



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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 46295/99  
by Dennis STAFFORD  
against the United Kingdom

The European Court of Human Rights, sitting on 29 May 2001 as a Chamber composed of

Mr J.-P. COSTA, *President*,

Mr W. FUHRMANN,

Mr P. KURIS,

Mrs F. TULKENS,

Mr K. JUNGWIERT,

Sir Nicolas BRATZA,

Mr K. TRAJA, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 24 July 1998 and registered on 22 February 1999,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

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

Having deliberated, decides as follows:

## THE FACTS

The applicant, Dennis Stafford, is a United Kingdom national, born in 1933 and resident in Durham. He is represented before the Court by Mr Purdon, a lawyer practising in Newcastle-upon-Tyne.

### A. The circumstances of the case

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

In January 1967, the applicant was convicted of murder. He was released on licence in April 1979. His licence required him to co-operate with his probation officer and to remain in the United Kingdom unless his probation officer agreed to him travelling abroad.

Soon after release, the applicant left the United Kingdom in breach of his licence and went to live in South Africa. In September 1980, his licence was revoked and thereafter he was continuously “unlawfully at large”.

In April 1989, the applicant was arrested in the United Kingdom having returned from South Africa in possession of a false passport. Possession of a false passport led to a fine. He remained in custody however due to the revocation of the life licence. He made written representations to the Parole Board against the 1980 decision to recall him to prison but the Board rejected those representations and recommended a further review in July 1990.

In November 1990, the Board recommended the applicant’s release subject to a satisfactory release plan. This recommendation was accepted by the Secretary of State. In March 1991, the applicant was released on life licence.

In July 1993, the applicant was arrested and remanded in custody on counterfeiting charges. On 19 July 1994, he was convicted on two counts of conspiracy to forge travellers’ cheques and passports and sentenced to six years’ imprisonment.

In September 1994, the Parole Board recommended revocation of the applicant’s life licence and further review at the parole eligibility date of his six year sentence. The Secretary of State accepted the Board’s recommendation, revoking the licence under section 39(1) of the Criminal Justice Act 1991 (“the 1991 Act”). The applicant made written representations but the Board maintained its decision.

In 1996, the Parole Board conducted a formal review of the applicant’s case and recommended his release on life licence. It said:

“This case is exceptional in that it is a recall one and he has previously made a successful transition from prison to the community without violent re-offending ... It is felt that the risk of serious re-offending in the future is very low. Recent reports of progress in prison have been favourable and no untoward incidents have been

reported; positive links with his family have been maintained. In view of these facts, it is now felt that he could be released safely and appropriately into the community. The Panel took the view after lengthy consideration that nothing further would be gained by a period in open conditions and the successful return to the community, bearing in mind all the risk factors, would be best facilitated by returning to his family directly.”

By letter of 27 February 1997, the Secretary of State rejected the Board’s recommendation stating that he:

“... notes with concern the circumstances surrounding your two recalls to prison ... Both these occasions represent a serious and grave breach of the trust placed in you as a life licensee and demonstrate a lack of regard for the requirements of supervision. Against this background the Secretary of State is not yet satisfied that if released on licence for a third time, you would fully comply with the conditions of your life licence. He notes that you have spent the past 3 1/2 years in closed prison conditions and therefore have not on this occasion followed the normal progression of life sentence prisoners. This involves a period in open conditions, giving you the opportunity to demonstrate sustained good behaviour and responsibility in a less secure environment, and to experience the full range of re-settlement activities in preparation for release.

For these reasons, the Secretary of State considers that you should be transferred to an open prison for a final period of testing and preparation. Your next formal review by the Parole Board will begin 2 years after your arrival there.”

On 10 June 1997, the applicant was granted leave to seek judicial review of the Secretary of State’s decisions to reject the Board’s recommendation for immediate release and to require him to spend a further two years in open conditions before the next review.

The Secretary of State acknowledged in the proceedings that there was not a significant risk that the applicant would commit further violent offences but asserted that he could lawfully detain a post-tariff mandatory lifer solely because there was a risk that he might commit further non-violent imprisonable offences.

