CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 55768/00
by Terence DANCY
against the United Kingdom

The European Court of Human Rights (Third Section), sitting on 21 March 2002 as a Chamber composed of

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Sir Nicolas BRATZA,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mr B. ZUPANČIČ,
Mrs H.S. GREVE, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 7 March 2000,

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, Terence Dancy, is a United Kingdom national, born in 1957 and currently serving a sentence of life imprisonment in HM Prison Full Sutton. He is represented before the Court by Mr E. Abrahamson, a solicitor practising in Liverpool.

A. The circumstances of the case

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

The applicant had a history of psychiatric illness. On 28 May 1992, he went to the police station where he confessed that he had attacked a man, Mr M., in the building where he lived as he thought the man had accused him of stealing his television. Mr M. was found dead with multiple depressed skull fractures consistent with use of a hammer.

On 23 September 1993, the applicant pleaded guilty to manslaughter on grounds of diminished responsibility and was sentenced by the judge to a term of life imprisonment. The judge declined to set a relevant period for deterrence and retribution (the "tariff"). His sentencing remarks were

> "... you have pleaded guilty to the crime of manslaughter on the basis of diminished responsibility. It was a horrendous crime committed with great violence. I bear in mind everything which I have read about you in the reports. I accept that your distress when you realised what you had done was genuine and that your remorse for it is genuine. Nevertheless, it is a very serious crime indeed and your mental state is such that though you are not a mentally sick person you present a continuing danger to the public because of your liability to fits of explosive temper unless you take regularly your proper medication. I am satisfied therefore that a sentence longer that would be necessarily appropriate to punish you having regard to the seriousness of the offence, is necessary to protect the public from serious harm. The sentence of the court upon you therefore is one of life imprisonment.
>
> [Addressing leading counsel for the applicant] I have considered the question of making it a discretionary life sentence under Section 34. I do not consider that appropriate for the reasons which I have explained."

By letter of 28 May 1998, the applicant was informed by the Home Office that as a tariff had not been set under section 34 of the Criminal Justice Act 1991 by the trial judge he was to be treated as a mandatory life prisoner and the Secretary of State would proceed to fix his tariff. He was informed of the trial judge's view, given in a recent report, that five years was an appropriate period and was given an opportunity to make written representations to the Secretary of State.

In or about November 1998, the Secretary of State set the applicant's tariff at five years. He had been advised that the applicant should originally have been treated as a discretionary life prisoner by the trial judge who

should himself have fixed as tariff at trial. For that reason, he regarded himself as bound to follow the trial judge's view.

On 22 December 1998, the applicant was informed of this decision and told that as his tariff had already expired (in May 1997) it was no longer a factor in his continued detention.

On 12 July 1999, the applicant lodged an appeal against sentence, alleging that the trial judge should have specified the five year tariff at the time the sentence was passed and that had the period been so specified he would have been treated as a discretionary life prisoner and not a mandatory life prisoner. Permission to appeal was granted on 5 October 1999.

In its judgment of 8 November 1999, the Court of Appeal upheld the appeal. Lord Justice Rose said:

> "It seems to this Court, from the sentencing observations of the learned judge, that, although he referred to the gravity of the offence and the danger then presented by the appellant, he was not seeking to say that, in this case, life should mean life. Indeed, his recent recommendation to the Home Secretary that a period of five years would be appropriate for retribution and deterrence is quite inconsistent with such having been his intention at that time.
>
> It is not clear whether the judge's attention was drawn to the Practice Direction and, in any event, he certainly did not have the advantage of the observations of this Court in Hollies, which was decided in August 1994, after the learned judge passed sentence. Had he had that advantage, it seems to us very unlikely that he would have expressed himself quite as he did in his sentencing remarks. The consequence, in our judgment, is that a period of five years ought to have been expressed by the learned judge at the time sentence was passed, in accordance with the Practice Direction and in accordance with what now appears in the judgment of this Court, in Hollies. Accordingly, this appeal will be allowed, to the extent that a five year tariff period will be specified... The consequence of this is, for the avoidance of doubt, that he will become a discretionary life prisoner and can and should be treated by the Parole Board accordingly."

The applicant was immediately re-categorised as a discretionary life prisoner by the Prison Service and Parole Board.

On 1 December 1999, the applicant's case was reviewed by the Parole Board, at an oral hearing. He appeared in person and was represented by his solicitor. He was entitled to adduce evidence and to cross-examine witnesses. It did not direct release, finding that the applicant remained a risk. It did recommend to the Secretary of State that his case be reviewed in twelve months as he had nearly completed the recommended offence related programmes and as he had been disadvantaged in not obtaining a review two years before the expiry of the tariff as his tariff had only been fixed recently.

