



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

FOURTH SECTION

Applications no. 66069/09, 130/10 and 3896/10,
by Douglas Gary VINTER, Jeremy Neville BAMBER and
Peter Howard MOORE
against the United Kingdom
lodged on 11 December 2009, 17 December 2009 and 6 January 2010.

STATEMENT OF FACTS

THE FACTS

A. The circumstances of the case

1. Introduction

Since the abolition of the death penalty in England and Wales, the sentence for murder has been a mandatory sentence of life imprisonment. When such a sentence is imposed, it is the current practice, in the majority of cases, for the trial judge to set a minimum term of imprisonment which must be served before the prisoner is eligible for release on licence. Exceptionally, however, “a whole life order” may be imposed by the trial judge instead of a minimum term. This has the effect that the prisoner cannot be released other than at the discretion of the Secretary of State, a discretion which will only be exercised on compassionate grounds when the prisoner is terminally ill or seriously incapacitated (see section 30(1) of the Crime (Sentences) Act 1997, Prison Service Order 4700 and the relevant provisions of the Criminal Justice Act 2003 set out in the relevant domestic law and practice section below).

Prior to the entry into force of the 2003 Act, it was the practice for the mandatory life sentence to be passed by the trial judge but for the Secretary of State, after receiving recommendations from the trial judge and the Lord Chief Justice, to decide the minimum term of imprisonment which the prisoner would have to serve before he would be eligible for early release

on licence. This was also referred to as the “tariff” part of the sentence and was taken to represent the minimum period which the prisoner was required to serve to satisfy the requirements of retribution and deterrence. With the entry into force of the 2003 Act (and, in particular, section 276 and schedule 22 to the Act), all prisoners whose tariffs were set by the Secretary of State have been able to apply to the High Court for review of that tariff. Upon such an application the High Court may set a minimum term of imprisonment or make a whole life order.

This case concerns three applicants who, having been convicted of murder in separate criminal proceedings in England and Wales, are currently serving mandatory sentences of life imprisonment. All three applicants have been given whole life orders: in the first applicant’s case this order was made by the trial judge under the current practice; in the case of the second and third applicants, who were convicted and sentenced prior to the entry into force of the 2003 Act, the orders were made by the High Court. All three applicants maintain that these whole life orders, as they apply to their cases, are incompatible *inter alia* with Articles 3 and 5(4) of the Convention. The facts of the applications, as submitted by the applicants, may be summarised as follows.

2. Mr Vinter

The first applicant, Mr Douglas Gary Vinter, is a British national who was born in 1969 and is currently detained at HMP Frankland. He is represented before the Court by Mr S. Creighton, a lawyer practising in London with Bhatt Murphy Solicitors, assisted by Mr P. Weatherby, counsel, and Professor D. van Zyl Smit.

On 20 May 1996, the first applicant was sentenced to life imprisonment for the murder of a work colleague, with a minimum term of 10 years. He was released on licence on 4 August 2005.

He began living with a woman who was to become the victim of his second murder offence. The couple married on 27 June 2006. On 31 December 2006 the first applicant was involved in a fight in a public house and charged with affray (using or threatening unlawful violence). His licence was revoked and he was recalled to prison. In July 2007, having pleaded guilty to the charge of affray, he was sentenced to 6 months’ imprisonment. He was released on licence again in December 2007 and returned to live with his wife and her four children. The couple became estranged and the first applicant left the marital home.

On 5 February 2008, the first applicant followed his wife to a public house. He had been drinking and had taken cocaine. The couple argued and the wife’s daughter, who was present, telephoned the police to alert them to the dispute. The first applicant ordered his wife to get into a car. When the daughter tried to get into the car to protect her mother, the first applicant forcibly removed her. He then drove off with his wife. When the police telephoned her to ascertain if she was safe, the first applicant forced his wife to tell them that she was fine. The first applicant also telephoned the police to tell them that his wife was safe and well. Some hours later he gave himself up to the police, telling them that he had killed her. A post-mortem examination revealed that the deceased had a broken nose, deep and extensive bruising to her neck (which was consistent with attempted

strangulation), and four stab wounds to the chest. Two knives were found at the scene, one of which had a broken blade.

The applicant pleaded guilty to murder and instructed his counsel not to make any submissions in mitigation lest it add to the grief of the victim's family. The trial judge considered that the first applicant fell into that small category of people who should be deprived permanently of their liberty. He passed the mandatory life sentence and made a whole life order.

The Court of Appeal dismissed his appeal on 25 June 2009. It considered the general principles for determining the minimum term of a mandatory life sentence (as set out in schedule 21 to the 2003 Act: see relevant domestic law and practice below). It found that, given the circumstances of the offence, there was no reason whatever to depart from the normal principle enshrined in schedule 21 to the 2003 Act that, where murder was committed by someone who was already a convicted murderer, a whole life order was appropriate for punishment and deterrence.

3. Mr Bamber

The second applicant, Mr Jeremy Neville Bamber, is a British national who was born in 1961 and is currently detained at HMP Full Sutton. He is represented before the Court by Mr B. Woods, a lawyer practising in Leeds with Cousins Tyrer Solicitors.

