991 Act instituted changes to the regime applicable to the release of discretionary life prisoners following the decision of the European Court of Human Rights in the case of *Thynne, Wilson and Gunnell v. the United Kingdom* (judgment of 25 October 1990, Series A no. 190-A).

22. Pursuant to section 34 of the 1991 Act, after the tariff has expired, the prisoner may require the Secretary of State to refer his case to the Parole Board which has the power to order his release if it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. Pursuant to the Parole Board Rules 1992 which came into force on 1 October 1992, a prisoner is entitled to an oral hearing, to disclosure of all evidence before the Parole Board and to legal representation. He is also entitled to call witnesses on his behalf and to cross-examine those who have written reports about him.

23. The regime applicable to mandatory life prisoners was, however, preserved within section 35 of the 1991 Act. Section 35 of the 1991 Act provides insofar as relevant:

“(2) If recommended to do so by the Board, the Secretary of State may, after consultation with the Lord Chief Justice together with the trial judge if available, release on licence a life prisoner who is not a discretionary life prisoner.”

24. The criterion for determining whether re-detention is justified is that of dangerousness, meaning a consideration of whether the offence constitutes an unacceptable risk of physical danger to the life or limb of the public (see *R v. Secretary of State for the Home Department, ex. parte Prem Singh*, unreported, transcript pp. 26F-27B; and the *Singh v. the United Kingdom* judgment of 21 February 1996, *Reports of Judgments and Decisions* 1996-I, at § 39).

D. Recent Developments

25. In light of the judgments of the Court in the cases of *Singh v. the United Kingdom* and *Hussain v. the United Kingdom* (*Singh v. the United Kingdom* judgment of 21 February 1996, *loc. cit.* p. 280, and *Hussain v. the*

United Kingdom judgment of 21 February 1996, *Reports* 1996-I, p. 252), the Secretary of State announced, on the 23 July 1996, the introduction of interim measures taking effect from 1 August 1996 which changed the procedure under which the cases of prisoners detained during Her Majesty's pleasure were reviewed by the Parole Board.

26. Pursuant to these measures, the review took the form of an oral hearing at which prisoners were entitled to legal representation and to examine and cross-examine witnesses. Prisoners also normally received full disclosure of all material relevant to the question of whether they should be released prior to the hearing. Pending amendment of section 53(2) of the 1991 Act, the Parole Board did not, however, have power to direct the release of any prisoner. This remained the prerogative of the Secretary of State subject to consultation with the judiciary, as required by section 53(2) of the 1991 Act.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

27. Article 5 § 4 of the Convention provides:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

28. The applicant complained that he had not been able, since the expiry of the tariff period applicable to his sentence, to take proceedings satisfying the requirements of Article 5 § 4 of the Convention. In particular, the applicant complained that any recommendation by the Parole Board for his release was subject to the approval of the Secretary of State. The applicant submitted that the interim arrangements introduced following the Court's judgments in *Singh and Hussain* (see paragraph 25 above) did not constitute an adequate review for the purposes of Article 5 § 4 since they did not allow for a court to direct release and made no provision for a speedy determination. As a consequence, the applicant contended that they constituted a continuing breach of Article 5 § 4 of the Convention.

29. The applicant further submitted that review of his detention did not satisfy the requirement of a “speedy” review, as ensured by Article 5 § 4 of the Convention. In particular, he submits that only in November 1995 was he notified of the Parole Board's recommendation made in August 1995, and the next Parole hearing took place some eighteen months after that

recommendation and some 12 months after the decision of the Court in *Singh and Hussain v. the United Kingdom* (judgments cited above).

30. The Government accepted that, prior to 1 August 1996, the applicant was unable to obtain a review of the lawfulness of his detention by a court which satisfied the requirements of Article 5 § 4. To that extent, the Government conceded the admissibility of the applicant's complaint in relation to the review of his case which was initiated in January 1995 and finally determined by the refusal of leave to apply for judicial review on 26 April 1996.

31. The Government denied, however, that any separate issue arose under Article 5 § 4 on account of the delay which the applicant alleged occurred in reviewing his case under the new procedures put in place in the light of the Court's judgments in *Singh and Hussain v. the United Kingdom*. The Government explained that, following the delivery of those judgments on 21 February 1996, they introduced new interim administrative arrangements with effect from 1 August 1996, and that by letter dated 12 August 1996 the applicant was offered the opportunity of having his case considered under the new arrangements. However, the reports on the applicant were nearly two years out of date and thus the Prison Service Lifer Unit requested the preparation of up to date reports before carrying out the review. The applicant's representative consented to this procedure.

