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

THIRD SECTION

CASE OF HIRST v. THE UNITED KINGDOM

(Application no. 40787/98)

JUDGMENT

STRASBOURG

24 July 2001

FINAL

24/10/2001

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 Hirst v. the United Kingdom,

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

Mr J.-P. COSTA, *President,*
Mr L. LOUCAIDES,
Mr P. KŪRIS,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mrs H.S. GREVE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 21 March 2000 and 3 July 2001,

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

PROCEDURE

1. The case originated in an application (no. 40787/98) 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") by a British national, Mr John Hirst ("the applicant"), on 1 February 1998.

2. The applicant, who had been granted legal aid, was represented by Hickman and Rose, solicitors practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr Huw Llewellyn of the Foreign and Commonwealth Office.

3. The applicant alleged that there had been undue delay between the reviews by the Parole Board of his continued detention as a prisoner serving a sentence of discretionary life imprisonment. He invoked Article 5 § 4 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11). The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

5. By a decision of 21 March 2000, the Chamber declared the application partly admissible.

6. Neither party filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. On 11 February 1980, the applicant pleaded guilty to manslaughter on the ground of diminished responsibility in respect of the death of his 62-year-old landlady whom he had battered with an axe. He was sentenced to life imprisonment. The court acted on medical evidence that the applicant had a gross personality disorder to such a degree that he was amoral. The consultant psychiatrist said in his report at the trial that:

> "... although [the applicant's] instability might get less over the years as he matured, should he be sent to prison, his eventual release should be approached with great caution."

8. The applicant was initially sent to a Category A prison due to concerns about his dangerousness and risk of escape. He was involved in work to address his offending and other problems. He successfully completed an Anger Management and Skills Courts in the Hull Special Unit in or about 1989 and his conduct was noted as significantly improving from that point. In 1993, he was transferred to a Category B prison.

9. The applicant's tariff period of 15 years expired on 25 June 1994 (this was the minimum period fixed by the Secretary of State concerning the requirements of retribution and deterrence). The Parole Board in that month agreed to the transfer of the applicant from a Category B to Category C prison. The Secretary of State deferred a decision until after the Discretionary Lifer Panel (DLP) of the Parole Board had conducted a hearing on the matter under the new provisions of the Criminal Justice Act 1991 ("the 1991 Act").

10. On 13 December 1994, after a hearing held pursuant to section 34 of the 1991 Act, the DLP decided it would not be safe to release the applicant but recommended transfer to Category D (open prison), or Category C with a review after 12 months instead of the usual two year period. On 15 March 1995, the Secretary of State decided to transfer the applicant to Category C with a review after 12 months.

11. In November 1995, the applicant failed to obtain leave to apply for judicial review of the decision of the DLP and the decision of the Secretary of State. In April 1996, the Court of Appeal refused leave to apply for judicial review.

12. Following a positive drugs test, the applicant agreed to follow and successfully completed in July 1996 a drugs awareness course.

13. On 9 October 1996, the applicant's case came before another DLP. Reports noted that he had made considerable progress over the preceding six years but would need phased re-introduction into society. A psychiatric

report dated 24 June 1996 stated that the applicant had much greater control over his behaviour, that personal and maturational developments had taken place and that he was not the same person that he was when he entered prison. It was concluded that the applicant, who had shown a reclusiveness and narrowness of interests, needed however to test and increase his social interaction in order to be able to cope with living outside prison. A psychiatric report issued about the same time stated that the applicant's personality, described as psychopathic, had shown some capacity for change and that, although he was not considered a serious risk to the public, any release on licence would have to be carefully planned, as problems were likely to arise following a long period of institutionalisation and a lack of family support. The DLP did not recommend release but transfer to a Category D prison. In paragraph 5 of the decision letter the DLP said:

> "The panel were satisfied that what was advanced at the hearing as 'exceptional circumstances', namely a good release plan, the fact that [the applicant is] four years beyond tariff, the fact that [the applicant has] completed a pre-release course in Category C, the fact that [the applicant had] previously been recommended for Category D status and the prospect of employment, did not amount to exceptional circumstances and that [the applicant's] release without progress through open conditions posed an unacceptable risk."

14. On 20 November 1996, the Secretary of State rejected the recommendation of transfer to an open prison, but directed an early review of the applicant's case, namely after 18 months had expired from 9 October 1996. The Secretary of State was not persuaded that the applicant's behavioural problems had been satisfactorily addressed while in closed conditions, nor that the benefits of open conditions were sufficiently worthwhile at that stage when balanced against the scale of the outstanding offence, related work needed in the applicant's case and his potential risk to the public.