On 7 August 1985, the second applicant's parents, his adoptive sister and her two young children were shot and killed. The second applicant was subsequently charged and, on 28 October 1986, convicted of the murders. The prosecution's case was that the murders were premeditated and planned and had been committed for financial gain. It was also alleged that the second applicant had arranged the crime scene so as to mislead the police by making it appear as if his adoptive sister had killed the family and then herself.

The trial judge recommended to the Secretary of State that the second applicant serve twenty-five years' imprisonment "as a minimum" (his underlining). On the trial judge's letter to the Secretary of State, the Lord Chief Justice added the comment "for my part I would never release him". In 1988, the Secretary of State imposed a whole life tariff. The practice at the time was not to inform the prisoner of this decision. By letter dated 15 December 1994, the applicant was informed that the Secretary of State had concluded that the requirements of retribution and deterrence could only be satisfied by the second applicant remaining in prison for the whole of his life.

In 2008, following the entry into force of section 276 and schedule 22 to the 2003 Act, the second applicant applied to the High Court for review for the whole life tariff. Having regard to schedule 21 to the Act, the High Court concluded that, given the number of murders involved and the presence of premeditation by the second applicant, the offence plainly fell within that category of cases where the appropriate starting point was a whole life order. Having further regard to statements submitted by the victims' next-of-kin and submissions by the second applicant, including reports as to the behaviour and progress he had made in prison, the High Court found that there was no reason to depart from the views of the Lord

Chief Justice and the Secretary of State. It therefore imposed a whole life order.

The second applicant appealed to the Court of Appeal, which dismissed the appeal on 14 May 2009. The court found that, when the Secretary of State had set a whole life tariff in 1988, he had been provided with two different judicial recommendations: one from the trial judge recommending a minimum term of twenty-five years and one from the Lord Chief Justice recommending that the second applicant should never be released. The Secretary of State had been entitled to choose between those recommendations or to adopt neither of them. The Court of Appeal also found that the whole life order imposed by the High Court was not only correct but, for the purposes of punishment and retribution, fully justified.

Relying on its previous judgment in *R v. Bieber* (see relevant domestic law and practice below), it found that no issue arose under Article 3 of the Convention as the whole life order was not an irreducible life sentence as that term had been used in *Kafkaris v. Cyprus* [GC], no. 21906/04, ECHR 2008-... Finally, following its ruling in *R v. Pitchfork* (see relevant domestic law and practice below) it found that the review procedure created by the 2003 Act was compatible with Article 7 of the Convention as, properly construed, the relevant statutory provisions meant a prisoner could not be disadvantaged by the outcome of the review: the term to be served could be reduced, or maintained, but it could not be increased or extended.

The second applicant applied to the Court of Appeal to certify that its judgment concerned a point of law of general public importance which ought to be considered by the House of Lords. That application was refused on 23 June 2009.

4. *Mr Moore*

The third applicant, Mr Peter Howard Moore, is a British national who was born in 1946 and is currently detained at HMP Wakefield. He is also represented before the Court by Chivers Solicitors, Bingley.

On 29 November 1996 the third applicant was convicted after trial in the Crown Court at Chester of four counts of murder. The victims were homosexual men and the applicant, himself a homosexual, was alleged to have committed the murders for his own sexual gratification. Each victim was stabbed many times with a large combat knife which the third applicant had bought for that purpose. The first victim was attacked in his home on 23 September 1995. Soon after, on the weekend of 7 October 1995, the third applicant met his second victim in a bar and arranged to take him home for sex; he instead took him to a forest, stabbed him to death and left the body there. The third victim was stabbed in the caravan where he lived on 30 November 1995. Finally, shortly before Christmas 1995, the third applicant went to a beach which was well-known for homosexual trysts. He met the fourth victim on the beach and stabbed him there.

Blood from the first and third victims was found on the third applicant's jacket and on the knife. Property from the first, second and fourth victims was found in his possession. He made extensive admissions about all four murders to the police. The police had been unaware of the second victim until the third applicant mentioned him to them. The body was recovered from the forest with his assistance. At trial, the applicant's defence was the

murders had been committed by someone else, though he admitted to having been present at all the murders save for that of the second victim.

After the third applicant was convicted, the trial judge passed the mandatory sentence of life imprisonment and recommended to the Secretary of State for the Home Department that, in his view, the applicant should never be released. Upon review, the Lord Chief Justice reported that he thought the minimum period before eligibility for release should be set at thirty years. On 27 September 2002, the Secretary of State decided to set a whole life tariff.

In 2008, pursuant to section 276 and schedule 22 to the Criminal Justice Act 2003, the third applicant applied to the High Court for review of the whole life tariff set by the Secretary of State. In its judgment of 12 June 2008 the High Court rejected the third applicant's submission that it should accept the Lord Chief Justice's recommendation of a minimum term of thirty years. It also rejected the submission that an issue arose under Article 6 given that a whole life tariff had been set by the Secretary of State. The High Court found that the procedure for applying to the High Court under section 276 and Schedule 22 of the Act provided the necessary independent review as to whether a prisoner should be released. The court also found that a whole life order would be compatible with Articles 3 and 5 of the Convention. Having regard to the general principles for determining the minimum term of a mandatory life sentence (as set out in Schedule 21 to the Act), no issue of arbitrariness arose and whether such a sentence was disproportionate depended on the facts of each case.