The applicant's case was reviewed by the Parole Board at an oral hearing held on 29 November 2000. By decision dated 30 December 2000, the Parole Board declined to direct the applicant's release as it concluded that the applicant remained a danger to the public. It recommended that the next

review take place in 24 months as considerable further offence-related, treatment/work programmes still needed to be undertaken e.g. further work on anger management and relationship issues as well as attendance on an Extended Sex Offender Treatment Programme. It noted that the applicant had acknowledged during the proceedings that neither release nor transfer to open conditions was appropriate at this stage. It did recommend that he be transferred to a Category C prison (lower security) to facilitate further treatment work and this was implemented. The applicant's next review was scheduled for November 2002.

On 1 March 2002, the applicant signed the annual review board summary setting out proposals for further treatment, indicating that he fully agreed with the recommendations.

The applicant has now been transferred to a Category C prison.

B. Relevant domestic law and practice

Sentences of life imprisonment

English law imposes a mandatory sentence for the offence of murder in respect of offenders under the age of 18 known as *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 (e.g. manslaughter, rape or 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 in order 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).

Persons sentenced to mandatory and discretionary life imprisonment, custody for life and those detained during Her Majesty's pleasure have a 'tariff' set in relation to the period of imprisonment they should serve in order to satisfy the requirements of retribution and deterrence. After the expiry of the tariff, the prisoner becomes eligible for release on licence. Applicable provisions and practice in respect of the fixing of the tariff and

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

Pursuant to section 34 of the 1991 Act, the trial judge in sentencing a person to a term of discretionary life imprisonment in open court after a trial was given the power to fix the tariff.

The role of the trial judge in this respect was clarified by the Court of Appeal in a Practice Direction (Crime – Life sentences) [1993 1 WLR 223]. Paragraph 3 stated:

> "The judge is not obliged by statute to make use of the provisions of section 34 when passing a discretionary life sentence. However the judge should do so, save in the very exceptional case where the judge considers that the offence is so serious that detention for life is justified by the seriousness of the offence alone, irrespective of the risk to the public. In such a case, the judge should state this in open court when passing sentence."

In August 1994, the case of *R v. Hollies* (16 Cr App R(S) LJ Stuart Smith said concerning the Practice Direction and the 1991 Act:

> "The scheme of the Act is that the judiciary should specify the period which the prisoner should serve, and that period should be appropriate to the punishment or retribution required and the need to deter the prisoner and others from committing similar grave offences. This period is usually referred to as the tariff period. Once that period has expired the prisoner can expect to be released on licence if the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined (see section 34(4)b). There is thus a clear division of function. The judges are to decide the period which the prisoner is to serve by way of punishment and deterrence. The Board must decide whether he still presents a danger to the public and, if he does not, he must be released. That means, save in cases of most exceptional gravity, where the judge thinks that a prisoner should remain a prisoner for the rest of his normal life, he should specify a period under the Act."

In cases of mandatory life sentences, it is for the Secretary of State to fix the tariff after consulting the trial judge and the Lord Chief Justice. He is entitled to depart from the judicial view.

Provisions concerning the release of life prisoners

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

The Parole Board's Chairman appointed three members of the Parole Board to consider discretionary life cases. They comprised the Discretionary Lifer Panel ("DLP"). Pursuant to the Parole Board Rules 1992 which came into force on 1 October 1992, a discretionary life prisoner was entitled to, amongst other things, an oral hearing, disclosure of evidence before the Parole Board and legal representation. He was also entitled to call witnesses

on his behalf and to cross-examine those who had written reports about him. A reasoned decision by the DLP was delivered within seven days of the hearing. Prior to 1 October 1997, the duty to release discretionary life prisoners was dealt with by section 34, which provided that where a discretionary life prisoner had served his tariff and the Board had directed his release, it was the duty of the Secretary of State to release him on licence.

Section 34(4) provided:

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

A discretionary life prisoner may require the Secretary of State to refer his case to the Parole Board, after the end of the period of two years beginning with the disposal of a previous reference to the Board (section 34 (5) (b) of the 1991 Act, now section 28 (7) (b) of the 1997 Act).

The regime applicable to mandatory life prisoners was, however, preserved within section 35 of the 1991 Act. Section 35 of the 1991 Act provided 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."