15. The applicant applied for leave to apply for judicial review of both decisions, alleging *inter alia* that the DLP had wrongly applied an "exceptional circumstances" test. Leave was refused on 11 April 1997.

16. On 21 October 1997, the applicant re-applied for leave for judicial review. Mr Justice Potts refused leave against the DLP's recommendation. He found that the DLP had correctly applied the statutory test concerning a risk to the public. He granted leave to apply in respect of the decision of the Secretary of State. Mr Justice Potts stated:

> "... a prisoner who has spent a long period in custody should be tested in open conditions before being released into the community: satisfactory completion of such testing is an indication that a prisoner is able to cope with the stresses of life outside prison and is therefore a cogent factor to take into account against all the other available material in deciding whether or not a prisoner can safely be released. Such an approach is undoubtedly sensible …

I think it is arguable that the Secretary of State's decision not to recategorise this applicant as a Category D prisoner was irrational and one that no reasonable Home Secretary could reasonably have reached."

17. In the light of this grant of leave, at the end of the hearing, the Secretary of State indicated that he would reconsider his decision of 20 November 1997.

18. On 13 March 1998, the Secretary of State informed the applicant that he had reconsidered the case but decided not to change his conclusion that the applicant should not be transferred to open conditions.

19. On 15 July 1998, the DLP again considered the applicant's case. Reports continued to note his progress, including the expression of genuine remorse for his offending. It was considered in a case officer report dated 31 October 1997 that he had taken advantage of treatment programmes and that all offending work had been completed. He had a "settled and fulfilling release plan" which involved him continuing the legal studies that he had commenced in prison and receiving support from a circle of friends that he had built up through contacts outside prison. Conversely, a psychiatric report dated 18 December 1997 considered *inter alia* that the applicant might benefit from further work on developing methods of dealing with interpersonal difficulties and increasing relationship skills.

20. By letter dated 16 July 1998, the DLP declined to recommend release but did recommend transfer to a Category D (open) prison.

"3. In reaching the decision that you are not yet suitable for release, the panel took into account the nature of the index offence, your violent disruptive early prison career (while recognising also the absence of any violence since 1989), the fact that you are still seen as having a psychopathic personality … and the remaining areas of concern identified by [Mrs B, a higher psychologist]… These areas of concern are egocentricity, a disregard for the points of view of other people and a limited ability to solve interpersonal frustrations and problems. The panel also considered that the sexual ambivalence referred to by [Dr G] merited further investigation, particularly in light of evidence that emerged at the panel hearing that you had been sexually abused in your youth. The panel also accepted [Mrs B's] evidence that a personality assessment was necessary to identify the manner in which the outstanding offence-related work should be carried out; and that the reasons underlying the index offence still require further investigation. In all these circumstances, the panel considered that you still presented too great a risk to the public to justify your release.

4. Moreover, you have been in custody for 19 years and although your release plan is being developed, it is not complete. At present you would have no fixed accommodation. Based on these factors and the impression the panel formed of you at the hearing, the panel considered that you would be unable to cope in the community, were you to be released directly or via a pre-release employment scheme.

5. The panel did recommend that you be transferred to open conditions. In coming to this conclusion, the panel took into account the length of time you have spent in custody, the opinion of the majority of the report writers and witnesses that the risk you present to the public could be safely managed in open conditions and the fact that the assessment and further work referred to above can be done in open conditions. The

panel also took into account that [Mrs B] could not say within what period the assessment could be carried out, and the danger of counter-productive stagnation and frustration on your part should you have to spend a further protracted period in category 'C' conditions.

6. To allow time for assessment and the necessary offence-related work and for your gradual reintegration into the community, the panel considered that your next review should begin in 2 years time."