The High Court found that, since the case involved the murder of two or more persons, sexual or sadistic conduct and a substantial degree of premeditation, under Schedule 21 the starting point was a whole life order. There were no mitigating features and even the Lord Chief Justice, in recommending a minimum term of thirty years, had shared the trial judge's view that it might never be safe to release the third applicant. There were no reasons, therefore, to mitigate the starting point of a whole life order. The High Court added that, even if the starting point were a minimum term of thirty years, the aggravating features of the murders were such as to make a whole life order appropriate.

On 26 February 2009, the Court of Appeal dismissed the third applicant's appeal, finding that the High Court was not only entitled, but clearly right, to conclude that a whole life order was appropriate.

It appears that the third applicant, in order to allow him to appeal to the House of Lords, then applied to the Court of Appeal to certify that its judgment concerned a point of law of general public importance which ought to be considered by the House of Lords. On 14 August 2009, he was informed by the Court of Appeal's Criminal Appeal Office that, because the Court of Appeal had refused his application for permission to appeal against sentence (as opposed to granting permission to appeal against sentence and then dismissing the appeal), an application to certify a point of law for the House of Lords could not be made.

B. Relevant domestic law and practice

1. Statutory provisions on mandatory life sentences

In England and Wales, the mandatory life sentence for murder is contained in section 1(1) of the Murder (Abolition of the Death Penalty) Act 1965.

The power of the Secretary of State to set tariff periods for mandatory life sentence prisoners, as contained in section 29 of the Crime Sentences Act 1997, was found by the House of Lords to be incompatible with Article 6 of the Convention in *R (Anderson) v. the Secretary of State for the Home Department* [2003] 1 AC 837. This led to the enactment of Chapter 7 of the Criminal Justice Act 2003 and schedules 21 and 22 to that Act.

Section 269 of the 2003 Act directs a trial judge, in passing a mandatory life sentence, to determine the minimum term which the prisoner must serve before he or she is eligible for early release on licence. By section 269(3), this minimum term must take into account the seriousness of the offence. Section 269(4) allows the trial judge to decide that, because of the seriousness of the offence, the prisoner should not be eligible for early release (in effect, to make a “whole life order”). Section 269(4) only applies to an offender who is 21 years of age or over when he committed the offence. Section 269(5) directs the trial judge, in considering the seriousness of the offence, to have regard *inter alia* to the principles set out in schedule 21 to the Act.

(a) Schedule 21 to the 2003 Act

Schedule 21 provides for three different “starting points” which may be increased or decreased depending on the presence of aggravating or mitigating features in the offence: a whole life order, a minimum term of thirty years’ imprisonment and a minimum term of fifteen years’ imprisonment.

By paragraph 4(1) of the schedule, if the seriousness of the offence is “exceptionally high” the appropriate starting point is a whole life order. Paragraph 4(2) provides that the following cases would normally fall within this category:

“(a) the murder of two or more persons, where each murder involves any of the following—

- (i) a substantial degree of premeditation or planning,
- (ii) the abduction of the victim, or
- (iii) sexual or sadistic conduct,

(b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation,

(c) a murder done for the purpose of advancing a political, religious or ideological cause, or

(d) a murder by an offender previously convicted of murder.”

By paragraph 5(1), if the seriousness of the offence does not fall within paragraph 4(1) but is “particularly high”, the appropriate starting point in determining the minimum term is thirty years’ imprisonment. Paragraph

5(2) provides that the following cases would normally fall within this category:

- “(a) the murder of a police officer or prison officer in the course of his duty,
- (b) a murder involving the use of a firearm or explosive,
- (c) a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death),
- (d) a murder intended to obstruct or interfere with the course of justice,
- (e) a murder involving sexual or sadistic conduct,
- (f) the murder of two or more persons,
- (g) a murder that is racially or religiously aggravated or aggravated by sexual orientation, or
- (h) a murder falling within paragraph 4(2) committed by an offender who was aged under 21 when he committed the offence.”

Paragraphs 6 and 7 provide that, in all other cases, the appropriate starting point in determining the minimum term is fifteen years’ imprisonment (twelve years for those less than eighteen years of age).

Paragraphs 8 and 9 provide that, having chosen a starting point, the trial judge should take into account any aggravating or mitigating factors which may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order.

Paragraph 10 provides that aggravating factors include:

- “(a) a significant degree of planning or premeditation,
- (b) the fact that the victim was particularly vulnerable because of age or disability,
- (c) mental or physical suffering inflicted on the victim before death,
- (d) the abuse of a position of trust,
- (e) the use of duress or threats against another person to facilitate the commission of the offence,
- (f) the fact that the victim was providing a public service or performing a public duty, and
- (g) concealment, destruction or dismemberment of the body.”

