

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

FIFTH SECTION

DECISION

Applications nos. 70495/10 and 74565/10
Paul LYNCH against Ireland
and Peter WHELAN against Ireland

The European Court of Human Rights (Fifth Section), sitting on 18 June 2013 as a Chamber composed of:

Mark Villiger, *President,*
Ann Power-Forde,
Ganna Yudkivska,
André Potocki,
Paul Lemmens,
Helena Jäderblom,
Aleš Pejchal, *judges,*

and Stephen Phillips, *Deputy Section Registrar*,

Having regard to the above applications lodged on 21 October 2010 and 17 November 2010 respectively.

Having deliberated, decides as follows:

THE FACTS

1. The applicant in the first case, Mr Paul Lynch, is an Irish national who was born in 1976. He is represented before the Court by Mr F. Taaffe, a solicitor practising in Kildare. The applicant in the second case, Mr Peter Whelan, is an Irish national who was born in 1982. He is represented before the Court by Mr J. Cuddigan, a solicitor practising in Cork. Both applicants are currently serving sentences in Portlaoise prison.

A. The circumstances of the case

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

3. Mr Lynch pleaded guilty on 10 February 1997 to murder. He was sentenced to a mandatory life sentence (section 2 of Criminal Justice Act 1990, "the 1990 Act"). Mr Lynch had struck the deceased numerous times with a frying pan, robbing a small sum of money in the process. Mr Lynch appealed arguing that his legal team forced him to plead guilty. In July 1998 the Court of Criminal Appeal ("CCA") rejected his appeal. The Interim Parole Board reported on his detention in 2004 and in July 2004 the Minister for Justice, Equality and Law Reform, ("the Minister") decided that Mr Lynch should not be released from prison and that no application for release should be considered until after three years.

4. Mr Whelan pleaded guilty on 2 December 2002 to murder of a woman and to the attempted murder of her friend. He had, without provocation, stabbed both women. He was also sentenced to a mandatory life sentence for murder under section 2 of the 1990 Act and to a consecutive sentence of 15 years' imprisonment for attempted murder. In June 2003 the CCA reversed the sentences: he was to first serve the 15 year sentence and then the life sentence.

5. The applicants took proceedings to challenge their mandatory life sentences. They argued that section 2 of the 1990 Act was unconstitutional: by obliging a judge in a statute to impose that sentence, the legislature was carrying out a sentencing exercise contrary to the constitutional principles of separation of powers and proportionality; and since it was the Minister who was likely to release the applicants, he was carrying out a judicial sentencing function which was also contrary to the principle of the separation of powers. They also maintained that that section breached the Convention: the uncertainty about how or when they would be released amounted to treatment contrary to Article 3; the Minister's decision was a sentencing exercise by the executive contrary to Article 5 § 1; there had and would be no review compliant with Article 5 § 4 and a decision not to re-consider detention for three years also breached that provision; and the Minister's sentencing exercise contravened Article 6 § 1 of the Convention.

6. Their actions were examined together and, by judgment of 5 October 2007, the High Court rejected all of their claims. They appealed.

7. On 14 May 2010 the Supreme Court rejected the appeal.

8. In the first place, the Supreme Court found section 2 of the 1990 Act to be constitutional. The assertion that the legislature usurped judicial sentencing power contrary to the principle of separation of powers was unfounded: the legislature could choose, consistently with the Constitution, to impose a fixed penalty in particular cases (*Deaton v. Attorney General* [1963] IR 170, O'Dalaigh C.J.) so long as there was a rational relationship

between the penalty and the requirements of justice. Since murder had historically been considered to be of exceptional gravity justifying the most serious of deterrents, it could be properly differentiated for a serious and mandatory sentence.

