AS TO THE ADMISSIBILITY OF

Application No. 23812/94
by Vincent KING
against the United Kingdom

The European Commission of Human Rights sitting in private on 10 October 1994, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
A. WEITZEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
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
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS

Mr. H.C. KRÜGER, 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 4 February 1994 by Vincent KING against the United Kingdom and registered on 6 April 1994 under file No. 23812/94;

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 facts as submitted by the applicant may be summarised as follows.

The applicant is a United Kingdom citizen, born in 1939, and he currently resides in London. He is represented before the Commission by Mr. R. Bhatt, a solicitor practising in London.

A. Particular circumstances of the case

In 1963 the applicant was convicted of murdering his mother-in-

law, his two sisters-in-law and his son. He received a mandatory life sentence and was released on licence in 1977.

While the applicant was at liberty he set up two successful businesses, re-married in 1980 and now has three children from that marriage.

Between 1977 and 1981 the applicant was convicted under the Obscene Publications Act 1964. He was fined and put on probation until 1981.

In or around 24 January 1992 the applicant was charged with rape and actual bodily harm ("A.B.H.") of a woman.

On 30 March 1992 the Secretary of State revoked the applicant's licence pursuant to section 62(1) of the Criminal Justice Act 1967 ("the 1967 Act") and the applicant was immediately recalled to prison because the Secretary of State was of the opinion that the applicant's presence in the community constituted "an unacceptable risk to the public".

On or about 8 July 1992 the Parole Board reviewed the applicant's case pursuant to section 62(4) of the 1967 Act based on his written representations and the information placed before it by the Home Office, the latter information having not been supplied to the applicant. The Parole Board did not recommend release but recommended that the applicant's case be reviewed immediately following the outcome of his trial on the rape and A.B.H. charges.

The applicant's trial took place between 7 and 14 September 1992 and the applicant was acquitted of rape but convicted on the charge of A.B.H.. He received a sentence of imprisonment of 28 days which (due to his re-detention since March 1992) in effect meant that he was entitled to immediate release if he were to be released on licence again.

On 2 November 1992 the Parole Board reviewed the applicant's case pursuant to section 61 of the 1967 Act (despite the applicant's request for another review pursuant to section 62(4) of the 1967 Act). By letter dated 19 January 1994 the Secretary of State communicated his decision not to release the applicant. The applicant deduced from the wording of that letter that the Parole Board had, in fact, made a recommendation for his release but the Secretary of State has refused to disclose to the applicant the nature of the Parole Board's recommendation.

On 12 March 1993 the applicant commenced judicial review proceedings. The outcome of those proceedings was a consent order, dated 4 August 1993, by which the applicant was to receive a further review before the Parole Board but this time pursuant to section 39(4) of the Criminal Justice Act 1991 ("the 1991 Act") - formerly section 62(4) of the 1967 Act. The applicant was also to receive full disclosure (subject to some exceptions) of all documents which had been and would be before the Parole Board in respect of his case, was to be given the opportunity to make oral representations and was to receive notification of the Parole Board's decision by the end of the first week in August 1993.

The Parole Board accordingly reviewed the applicant's case and recommended the release of the applicant. Since this recommendation was made pursuant to section 39(4) of the 1991 Act (formerly section 62(4) of the 1967 Act), the Secretary of State was bound to give effect to that decision immediately.

The applicant was therefore released on licence on 6 August 1993.

B. Relevant domestic law and practice

In addition to the facts as submitted by the applicant the Commission has had regard to the outline of relevant domestic law and practice in the judgment of the Court in the Wynne case (judgment of 18 July 1994, Series A no. 294-A, paras. 12-23). In particular the Commission has noted the following:

1. Life sentences

Murder carries a mandatory sentence of life imprisonment under the Murder (Abolition of Death Penalty) Act 1965.

A life sentence may also be passed, in the exercise of the court's discretion, on a person convicted of any of the offences for which life imprisonment is provided by the relevant legislation as the maximum penalty for the offence concerned - a discretionary life sentence. In practice, the use of such a discretionary life sentence is reserved, broadly speaking, for cases where the offence is grave and it appears that the accused is a person of unstable character likely to commit such offences in the future, thus making him dangerous to the public in respect of his probable future behaviour unless there is a change in his condition.

The Criminal Justice Act 1991 ("the 1991 Act") introduced changes to the procedures for the release of discretionary life prisoners to reflect the fact that reviews, complying with Article 5 para. 4 of the Convention, are required in respect of the non-punitive period of discretionary life sentences. These changes were not extended to mandatory life prisoners. In the course of the debate in the House of Commons in respect of what was to become the 1991 Act, the Minister of State for Home Affairs explained, inter alia, the difference between mandatory and discretionary life sentences, and described mandatory life sentences as follows:

> "The nature of the mandatory sentence is different. The element of risk is not the decisive factor in handing down a life sentence. According to the judicial process, the offender has committed a crime of such gravity that he forfeits his liberty to the state for the rest of his days. If necessary he can be detained for life without the necessity for a subsequent judicial intervention."