Paragraph 11 provides that mitigating factors include:

- “(a) an intention to cause serious bodily harm rather than to kill,
- (b) lack of premeditation,
- (c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957 (c. 11)), lowered his degree of culpability,
- (d) the fact that the offender was provoked (for example, by prolonged stress) in a way not amounting to a defence of provocation,
- (e) the fact that the offender acted to any extent in self-defence,
- (f) a belief by the offender that the murder was an act of mercy, and
- (g) the age of the offender.”

In *R v. Neil Jones and Others* [2006] 2 Cr. App. R. (S.) 19 the Court of Appeal held that protection of the public was not a relevant factor in fixing

the minimum term, since it was the task of the Parole Board to ensure that the offender was not released after serving the minimum term unless this presented no danger to the public. The court also held:

“A whole life order should be imposed where the seriousness of the offending is so exceptionally high that just punishment requires the offender to be kept in prison for the rest of his or her life. Often, perhaps usually, where such an order is called for the case will not be on the borderline. The facts of the case, considered as a whole, will leave the judge in no doubt that the offender must be kept in prison for the rest of his or her life. Indeed if the judge is in doubt this may well be an indication that a finite minimum term which leaves open the possibility that the offender may be released for the final years of his or her life is the appropriate disposal. To be imprisoned for a finite period of 30 years or more is a very severe penalty. If the case includes one or more of the factors set out in para.4(2) it is likely to be a case that calls for a whole life order, but the judge must consider all the material facts before concluding that a very lengthy finite term will not be a sufficiently severe penalty.”

(b) Schedule 22 to the 2003 Act

Schedule 22 enacts a series of transitional measures for those prisoners who were given mandatory life sentences prior to the entry into force of section 269 of the Act and whose minimum term of imprisonment were set by the Secretary of State. It also applies to those prisoners whom the Secretary of State directed should never be eligible for early release on licence (that is, those prisoners for whom a whole life tariff had been set). Paragraph 3 of the Schedule allows both categories of prisoners to apply to the High Court. Upon such an application the High Court must, in the case of a prisoner who is subject to a minimum term of imprisonment set by the Secretary of State, make an order specifying the minimum term that prisoner must serve before he or she is eligible for early release. The minimum term set by the High Court must not be greater than that previously set by the Secretary of State (paragraph 3(1)(a)). Under paragraph 3(1)(b), where the Secretary of State notified the prisoner that a whole life tariff had been set, the High Court may make an order that the prisoner should not be eligible for release (“a whole life order”).

In determining an application under paragraph 3, the High Court must have regard *inter alia* to the seriousness of the offence and, in so doing, must also have regard to the general principles set out in Schedule 21 and any recommendations to the Secretary of State by the trial judge or the Lord Chief Justice as to the minimum term to be served by the offender before release on licence (paragraphs 4 and 5 of schedule 22).

2. The Secretary of State’s discretion to release

Section 30(1) of the Crime (Sentences) Act 1997 provides that the Secretary of State may at any time release a life prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner’s release on compassionate grounds.

The criteria for the exercise of that discretion are set out in Prison Service Order 4700 chapter 12, which, where relevant, provides:

“• the prisoner is suffering from a terminal illness and death is likely to occur very shortly (although there are no set time limits, 3 months may be considered to be an appropriate period for an application to be made to Public Protection Casework Section [PPCS]), or the ISP is bedridden or similarly incapacitated, for example, those paralysed or suffering from a severe stroke;

and

- the risk of re-offending (particularly of a sexual or violent nature) is minimal;

and

- further imprisonment would reduce the prisoner’s life expectancy;

and

- there are adequate arrangements for the prisoner’s care and treatment outside prison;

and

- early release will bring some significant benefit to the prisoner or his/her family.”

In response to a freedom of information request by the first applicant, the Ministry of Justice indicated that, as of 30 November 2009, there were thirty-four prisoners serving life sentences with whole life orders. Between 2004 and 2009, thirteen life sentenced prisoners were released on compassionate grounds. Separate figures for the number of whole life prisoners who have been released on compassionate grounds have not been provided.

3. Relevant domestic case-law on mandatory life sentences and the Convention

(a) Case-law on the pre-2003 Act system

The House of Lords in *R. v. Secretary of State for the Home Department, ex parte Hindley* [2001] 1 AC 410, HL found that, under the tariff system then in operation, there was “no reason, in principle, why a crime or crimes, if sufficiently heinous should not be regarded as deserving lifelong incarceration for purposes of pure punishment” (per Lord Steyn at pp. 416H). Lord Steyn also observed: “there is nothing logically inconsistent with the concept of a tariff by saying that there are cases where the crimes are so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution and deterrence” (p. 417H). The House of Lords also found that the Secretary of State had not unlawfully fettered his discretion in reviewing the cases of prisoners where a whole life tariff was in place after the prisoner had served twenty-five years’ imprisonment (p. 417A-E) and reducing the tariff in appropriate cases, such as when the prisoner had made exceptional progress.