21. By letter dated 7 October 1998, the Secretary of State rejected the DLP's recommendation. He stated that he accepted the psychologist's view that further work needed to be done in respect of the applicant's attitude to his original offence, his egocentricity, his intolerance of others, his inability to deal adequately with problems and his lack of responsibility for his actions. He agreed that a full personality assessment was required of the applicant who was still seen as having a psychopathic personality. The Secretary of State did not agree that these matters could be safely addressed in open prison conditions. He noted that the applicant had failed to attend further courses in anger management, social skills and communications, as arranged after the Secretary of State's decision of 20 November 1996. He also had regard to an intervening incident which had occurred on 31 July 1998 when the applicant was being escorted to court by a female officer. After she had refused to allow him to smoke in the vehicle, he had slammed the van door against her, causing her to fall and hurt her arm. He had sworn at her, threatening to kill her, adding that he had already killed one woman. The applicant was found guilty under the Prison Rules of assault and using threatening, abusive or insulting words. The Secretary of State considered that this disclosed impulsive violent behaviour towards a woman over a trivial incident, which had clear similarities with his original offence. He remained an unacceptable risk and was advised that until he co-operated with staff in addressing the areas of concern, the Secretary of State saw no justification in allowing him to progress further towards release. It was however agreed that his next review should take place in July 2000.

22. On 2 February 2000, the applicant's renewed application for leave to judicially review the DLP's decision of October 1996, which had been dormant since 21 October 1997, was listed for hearing before the Court of Appeal. The applicant's request to amend his grounds of application to add complaints about a lack of independence was refused. The Court of Appeal rejected his application for leave to apply for judicial review.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. PROVISIONS CONCERNING THE RELEASE OF DISCRETIONARY LIFE PRISONERS

23. 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, most notably, following the coming into force on 1 October 1992 of the Criminal Justice Act 1991 ("the 1991 Act"), which was in force at the relevant time. The provisions of the 1991 Act were replaced by the Crime (Sentences) Act 1997 ("the 1997 Act") from 1 October 1997.

24. Pursuant to section 32 (2) of the 1991 Act, the Parole Board had a duty to advise the Secretary of State with respect to any matter referred to it by him which was connected with the early release or recall of prisoners.

25. The Parole Board's Chairman appointed three members of the Parole Board to consider discretionary life cases. They comprised the DLP. Pursuant to the Parole Board Rules 1992 which came into force on 1 October 1992, a discretionary life prisoner was entitled to, amongst other things, an oral hearing, disclosure of evidence before the Parole Board and legal representation. He was also entitled to call witnesses on his behalf and to cross-examine those who had written reports about him. A reasoned decision by the DLP was delivered within seven days of the hearing. Prior to 1 October 1997, the duty to release discretionary life prisoners was dealt with by section 34 of the 1991 Act, which provided that where a discretionary life prisoner had served his tariff and the Board had directed his release, it was the duty of the Secretary of State to release him on licence.

26. Section 34(4) of the 1991 Act provided:

> "The Board shall not give a direction ... unless –
>
> (a) the Secretary of State has referred the prisoner's case to the Board;
>
> (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."

27. When deciding on release or recall of prisoners, the DLP often gave guidance as to the timing of the next review. It normally recommended a further review in two years but an earlier date could be given in an appropriate case, with reasons. Where no guidance was given, the Secretary

of State decided the date of the next review. Where it became clear that the prisoner had made unexpectedly rapid progress prior to the set review date, the date of the review could be brought forward.

28. A discretionary life prisoner may require the Secretary of State to refer his case to the Parole Board, after the end of the period of two years beginning with the disposal of a previous reference to the Board (section 34 (5) (b) of the 1991 Act, now section 28 (7) (b) of the 1997 Act). The Government stated that in practice it is not necessary to invoke this provision since, as a matter of policy, the Secretary of State refers each case back to the DLP for the second anniversary of the previous reference.

29. Section 34 of the 1991 Act has now been replaced, and largely reproduced, by section 28 of the 1997 Act.

THE LAW

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

30. The applicant complained that the review procedures carried out by the Parole Board in respect of his continued detention were not carried out with the necessary expedition, invoking Article 5 § 4 of the Convention which provides as follows:

> "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."

31. The applicant submitted that since 24 June 1994 his continued detention has been justifiable solely on security grounds and that Article 5 § 4 required that he receive prompt reviews as to whether that detention was justified. He points out that his first review by a body with the power to decide took place on 13 December 1994, five and a half months after the expiry of his tariff, which delay resulted from an unjustifiable administrative policy in fixing first review dates.