However the English courts have recognised, in determining the principles of fairness that apply to the procedures governing the review of mandatory life sentences, that the mandatory sentence is, like the discretionary sentence, composed of both a punitive period (the "tariff") and a security period, the latter period being linked to the assessment of the prisoner's risk to the public following the expiry of the "tariff".

The English courts have also recognised that there is, therefore, a gap between the theory and practice in respect of mandatory life sentences (R. v. Secretary of State for the Home Department, ex parte Doody [1993] 3 All England Reports 92). In that case, Lord Mustill, with whom the other Law Lords agreed, 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. Lord Mustill went on to recognise that the mandatory life sentence may be converging with the discretionary life sentence but stated that nevertheless there remained a substantial gap between the two types of sentences and it would be a task for Parliament to further assimilate the effect of the two types of life sentences.

2. Release of life prisoners on licence and revocation of a

licence

Under section 61 of the Criminal Justice Act 1967 ("the 1967 Act") the Secretary of State may release on licence a person only if recommended to do so by the Parole Board, and after consultation with the Lord Chief Justice of England and the trial Judge if available. The decision on whether to release is, however, for the Secretary of State alone.

By virtue of section 62(1) of the 1967 Act the Secretary of State may revoke the licence of a person either on his own initiative or on the recommendation of the Parole Board. Under section 62(7) of the 1967 Act, if a person subject to a licence is convicted on indictment of an offence, the trial court may, whether or not it passes any other sentence on him, revoke the licence.

Pursuant to section 62(9) of the 1967 Act the effect of the revocation of a licence, whether by a Secretary of State or a court, is that the person is liable to be re-detained in pursuance of his original sentence.

According to section 62(4) of the 1967 Act when the prisoner's licence is revoked by the Secretary of State, and the prisoner makes written representations against the decision to revoke his licence, he is entitled to a special review by the Parole Board. For the purposes of that review the prisoner can only make written representations to the Parole Board and is not entitled to access to the documents placed before the Parole Board. The decision of the Parole Board, made pursuant to this section, is binding on the Secretary of State. If the prisoner is not released after that review any further review is completed pursuant to section 61 of the 1967 Act and the outcome of the latter review is not binding on the Secretary of State.

Since October 1992 the above provisions, having been incorporated into the 1991 Act, continue to apply to mandatory life prisoners.

COMPLAINTS

The applicant complains under Article 5 para. 4 of the Convention that he was entitled to, and did not receive, a prompt, fair and "court-like" review by a tribunal empowered to order his release, immediately on the revocation of his licence in March 1992 and thereafter. In this regard the applicant argues, inter alia, that:

(a) according to recent domestic case-law a mandatory life sentence incorporates a tariff period and a security element. The applicant's first release indicated that he had exhausted the penal consequences of his crime and his re-detention could only be authorised if he was considered to be a danger to the public. Alternatively, his 15 year period of conditional liberty was so substantial as to break the chain of causation between the punitive element of his sentence and his further detention and any recall is justified on preventative grounds only.

(b) regardless of the characterisation of the mandatory life sentence which is to be accepted by the Commission, the 15 year period of conditional liberty broke the chain of causation between any objective (whether punitive, preventative or both) of the original sentence and the purpose of the recall. Therefore even if the Commission views the mandatory life sentence as being imposed for a punitive, and thus unchanging, objective the mere fact that the applicant was on conditional liberty for so long means that any re-detention requires reviews complying with the provisions of Article 5 para. 4 of the Convention.

THE LAW

The applicant alleges that he was entitled to a review, which satisfied the requirements of Article 5 para. 4 (Art. 5-4) of the Convention, of the lawfulness of his re-detention from the time his licence was revoked and that the requirements of Article 5 para. 4 (Art. 5-4) of the Convention were not satisfied by the reviews which were conducted.

Article 5 para. 4 (Art. 5-4) of the Convention reads as follows:

> "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 his detention is not lawful."

The Commission notes that the arguments advanced by the applicant at (a) above, in support of his complaints, are expressly based on the premise that the mandatory life sentence is, in fact, composed of a "tariff" period, to reflect the requirements of retribution and deterrence, and a subsequent security element. The applicant argues that recent domestic case-law recognises these elements of the mandatory life sentence.