In *R. v. Lichniak* and *R. v. Pyrah* [2003] 1 AC 903, the House of Lords considered that, in its operation at that time, a mandatory life sentence was not incompatible with either Article 3 or 5 of the Convention. Such a sentence was partly punitive, partly preventative. The punitive element was represented by the tariff term, imposed as punishment for the serious crime which the convicted murderer had committed. The preventative element was represented by the power to continue to detain the convicted murderer in prison unless and until the Parole Board, an independent body, considered it safe to release him, and also by the power to recall to prison a convicted murderer who had been released if it was judged necessary to recall him for the protection of the public (Lord Bingham of Cornhill at § 8 of the judgment). The House of Lords therefore held firstly, that the appellant’s complaints were not of sufficient gravity to engage Article 3 of the

Convention and secondly, that the life sentence was not arbitrary or otherwise contrary to Article 5 § 1 of the Convention. Lord Bingham added:

“If the House had concluded that on imposition of a mandatory life sentence for murder the convicted murderer forfeited his liberty to the state for the rest of his days, to remain in custody until (if ever) the Home Secretary concluded that the public interest would be better served by his release than by his continued detention, I would have little doubt that such a sentence would be found to violate articles 3 and 5 of the European Convention on Human Rights ... as being arbitrary and disproportionate.”

(b) Case-law on the 2003 Act system

In *R v. Bieber* [2009] 1 WLR 223 the Court of Appeal considered the compatibility of the 2003 Act with Article 3 of the Convention in the light of *Kafkaris v. Cyprus* [GC], no. 21906/04, ECHR 2008-...

It found that a whole life order did not contravene Article 3 of the Convention because of the possibility of compassionate release by the Secretary of State. It also found that the imposition of an irreducible life sentence would not itself constitute a violation of Article 3 but rather that a potential violation would only occur once the offender had been detained beyond the period that could be justified on the ground of punishment and deterrence. The court observed:

“45. While under English law the offence of murder attracts a mandatory life sentence, this is not normally an irreducible sentence. The judge specifies the minimum term to be served by way of punishment and deterrence before the offenders release on licence can be considered. Where a whole life term is specified this is because the judge considers that the offence is so serious that, for purposes of punishment and deterrence, the offender must remain in prison for the rest of his days. For the reasons that we have given, we do not consider that the Strasbourg court has ruled that an irreducible life sentence, deliberately imposed by a judge in such circumstances, will result in detention that violates article 3. Nor do we consider that it will do so.

46. It may be that the approach of the Strasbourg court will change. There seems to be a tide in Europe that is setting against the imposition of very lengthy terms of imprisonment that are irreducible. Thus it may become necessary to consider whether whole life terms imposed in this jurisdiction are, in fact irreducible.

...

Under the regime that predated the 2003 Act it was the practice of the Secretary of State to review the position of prisoners serving a whole life tariff after they had served 25 years with a view to reducing the tariff in exceptional circumstances, such as where the prisoner had made exceptional progress whilst in custody. No suggestion was then made that the imposition of a whole life tariff infringed article 3.

...

Under the current regime the Secretary of State has a limited power to release a life prisoner under section 30 of the Crime (Sentences) Act 1997.

...

At present it is the practice of the Secretary of State to use this power sparingly, in circumstances where, for instance, a prisoner is suffering from a terminal illness or is bedridden or similarly incapacitated. If, however, the position is reached where the continued imprisonment of a prisoner is held to amount to inhuman or degrading treatment, we can see no reason why, having particular regard to the requirement to comply with the Convention, the Secretary of State should not use his statutory power to release the prisoner.

49. For these reasons, applying the approach of the Strasbourg court in *Kafkaris v Cyprus* 12 February 2008, we do not consider that a whole life term should be considered as a sentence that is irreducible. Any article 3 challenge where a whole life term has been imposed should therefore be made, not at the time of the imposition of the sentence, but at the stage when the prisoner contends that, having regard to all the material circumstances, including the time that he has served and the progress made in prison, any further detention will constitute degrading or inhuman treatment.

50. For these reasons we reject the challenge made to the defendant’s sentence that is founded on article 3.

51 We would add, for the avoidance of doubt, that we have not been asked to consider, nor have we, whether the decision under section 30 of the 1997 Act is one that should properly be taken by a judge rather than by a minister.”

The transitional measures set out in schedule 22 were found by the Court of Appeal to be compatible with Articles 6 and 7 of the Convention in *R v. Pitchfork* [2009] EWCA Crim 963. The schedule expressly provided that the outcome of the High Court review could not be an increase in the minimum period set by the Secretary of State. It was not in breach of Article 7 to direct the High Court to consider the general principles set out in schedule 21: neither those principles nor the original recommendations by the trial judge and the Lord Chief Justice were to enjoy primacy over the other. Instead, the High Court was conducting a fresh review, taking account of both the judicial recommendations and schedule 21.

(c) *R (Wellington) v. Secretary of State for the Home Department* [2008] UKHL 72

The United States requested the extradition of Ralston Wellington from the United Kingdom to stand trial in Missouri on two counts of murder in the first degree. In his appeal against extradition, Mr Wellington argued that his surrender would violate Article 3 of the Convention, on the basis that there was a real risk that he would be subjected to inhuman and degrading treatment in the form of a sentence of life imprisonment without parole.

