CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF WYNNE v. THE UNITED KINGDOM (no. 2)

(Application no. 67385/01)

JUDGMENT

STRASBOURG

16 October 2003

FINAL

16/01/2004

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

In the case of Wynne v. the United Kingdom (no. 2),

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

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Sir Nicolas BRATZA,
Mr L. CAFLISCH,
Mr P. KÛRIS,
Mr J. HEDIGAN,
Mrs H.S. GREVE, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 25 September 2003,

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

PROCEDURE

1. The case originated in an application (no. 67385/01) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mr Edward Wynne ("the applicant"), on 19 December 2000.

2. The applicant, who had been granted legal aid, was represented by Ms A. Bromley, a lawyer practising in Nottingham. The United Kingdom Government ("the Government") were represented by their Agent, Mr J. Grainger of the Foreign and Commonwealth Office, London.

3. The applicant alleged that he had not been afforded a proper review of the lawfulness of his continued detention as a mandatory life prisoner and that he did not enjoy an enforceable right to compensation for any breaches of his right to liberty.

4. 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.

5. By a decision of 22 May 2003, the Court declared the application partly admissible.

6. Neither party filed further observations. The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant, born in 1939, is currently detained in HM Prison Full Sutton.

8. In 1964, the applicant was convicted of the murder of a woman whom he had violently assaulted. He was sentenced to a mandatory term of life imprisonment. In May 1980 (or November 1979, according to the applicant's submissions), he was released on life licence after a positive recommendation from the Parole Board.

9. In June 1981, the applicant killed a 75 year old woman. His plea of manslaughter on grounds of diminished responsibility was accepted by the court. In January 1982 a discretionary sentence of life imprisonment was imposed by the judge having regard to the extreme danger to the public posed by the applicant. At the same time, the court revoked his life licence concerning his earlier sentence of mandatory life imprisonment.

10. In December 1985, the applicant was transferred to the hospital wing of Parkhurst prison. Since then, he has been transferred into ordinary prison locations as a “Category A” (high security) prisoner.

11. The applicant learned that his “tariff” period fixed by the trial judge on the manslaughter offence expired in June 1991. He was informed by a Home Office Memorandum of 5 June 1992 that his continued detention was based on the risk he represented.

12. According to the applicant's submissions, his only Parole Board review took place in 1999, when, without holding an oral hearing, the Board declined to recommend release. According to the Government's submissions, the Parole Board considered the applicant's case in September 1994 and January 1997. In 1994, it concluded that his behaviour was aggressive and intimidatory and that he represented a high risk to the public. On 10 January 1997, it concluded that he remained far too great a risk to warrant transfer to open conditions. Of the reports before the Parole Board, none recommended early release or early transfer to open conditions.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Life sentences

13. Murder carries a mandatory sentence of life imprisonment under the Murder (Abolition of Death Penalty) Act 1965. A person convicted of other serious offences (for example,. manslaughter or rape) may also be sentenced

to life imprisonment at the discretion of the trial judge in certain other cases where the offence is grave and where there are exceptional circumstances which demonstrate that the offender is a danger to the public and it is not possible to say when that danger will subside.

B. Tariffs

14. Over the years, the Secretary of State has adopted a "tariff" policy in exercising his discretion whether to release offenders sentenced to life imprisonment. This was first publicly announced in Parliament by Mr Leon Brittan on 30 November 1983 (Hansard (House of Commons Debates) cols. 505-507). In essence, the tariff approach involves breaking down the life sentence into component parts, namely retribution, deterrence and protection of the public. The "tariff" represents the minimum period which the prisoner will have to serve to satisfy the requirements of retribution and deterrence. The Secretary of State will not refer the case to the Parole Board until three years before the expiry of the tariff period, and will not exercise his discretion to release on licence until after the tariff period has been completed (per Lord Browne-Wilkinson, *Ex parte V. and T.*, [1998] Appeal Cases 407, at pp. 492G-493A).

15. Under section 34 of the 1991 Act, the tariff of a discretionary life prisoner is fixed in open court by the trial judge after conviction. After expiry of the tariff, the prisoner may require the Secretary of State to refer his case to the Parole Board which has the power to release if satisfied that it is no longer necessary to detain him for the protection of the public.

16. A different regime, however, applies under the 1991 Act to persons serving a mandatory sentence of life imprisonment. In relation to these prisoners, the Secretary of State decides the length of the tariff. The view of the trial judge is made known to the prisoner after his trial, as is the opinion of the Lord Chief Justice. The prisoner is afforded the opportunity to make representations to the Secretary of State who then proceeds to fix the tariff and is entitled to depart from the judicial view (*R. v. Secretary of State for the Home Department, ex parte Doody* [1994] 1 Appeal Cases 531; and see the Home Secretary, Mr Michael Howard's, policy statement to Parliament, 27 July 1993, (Hansard (House of Commons Debates) cols. 861-864).

C. Release on licence of mandatory life sentence prisoners

17. At the relevant time, the Criminal Justice Act 1991 provided in section 35(2):

> "If recommended to do so by the [Parole] 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."

