AS TO THE ADMISSIBILITY OF

Application No. 22564/93
by William GRICE
against the United Kingdom

The European Commission of Human Rights sitting in private on
14 April 1994 the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
A. WEITZEL
F. ERMACORA
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL CONFORTI
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY

Mr. H.C KRUGER, Secretary to the Commission

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

Having regard to the application introduced on 8 October 1993 by William Grice against the United Kingdom and registered on 13 October 1993 under file No. 22761/93;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the Commission's decision of 8 September 1993 to communicate the application;

- the observations submitted by the respondent Government on 6 October 1993 and the observations in reply submitted by the applicant on 23 March 1994;

THE FACTS

a. Particular circumstances of the case

The applicant is a British citizen, born in 1956 and is resident in London. He is represented before the Commission by

Gilchrists, solicitors practising in London. The facts as submitted by the applicant may be summarised as follows.

In 1988 the applicant was informed that he was infected with HIV (human immunodeficiency viruses). He began to suffer AIDS-related conditions (acquired immunity deficiency syndrome).

On 6 August 1992, the applicant was sentenced to 4 years' imprisonment for offences of buggery and indecent assault on a male child aged 7, which arose from incidents which took place in 1983.

In December 1992, the applicant was diagnosed as suffering from full-blown AIDS. A letter dated 7 June 1993 from the consultant doctor treating the applicant states that persons with this diagnosis generally die within 2 years. He further states that the applicant is already suffering from AIDS-related conditions which threaten to develop into carcinoma:

> "I have no doubt that the fact that <the applicant> is a prisoner and having to endure less than satisfactory living conditions and less than satisfactory attention to personal hygiene, that his life expectancy will be considerably shortened."

The applicant applied for early release on compassionate grounds on 17 December 1992. His request was refused on 24 June 1993 by the Secretary of State on the ground that his medical condition was not sufficiently serious.

By letter dated 31 March 1993 to a Member of Parliament supporting the applicant's request, the Home Office replied that the Governor of the prison and the medical officer considered that the applicant's medical condition was being managed satisfactorily within prison. It was considered that the circumstances did not justify the wholly exceptional step of authorising his early release on compassionate grounds before he became eligible for release on parole. His case would be kept under review with respect to any significant deterioration.

In June 1993, the applicant's case was reviewed and the earlier refusal maintained since the prison medical officer confirmed that the applicant's condition continued to to be satisfactorily managed in prison and his life expectancy continued to be about 2 years.

The applicant has provided a letter dated 9 July 1993 from another Member of Parliament which states that he has discovered that no prisoners who have AIDS or who are HIV positive have been granted compassionate early release. The same M.P. put a Parliamentary question with respect to the number of AIDS sufferers who have died in prison. In a reply dated July 1993, he was informed that 12 prisoners have died in England and Wales as a consequence of AIDS related illness while in custody. All were in an external hospital or hospice at the time.

In a report dated 23 September 1993, the applicant's doctor informed the Parole Unit of the Prison Service:

> "<the applicant's> latest CD4 count is 25 which is much below the level of 200 at which full blown AIDS is diagnosed.
>
> In an attempt to prevent severe infection occurring, I have prescribed antibiotics. However it is not possible to offer prophylaxis for every life threatening infection.

In my experience, people with HIV infection do best in terms of quality and quantity of life if, as well as good medical care, they have a good diet with dietary supplements and have a low stress level.

Again it is my opinion that <the applicant's> medical condition of severe immune deficiency would be better managed if he were not in prison. A healthy lifestyle with regular medical checks are his only chance of maintaining his already very restricted life expectancy."

The applicant's doctor who visited the applicant in prison once per week gave his life expectancy 12 months if he was outside prison or as 6-12 months inside prison, due to the greater risk of infection.

On 27 September 1993, following the applicant's application to the Commission, the Minister reviewed the applicant's case. Although his life expectancy at that stage was thought to be 6-12 months, his condition, mobility and capacity to reoffend were unchanged and it was not considered appropriate to grant his release on compassionate grounds.

In the report of the Probation Officer to the Local Review Committee which considers release on licence, it was stated that the applicant experienced his environment more harshly than otherwise as a result of his ill health and that he found his feelings of isolation the most difficult to cope with. It concluded that the reasons for releasing the applicant on compassionate grounds were high and supported his application.

The applicant's behaviour in prison was acknowledged to be exemplary. He was described as conscientious, willing and cheerful and gained employment in a trusted capacity as a Red Band Legal Aid Orderly.