32. The Court recalls that prisoners detained during Her Majesty's Pleasure are entitled, after the expiry of their "tariff", to have the lawfulness of their continued detention reviewed by a court offering the necessary judicial guarantees, in particular, the power to order release and adversarial proceedings (see *Hussain v. the United Kingdom*, cited above, § 57; *Singh v. the United Kingdom*, cited above, § 66). The applicant's tariff expired in 1987. Before his eventual release in May 1997, the applicant did not receive a review by a body fulfilling this criteria as the Parole Board, even under the interim arrangements, did not have the power to order the applicant's release.

33. In these circumstances, the applicant did not receive a review which was decided by a court or which was decided speedily. It is unnecessary to examine separately the claim that there was excessive delay in implementing the interim arrangements.

34. The Court concludes that there has been a breach of Article 5 § 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

35. Article 5 § 5 of the Convention provides:

"Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

36. The applicant complained that he had no enforceable right to compensation in respect of the violation of Article 5 § 4 above.

37. It is not contested by the Government that this violation could not give rise to an enforceable claim for compensation before the domestic courts.

38. The Court concludes that there has been a violation of Article 5 § 5 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

39. Article 3 of the Convention provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

40. The applicant also alleges that the effect of such a long period of detention in the absence of any proper or adequate procedure to decide upon his release was such as to constitute inhuman or degrading punishment in violation of Article 3 of the Convention.

41. The Government submitted that the alleged treatment did not fall within the scope of Article 3.

42. The Court finds that there is no indication that the lack of any review complying with Article 5 § 4 was sufficiently severe in its effects to disclose treatment contrary to Article 3 of the Convention. It finds that there has been no breach of this provision.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. Article 41 of the Convention provides:

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

A. Damages

44. The applicant claimed that he should be compensated for the loss of liberty resulting from the failure to introduce a proper system of review, and also for the absence of any enforceable right to compensation in the domestic courts. He submitted that domestic scales of compensation relative to unlawful detention should apply, otherwise the Government would profit from the breach of Article 5 § 5. He claimed that this should be calculated either from the first recommended date of release given by the Parole Board - as of August 1996 - or from the second recommendation for release on

14 February 1997, and amounted to 50,000 or 25,000 pounds sterling (GBP) respectively.

45. The Government disputed that domestic scales were applicable in this context and referred to the Court's approach in previous cases in reaching its own assessment of the proper level of just satisfaction.

46. The Court observes that in this case the Parole Board twice recommended the applicant's release, setting a provisional release date for August 1996 and following an oral hearing on 7 February 1997. It also notes the length of time - ten years - during which the applicant did not receive a review by a body complying with the requirements of Article 5 § 4 of the Convention. In these circumstances, it considers that the applicant must have suffered feelings of frustration, uncertainty and anxiety which cannot be compensated solely by the findings of violations. It does not, however, consider that the domestic scales of compensation applicable to unlawful detention apply in the present case where there has been no equivalent finding of unlawfulness. Making an assessment on an equitable basis, it awards 1,500 GBP for non-pecuniary damage.

B. Costs and expenses

47. The applicant claimed 4,882.40 GBP, plus 458.15 GBP value added tax (VAT) for costs and expenses. Of this amount, 2,264.40 GBP related to the work done by the applicant's representative who introduced the application, and 2,618 GBP in respect of the work done by his current solicitors who took over the case on 4 January 1999.

48. The Government submitted that the amount claimed was excessive in relation to the work undertaken. They pointed out that the applicant's current solicitors had not submitted any observations on the admissibility and merits and had only written letters to the Court on behalf of the applicant. The Government should not be held liable for any extra instructions required by the applicant's change in solicitors. They submitted that 1,500 GBP was a reasonable sum.

49. The Court notes that, in fact, the applicant has been represented throughout by Mr Simon Creighton, who moved from the Prisoner's Advice Service to Bhatt Murphy Solicitors. It is not apparent therefore that there were any increased costs resulting from the nominal change in representation. Nonetheless, it finds the amount of costs claimed in respect of the period after the case was declared admissible disproportionate. Accordingly, making an assessment on an equitable basis, it awards the sum of 2,264.40 GBP in respect of the initial work done in the case and 1,400 GBP in respect of the period after admissibility, together with any VAT which may be payable. This makes a total of 3664.40 GBP, less the sum of 4100 French francs received by way of legal aid from the Council of Europe.

C. Default interest

50. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 5 § 4 of the Convention;
2. *Holds* that there has been a violation of Article 5 § 5 of the Convention;
3. *Holds* that there has been no violation of Article 3 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, the following amounts:
 - (i) 1,500 (one thousand five hundred) pounds sterling for non-pecuniary damage;
 - (ii) 3664 (three thousand six hundred and sixty four) pounds sterling and 40 (forty) pence for costs and expenses, together with any value added tax that may be chargeable, less 4,100 (four thousand one hundred) French francs to be converted into pounds sterling at the exchange rate applicable at the date of delivery of this judgment;
 - (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;
5. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 28 March 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President