In giving judgment in the High Court ([2007] EWHC 1109(Admin)), Lord Justice Laws found that there were “powerful arguments of penal philosophy” which suggested that risk of a whole-life sentence without parole intrinsically violated Article 3 of the Convention. He observed:

“The abolition of the death penalty has been lauded, and justified, in many ways; but it must have been founded at least on the premise that the life of every person, however depraved, has an inalienable value. The destruction of a life may be accepted in some special circumstances, such as self-defence or just war; but retributive punishment is never enough to justify it. Yet a prisoner’s incarceration without hope of release is in many respects in like case to a sentence of death. He can never atone for his offence. However he may use his incarceration as time for amendment of life, his punishment is only exhausted by his last breath. Like the death sentence the whole-life tariff is *lex talionis*. But its notional or actual symmetry with the crime for which it is visited on the prisoner (the only virtue of the *lex talionis*) is a poor guarantee of proportionate punishment, for the whole-life tariff is arbitrary: it may be measured in days or decades according to how long the prisoner has to live. It is therefore liable to be disproportionate – the very vice which is condemned on Article 3 grounds – unless, of course, the death penalty’s logic applies: the crime is so heinous it can never be atoned for. But in that case the supposed inalienable value of the prisoner’s life is reduced, merely, to his survival: to nothing more than his drawing breath and being kept, no doubt, confined in decent circumstances. That is to pay lip-service to the value of life; not to vouchsafe it.”

However, and “not without misgivings”, he considered that the relevant authorities, including those of this Court, suggested an irreducible life sentence would not always raise an Article 3 issue.

On Wellington’s appeal to the House of Lords, a majority of their Lordships found that Article 3, insofar as it applied to inhuman and degrading treatment and not to torture, was applicable only in attenuated form to extradition cases. In any event, all five Law Lords found that the sentence likely to be imposed on the appellant would not be irreducible; having regard to the powers of clemency and commutation of the Governor of Missouri, it would be just as reducible as the sentence at issue in *Kafkaris*. Moreover, Lord Hoffmann, Lord Scott, Baroness Hale and Lord Brown all doubted Lord Justice Laws’s view (endorsed by the Privy Council in *de Boucherville* – see section 3 below) that life imprisonment without parole was *lex talionis*. Lord Hoffman, Baroness Hale and Lord Brown did not accept his premise that the abolition of the death penalty had been founded on the idea that the life of every person had an inalienable value; there were other, more pragmatic reasons for abolition such as its irreversibility and lack of deterrent effect. Lord Scott rejected the view that an irreducible life sentence was inhuman and degrading because it denied a prisoner the possibility of atonement; once it was accepted that a whole life sentence could be a just punishment, atonement was achieved by the prisoner serving his sentence.

Wellington’s application to this Court was struck out on 5 October 2010, the applicant having indicated his wish to withdraw it; *Wellington v. the United Kingdom* (dec.), no. 60682/08.

C. Other relevant case-law on mandatory sentences for murder

1. Commonwealth jurisdictions

In *Reyes v. the Queen* [2002] UKPC 11 the Judicial Committee of the Privy Council considered that a mandatory death penalty for murder by shooting was not compatible with section 7 of the Constitution of Belize, which prohibits torture and ill-treatment in identical terms to Article 3 of the Convention. Lord Bingham, for the unanimous Committee, stated:

“In a crime of this kind there may well be matters relating both to the offence and the offender which ought properly to be considered before sentence is passed. To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which section 7 exists to protect.”

The relevant law was not saved by the powers of pardon and commutation vested by the Constitution in the Governor-General, assisted by an Advisory Council; in Lord Bingham’s words “a non-judicial body cannot decide what is the appropriate measure of punishment to be visited on a defendant for the crime he has committed”.

In *de Boucherville v. The State of Mauritius* [2008] UKPC 70 the Judicial Committee of the Privy Council considered the case of someone who had been sentenced to death and, with the abolition of the death penalty in Mauritius, had had his sentence commuted to a mandatory life sentence. It considered the Court’s judgment in *Kafkaris*, cited above, and found that the

safeguards available in Cyprus to prevent Kafkaris from being without hope of release were not available in Mauritius. The Mauritian Supreme Court had interpreted such a sentence as condemning de Boucherville to penal servitude for the rest of his life and the provisions of the relevant legislation on parole and remission did not apply. This meant the sentence was manifestly disproportionate and arbitrary and so contrary to section 10 of the Mauritian Constitution (provisions to secure protection of law, including the right to a fair trial).

It had also been argued by the appellant that the mandatory nature of the sentence violated section 7 of the Constitution (the prohibition of torture, inhuman or degrading punishment or other such treatment). In light of its conclusion on section 10, the Committee considered it unnecessary to decide that question or to consider the relevance of the possibility of release under section 75 (the presidential prerogative of mercy). It did, however, find that the safeguards available in Cyprus (in the form of the Attorney-General's powers to recommend release and the President's powers to commute sentences or decree release) were not available in Mauritius. It also acknowledged the appellant's argument that, as with the mandatory sentence of death it had considered in *Reyes*, a mandatory sentence of life imprisonment did not allow consideration of the facts of the case. The Privy Council also considered any differences between mandatory sentences of death and life imprisonment could be exaggerated and, to this end, quoted with approval the dicta of Lord Justice Laws in *Wellington* and Lord Bingham in *Lichniak* (see above).