18. On 27 July 1993, the Secretary of State made a statement in Parliament explaining his practice in relation to mandatory life prisoners. The statement emphasised that before any mandatory life prisoner is released on life licence, the Secretary of State:

> "... will consider not only, (a) whether the period served by the prisoner is adequate to satisfy the requirements of retribution and deterrence and, (b) whether it is safe to release the prisoner, but also (c) the public acceptability of early release. This means that I will only exercise my discretion to release if I am satisfied that to do so will not threaten the maintenance of public confidence in the system of criminal justice."

19. In determining the principles of fairness that apply to the procedures governing the review of mandatory life sentences, the English courts have recognised that the mandatory sentence is, like the discretionary sentence, composed of both a punitive period ("the tariff") and a security period. As regards the latter, detention is linked to the assessment of the prisoner's risk to the public following the expiry of the tariff (see, for example, *R. v. Parole Board, ex parte Bradley* (Divisional Court) [1991] 1 WLR 135; *R. v. Parole Board ex parte Wilson* (Court of Appeal) [1992] 2 AER 576).

D. Recent developments

20. Following the judgment in *Stafford v. the United Kingdom* (no. 46295/99, ECHR 2002-IV), the Secretary of State announced in the House of Commons on 17 October 2002 his decision to introduce interim measures applicable to the review and release of mandatory life sentence prisoners applicable to reviews from 1 January 2003:

> "If, at the end of the review process, the Parole Board favours the release of a mandatory life sentence prisoner once the minimum period has been served the Home Secretary will normally accept such a recommendation. ..."

This allows for prisoners, whose tariff had expired, to apply for an oral hearing at which they may have representation, receive full disclosure of material relevant to the question of release and be able to examine and cross-examine witness.

THE LAW

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

21. 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."

A. Parties' submissions

22. The applicant essentially complained about his continued detention following the expiry of his tariff. He relied on the Court's judgment in *Stafford v. the United Kingdom* (no. 46295/99, ECHR 2002–IV), and submitted that his case was not reviewed by a body with a power to release or with the necessary safeguards, including, for example, the possibility of an oral hearing.

23. The Government accepted that in *Stafford* the Court found a violation of Article 5 § 4 on the basis that the applicant's continued detention under a mandatory sentence of life imprisonment for murder was not reviewed by a body with a power to release or with a procedure containing the necessary judicial safeguards. They submitted, however, that the applicant's case could be distinguished on the grounds that Stafford had been detained on the basis of the risk of further non-violent offending, while the applicant's continued detention was justified on the basis of the risk of danger to the public. Further, the Parole Board had recommended Stafford's release, whereas it has not recommended the release of the applicant nor his transfer to open conditions.

B. The Court's assessment

24. The Court recalls that in *Stafford* (cited above) it found in respect of a mandatory life prisoner sentenced for murder that, after the expiry of the tariff, which was the punishment element of the sentence, continued detention depended on elements of risk and dangerousness that could change with the course of time. Article 5 § 4 therefore required that he should be able periodically to challenge the continuing legality of his detention in an appropriate procedure.

25. In this case, the applicant's tariff under his mandatory life sentence must be assumed to have expired by 1980 when he was released on licence. His tariff under the intervening tariff imposed under a discretionary life sentence for manslaughter expired in 1992, after which his continued detention was based on the risk that he represented. While the Parole Board appears to have reviewed the applicant's case, at least once, in or about 1997 or 1999, it did not have any power to order his release and could only make recommendations to the Secretary of State. Nor did any oral hearing take place, with the opportunity to examine or cross-examine witnesses relevant to any allegations that the applicant remained a risk to the public.

26. The Government did not dispute that the lawfulness of the applicant's continued detention was not reviewed by a body with the power to order release or with a procedure containing the necessary judicial safeguards as required by Article 5 § 4. Insofar as they referred to the fact that the applicant in *Stafford* had been re-detained due to the likelihood of

further non-violent offending rather than any risk of violence, this element was relevant rather to the Court's finding of insufficient causal connection for the purposes of Article 5 § 1 (a) between the original conviction and the subsequent re-detention and is not a material ground of distinction concerning this applicant's complaints under Article 5 § 4. Similarly, the fact that the Parole Board has never in fact recommended this applicant's release does not deprive him of the right to have a review by a body offering the requisite guarantees.

27. The Court concludes that there has been in that respect a violation of Article 5 § 4.

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

28. 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."

29. The applicant submitted that he had further been denied an enforceable right to compensation as provided by Article 5 § 5 in respect of any breaches of the other provisions of Article 5.

30. The Government submitted that the applicant had not been unlawfully detained, and therefore no question of compensation arose.

31. The Court has found above a violation of Article 5 § 4 in that the applicant did not receive a review of the lawfulness of his detention in accordance with the requirements of that provision. No possibility of obtaining compensation existed at the relevant time in domestic law in respect of that breach of the Convention. The applicability of Article 5 § 5 is not dependent on a domestic finding of unlawfulness or proof that but for the breach the person would have been released (see *Thynne, Wilson and Gunnell v. the United Kingdom*, judgment of 25 October 1990, Series A no. 190-A, § 82, and the authorities cited therein).

32. There has, accordingly, been a violation of Article 5 § 5.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. 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."

34. The applicant has not made any claims for just satisfaction when invited to do so by the Court and the time-limit for such claims has expired without any request for extension. In the circumstances, the Court makes no awards under Article 41 of the Convention.

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;

Done in English, and notified in writing on 16 October 2003 pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER Registrar	Georg RESS President