AS TO THE ADMISSIBILITY OF

Application No. 29193/95
by Robert COMERFORD
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 9 April 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 3 July 1995 by Robert COMERFORD against the United Kingdom and registered on 9 November 1995 under file No. 29193/95;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1964 and currently serving a sentence of detention at Her Majesty's pleasure at HM Prison Elmley, Sheerness. He is represented before the Commission by Messrs. B. M. Birnberg & Co., solicitors practising in London.

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

A. Particular circumstances of the case

In 1980 the applicant then aged 16 was convicted of murder and sentenced to be detained at Her Majesty's pleasure. He was released on licence in 1986.

In 1988 the applicant was arrested and charged with a number of offences including burglary. On the 13 July 1988 he was sentenced on

a guilty plea to 15 months' imprisonment. The trial judge did not revoke the applicant's licence.

On 26 July 1988, following the recommendation of the Parole Board, the Secretary of State revoked the applicant's licence pursuant to section 62 of the Criminal Justice Act 1967. On 18 November 1988, the Parole Board rejected the applicant's written representations against the revocation of his licence.

In May 1990 the applicant's case was reviewed by the Parole Board who recommended that the applicant be transferred from a Category C (closed) to a Category D (open) prison. The Parole Board's recommendation was accepted by the Secretary of State who directed that the applicant's case should be reviewed again in 18 months.

That review was deferred as a result of a series of breaches of prison rules by the applicant. When the applicant's case was eventually reviewed in April 1993, the Parole Board recommended his release on licence provided the applicant first spend six months in a hostel providing a pre-release employment scheme. Before the Parole Board's recommendation came before the Secretary of State the applicant in breach of prison rules returned late from his work placement in consequence of which the Parole Board's recommendation was not implemented. Instead the Secretary of State, in or about October 1993, directed that the applicant's case should be reviewed again in 12 months.

Prior to that review the applicant again returned late from his work placement in consequence of which he was transferred from a Category D to a Category C prison.

As at the date of registration a further review, initiated in September 1994, was under way in which the applicant was seeking a recommendation from the Parole Board that he be transferred from a Category C to a Category D prison.

The Parole Board has since recommended that the applicant be transferred to Category D prison. This recommendation was not, however, accepted by the Secretary of State who, on 28 November 1995, directed that the applicant be transferred to another Category C prison pending a further review to be initiated by the Parole Board in September 1996.

B. Relevant domestic law and practice

1. Detention at Her Majesty's pleasure

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

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

i. that the offence is grave, and

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

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

2. Categorisation of detention "at Her Majesty's pleasure"

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

In 1908, detention at His Majesty's pleasure was introduced in respect of offenders aged ten to sixteen and then extended to cover those under eighteen in 1933. The provision in force at present is Section 53 (1) of the Children and Young Persons Act 1933 (as amended) which provides:

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

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

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

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

3. Release on licence and revocation of licences

Persons sentenced to mandatory and discretionary life imprisonment, custody for life and those detained at Her Majesty's pleasure have a "tariff" set in relation to the period of imprisonment they should serve in order to satisfy the requirements of retribution and deterrence. After the expiry of the tariff, the prisoner becomes eligible for release on licence. Applicable provisions and practice in respect of the fixing of the tariff and release on licence have been subject to change in recent years, in particular, following the coming into force on 1 October 1992 of the Criminal Justice Act 1991.

Under the relevant provisions of the Criminal Justice Act 1967 the regime applying to the release and re-detention of discretionary and mandatory life prisoners was the same. Section 61(1) of the 1967 Act provided inter alia that the Secretary of State on the recommendation of the Parole Board and after consultation with the Lord Chief Justice and the trial judge, may :

> "release on licence a person serving a sentence of imprisonment for life or a person detained under section 53 of the Children and Young Persons Act 1933."

Section 62 of the 1967 Act provided inter alia that:

> "1. Where the Parole Board recommends the recall of any person who is subject to a licence under section ... 61 of this Act, the Secretary of State may revoke that person's licence and recall him to prison.
>
> 2. The Secretary of State may revoke the licence of any such person and recall him as aforesaid without consulting the Board, where it appears to him that it is expedient in the public interest to recall that person before such consultation is practicable.
>
> 3. A person recalled to prison under the foregoing provisions of this section may make representations in writing with respect to his recall and shall on return to prison be informed of the reasons for his recall and of his right to make such representations...
>
> 4. The Secretary of State shall refer to the Board the case of a person recalled under subsection (1) of this section who makes representations...
>
> 5. Where the Board recommends the immediate release on licence of a person whose case is referred to it under this section, the Secretary of State shall give effect to the recommendation, and where it is necessary for that purpose to release that person under subsection (1) of the last foregoing section, the Secretary of State shall do so without the consultation required by that subsection...".

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

Pursuant to section 34 of the 1991 Act, after the tariff has expired the prisoner may require the Secretary of State to refer his case to the Parole Board which has the power to order his release if it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. Pursuant to the Parole Board Rules 1992 which came into force on 1 October 1992, a prisoner is entitled to an oral hearing, to disclosure of all evidence

before the Parole Board and to legal representation. He is also entitled to call witnesses on his behalf and to cross-examine those who have written reports about him.