On 5 September 1997, Mr Justice Collins quashed the Secretary of State’s decision of February 1997, holding that it was beyond his power to detain a post-tariff lifer other than on the basis that there existed an unacceptable risk that he might commit a future offence involving a risk to the life or limb of the public.

On 26 November 1997, the Court of Appeal allowed the Secretary of State’s appeal, holding that section 35(2) of the 1991 Act conferred a broad discretion on the Secretary of State to direct the release of mandatory life sentence prisoners and his decision not to release the applicant was in accordance with the previously stated policy whereby the risk of re-offending was taken into account, such risk not having been expressed as being limited to offences of a violent or sexual nature. Lord Bingham CJ stated however:

“The applicant is now serving the equivalent of a determinate sentence of about 5 years, albeit in open conditions. This term has not been imposed on him by way of

punishment, because he has already served the punitive term which his previous, very serious offences have been thought to merit. The term has not been imposed because he is thought to present danger to the public because that is not suggested. It is not submitted that the term imposed bears any relation to the gravity of any future imprisonable offence which the applicant might commit or that such term is needed to ensure future compliance with the terms of his life licence. While a powerful case can be made for testing in open conditions a mandatory life prisoner who has been institutionalised for long years of incarceration in closed conditions, such a case loses much of its force in the case of a man who has, since serving the punitive term of his life sentence, demonstrated his capacity for living an independent and apparently lawful life by doing so for a number of years. The imposition of what is in effect a substantial term of imprisonment by the exercise of executive discretion, without trial, lies uneasily with ordinary concepts of the rule of law. I hope that the Secretary of State may, even now, give further consideration to the case.”

Lord Justice Buxton, concurring with the latter remarks, added:

“The category of imprisonable offence is extremely wide, and can encompass many matters that are wholly unrelated, both in nature and seriousness, to the reasons for the life sentence prisoner being within the power of the state in the first place. I also find it uncomfortable that the criterion should be used as the justification for continued imprisonment. We were told in argument that the test of imprisonable offence, rather than fault of a purely moral or social nature, was used because faults of the latter nature would be unconnected with the original reasons for the subject’s incarceration; but in reality this lack of connection exists, or at least is strongly threatened, by the imprisonable offence criterion also. ...”

On 16 December 1997, the applicant was moved to open conditions.

By letter dated 21 January 1998, the Secretary of State decided that the applicant should spend only six months in open conditions before his next review.

On 23 July 1998, the House of Lords dismissed the applicant’s appeal against the Court of Appeal decision. In his speech, with which the rest of the judges agreed, Lord Steyn held that section 35(2) of the 1991 Act conferred a wide administrative discretion on the Secretary of State to decide upon the release on licence of mandatory life prisoners and that there was no fundamental common law principle of retributive proportionality which constrained him from detaining a mandatory lifer by reference to a risk that he may in future commit a serious but non-violent offence. He agreed however with Lord Bingham’s concern that:

“the imposition of what is in effect a substantial term of imprisonment by exercise of administrative discretion, without trial, lies uneasily with ordinary concepts of the rule of law.”

On 22 December 1998, the applicant was released on licence by the Secretary of State.

## B. Relevant domestic law and practice

### *Life sentences*

Murder carries a mandatory sentence of life imprisonment under the Murder (Abolition of Death Penalty) Act 1965. A person convicted of other serious offences (e.g. 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.

### *Tariffs*

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 Home Secretary 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.*, *op. cit.*, at pp. 492G-493A).

Pursuant to 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 the tariff has expired, the prisoner may require the Secretary of State to refer his case to the Parole Board which has the power to order his release if it is satisfied that it is no longer necessary to detain him for the protection of the public.

A different regime, however, applies under the 1991 Act to persons detained during Her Majesty’s pleasure or 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).