32. The applicant contended that subsequent reviews should have taken place at reasonable intervals. An automatic review every two years was not reasonable on the basis that it was simply too long, as shown by comparable cases examined by the Court (e.g. the Herczegfalvy v. Austria judgment of 24 September 1992, Series A no. 244, pp. 24-25, §§ 75-78). There was no possibility for the applicant to apply to the DLP during the intervening period and there was no provision for any judicial control over the length of the period between reviews, the decision to hold earlier reviews lying at the discretion of the Secretary of State. He submitted that where there was a realistic prospect of release or real progress towards release, as shown in his

case, the appropriate intervals between periodic reviews ought to be no longer than one year, as was the case with patients held under mental health provisions.

33. The Government submitted that the applicant had benefited from speedy and frequent DLP reviews, more frequently than the normal two years. In particular, there have been four DLP reviews in the period of five years since his tariff expired. On one occasion (December 1994), when the DLP recommended an interval of 12 months, the Secretary of State accepted this. On another occasion (November 1996), the Secretary of State fixed an interval of only 18 months.

34. The Government submitted that these intervals were reasonable. Two years was a deliberate and purposeful interval, which took account of the time normally needed for a prisoner to be transferred between a Category C prison and open conditions, and to undertake other activities necessary to help prisoners make the difficult transition between prison and free society. In the applicant's case, time was necessary for him to attend courses and therapy, and for possible improvements in his character and behaviour to be properly assessed. The DLP reviews in 1996 and 1998 concluded that he was not ready for release and, in view of the need for work on reintegration and prolonged testing on the areas of concern in his behaviour, it was reasonable and proportionate to revert to the normal two year interval. In any event, these periods were not immutable as reviews could be brought forward if the applicant had made unexpectedly rapid and impressive progress.

35. The Court recalls that a Parole Board hearing before the DLP concerning the applicant's release took place on 9 October 1996. The applicant's continued detention was next reviewed by the DLP on 15 July 1998, after a lapse of time of just over twenty-one months. The time fixed for the subsequent review was July 2000, two years further on. The Court has not taken into account the reviews prior to 1996, which concerned periods of delay more than six months before the introduction of this application.

36. The issue to be determined is whether the lapse of time between the later reviews complies with the requirement of Article 5 § 4 of the Convention that decisions concerning continued detention be taken "speedily".

37. It is already established in the case-law of the Convention organs that this requirement implies not only that the competent courts must reach their decisions "speedily" but also that, where an automatic review of the lawfulness of detention has been instituted, their decisions must follow at "reasonable intervals" (see the aforementioned Herczegfalvy v. Austria judgment, p. 24, § 75). In practice, the system of review of discretionary life prisoners involves automatic reviews set at periods of two years or less, at

the direction of the Secretary of State, who may or may not have received a recommendation as to timing by the DLP at the previous review.

38. It is true that the question of whether periods comply with the requirement must – as with the reasonable time stipulation in Article 5 § 3 and Article 6 § 1 – be determined in the light of the circumstances of each case (see the Sanchez-Reisse v. Switzerland judgment of 21 October 1986, Series A no. 107, p. 55, § 55). It is therefore not for this Court to attempt to rule as to the maximum period of time between reviews which should automatically apply to this category of life prisoner as a whole. It notes that the system as applied in this case has a flexibility which must reflect the realities of the situation, namely, that there are significant differences in the personal circumstances of the prisoners under review.

39. In previous cases, the Convention organs have accepted periods of less than a year between reviews and rejected periods of more than one year. In the case of A.T. v. the United Kingdom, the Commission found that a period of almost two years before a review of the detention of a discretionary life prisoner was not justified, where the DLP had recommended that his case should be reviewed within a year (no. 20448/92, Commission report 29 November 1995). The Court in the Herczegfalvy case (cited above, pp. 24-25, § 77) found that periods between reviews of fifteen months and two years were not reasonable in the case of a person detained on grounds of mental illness. In the case of *Oldham v. the United Kingdom* (Section 3), no. 36273/97, judgment of 26 September 2000), also concerning a discretionary life prisoner, the Court found that a two year delay between reviews was not reasonable.

40. The Government pointed out that in the present case, unlike that of A.T. v. the United Kingdom (cited above), the DLP made no recommendation in 1996 or 1998 for a review to take place earlier than two years, though in 1996 the Secretary of State indicated that an eighteen month period was appropriate. This applicant, they argued, had problems to address and progress to monitor which could not realistically be done in under that period. They also claimed that discretionary lifers, who were detained on grounds of risk to the public, should not be compared with cases of persons detained on grounds of mental illness.