Therefore, according to the applicant, any revocation of a licence and consequent re-detention must be justified on the basis of risk to the public. In such circumstances the applicant claims that the reviews conducted on such revocation and during such re-detention must satisfy the requirements of Article 5 para. 4 (Art. 5-4) of the Convention as is the case with discretionary life prisoners in the post-"tariff" stage. The Commission notes, therefore, that the applicant is effectively making the case that the distinction between the two types of life sentence, noted by the Court in the case of Thynne, Wilson and Gunnell v. the United Kingdom (judgment of 25 October 1990, Series A no. 190-A, pp. 27 and 29, paras. 70, 73-74), is no longer valid.

The Commission recalls the judgment of the European Court in the case of Wynne v. the United Kingdom (Eur. Court H.R., judgment of 18 July 1994, Series A no. 294-A). In that case the applicant's licence had been revoked and it was established by the Court that the legal basis for his continuing detention was a mandatory life sentence (although "supplemented" by a subsequent discretionary life sentence). The applicant in the Wynne case was arguing that the distinction between mandatory and discretionary life sentences set out in the above-mentioned Thynne, Wilson and Gunnell case was no longer valid referring in support of his arguments to recent domestic practices, case-law and official pronouncements. The Court in the Wynne case (loc. cit., paras. 35-36) however, found as follows:

> "..... the fact remains that the mandatory life sentence belongs to a different category from the discretionary sentence in the sense that it is imposed automatically as the punishment for the offence of murder irrespective of considerations pertaining to the dangerousness of the offender ..... That mandatory life prisoners do not actually spend the rest of their lives in prison and that a notional tariff period is also established in such cases - facts of which the Court was fully aware in Thynne, Wilson and Gunnell ..... - does not alter this essential distinction between the two types of life sentence .....
>
> ..... Against the above background, the Court sees no cogent reasons to depart from the finding in the Thynne, Wilson and Gunnell case that, as regards mandatory life sentences, the guarantee of Article 5 para. 4 (Art. 5-4) was satisfied by the original trial and appeal proceedings and confers no additional right to challenge the lawfulness of continuing detention or re-detention following revocation of the life sentence ..... Accordingly, in the circumstances of the present case, there are

no new issues of lawfulness which entitle the applicant to a review of his continued detention under the original mandatory life sentence."

In the present case the Commission notes that the applicant's licence was also revoked. It is further noted that he was also re-detained pursuant to the original mandatory life sentence (section 62(9) of the 1967 Act). The Commission also notes that the applicant, in making the case that there is no meaningful difference between mandatory and discretionary life sentences, relies on the same domestic case-law as the applicant in the Wynne case (loc. cit., paras. 22-23).

The Commission considers that the applicant has submitted no evidence to demonstrate that the character of the mandatory life sentence has changed in domestic law. It remains a sentence imposed automatically as punishment for the offence of murder irrespective of considerations pertaining to the dangerousness of the offender. The Commission therefore finds, as did the Court in the Wynne case, that the applicant has advanced no cogent reason to depart from the finding in the above-mentioned Thynne, Wilson and Gunnell case.

The Commission notes that the applicant makes one argument (at (b) above) which he submits is not dependent on the interpretation of the character of the mandatory life sentence as confirmed above by the Commission or indeed as submitted by the applicant. He argues that the fact that he was at liberty, albeit conditional liberty, for such a substantial period of time is of itself reason enough for a review in accordance with the provisions Article 5 para. 4 (Art. 5-4) of the Convention because the sheer passage of time breaks the chain of causation between any objective of the original sentence and the purpose of any recall.

The Commission does not accept that the fact of, or the period of, release on licence is relevant as to whether or not the applicant was entitled to a review in accordance with Article 5 para. 4 (Art. 5-4) of the Convention. The Commission notes that, on revocation of the applicant's licence, he was re-detained under the original mandatory life sentence (section 62(9) of the 1967 Act). The Commission recalls that the reason the requirements of Article 5 para. 4 (Art. 5-4) of the Convention are found to be satisfied by the original trial, in the case of a mandatory life sentence, is the unchanging quality of the objective of that life sentence (see the above-mentioned Thynne, Wilson and Gunnell judgment, pp. 27 and 29, paras. 70, 73-74). Therefore once the mandatory life sentence is imposed, the objective of that sentence is not changed by the release of the prisoner on licence even for a period of 15 years.

The Commission therefore concludes that the guarantees provided by Article 5 para. 4 (Art. 5-4) of the Convention were satisfied by the original trial and appeal proceedings (if any) of the applicant. Accordingly, no new issues of lawfulness arose, in relation to the applicant's detention in 1992 and 1993, which entitled the applicant to a review under Article 5 para. 4 (Art. 5-4) of the Convention.

In view of the finding above that the applicant was not entitled to a review in accordance with the provisions of Article 5 para. 4 (Art. 5-4) of the Convention no issue arises in respect of the applicant's complaint that the reviews he received fell short of the standards required under Article 5 para. 4 (Art. 5-4) of the Convention.

Therefore the Commission must reject the applicant's complaints as manifestly ill-founded pursuant to Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)