In the judicial review proceedings in the cases of T. and V. (*R. v. the Secretary of State for the Home Department, ex parte T. and V.*, 1998 AC 407), the House of Lords gave consideration, *inter alia*, to the nature of the tariff-fixing exercise:

Lord Steyn held:

“The starting point must be to inquire into the nature of the power to fix a tariff which the Home Secretary exercises. Writing on behalf of the Home Secretary the Home Office explained that: ‘The Home Secretary must ensure that, at all times, he acts with the same dispassionate fairness as a sentencing judge’. The comparison between the position of the Home Secretary, when he fixes a tariff representing the punitive element of the sentence, and the position of the sentencing judge is correct. In fixing a tariff the Home Secretary is carrying out, contrary to the constitutional principle of the separation of powers between the executive and the judiciary, a classic judicial function. Parliament entrusted the underlying statutory power, which entailed a discretion to adopt a policy and fix a tariff, to the Home Secretary. But the power to fix a tariff is nevertheless equivalent to a judge’s sentencing power.”

Lord Hope held:

“But the imposition of a tariff, which is intended to fix the minimum period in custody is, in itself, the imposition of a form of punishment. This has, as Lord Mustill observed in *R. v. Secretary of State for the Home Department, ex parte Doody* at p. 557A-B, the characteristics of an orthodox judicial exercise, which is directed to the circumstances of the offence and those of the offender and to what, having regard to the requirements of retribution and deterrence, is the appropriate minimum period to be spent in custody. The judge, when advising the Secretary of State about the tariff, must and does confine his attention to these matters ...

If the Secretary of State wishes to fix a tariff for the case – in order to replace the views of the judiciary with a view of his own about the length of the minimum period – he must be careful to abide by the same rules ... .”

After conviction and sentence, persons sentenced to mandatory life imprisonment are informed by the Secretary of State, after they have been given an opportunity to make representations, of the period (tariff) which represents the period during which they will be detained for the purposes of punishment and deterrence. The trial judge and Lord Chief Justice give their views to the Secretary of State as to the appropriate tariff.

Tariffs are similarly set in respect of discretionary life sentences. Since the Criminal Justice Act 1991, however, they are set by the trial judge.

#### *Release on licence of mandatory life sentence prisoners*

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.”

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.”

In determining the principles of fairness that apply to the procedures governing the review of mandatory life sentences, the English courts have recognised 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 e.g. *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).

In *R. v. Secretary of State for the Home Department, ex parte Doody* ([1993] 3 AER 92), the House of Lords observed that, in contrast with the position as regards discretionary life sentences, the theory and practice in respect of mandatory life sentences were out of tune. In his speech, with which the other judges agreed, Lord Mustill explained that the policy whereby murder was treated as an offence so grave that the proper penal element of the sentence was detention for life was inconsistent with the practice adopted by successive Secretaries of State that a mandatory life sentence included a “tariff” period to reflect the requirements of retribution and deterrence. He added:

“The discretionary and mandatory life sentences, having in the past grown apart, may now be converging. Nevertheless, on the statutory framework, the underlying theory and current practice, there remains a substantial gap between them. It may be - I express no opinion - that the time is approaching when the effect of the two types of sentence may be further assimilated. But this is a task of Parliament, and I think it quite impossible for the courts to introduce a fundamental change in the relationship between the convicted murderer and the State, through the medium of judicial review.”

On 10 November 1997, the Secretary of State made the following Parliamentary statement, *inter alia*:

“I take the opportunity to confirm that my approach on the release of adults convicted of murder once tariff has expired will reflect the policy set out in the answer given on 27 July 1993. In particular, the release of such a person will continue to depend not only on the expiry of tariff and on my being satisfied that the level of risk of his committing further imprisonable offences presented by his release is acceptably low, but also on the need to maintain public confidence in the system of criminal justice. The position of a prisoner subject to a mandatory life sentence continues to be distinct from that of a prisoner serving a discretionary life sentence, a decision on whose final release is a matter for the Parole Board alone.”

## COMPLAINTS

1. The applicant complains under Article 5 § 1 of the Convention that his detention from the expiry of his six year sentence in July 1997 until his release on licence on 22 December 1998 was arbitrary. He points out that by the time of his detention in July 1997 he had long since completed the punitive phase of the life sentence imposed on him for murder. Since his release in 1979, he had spent many years at liberty without re-offending in a violent way. The decision to detain him after the expiry of the six year term for a dishonesty offence was justified solely by the consideration that, if released on licence, he might commit another offence of dishonesty. This had no relation to the original basis of his detention.