The provisions concerning oral hearings and the requirement for regular reviews were not extended to mandatory life prisoners and the Parole Board was not given any power to direct their release.

COMPLAINTS

The applicant complains under Article 6 of the Convention that the fixing of his tariff, which was part of his sentence, should have been carried out in a fair and public hearing by an independent and impartial tribunal. It was however fixed in private by the Secretary of State. It was also not fixed within a reasonable time, but some five to six years after his conviction. As a result of the failure to fix a tariff at his trial, he was deprived of the preparations for release before the expiry of the tariff in respect of the proceedings before the DLP, and he did not receive an oral hearing at that time. His tariff had expired before he was informed what it was.

The applicant also invoked the Court's case-law to the effect that, following the expiry of the tariff, prisoners sentenced to a discretionary life sentence should be entitled to regular reviews by a judicial like body of their

continued imprisonment (Thynne, Gunnell and Wilson v. the United Kingdom judgment of 25 October 1990, Series A no. 190).

THE LAW

1. The applicant complains of the process by which his tariff was fixed by the Secretary of State in 1998, invoking Article 6 § 1 of the Convention which provides as relevant:

> "In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The Government argue that the applicant cannot claim to be a victim of any shortcoming in this regard nor to have made normal use of available domestic remedies. The failure of the trial judge to fix the applicant's tariff at trial was contrary to domestic law and this could have been subject of an appeal against sentence to the Court of Appeal. However he did not make use of this remedy until almost six years later. The applicant put forward no good reason for the delay in taking advantage of this right of appeal. He was represented at trial by senior and junior counsel and has always had access to legal advice. If the applicant had received advice that the trial judge's verdict was not improper, this advice was patently wrong. It was clear from the trial judge's remarks that he was sentencing the applicant in a manner inconsistent with the applicable practice direction. Appeal to the Court of Appeal would have, and in the event, did offer redress for the mistake and the applicant cannot complain about the delay in obtaining it.

The applicant submits that it was not his fault that the trial judge made a mistake. He was not informed that the judge's recommendation was for a five-year tariff for a considerable time and it was only then that that he was alerted to the possibility of a wrong having taken place. He considers that it does not follow that if he had appealed against the judge's sentence more promptly to the Court of Appeal he would have suffered no harm. Although the Practice Direction was in existence at the time of his trial, it was not until August 1994 that *Hollies* provided case-law on the matter. It was not certain that the Court of Appeal would have fixed a tariff itself at an earlier stage, particularly if the trial judge had not yet expressed his view to the Secretary of State.

The Court recalls that the applicant was sentenced on 23 September 1993 and that the trial judge, in open court, declined to set a tariff for the minimum period to be served for retribution and deterrence referring to the need to protect the public from serious harm, an approach which failed to accord with proper practice and which was wholly inappropriate in the

circumstances of the applicant's case. No appeal was however made as regards sentence at that time. It was only some considerable time later, on 12 July 1999, that the applicant lodged an application for appeal against sentence, which proved successful in obtaining a judicially imposed tariff of five years and clarifying his status as a discretionary lifer.

The Court does not consider that the applicant has given a satisfactory explanation for this delay in using an effective and accessible remedy. He was represented by counsel and solicitor at his trial and the failure to fix a tariff was known to them. The Practice Direction (Crime – Life Sentences) indicated that it was only in exceptional circumstances, and where the seriousness of the crime required it, that detention for life should be envisaged. As the Government have stated, any erroneous advice given to the applicant by his lawyers as regards the possibility of appealing does not detract from the availability of access to court, namely the Court of Appeal, to have his tariff fixed by the judiciary rather than the executive. Insofar as the applicant argues that he was prejudiced by the time taken by the Secretary of State in informing him of the tariff fixed, the Court notes that it would have been possible for him to bring the matter before the courts in judicial review proceedings.

In the circumstances, the Court finds that the applicant cannot complain of being a victim of any violation of Article 6 § 1 of the Convention as regards the way in which his tariff was fixed and his complaints in this respect must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

2. The applicant complains that he has not received reviews of the lawfulness of his continued detention in accordance with the requirements of Article 5 § 4 of the Convention, which provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The Government submit that since the expiry of his tariff the applicant has obtained two Parole Board reviews which satisfied the requirements of Article 5 § 4, involving oral hearings at which the applicant was represented by his solicitor and where he was entitled to examine and cross-examine witnesses. While a further hearing before the Parole Board is not set until November 2002, this reflected the need for the applicant to complete a considerable amount of offence related treatment/work before he can be considered realistically for a move to open conditions as a precursor to release. This followed a one year period between reviews which had not proved successful as the hoped for progress had not occurred. They point out that the applicant acknowledged at his last review that he was not ready for transfer to open conditions and has accepted the new sentence plan.