9. The applicants had argued that this reasoning had no application to a mandatory life sentence because it was not, in practice, a determinate sentence imposed by a court: rather it was a sentence the length of which was decided by the Minister based on punitive and preventative factors the latter of which depended on numerous circumstances. The Supreme Court responded that the life sentence was exclusively punitive and the exercise by the Minister of his discretion to grant release was an executive privilege and not a prisoner's right so that early release was a privilege or concession which did not interrupt the wholly punitive nature of a mandatory life sentence. The sentence subsisted in law for the entire life of the convicted person which person remained therefore liable to imprisonment if temporary release was terminated for good and sufficient reason. A decision to grant discretionary early release did not therefore constitute a termination, let alone a determination, of the sentence judicially imposed. The Minister's consideration, *inter alia*, of public safety does not mean that the Minister was exercising a judicial function and, in particular, did not mean that a decision not to release on public safety grounds converted the punitive sentence into a preventative one since the Minister, in deciding on discretionary temporary release taking into account certain statutory factors, was deciding whether or not to grant a privilege.

10. As to the Convention compatibility of section 2, the Supreme Court recalled the difference between life sentences in England and Wales, the subject of much Convention case-law, and a life sentence imposed pursuant to section 2 of the 1990 Act. The former comprised a punitive "tariff" period followed by a period of preventative detention whereas a mandatory life sentence in Ireland could not as a matter of law include any preventative elements. The exercise by the Minister of his discretion as a distinct executive function was a form of clemency or commutation and did not constitute a determination of punishment as the life sentence imposed continued to exist even after release by the Minister. The Supreme Court considered the life sentence at issue in *Kafkaris v. Cyprus* ([GC], no. 21906/04, ECHR 2008) to be similar to that at issue in the present case. It therefore considered the Irish mandatory life sentence compatible with Article 5 § 1 because there remained a clear and sufficient *de jure* and *de facto* causal connection between the trial court's sentencing and the applicants' ongoing detention which was not interrupted by a Ministerial review and remission. The case-law on which the applicant relied concerning the United Kingdom concerned a "radically different" sentencing regime which was "in stark contrast to the longstanding position in Irish law" so that that Convention case-law was not applicable to the

present case. The Supreme Court reviewed this Court's case-law against the United Kingdom underlining how that sentencing regime was relevantly different to the Irish regime and how that case-law was not therefore applicable to it. It noted, in particular, that prior to the *Stafford* judgment, the English courts had already begun to accept that the mandatory sentence also comprised a punitive and a later security period so that this Court had been thereby prompted to find that detention, on foot of the original mandatory life sentence when the punitive part had been exhausted, breached Article 5 § 1 of the Convention.

11. The Supreme Court concluded that the case-law of this Court relied upon by the applicants had no material application to a wholly punitive sentence imposed under section 2 of the 1990 Act which bore no relationship to the system in the United Kingdom scrutinised by the Court in its case-law. The Supreme Court relied rather on the *Kafkaris* judgment where the Court re-affirmed that an entirely punitive mandatory life sentence for a serious crime imposed by national law did not, as such, breach the Convention provided at least that national law afforded the possibility of early release.

B. Relevant domestic law and practice

1. The Irish Constitution

12. The Constitution implicitly recognised, until its amendment in 2001, that the death penalty could be imposed in certain cases. Article 13.6 of the Constitution vested in the President the right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction and also provided that such powers could also be conferred by law on other authorities "except in capital cases". Article 40.5 made special provision for deferring a death sentence where a court had made an order pursuant to Article 40 for the production of the body of a person who was in detention and under sentence of death.

13. The Twenty First Amendment of the Constitution Act 2001 provided for the removal of all references to the death penalty in the Constitution and inserted Article 15.5.2 which provides that the legislature "shall not enact any law providing for the imposition of the death penalty".

2. History of the offence of murder

14. At the foundation of the State in 1922 the crimes of murder, treason and piracy carried a mandatory death penalty (the Offences Against The Person Act 1861). The Criminal Justice Act 1964 restricted the imposition of the death penalty to capital murder (including murder of a police/prison officer on duty) and provided for a mandatory life sentence for murder other

than capital murder. The Criminal Justice Act 1990 ("the 1990 Act") made provision for the abolition of the death penalty. Section 1 of that Act provides that no person should suffer death for any offence. Section 2 provides for a mandatory life sentence for murder. Section 4 requires the court, when sentencing for treason and capital murder, to specify that the minimum period of imprisonment must not be less than 40 years. There were 50 murder convictions in 2008, 56 in 2009 and 53 in 2010.