2. The applicant complains under Article 5 § 4 of the Convention that he did not have the right to have the lawfulness of his continued detention decided by a court at reasonable intervals.

## THE LAW

The applicant complains of the decision of the Secretary of State to revoke his life licence and continue his detention, invoking Article 5 §§ 1 and 4 of the Convention which provide as relevant:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court; ...

4. 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.”

The Government submit that the imposition of a mandatory life sentence for murder satisfies Article 5 § 1 of the Convention. In their view, this continued to provide a lawful basis for his detention after the expiry of the six year sentence for fraud offences as his life licence had been revoked. They reject the applicant’s argument that this detention, on the basis of a concern that he might commit serious non-violence offences of dishonesty bore no proper relationship to the object of the original mandatory life sentence. They argue that the original sentence was imposed because of the gravity of the offence of murder. The object and purpose of the punishment was to confer power on the Secretary of State to decide when, if at all, it was in the public interest to allow the applicant to return to society on life licence and to empower the Secretary of State to decide, subject to the applicable statutory procedures, whether it was in the public interest to

recall the applicant to prison at any time until his death. Whether or not the concern is about risk of further offences of violence or further non-violent offences a refusal to release on life licence, or to revoke the life licence, is closely related to the original mandatory life sentence by reason of the gravity of the offence and to ensure that the prisoner could only be released when the public interest made it appropriate to do so.

The Government submit, in deciding whether it is in the public interest to release the applicant, the Secretary of State is therefore entitled to have regard to the risk of serious non-violent offending. It would not be logical or rational if he was able to refuse to order the release of a prisoner where there was an unacceptable risk of his committing serious non-violent offences such as burglary or trafficking in heroin, which attract far longer prison sentences than some offences of a violent nature (e.g. wounding) and which cause far more harm to the public interest. It would be absurd if the Secretary of State was bound to release a life prisoner on expiry of tariff even where there was undisputed evidence that he intended on release to set up as a forger or drug trafficker, offences of a non-violent nature. The Government refer to the previous Court case-law which found that continued detention of life prisoners was justified by their original trial and appeal proceedings (e.g. *Weeks v. the United Kingdom* judgment of 2 March 1987, Series A no. 114, and *Wynne v. the United Kingdom* judgment of 18 July 1994, Series A no. 294-A). The fact that the applicant was released on life licence and was living for some time at liberty has no relevance to the lawful basis of his detention after revocation of that licence.

The Government consider that the requirements of Article 5 § 4 of the Convention are therefore met by the original trial and appeal procedures and that no new issues of lawfulness concerning the applicant's detention have arisen requiring the possibility of recourse to a court or similar body with power to order release. The Secretary of State's determination of tariff was an administrative procedure governing the implementation of a sentence and not part of the imposition of the sentence itself. Mandatory adult life prisoners convicted for murder are in a distinct category in domestic law, as has continued to be recognised in the Court's case-law (e.g. *Thynne, Gunnell and Wilson v. the United Kingdom* judgment of 25 October 1990, Series A no. 190, and *V. v. the United Kingdom*, [GC] no. 24888/94, ECHR 1999-IX). The sentence is imposed because of the inherent gravity of the offence and not because of the presence of factors susceptible to change with the passage of time, such as mental instability or dangerousness. There has been no relevant change in the statutory framework or in the domestic courts' approach. A judge must impose a mandatory life sentence where a person is convicted of murder and enjoys no discretion. Parliament has decided that all adult murderers must be sentenced to life imprisonment whether or not they are dangerous and whatever their circumstances because such a grave crime deserves to be punished by loss of liberty for life. In any

event, the Government point out that when the applicant was recalled to prison on revocation of his life licence, the Parole Board enjoyed a power to direct the Secretary of State that he be immediately released. No such direction was made. That was sufficient in itself to ensure compliance with Article 5 § 4 in the circumstances of the case.