The applicant applied for judicial review of the Secretary of State's refusal to exercise his discretion under section 36 of the 1991 Act. Leave was granted by the Divisional Court and an order made for an expedited hearing.

The applicant however became eligible for release on licence on 5 December 1993. He was released on licence on 17 December 1993.

Since his release, the applicant's health has improved and his CD4 count has risen.

b. Relevant domestic law and practice

Section 36 of the Criminal Justice Act 1991 provides:

"1. The Secretary of State may at any time release a prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds."

Circular Instruction 36/1992 concerns the policy applied in respect of early release of prisoners on compassionate grounds under the Criminal Justice Act 1991. It recommends early release where a prisoner is suffering from a terminal illness and death is likely to occur soon (within three months is given as an appropriate period). The criteria to be satisfied are:

"- the prisoner is suffering from a terminal illness and death is likely to occur soon; or the prisoner is bedridden or similarly incapacitated, and

- the risk of further crime is past, and

- there are adequate facilities for the prisoner's care and treatment outside prison, and

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

Pursuant to section 35(1) of the 1991 Act as modified by paragraph 8(6)a of Schedule 12 which applied at the relevant time to prisoners such as the applicant sentenced prior to 1 October 1992 to a term of 4 years' imprisonment, the Secretary of State may if recommended to do so by the Parole Board release a prisoner on licence after he has served one-third of his sentence. Decisions as to suitability for release on licence are based on reports concerning the prisoner's conduct in prison, his personal and criminal history, his approach to offending behaviour, plans on release and medical condition.

COMPLAINTS

The applicant alleges violations of Articles 2, 3, 5 para. 1, 8 and 14 of the Convention. He also invokes Articles 1 and 2 of Protocol No. 4 to the Convention.

The applicant submits that the Home Office is discriminating against prisoners suffering from AIDS none of whom are released early on compassionate grounds. He alleges that prisoners suffering from non-life threatening conditions such as senile dementia are being released, as well as persons with cancer which is treatable. He considers that AIDS patients who suffer from a painful and incurable condition are being left in prison to die. Though he has now been released on parole, he alleges that he should have been released at a much earlier stage and that by virtue of his continued incarceration there is a substantial risk that his life expectancy has been shortened.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 24 April 1993 and registered on 1 September 1993.

On 8 September 1993, the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the complaints under Articles 3 and 14 of the Convention. The Commission granted the case priority under Rule 33 of its Rules of Procedure.

The Government's observations were submitted on 6 October 1993 and the applicant's observations in reply were submitted on 23 March 1994 after two extensions in the time-limit.

On 21 January 1994, the Commission granted the applicant legal aid.

On 9 March 1994, the Commission examined the application.

THE LAW

1. The applicant complains that he was refused release from prison on compassionate grounds. While he has now been released on licence having served a third of his sentence, he submits that he should have been released earlier and that there is a risk that his life expectancy has been shortened as a result. He invokes Articles 2, 3, 5 para. 1, 8 and 14 (Art. 2, 3, 5-1, 8,

14) of the Convention and Articles 1 and 2 of Protocol No. 4 (P4-1, P4-2).

The respondent Government submit that the applicant has not exhausted domestic remedies as required by Article 26 (Art. 26) of the Convention, in particular, since he did not challenge the refusal of the Secretary of State to grant early release on compassionate grounds by way of judicial review.

While judicial review proceedings were commenced by the applicant, they were overtaken by the applicant's release on licence. The applicant submits that in any case the Secretary of State enjoys a discretion as to whether to order release and submits that judicial review would not have furnished an effective or sufficient remedy.

The Commission however for the reasons set out below finds it unnecessary to decide whether judicial review, if commenced at an earlier stage, would have constituted an effective remedy for the purposes of Article 26 (Art. 26) of the Convention.

2. The applicant complains that the refusal to release him earlier on compassionate grounds constituted a violation of Articles 2 and 3 (Art. 2, 3) of the Convention. These provide insofar as relevant:

Article 2 (Art. 2) of the Convention

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

Article 3 (Art. 3) of the Convention

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

As regards Article 3 (Art. 3) of the Convention, the case-law of the Convention organs establishes that ill-treatment must attain a minimum level of severity if it is to fall within the scope of the provision. Further, the Court has held that the suffering occasioned must attain a certain level before treatment can be classified as inhuman. The assessment of that minimum is relative and depends on all the circumstances of the case, including the duration of the treatment and its physical and mental effects (see eg. Eur. Court H.R., Ireland v. the United Kingdom, judgment of 18 January 1978, Series A no. 25, p. 65, para. 162).