In the earlier case of *State v. Philibert* [2007] SCJ 274, the Supreme Court of Mauritius held that a mandatory sentence of 45 years' imprisonment for murder amounted to inhuman or degrading treatment in violation of section 7 on the grounds that it was disproportionate. In *State v. Tcoeib* [1997] 1 LRC 90 the Namibian Supreme Court considered the imposition of a discretionary life sentence to be compatible with section 8 of the country's constitution (subsection (c) of which is identical to Article 3 of the Convention). Chief Justice Mahomed, for the unanimous court, found the relevant statutory release scheme to be sufficient but observed that if release depended on the "capricious exercise" of the discretion of the prison or executive authorities, the hope of release would be "too faint and much too unpredictable" for the prisoner to retain the dignity required by section 8.

2. *Germany*

Article 1 of the Basic Law of the Federal Republic of Germany provides that human dignity shall be inviolable. Article 2(2) provides:

"Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law."

The compatibility of a mandatory sentence of life imprisonment for murder with these provisions was considered by the Federal Constitutional Court in the *Life Imprisonment* case of 21 June 1977, 45 BVerfGE 187 (an English translation of extracts of the judgment, with commentary, can be found in D.P. Kommers, *The Constitutional Jurisprudence of the Federal*

Republic of Germany (2nd ed.), Duke University Press, Durham and London, 1997 at pp. 306-313).

The court found that the state could not turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth. Respect for human dignity and the rule of law meant the humane enforcement of life imprisonment was possible only when the prisoner was given “a concrete and realistically attainable chance” to regain his freedom at some later point in time.

The court underlined that prisons also had a duty to strive towards the resocialisation of prisoners, to preserve their ability to cope with life and to counteract the negative effects of incarceration and the destructive changes in personality that accompanied imprisonment. It recognised, however, that, for a criminal who remained a threat to society, the goal of rehabilitation might never be fulfilled; in that case, it was the particular personal circumstances of the criminal which might rule out successful rehabilitation rather than the sentence of life imprisonment itself. The court also found that, subject to these conclusions, life imprisonment for murder was not a senseless or disproportionate punishment.

In the later *War Criminal* case 72 BVerfGE 105 (1986), where the petitioner was eighty-six years of age and had served twenty years of a life sentence imposed for sending fifty people to the gas chambers, the court considered that the gravity of an person’s crime could weigh upon whether he or she could be required to serve his or her life sentence. However, a judicial balancing of these factors should not place too heavy an emphasis on the gravity of the crime as opposed to the personality, state of mind, and age of the person. In that case, any subsequent review of the petitioner’s request for release would be required to weigh more heavily that before the petitioner’s personality, age and prison record.

D. Further international materials

1. Council of Europe texts

Recommendation (2003)22 of the Committee of Ministers of the Council of Europe on conditional release recommends inter alia that governments of members states:

- “1. introduce conditional release in their legislation if it does not already provide for this measure;
2. be guided in their legislation, policies and practice on conditional release by the principles contained in the appendix to this recommendation”

The fourth principle set out in the appendix provides:

“4.a. In order to reduce the harmful effects of imprisonment and to promote the resettlement of prisoners under conditions that seek to guarantee safety of the outside community, the law should make conditional release available to all sentenced prisoners, including life-sentence prisoners.

4.b. If prison sentences are so short that conditional release is not possible, other ways of achieving these aims should be looked for.”

The explanatory memorandum to the Recommendation adds:

“Life-sentence prisoners should not be deprived of the hope to be granted release either. Firstly, no one can reasonably argue that all lifers will always remain dangerous to society. Secondly, the detention of persons who have no hope of release poses severe management problems in terms of creating incentives to co-operate and address disruptive behaviour, the delivery of personal-development programmes, the organization of sentence-plans and security. Countries whose legislation provides for real-life sentences should therefore create possibilities for reviewing this sentence after a number of years and at regular intervals, to establish whether a life-sentence prisoner can serve the remainder of the sentence in the community and under what conditions and supervision measures.”

Recommendation (2003)23 of the Committee of Ministers on the management by prison administrations of life sentence and other long-term prisoners, where relevant, provides as follows:

“General objectives

2. The aims of the management of life sentence and other long-term prisoners should be:

- to ensure that prisons are safe and secure places for these prisoners and for all those who work with or visit them;
- to counteract the damaging effects of life and long-term imprisonment;
- to increase and improve the possibilities for these prisoners to be successfully resettled in society and to lead a law-abiding life following their release.

...

Special categories of life sentence and other long-term prisoners

...

31. Special management care and attention should be given to the particular problems posed by prisoners who are likely to spend their natural life in prison. In particular, their sentence planning should be sufficiently dynamic and allow them to benefit from participation in meaningful activities and adequate programmes including interventions and psychosocial services designed to help them cope with their sentence.

...