15. The courts have confirmed that the legislature can, consistently with the constitutional principle of the separation of powers, choose to impose a mandatory penalty for a particular offence provided the penalty is proportionate. In *Deaton v. Attorney General* ([1963] I.R 170) the Supreme Court considered the separation of powers and the respective functions of the legislature and the judiciary in relation to sentencing. The case concerned customs offences and a penalty provision permitting the Revenue Commissioners to choose between two penalties in a case. This provision was set aside as wrongfully interfering with the judicial function conferred by the Constitution on the courts. O'Dalaigh C.J. stated as follows:

> "There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case. It is here that the logic of the Defendants' argument breaks down. The Legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the Courts. If the general rule is enunciated in the form of a fixed penalty then all citizens convicted of the offence must bear the same punishment. But if the rule is stated by reference to a range of penalties to be chosen from according to the circumstances of the particular case, then a choice or selection of penalty falls to be made. At that point the matter has passed from the legislative domain. Traditionally, as I have said, this choice has lain with the Courts. Where the Legislature has prescribed a range of penalties the individual citizen who has committed the offence is safeguarded from the Executive's displeasure by the choice of penalty being in the determination of an independent judge. The individual citizen needs the safeguard of the Courts in the assessment of punishment as much as on his trial for the offence. The degree of punishment which a particular citizen is to undergo for an offence is a matter vitally affecting his liberty; and it is inconceivable to my mind that a Constitution which is broadly based on the separation of powers - and in this the Constitution of [the Irish Free State] and the Constitution of Ireland are at one - could have intended to place in the hands of the Executive the power to select the punishment [to] be undergone by citizens. It would not be too strong to characterize such a system of government as one of arbitrary power ... In my opinion the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive as Parliament purported to do in s.186 of the Customs Consolidation Act, 1876."

16. In *Osmanovic v D.P.P. and others* ([2006] IESC 50), the Chief Justice affirmed the power of the legislature to provide for mandatory fixed sentences as part of its law-making role.

3. The Interim Parole Board

17. Section 23 of the Criminal Justice Act 1951 provides that, except in cases of capital murder, the Government may commute or remit, in whole or in part, any criminal punishment imposed by a court subject to such conditions as are considered proper and that the Government may delegate that power to the (now) Minister for Justice, Equality and Law Reform ("the Minister"). The Criminal Justice (Miscellaneous Provisions) Act 1997 and the Prisons Act 2007 allow the Minister to make rules on the procedures and processes of remission.

18. The Interim Parole Board was set up by the Minister in April 2001 on an administrative basis. It was envisaged that a statutory provision would follow but this has not happened. The Interim Parole Board considers applications for early release in cases of, *inter alia*, mandatory life sentence prisoners who have served more than 7 years of their sentence and, thereafter, every three years. The Board advises the Minister: while its recommendations are not binding, the majority are accepted.

4. Temporary Release

19. There are three forms of early release under Irish law. The first, 'special remission', is the power of commutation or remission vested in the Executive (formerly known as the 'royal prerogative'). The second, standard remission, is the entitlement of prisoners under the Prison Rules to gain early release based on good conduct and other factors but it is not available to life prisoners.

20. The third form is 'temporary release' as provided for by section 2 of the Criminal Justice Act 1960 as amended by section 1 of the Criminal Justice (Temporary Release of Prisoners) Act 2003 ("the 1960 Act, as amended"). Section 2(1) of the 1960 Act, as amended allows the Minister to direct release:

> "The Minister may direct that such person ... shall be released from prison for such temporary period, and subject to such conditions, as may be specified in the direction or rules under this section applying to that person—
>
> (a) for the purpose of—
>
> (i) assessing the person's ability to reintegrate into society upon such release,
>
> (ii) preparing him for release upon the expiration of his sentence of imprisonment, or upon his being discharged from prison before such expiration, or
>
> (iii) assisting the Garda Síochána in the prevention, detection or investigation of offences, or the apprehension of a person guilty of an offence or suspected of having committed an offence,

(b) where there exist circumstances that, in the opinion of the Minister, justify his temporary release on—

(i) grounds of health, or

(ii) other humanitarian grounds,

(c) where, in the opinion of the Minister, it is necessary or expedient in order to—

(i) ensure the good government of the prison concerned, or

(ii) maintain good order in, and humane and just management of, the prison concerned, or

(d) where the Minister is of the opinion that the person has been rehabilitated and would, upon being released, be capable of reintegrating into society.