The applicant submits that his tariff expired in 1997 and that he should have had a review at that stage to determine the lawfulness of his continued detention as required by Article 5 § 4 of the Convention. As a result of the mistakes made by the authorities, he did not receive a proper review until December 1999. If the review process had been started at the earlier stage, it would have accelerated his treatment and release programme. He has thereby been deprived of fair progress through the prison system and of making more substantial improvements by the date of the later reviews.

The Court recalls that a Parole Board hearing concerning the applicant's release took place on 1 December 1999. The applicant's continued detention was next reviewed by the Parole Board on 29 November 2000. The next review has been set for November 2002. The applicant takes issues with the speed of reviews rather than the procedures adopted. Accordingly, the question to be determined is whether the lapse of time between reviews complies with the requirement of Article 5 § 4 of the Convention that decisions concerning continued detention be taken "speedily".

It is already established in the case-law of the Convention organs that this requirement implies not only that the competent courts must reach their decisions "speedily" but also that, where an automatic review of the lawfulness of detention has been instituted, their decisions must follow at "reasonable intervals" (see the Herczegfalvy v. Austria judgment of 24 September 1992, Series A no. 244, p. 24, § 75). In practice, the system of review of discretionary life prisoners involves automatic reviews set at periods of two years or less, at the direction of the Secretary of State, who may or may not have received a recommendation as to timing by the DLP at the previous review.

The question of whether periods comply with the requirement must – as with the reasonable time stipulation in Article 5 § 3 and Article 6 § 1 – be determined in the light of the circumstances of each case (see the Sanchez-Reisse v. Switzerland judgment of 21 October 1986, Series A no. 107, p. 55, § 55). The Court has therefore refrained from attempting to rule as to the maximum period of time between reviews which should automatically apply to this category of life prisoners as a whole. It notes that the system as applied in this case has a flexibility which must reflect the realities of the situation, namely, that there are significant differences in the personal circumstances of the prisoners under review.

In previous cases, the Convention organs have accepted periods of less than a year between reviews and rejected periods of more than one year. In the case of A.T. v. the United Kingdom, the Commission found that a period of almost two years before a review of the detention of a discretionary life prisoner was not justified, where the DLP had recommended that his case should be reviewed within a year (no. 20448/92, Commission report of 29 November 1995). The Court in the Herczegfalvy case (cited above, pp. 24-25, § 77) found that periods between reviews of

fifteen months and two years were not reasonable in the case of a person detained on grounds of mental illness. In the case of *Oldham v. the United Kingdom* (Section 3), no. 36273/97, judgment of 26 September 2000), and Hirst v. the United Kingdom (Section 3), no. 40787/98, judgment of 24 July 2001) also concerning discretionary life prisoners, the Court found that twenty one month and two year delays between reviews was not reasonable.

In the present case, it is true that there was a delay of two years seven months, from May 1997 to December 1999, between the expiry of the applicant's tariff and the first review. However as this arose from the trial judge's failure to impose a judicial tariff which the applicant could have challenged at a much earlier stage, the Court does not find any issue of State responsibility arising for this lapse of time. Once the Court of Appeal had settled the applicant's status on 8 November 1999, a review hearing took place with due expedition.

As regards the one-year period before the next hearing in November 2000, the Court finds that this accords with the case-law set out above. As regards the twenty four-month period set for the third review, the Court is not persuaded that in the circumstances of this case this shows a failure to apply standards of reasonable expedition. It observes that a twelve month period had been set between the first and second reviews on the basis, *inter alia*, of anticipated progress but that it transpired that this had been an over-optimistic assessment and that much remaining offence-related work had been identified as necessary. To facilitate this work, the applicant was transferred to a Category C prison. Though the Government assert that the applicant accepted that he was not ready for either open prison or release and has agreed to the treatment plans, this is not conclusive as to any waiver of any entitlement to more speedy review, though it is significant that the applicant has not commented on the Government's observations on this point and does not raise any specific complaint on this aspect. The Court is satisfied that the question of review and progress towards release in the applicant's case has been approached with flexibility and due regard to his individual circumstances.

Consequently, the Court does not find any failure on the part of the authorities to comply with the requirements of Article 5 § 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Vincent BERGER
Registrar

Georg RESS
President