The applicant submits that it is obsolete under domestic law to regard a mandatory life prisoner as having forfeited his liberty for life. On analysis, the parole exercise can no longer be regarded as a matter of leniency to a post-tariff prisoner. In recent cases (*Ex parte Doody*, *Ex parte V. and T.* and *Ex parte Pierson*), the House of Lords has moved to a recognition of the clear similarity of the exercise of fixing a tariff to a sentencing exercise which Buxton LJ noted in the present case was incompatible with the notion that a mandatory lifer was “in mercy unless there is an exercise in his favour of an inscrutable executive discretion”. References therefore to notions of “public acceptability” of release must be seen in their context and cannot be relied on as clear authority for the proposition that the Secretary of State can rely on the wholly undefined and uncertain concept of the “public interest” as a reason for not releasing a mandatory lifer who has completed his tariff and who is no longer considered to be a risk to the public in the sense of being likely to commit further offences of violence.

The applicant claims that to detain a post-tariff mandatory lifer by reference to concerns about the prisoner which bear no necessary relationship to the nature of the criminal conduct which resulted in the imposition of the sentence in the first place, results in a form of detention which has no sufficient connection with the object of the legislature and the sentence of the court, so that it amounts to an arbitrary detention in breach of Article 5 § 1 of the Convention. He points out that no Secretary of State has ever sought to justify post-tariff detention of a mandatory lifer who was no longer a risk to the public on the basis of a general need to maintain public confidence in the system of criminal justice. In his own case, the Secretary of State was careful not to rely on arguments about public acceptability. The Government cannot convincingly rely on the domestic courts’ decisions where those judges have expressed unease about the imposition of a substantial term of imprisonment by the exercise of executive discretion. Nor can they rely on the recent case-law of this Court in *V. v. the United Kingdom* (cited above), which concerned minors detained at Her Majesty’s Pleasure, since no arguments were addressed concerning any developments in domestic law concerning mandatory adult lifers. The domestic courts themselves found no practical distinction between these two categories and have clearly found that the fixing of tariffs in both is akin to an exercise of sentencing or imposing punishment which attracts the same procedural safeguards as applied to a judge when passing sentence.

The applicant disputes that the true objective of the mandatory life sentence is life long punishment. He remains the only mandatory life

prisoner who has been detained post-tariff on the basis that the Secretary believes that he may commit a non-violent offence if released. Different considerations might well apply where a risk of drug trafficking was concerned as such activity is clearly capable of causing physical and psychological harm to others. To justify indefinite imprisonment by reference to a belief that he may on release commit a wholly non-violent crime involving no conceivable physical harm to others (financial fraud), is arbitrary, encompassing matters wholly unrelated in nature and seriousness to the reasons for the life prisoner being within the power of the State in the first place.

The applicant argues therefore that he was entitled to review of his continued detention by a body satisfying the requirements of Article 5 § 4. He submits that, since the case of *Wynne v. the United Kingdom* (judgment of 18 July 1994, Series A no. 294) was decided, the courts in the United Kingdom have so altered the approach to and understanding of the mandatory life sentence that it is no longer possible to argue that the safeguards mandated by Article 5 § 4 are incorporated into the sentence by the original trial process. The Court should reconsider its judgment in *Wynne*, in particular, determining whether the recognition that the mandatory life sentence, like the discretionary life sentence, authorises a two phase period of detention does have implications in terms of Article 5 § 4 in the post-tariff phase. The fact that the Parole Board had power to direct the applicant's release on his initial recall was not sufficient to meet the requirements of Article 5 § 4 which applied to his post-tariff detention as a whole and, when it did later recommend his release, this was not binding on the Secretary of State.

The Court has examined the applicant's complaints and the submissions of the parties and finds that serious questions of fact and law arise, which are of such complexity that their determination should depend on an examination of the merits. The application cannot, therefore, be regarded as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Court unanimously

*Declares* the application admissible, without prejudging the merits of the case.

S. DOLLÉ  
Registrar

J.-P. COSTA  
President