21. Before making a direction, the Minister shall have regard to the factors listed in section 2(2) of the 1960 Act, as amended:

"(a) the nature and gravity of the offence to which the sentence of imprisonment being served by the person relates.

(b) the sentence of imprisonment concerned and any recommendations of the court that imposed that sentence in relation thereto,

(c) the period of the sentence of imprisonment served by the person,

(d) the potential threat to the safety and security of members of the public (including the victim of the offence to which the sentence of imprisonment being served by the person relates) should the person be released from prison,

(e) any offence of which the person was convicted before being convicted of the offence to which the sentence of imprisonment being served by him relates,

(f) the risk of the person failing to return to prison upon the expiration of any period of temporary release,

(g) the conduct of the person while in custody, while previously the subject of a direction under this section, or during a period of temporary release to which rules under this section, made before the coming into operation of the Criminal Justice (Temporary Release of Prisoners) Act 2003, applied,

(h) any report of, or recommendation made by—

(i) the governor of, or person for the time being performing the functions of governor in relation to, the prison concerned,

(ii) the Garda Síochána,

(iii) a probation and welfare officer, or

(iv) any other person whom the Minister considers would be of assistance in enabling him to make a decision as to whether to give a direction under subsection (1) that relates to the person concerned.

(i) the risk of the person committing an offence during any period of temporary release,

(j) the risk of the person failing to comply with any conditions attaching to his temporary release, and

(k) the likelihood that any period of temporary release might accelerate the person's reintegration into society or improve his prospects of obtaining employment."

22. Section 3(3) provides that the Minister shall not give a direction in respect of a person:

"(a) if he is of the opinion that, for reasons connected with any one or more of the matters referred to in subsection (2), it would not be appropriate to so do,

(b) where the release of that person from prison is prohibited by or under any enactment, whether passed before or after the passing of this Act, or

(c) where the person has been charged with, or convicted of, an offence and is in custody pursuant to an order of a court remanding him to appear at a future sitting of a court."

23. Section 6 provides that the release of a person by Ministerial direction does not confer an entitlement to further release.

24. The majority of life prisoners are released during the course of their sentence. According to the Report into Determination of Life Sentences 2006 published by the Irish Human Rights Commission, the average detention of a life prisoner before consideration for release was 12-14 years.

25. The Supreme Court recognises the powers of the Minister. In, for example, *D.P.P. v R McC & D* ([2007] IESC 47), it stated that the imposition of a life sentence did not usually mean imprisonment for the actual life of the prisoner because "in practice, any decision as to the length of time a person sentenced to life imprisonment" actually serves rests with the executive rather than with the judiciary. In *D.P.P. v. Tiernan* ([1989] I.L.R.M. 149) and *Murray v. Ireland* ([1991] I.L.R.M. 465), it was reiterated that the exercise of this executive power was subject to judicial review so that the power should not be exercised in a "capricious, arbitrary or unjust way".

COMPLAINTS

26. The applicants complain about their mandatory life sentences for murder under section 2 of the 1990 Act because the sentencing courts were

obliged to impose those sentences and since the duration of the sentences is decided by the Minister under section 2 of the 1960 Act, as amended.

27. Mr Whelan invokes Articles 3, 5 §§ 1 and 4 and 6 § 1 and Mr Lynch invokes Articles 3, 6 and 13 of the Convention.

THE LAW

A. Joinder

28. Having regard to the similarity of the applicants' Convention arguments before the domestic courts, the joint judgment of the Supreme Court and the similarity of the issues they raise before this Court, the Court decides that the two applications should be joined pursuant to Rule 42 § 1 of the Rules of Court. Mr Lynch is referred to below as the first applicant, Mr Whelan as the second applicant.

B. Article 3 alone (both applicants) and in conjunction with Article 13 of the Convention (first applicant only)

29. The first applicant complains under Article 3, alone and in conjunction with Article 13, about the uncertainty created by the State concerning the length of detention pursuant to a mandatory life sentence. The second applicant notes that the Court accepted in *Kafkaris v. Cyprus* ([GC], no. 21906/04, ECHR 2008) that a punitive but reducible life sentence could be compatible with Article 3 of the Convention. However, he complains that the automatic imposition of a punitive life sentence breached the principle of proportionality, was arbitrary and amounted to "inhuman and degrading treatment" contrary to that Article.

30. Article 3 reads as follows:

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

Article 13, in so far as relevant, reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority ..."

31. The Court refers to the principles and their application set out in paragraphs 95-108 in the above-cited *Kafkaris* judgment. It considers that the nature of the life sentences at issue in the present and the *Kafkaris* cases are similar: indeed the evidence of regular review and of early release of life prisoners in Ireland indicates that the present applicants have a greater likelihood of being released than had Mr Kafkaris and, indeed, than had the applicants in *Babar Ahmad and Others v. the United Kingdom* (nos.

24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, § 242, 10 April 2012). While the average release time of life prisoners in Ireland appears to have increased somewhat since the mid-2000s, the applicants' sentences are *de facto* and *de jure* reducible and, as such, not incompatible with Article 3 of the Convention. Moreover, even assuming that a disproportionate sentence could breach Article 3, the Court does not consider that the imposition of the life sentences in the present cases discloses any such disproportionality. It recalls, in this respect, that comparatively severer sentences had been found not to violate Article 3 (for example, *Iorgov v. Bulgaria (no. 2)*, no. 36295/02, 2 September 2010; and *Törköly v. Turkey*, (dec.), no. 4413/06, 5 April 2011).

32. It follows that the applicants' complaints under Article 3 are manifestly ill-founded. There being no "arguable claim" of a violation of Article 3, the second applicant's associated complaint under Article 13 is equally manifestly ill-founded (*Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, p. 23, § 52). This part of the application must therefore be rejected as in accordance with Article 35 §§ 3 and 4 of the Convention.

C. The remaining complaints of the applicants

33. The applicants complain about their mandatory life sentences for murder under section 2 of the 1990 Act because the sentencing courts were obliged to impose those sentences and since the duration of the sentences is decided by the Minister under section 2 of the 1960 Act, as amended. The first applicant invokes Article 6 and the second applicant both Articles 5 and 6 of the Convention. It being the "master of the characterisation" to be given in law to the facts before it (*Akdeniz v. Turkey*, no. 25165/94, § 88, 31 May 2005), the Court considers that the facts invoked by the applicants fall to be examined under Articles 5 §§ 1 and 4 and 6 §1 of the Convention.

34. The first applicant takes issue with the imposition by statute of one sentence, the mandatory life sentence, following his conviction for murder and of its imposition regardless of the circumstances or of any aggravating/mitigating factors. He further complains about the manner in which that sentence is reviewed submitting that the Interim Parole Board is not independent, that the review process is unfair, that the Interim Parole Board's recommendations do not bind the Minister and that it is the Minister who decides on the duration of detention on foot of a life sentence in Ireland. He consequently complains that the determination of sentence has been taken out of the hands of the courts by the executive.

35. The second applicant argues that the imposition of that life sentence was not "in accordance with a procedure prescribed by law" because its length depends on executive discretion, is indeterminate and arbitrary. The Court will examine this complaint under Article 5 § 1 of the Convention. He

further complains that the review system, comprising non-binding recommendations of the Interim Parole Board and a binding decision of the Minister, is not compliant with Article 5 § 4. He claims that the notion that the sentence is wholly punitive does not reflect the reality because a life prisoner does not, in reality, spend his life in prison but his period of detention is systematically determined by the Minister and, in doing so, the Minister is statutorily obliged to consider, *inter alia*, public risk and other factors with a preventative aim. Finally, he complains under Article 6 § 1 of the Convention that the judicial act of sentencing was usurped by the legislature in fixing the sentence and by the executive in determining its length.

36. The Court considers that it cannot, on the basis of the case file, determine the admissibility of these complaints and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

For these reasons, the Court unanimously

Decides to join the applications

Declares the applicants' complaints, that their life sentences amounted to inhuman and degrading treatment and about a lack of a domestic remedy in that respect, inadmissible; and

Decides to adjourn the remainder of the application.

Stephen Phillips
Deputy Registrar

Mark Villiger
President