The regime applicable to mandatory life prisoners has, however, been preserved within sections 35 and 39 of the 1991 Act. Section 35 of the 1991 Act provides insofar as relevant:

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

Section 39 provides insofar as relevant:

> "(1) If recommended to do so by the Board in the case of a long term or life prisoner who has been released on licence under this Part, the Secretary of State may revoke his licence and recall him to prison...
>
> (3) A person recalled to prison under subsection (1) or (2) above
>
> (a) may make representations in writing with respect to his recall; and
>
> (b) on his return to prison, shall be informed of the reasons for his recall and of his right to make representations.
>
> (4) The Secretary of State shall refer to the Board -
>
> (a) the case of a person recalled under subsection (1) above who makes representations under sub-section (3) above ...
>
> (5) Where on a reference under subsection (4) above the Board -
>
> (a) directs in the case of a discretionary life prisoner;
>
> or
>
> (b) recommends in the case of any other person,
>
> his immediate release on licence under this section, the Secretary of State shall give effect to the direction or recommendation."

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

COMPLAINTS

1. The applicant complains that he has not been able, either on his recall to prison following the revocation of his life licence or thereafter during the currency of his continued detention, to take proceedings satisfying the requirements of para. 4 of Article 5 of the Convention.

2. The applicant further complains that a test which requires the Parole Board to be satisfied that the applicant does not continue to represent any risk to the life or limb of the public before recommending his release following re-detention is too onerous and such

as to constitute a violation of para. 1 (a) of Article 5 of the Convention. The applicant submits that the Parole Board should recommend release unless it is established that he continues to represent a risk to the life or limb of the public.

THE LAW

1. The applicant complains of the absence of any procedure satisfying the requirements of Article 5 para. 4 (Art. 5-4) of the Convention whereby the lawfulness of his continued detention may be determined.

The Commission recalls that in the case of persons detained at Her Majesty's pleasure following the expiry of the tariff period, the Court found that the procedure under which their continued detention was reviewed did not satisfy the requirements of Article 5 para. 4 (Art. 5-4) (see Eur. Court HR, Singh v. the United Kingdom of 21 February 1996, to be reported in Reports 1996 and Eur. Court HR, Hussain v. the United Kingdom judgment of 21 February 1996, to be reported in Reports 1996).

The applicant's case raises identical issues. Accordingly, the Commission considers that this part of the application be communicated to the respondent Government in accordance with Rule 48 para. 2 (b) of the Rules of Procedure.

2. The applicant complains that the test applied by the Parole Board and the Secretary of State in considering whether the applicant should be released is too onerous and such as to constitute a violation of para. 1 (a) of Article 5 (Art. 5-1-a) of the Convention which provides:

> "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;"

The Commission recalls that an indeterminate term of detention for a convicted young person, which may be as long as that person's life, can only be justified by considerations based on the need to protect the public (see Eur. Court HR, Singh v. the United Kingdom of 21 February 1996, to be reported in Reports 1996, loc. cit., at para. 61 and Eur. Court HR, Hussain v. the United Kingdom judgment of 21 February 1996, loc. cit., at para. 53).

The Commission further recalls that before any term of re-detention complies with para. 1 (a) of Article 5 (Art. 5-1-a) there must be a sufficient causal link between the subsequent detention and the original conviction, that is that the decision to re-detain, or any subsequent decision not to release, must be based on grounds consistent with the objectives of the sentencing court (see Eur. Court HR, Van Droogenbroeck v. Belgium judgment of 24 June 1982, Series A no. 30, p. 19, para. 35 and Weeks v. the United Kingdom judgment of 2 March 1987, Series A no. 114, p. 26, para. 49).

The Commission notes that the criterion for determining whether any period of re-detention is justified is that of dangerousness, meaning an unacceptable risk of physical danger to the life or limb of the public (see R v. Secretary of State for the Home Department, ex. parte Prem Singh, unreported, transcript pp. 26F-27B; and Eur. Court HR, Singh v. the United Kingdom judgment of 21 February 1996, loc. cit., at para. 39). The Commission considers this criterion to be manifestly consistent with the objectives of a sentence of detention at Her Majesty's pleasure, namely considerations of the need to protect the public.

Whilst a test which in terms requires the Parole Board to satisfy itself that the applicant no longer represents a danger to the life or limb of the public gives rise to a different presumption from a test which in terms requires the Parole Board to release the applicant unless it is established that he continues to represent a danger, namely in the former case that the applicant is to be considered to represent a risk unless the contrary is proved, the Commission does not consider that such a test may be said to be based on grounds inconsistent with the objectives of the sentencing court so as to constitute a violation of Article 5 para. 1 (a) (Art. 5-1-a) of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

DECIDES TO ADJOURN the examination of the applicant's complaint under Article 5 para. 4 of the Convention;

unanimously
DECLARES INADMISSIBLE the remainder of the application.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber