CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 40787/98
by John HIRST
against the United Kingdom

The European Court of Human Rights (Third Section), sitting on 21 March 2000 as a Chamber composed of

Mr J.-P. Costa, *President,*
Sir Nicolas Bratza,
Mr L. Loucaides,
Mr P. Kūris,
Mrs F. Tulkens,
Mr K. Jungwiert,
Mrs H.S. Greve, *judges*,
and Mrs S. Dollé, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 1 February 1998 and registered on 16 April 1998,

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 Court's partial decision of 1 December 1998,

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 is a British citizen born in 1950 and currently detained in H.M. Prison Stocken, Leicestershire. He is represented before the Court by Hickman & Rose, solicitors practising in London.

A. The circumstances of the case

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

On 11 February 1980, the applicant pleaded guilty to manslaughter on the ground of diminished responsibility in respect of the death of his 62 year old landlady whom he had battered with an axe. He was sentenced to life imprisonment. The Court acted on medical evidence that the applicant had a gross personality disorder to such a degree that he was amoral. The consultant psychiatrist said in his report at the trial that:

> "... although <the applicant's> instability might get less over the years as he matured, should he be sent to prison, his eventual release should be approached with great caution."

The applicant was initially sent to a Category A prison due to concerns about his dangerousness and risk of escape. In 1993, he was transferred to a Category B prison.

The applicant's tariff period of 15 years expired on 25 June 1994. The Parole Board in that month agreed to the transfer of the applicant from a Category B to Category C prison. The Secretary of State deferred a decision until after the Discretionary Lifer Panel (DLP) of the Parole Board had conducted a hearing on the matter under the new provisions of the Criminal Justice Act 1991 ("the 1991 Act"). On 13 December 1994, after a hearing held pursuant to section 34 of the 1991 Act, the DLP decided it would not be safe to release the applicant but recommended transfer to Category D (open prison), or Category C with a review after 12 months instead of the usual two year period. On 15 March 1995, the Secretary of State decided to transfer the applicant to Category C with a review after 12 months.

In November 1995, the applicant failed to obtain leave to apply for judicial review of the decision of the DLP and the decision of the Secretary of State**.** In April 1996, the Court of Appeal refused leave to apply for judicial review.

On 9 October 1996, the applicant's case came before another DLP, which did not recommend release but transfer to a Category D prison. In paragraph 5 of the decision letter the DLP said:

> "The panel were satisfied that what was advanced at the hearing as 'exceptional circumstances', namely a good release plan, the fact that <the applicant is> four years beyond tariff, the fact that <the applicant has> completed a pre-release course in Category C, the fact that <the applicant had> previously been recommended for Category D status and the prospect of employment, did not amount to exceptional circumstances and that <the applicant's> release without progress through open conditions posed an unacceptable risk."

On 20 November 1996, the Secretary of State rejected the recommendation of transfer to an open prison, but directed an early review of the applicant's case (i.e. after 18 months had expired from 9 October 1996). The Secretary of State was not persuaded that the applicant's behavioural problems had been satisfactorily addressed while in closed conditions, nor that the benefits of open conditions were sufficiently worthwhile at that stage when balanced against the scale of the outstanding offence, related work needed in the applicant's case and his potential risk to the public.

The applicant applied for leave to apply for judicial review of both decisions, alleging *inter alia* that the DLP had wrongly applied an "exceptional circumstances" test. Leave was refused on 11 April 1997.

On 21 October 1997, the applicant re-applied for leave for judicial review. Mr Justice Potts refused leave against the DLP's recommendation. He found that the DLP had correctly applied the statutory test concerning risk to the public. He granted leave to apply in respect of the decision of the Secretary of State. Mr Justice Potts stated:

> "... a prisoner who has spent a long period in custody should be tested in open conditions before being released into the community: satisfactory completion of such testing is an indication that a prisoner is able to cope with the stresses of life outside prison and is therefore a cogent factor to take into account against all the other available material in deciding whether or not a prisoner can safely be released. Such an approach is undoubtedly sensible …
> I think it is arguable that the Secretary of State's decision not to recategorise this applicant as a Category D prisoner was irrational and one that no reasonable Home Secretary could reasonably have reached."

In the light of this grant of leave, at the end of the hearing, the Secretary of State indicated that he would reconsider his decision of 20 November 1997.

On 13 March 1998, the Secretary of State informed the applicant that he had reconsidered the case but decided not to change his conclusion that the applicant should not be transferred to open conditions.

On 15 July 1998, the DLP again considered the applicant's case. By letter dated 16 July 1998, it declined to recommend release but did recommend transfer to a Category D (open) prison. It referred to the views of the majority of the reports and witnesses that the risk presented by the applicant could be safely managed in open conditions, and the danger of counter-productive stagnation and frustration if the applicant had to spend a further protracted period in category C conditions. It decided there should be a further review in two years. It stated that a two year review period was appropriate in order:

> "to allow time for assessment and the necessary offence-related work and for <the applicant's> gradual reintegration into the community."

By letter dated 7 October 1998, the Secretary of State rejected the DLP's recommendation. He stated that he accepted the psychologist's view that further work needed to be done in respect of the applicant's attitude to his original offence, his egocentricity, his intolerance of others, his inability to deal adequately with problems and his lack of responsibility for his actions. He agreed that a full personality assessment was required of the

applicant. who was still seen as having a psychopathic personality. The Secretary of State did not agree that these matters could be safely addressed in open prison conditions. He noted that the applicant had failed to attend courses in anger management, social skills and communications, as arranged after the Secretary of State's decision of 20 November 1996. He also had regard to a violent incident which had occurred on 31 July 1998 when the applicant was being escorted to court by a female officer. After she had refused to allow him to smoke in the vehicle, he had slammed the van door against her, causing her to fall and hurt her arm. He had sworn at her, threatening to kill her, adding that he had already killed one woman. The applicant was found guilty under the Prison Rules of assault and using threatening, abusive or insulting words. The Secretary of State considered that this disclosed impulsive violent behaviour towards a woman over a trivial incident, which had clear similarities with his original offence. He remained an unacceptable risk. It was however agreed that his next review should take place in July 2000. The applicant's application for judicial review has not yet been heard.

On 2 February 2000, the applicant's renewed application for leave to judicially review the DLP's decision of October 1996, which had been dormant since 21 October 1997, was listed for hearing before the Court of Appeal. The applicant's request to amend his grounds of application to add complaints about a lack of independence was refused. The Court of Appeal rejected his application for leave to apply for judicial review.

B. Relevant domestic law and practice

Provisions concerning the release of discretionary life prisoners

Under section 32(2) of the Criminal Justice Act 1991, the Parole Board has a duty to advise the Secretary of State with respect to any matter referred to it by him which is connected with the early release or recall of prisoners. The Parole Board always holds an oral hearing when considering whether to release a discretionary life prisoner, the relevant part of whose sentence has expired (the tariff), or when considering the recall of a discretionary life prisoner whose licence has been revoked. In its function of reviewing discretionary life prisoners, the Board is known as the DLP (discretionary lifer panel).

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."

Under section 34(5)(b), a discretionary life prisoner could require the Secretary of State to refer his case to the Parole Board two years or more after a previous reference to the Board. The Government state that in practice it is not necessary to invoke this provision since, as a matter of policy, the Secretary of State refers each case back to the DLP for the second anniversary of the previous reference.

When the DLP decides under section 34 not to order the release of a discretionary life prisoner, it often gives guidance on the timing of the next review. It normally recommends a further review two years later, but an earlier date may sometimes be given in an appropriate case. If the DLP gives no guidance, the Secretary of State decides the date of the next review. Where it becomes clear that the prisoner has made unexpectedly rapid and impressive progress, the date may be brought forward by decision of the Secretary of State.

Section 34 has now been replaced, and largely reproduced, by section 28 of the Crime (Sentences) Act 1997.

The Parole Board (DLP)

The Parole Board is a body corporate, first established by section 59 of the Criminal Justice Act 1967. With effect from 1 July 1996, it has been governed by section 32 of the 1991 Act (as amended by section 149 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act)). Its status, capacity and composition are regulated by section 32 of, and Schedule 5, to the 1991 Act, as amended by the 1994 Act. It operates pursuant to the Parole Board Rules 1997 which came into force on 6 October 1997.

DLP panels consist of three members, presided over by a member who holds, or has held, judicial office. The Board's members as listed for the years 1997/1998 included persons holding or having held office as judges, probation officers, psychiatrists and doctors, former high-ranking police officers, barristers, solicitors, former head teachers, senior university academics and former members of Boards of Visitors at various prisons. All secretariat staff are seconded Prison Service civil servants.

COMPLAINTS

The applicant alleges a breach of Article 5 § 4 of the Convention as he claims that his continued detention is unlawful. He states that he no longer poses a threat to the public, that his tariff is in effect being unlawfully extended by the DLP, that the DLP is not impartial, that there is no right of appeal, that the review process is too slow and that the burden of proof wrongly falls on the prisoner to show that he is not a danger to the public. He complains that this also discloses a violation of Article 6 of the Convention.

THE LAW

The applicant complains that the review procedures carried out by the Parole Board in respect of his continued detention do not comply with Article 5 § 4 of the Convention, in particular as they are not carried out with the necessary expedition and as the Parole Board lacks independence and impartiality. He has also invoked Article 6 in this respect. As Article 5 may generally be regarded as the *lex specialis* concerning issues of lawfulness of detention and procedures for release, the Court proposes to examine the complaints under Article 5 § 4 alone.

Article 5 § 4 of the Convention 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."

Concerning the speed of reviews

The Government submit that the applicant has benefited from speedy and frequent DLP reviews, more frequent than the normal two years. In particular, there have been four DLP reviews in the period of five years since his tariff expired. On one occasion (December 1994), when the DLP recommended an interval of 12 months, the Secretary of State accepted this. On another occasion (November 1996), the Secretary of State fixed an interval of only 18 months.

They submit that these intervals were reasonable. Two years is a deliberate and purposeful interval, which takes account of the time normally needed for a prisoner to be transferred between a Category C prison and open conditions, and to undertake other activities necessary to help prisoners make the difficult transition between prison and free society. In the applicant's case, time was necessary for him to attend courses and therapy, and for possible improvements in his character and behaviour to be properly assessed. The DLP reviews in 1996 and 1998 concluded that he was not ready for release and, in view of the need for work on reintegration and prolonged testing on the areas of concern in his behaviour, it was reasonable and proportionate to revert to the normal two year interval. In any event, these periods were not immutable as reviews could be brought forward if the applicant had made unexpectedly rapid and impressive progress.

The applicant submits that since 24 June 1994 his continued detention has been justifiable solely on security grounds and that Article 5 § 4 required that he receive prompt reviews as to whether that detention was justified. He points out that his first review by a body with the power to decide took place on 13 December 1994, five and a half months after the expiry of his tariff, which delay resulted from an unjustifiable administrative policy in fixing first review dates.

The applicant contends that subsequent reviews should have taken place at reasonable intervals. An automatic review every two years was not reasonable on the basis that it is simply too long, as shown by comparable cases examined by the Court (eg. Hercezgfalvy v. Austria judgment of 24 September 1992, Series A no. 244, pp. 24-25, §§ 75-78). There is no possibility for the applicant to apply to the DLP during the intervening period and there is no provision for any judicial control over the length of the period between reviews, the decision to hold earlier reviews lying at the discretion of the Secretary of State. He submits that where there is a realistic prospect of release or real progress towards release, as shown in his case, the appropriate intervals between periodic reviews ought to be no longer than one year, as is the case with patients held under mental health provisions.

The Court recalls its previous case-law concerning the requirement that reviews of continued detention must be conducted "speedily", which imports in a system of automatic reviews that decisions of the courts must follow at reasonable intervals (see, amongst others, Hercezgfalvy v. Austria judgment cited above).

Having regard to the parties' submissions, the Court finds that this part of the application raises serious issues of law under the Convention, the determination of which must be reserved to an examination of the merits. It cannot therefore be declared manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

Concerning the independence and impartiality of the Parole Board

The Government point out that in the case of Weeks v. the United Kingdom (judgment of 2 March 1987, Series A no. 114, § 62) the Court found that the Parole Board had the necessary judicial character to comply with Article 5 § 4, notwithstanding complaints that the Parole Board was not independent of the Secretary of State as he appointed the members, provided its staff and laid down its rules. This applies to the DLP in the present case, which also has the power to issue decisions to release which bind the Secretary of State.

The Government submit that the Parole Board is an executive non-departmental public body which is separate and independent from the Home Office or any other Government department. The DLP consists of three members of the Parole Board, at least one of whom must hold or have held judicial office, while in practice one of the other members is a psychiatrist, the last member being drawn from probation, criminology or other relevant disciplines. None of the members were currently employed by the Prison Service, and the Government dispute that the fact that certain members might at some stage have worked or been connected with the Prison Service or Board of Visitors casts any doubt on their independence or impartiality. The Government further point out that the applicant has not applied for judicial review on the basis that particular members of the DLP were biased or lacking in impartiality for whatever reason, and on that basis he has not exhausted domestic remedies as required by Article 35 § 1 of the Convention.

The applicant submits that he has exhausted domestic remedies as he made an application to the Court of Appeal to amend his grounds to include details of alleged lack of independence and impartiality, which the Court of Appeal refused on 2 February 2000. He alleges that DLPs are not properly independent of the executive or the parties to the case. He points out that more than 10% of the members of the Parole Board are either former employees of the Prison Service or exercised decision-making powers within prisons as members of Boards of Visitors. The entire secretariat of the Parole Board are Prison Service employees who have been seconded while the salaries and wages are paid via the Prison Service. This cumulatively discloses that the DLPs do not appear to be independent of a powerful party to the proceedings, the Secretary of State in charge of the Prison Service.

The applicant argues that this is highlighted by the facts of his case, where Mrs P., a former member of a Board of Visitors at his prison at a time when he was in dispute with the Board, sat on one of the DLP reviews. Dr B, previously a doctor from his prison, also sat on his 1996 review, while Dr S., who sat on his 1998 review, was a former prison service medical staff member. He also alleges that the 1996 DLP appeared to follow instructions from the Secretary of State concerning “mandatory lifers”.

The Court recalls that the court referred to in Article 5 § 4 does not necessarily have to be a court of law of the classic kind integrated in the ordinary judicial machinery of the country. It does however denote bodies which exhibit common fundamental features, of which the most important is independence of the executive and of the parties to the case (see the Weeks v. the United Kingdom judgment cited above, at § 61).

The Parole Board, which provided the members of the DLP panels who sat on reviews of the applicant’s continued detention, was found in the above-mentioned Weeks case (see § 62) to satisfy the requirements of independence, having regard not only to their manner of appointment but also to their functional independence from the executive. The

Court notes that the applicant in this case criticises the fact that membership of the Board includes former prison service employees and previous members of Boards of Visitors, and that there are structural links between the Board's secretariat and financing and the Prison Service. The Court is not persuaded that the presence on DLPs, which are presided over by a judge, of doctors or other qualified persons who have previous, relevant experience of work within prisons, for or in contact with the Prison Service, is sufficient to cast doubt on their independence or impartiality in their functions for the Parole Board. Nor does it perceive that their independence is undermined by the staffing or budgetary arrangements as described.

The Court observes that the applicant has not provided any information which would indicate that the DLP members in his reviews, who had previously been prison medical staff or members of a Board of Visitors risked showing bias against him for personal or subjective reasons. As the Government state, such factors would in any event have furnished grounds for judicial review, which proceedings have not been pursued on this basis. Furthermore, while the applicant refers to his 1996 DLP as being influenced by instructions from the Secretary of State, this issue was challenged by the applicant in a judicial review application, the High Court finding however that the DLP had applied the proper statutory test to the applicant's circumstances.

Even assuming therefore that the applicant has exhausted domestic remedies in respect of alleged bias of individual DLP members, the Court finds that the DLP panels which reviewed the applicant's continued detention satisfied the requirements of independence and impartiality imposed by Article 5 § 4 of the Convention.

It follows that this part of the application must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaint that the delay between reviews by the Parole Board was unreasonable;

DECLARES INADMISSIBLE the remainder of the application.

S. Dollé
Registrar

J.-P. Costa
President