Managing reintegration into society for life sentence and other long-term prisoners

33. In order to enable life sentence and other long-term prisoners to overcome the particular problem of moving from lengthy incarceration to a law-abiding life in the community, their release should be prepared well in advance and take particular account of the following:

- the need for specific pre-release and post-release plans which address relevant risks and needs;
- due consideration of the possibility of achieving release and the continuation post-release of any programmes, interventions or treatment undertaken by prisoners during detention;
- the need to achieve close collaboration between the prison administration and post-release supervising authorities, social and medical services.

34. The granting and implementation of conditional release for life sentence and other long-term prisoners should be guided by the principles set out in Recommendation Rec(2003)22 on conditional release.”

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“CPT”) prepared a report on “Actual/Real Life Sentences” dated 27 June 2007 (CPT (2007) 55). The

report reviewed various Council of Europe texts on life sentences, including recommendations (2003) 22 and 23, and stated in terms that: (a) the principle of making conditional release available is relevant to all prisoners, “even to life prisoners”; and (b) that all Council of Europe member states had provision for compassionate release but that this “special form of release” was distinct from conditional release.

It noted the view that discretionary release from imprisonment, as with its imposition, was a matter for the courts and not the executive, a view which had led to proposed changes in the procedures for reviewing life imprisonment in Denmark, Finland and Sweden. The report also quoted with approval the CPT’s report on its 2007 visit to Hungary in which it stated:

“[A]s regards “actual lifers”, the CPT has serious reservations about the very concept according to which such prisoners, once they are sentenced, are considered once and for all as a permanent threat to the community and are deprived of any hope to be granted conditional release”.

The report’s conclusion included recommendations that: no category of prisoners should be “stamped” as likely to spend their natural life in prison; no denial of release should ever be final; and not even recalled prisoners should be deprived of hope of release.

2. *The International Criminal Court*

Article 77 of the Rome Statute of the International Criminal Court allows for the imposition of a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. Such a sentence must be reviewed after twenty-five years to determine whether it should be reduced (Article 110).

COMPLAINTS

First, relying on the international materials set out above, the judgments of the Privy Council in *Reyes* and *de Boucherville*, that of the German Federal Constitutional Court in the *Life Imprisonment* case and this Court’s judgments in *Kafkaris*, cited above, and *Léger v. France* (striking out) [GC], no. 19324/02, ECHR 2009-..., the applicants complain that the imposition of whole life orders means their sentences are, in effect, irreducible and in violation of Article 3 of the Convention. They maintain that, once imposed, a whole life order is not subject to review by the courts and the Secretary of State’s discretion to release on compassionate grounds, when a prisoner is terminally ill or incapacitated, is not sufficient to make that sentence *de facto* reducible.

Second, the applicants further complain that the imposition of whole life orders without the possibility of regular review by the courts is in violation of Article 5(4) or, alternatively, Article 6 of the Convention. They rely in particular on the dicta of Lord Bingham in *Lichniak* (see relevant domestic law and practice above) and Judge Bratza in *Kafkaris*.

Third, the second and third applicants also complain that the making of whole life orders in their case by the High Court was in violation of Article

7 of the Convention. They submit that it was impermissible for the High Court to have regard to the principles set out in Schedule 21, which reflected a harsher sentencing regime than was in place when their offences were committed.

QUESTIONS TO THE PARTIES

A. Article 3

1. Does the imposition of an irreducible life sentence in itself amount to a violation of Article 3 or would a violation only occur at a later point in the sentence? If the latter, at which point does the violation occur?

2. Is a whole life order, when taken with the Secretary of State's discretion to release, an irreducible life sentence within the meaning of *Kafkaris v. Cyprus* [GC], no. 21906/04, ECHR 2008-...?

3. Does *de facto* reducibility require the possibility of both compassionate and conditional release (see the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") report on "Actual/Real Life Sentences" dated 27 June 2007 (CPT (2007) 55))?

4. The Government are requested to provide the following information:

- how many prisoners are currently serving mandatory life sentences for murder in England and Wales?
- how many prisoners are currently the subject of whole life orders?
- since 2000, how many whole life order prisoners (or prisoners previously serving whole life tariffs) have been released on compassionate grounds within the terms of Prison Service Order 4700 chapter 12?
- since 2000, have any whole life order/whole life tariff prisoners been released outside the terms of the Prison Service Order?

5. In conclusion, in respect of each applicant, has there been a violation of Article 3 of the Convention?

B. Article 5(4)

6. Have the applicants exhausted all effective domestic remedies, as required by Article 35 § 1 of the Convention?

7. When a prisoner has been made subject to a "whole life order" is the possibility of release only at the discretion of the Secretary of State compatible with Article 5(4) of the Convention? In particular, the Government are requested to comment on why the previous practice of review of a whole life tariff after twenty-five years' imprisonment was not enacted in modified form in the present statutory framework (see *R. v.*

Secretary of State for the Home Department, ex parte Hindley [2001] 1 AC 410, HL at 427A-E).

C. Article 7

8. In respect of the second and third applicants, did the making of a whole life order by the High Court amount to a violation of Article 7 of the Convention?