The Commission notes that the applicant has now been released from prison and that his health has improved. It does not appear that during his detention in prison the applicant failed to receive the requisite medical care. His condition was also subject to continuous monitoring during that period. While the report of the Probation Officer indicates that the applicant experienced his environment more harshly as a result of his illness and suffered feelings of isolation, it nonetheless appears that the applicant, who was reported as a model prisoner, coped well with prison life. The applicant has further provided no substantiation of his allegation that his period of detention has had any longterm effect on his health or his life expectancy.

In these circumstances, the Commission finds no appearance of a failure to protect the applicant's life nor that the applicant by reason of the failure to release him at an earlier

date was subjected to torture or inhuman or degrading treatment or punishment.

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

3. The applicant complains that he has been subject to discrimination in the operation of the provisions for early release. The Commission has examined this complaint under Articles 5 and 14
(Art. 5, 14) of the Convention which provide as relevant:

Article 5 (Art. 5) of the Convention

"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..."

Article 14 (Art. 14) of the Convention

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

According to the case-law of the Convention organs, Article 14 (Art. 14) of the Convention in effect has no independent existence but plays an important role in supplementing the other provisions of the Convention and its Protocols. Article 14 (Art. 14) safeguards individuals, placed in similar situations, from discrimination in the enjoyment of the rights and freedoms set out in those other provisions. A measure which as such might be in conformity with the normative provision in issue may nevertheless violate that provision taken in conjunction with Article 14 (Art. 14), if it is applied in a discriminatory manner. It is as though Article 14 (Art. 14) formed an integral part of each of the provisions laying down the specific rights and freedoms (see eg. Eur. Court H.R. Belgian Linguistic judgment of 23 July 1968, Series A no. 6 p. 33-34, paras. 8-9).

As regards the present case, the Commission notes first of all that complaints concerning length of sentence passed after due process of law by a judge generally do not fall within the scope of the Convention (see eg. No. 5871/72, Dec. 30.9.74, D.R. 1 p.54). Further there is no right as such to be released on licence. Where however procedures relating to the release of prisoners appear to operate in a discriminatory manner, the Commission has held that this may raise issues under Article 5 in conjunction with Article 14 (Art. 5+14) of the Convention (see eg. No. 11077/84, Dec. 13.10.86, D.R. 49 p. 170).

The applicant has alleged that he is discriminated against as an AIDS sufferer since he has been refused release on compassionate grounds notwithstanding the terminal nature of his illness whereas prisoners suffering from other types of life threatening illness have been so released.

The Government deny that the applicant has been subject to any form of discrimination, submitting that all prisoners are subject to the same criteria in determining whether release should be granted. In each case, they submit, regard is had to the risk of re-offending and to whether the likelihood of death

is imminent. They have given details of prisoners who have been released, for example, a prisoner suffering from acute leukaemia with a life expectancy of 2 months; a prisoner suffering from a lung complaint with a life expectancy of days rather than weeks; and a prisoner who had suffered three heart attacks whom the medical officer considered ran the risk of another attack under the stress of detention.

The Commission notes that the authorities appear to order release where life expectancy of a prisoner is in the order of a few weeks or months. In the case of the applicant, the Commission recalls that his life expectancy was given after his trial as 2 years and this was still the prognosis in June 1993. The applicant's doctor subsequently gave an estimate of 6-12 months. During his detention it does not appear that the applicant suffered any sudden deterioration in his condition or that he was incapacitated or threatened by the development of the opportunistic infections to which AIDS sufferers are prone.

The Commission concludes that there is no indication that the applicant was treated differently in the exercise of the Secretary of States's discretion to order release on compassionate grounds on account of his status as an AIDS sufferer.

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.

4. The applicant has also invoked Article 8 (Art. 8) of the Convention and Articles 1 and 2 of Protocol No. 4 (P4-1, P4-2) to the Convention.

The Commission has examined the applicant's complaints as submitted by him. It finds no appearance of a violation of Article 8 (Art. 8) of the Convention and notes that the United Kingdom is not a party to Protocol No. 4 (P4).

It follows that these complaints must be rejected as manifestly ill-founded and incompatible ratione personae with the provisions of the Convention respectively within the meaning of Article 27 para. 2
(Art. 27-2).

For these reasons, the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission President of the Commission

(H.C. KRUGER) (C.A. NØRGAARD)