41. The Court is not persuaded by the latter argument. Article 5 § 4 of the Convention was held applicable to discretionary life sentences since these are imposed on offenders due to considerations of mental instability and dangerousness which are susceptible to change over the passage of time (see, for example, the Thynne, Gunnell and Wilson v. the United Kingdom judgment of 25 October 1990, Series A no. 190, p. 30, § 76, where the Court drew comparisons from its case-law concerning the detention of persons of unsound mind under Article 5 § 1 (e) of the Convention, at p. 27, § 69). Nor have the Government substantiated their assertion that mental

disorder in the context of mental illness is more susceptible to change over time than mental instability posing risks of dangerousness.

42. As regards the lack of recommendation by the DLP or Secretary of State for a review of this applicant's case within a period of less than eighteen months or two years, the Court does not find this to be a decisive ground of distinction. While the applicant was perceived as having remaining problems to address, in particular following an incident with a female prison officer in July 1998, it is apparent that the panels, who in 1996 and 1998 heard the applicant and the evidence concerning the risk posed by him to the public, considered that he was showing improvement and recommended that this be reflected in progressive steps towards a less restrictive regime. The judge who heard the judicial review application in October 1997 also had doubts as to the rationality of the Secretary of State's decision to keep the applicant in closed conditions, noting that it was only after a long term prisoner had been tested in open conditions that he could safely be released. It is evident therefore that the applicant was a prisoner who had developed significantly during the course of his sentence and could not be considered as a person in respect of whom no further change of circumstance could be envisaged. Against this background, the Court is not satisfied that the periods of twenty one months and two years which elapsed were justified by considerations of rehabilitation and monitoring.

43. It was in any event open to the Secretary of State, the Government asserted, to bring forward the date of the review where a prisoner showed unexpectedly rapid progress in addressing problems. The Court has already noted the flexibility in the system as mitigating the application of an automatic two-year review system. However, while the DLP could recommend earlier review and the Secretary of State direct an earlier date, there was no possibility for an applicant himself to apply for a review within the two year period. The applicant in the present case was therefore unable to bring his case back before the Parole Board in the absence of the Secretary of State's exercising his discretion in his favour exceptionally.

44. The Court concludes in the circumstances of this case that the twenty one month and two year delays between reviews were not reasonable and that the question of whether his continued detention was lawful was not decided "speedily" within the meaning of Article 5 § 4 of the Convention. There has, accordingly, been a violation of this provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

45. Article 41 of the Convention provides:

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

A. DAMAGE

46. The applicant claimed that he should be compensated for the potential loss of liberty resulting from the ongoing failure of the respondent Government to ensure an annual system of review under Article 5 § 4 of the Convention. While he accepted that there had been no direction by the Parole Board requiring his release, he argued that some mark of compensation for loss of opportunity and for feelings of frustration, uncertainty and anxiety would be appropriate. He proposed an award in the range of 3,000 to 5,000 pounds sterling (GBP).

47. The Government submitted that a finding of a violation in itself would be sufficient just satisfaction. They argued that there was no causal link between a finding of a violation of the Convention and the applicant's alleged losses. In particular, they pointed out that even if the applicant had had an earlier review he would not necessarily have been released earlier.

48. The Court does not find that any loss of liberty may be regarded as flowing from the finding of a breach of Article 5 § 4, which in this case is limited to the delay in between reviews. However, the Court considers that the applicant must have suffered feelings of frustration, uncertainty and anxiety flowing from the delays in review which cannot be compensated solely by the finding of violation. Making an assessment on an equitable basis, it awards GBP 1,000 for non-pecuniary damage.

B. COSTS AND EXPENSES

49. The applicant claimed GBP 8,632.73 for legal costs and expenses, inclusive of VAT. This included GBP 6,147 for solicitors' fees and expenses and GBP 1,200 for counsel's advice.

50. The Government noted that there had been no oral hearing in the case nor lengthy written submissions and considered that GBP 6,500, inclusive of VAT would be a more reasonable figure for costs.

51. Making an assessment on an equitable basis and taking into account the amount of payments made by way of legal aid from the Council of

Europe (5,750 French francs), the Court awards GBP 7,500 for costs and expenses, inclusive of VAT.

C. DEFAULT INTEREST

52. 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*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts;
      (i) 1,000 (one thousand) pounds sterling in respect of non-pecuniary damage;
      (ii) 7,500 (seven thousand five hundred) pounds sterling in respect of costs and expenses;
   (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;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 July 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President