CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 25185/02
by Andrew A. STEWART
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 16 December 2003 as a Chamber composed of:

Mr M. PELLONPÄÄ, *President*,
Sir Nicolas BRATZA,
Mrs V. STRÁŽNICKÁ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges*,
and Mr M. O'BOYLE, *Section Registrar*

Having regard to the above application lodged on 19 June 2002,

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, Mr Andrew A. Stewart, is a United Kingdom national, who was born in 1939 and is currently detained in HM Prison Garth. He was represented before the Court by Mr G. Rushton, a lawyer practising in Manchester.

A. The circumstances of the case

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

On 17 December 1979, the applicant was convicted of murder, a premeditated offence described by the trial judge as "brutal and savage". The applicant had a number of previous convictions including assault, actual bodily harm and grievous bodily harm. He was sentenced to a mandatory term of life imprisonment. The pre-trial medical report found that his traits fitted into the definition of psychopathic disorder and that he thus had a serious personality disorder. In view of his age, then 40, it was not considered that the applicant require, or would benefit from, any medical treatment. The trial judge advised the Home Secretary that "the applicant is and will be for a long time dangerous, if at large" and recommended a tariff (the minimum period of detention needed to satisfy the requirements of retribution and deterrence) of twenty years, having regard *inter alia* to his history of violence, the premeditated, if random, nature of the murder, the brutal character of the murder and the applicant's lack of remorse. The Home Secretary accepted the recommendation and fixed the tariff to expire on 25 July 1999.

Whilst in prison, the applicant received 31 adverse adjudications including one assault of a prison officer, two assaults on other prisoners, four instances of abusive conduct and seven drug offences.

The release review procedure commenced three years before the expiry of the applicant's tariff. The Parole Board decided against any move to open conditions for release preparation and recommended a review in two years' time. By letter dated 6 January 1997, the Secretary of State informed the applicant that the Parole Board had not recommended his release for the following reasons:

> "...Until [the applicant] changes his attitude to his offending behaviour he will remain as a high risk to the public. The Panel is concerned by his continued lack of remorse for any of the victims of his violent offences and by the fact that at present he has made no positive effort to understand the causes and consequences of his violent offending. Consequently there has been no progress in his doing so. The Panel notes that he now admits that his personality and his attitudes are problem areas and that he has shown his willingness to address these. In particular he needs to do work on violence and anger control and his attitudes to women, so as to reduce the risk of his re-offending. ..."

The next Parole Board review was set to begin in December 1998.

On 26 March 1999, the Parole Board reviewed the applicant's case and recommended that the applicant was "clearly unsuitable" for release or move to open prison. By letter dated 22 April 1999, the applicant was informed by the Home Secretary of the reasons:

> "...[the applicant's] index offence, past criminal record taken in conjunction with his current attitude to offending, lack of empathy, refusal to participate in relevant offending behaviour courses and a recent positive mandatory drug test makes him clearly unsuitable for release or open conditions. Unless [the applicant] participates in and successfully completes the relevant courses to understand the causes and consequences of his offending and shows sustained improvement in his attitude and behaviour, he cannot be considered as an acceptable risk for the progressive move to open conditions. [The applicant's] co-operation with Psychologist and Psychiatrist is essential in terms of assessing his future risk. The extensive range of work required to reduce his risk will take time, hence his next review should be scheduled for two years."

On 15 March 2002, the Parole Board conducted its third review of the applicant's case. It again concluded that the applicant was not ready for release or move to open conditions, recommending that he remain in closed conditions and that his case be reviewed two years later. By letter dated 4 April 2002, the Home Secretary accepted the recommendation:

> "Until relatively recently [the applicant] has refused to participate in any offending behaviour programmes. However reports prepared in January of last year indicated that he was willing to attend anger management, an R & R course and courses in relationships and personal development but he has not yet participated in such courses and subsequently refused to be interviewed by the prison psychologist. Throughout his sentence [the applicant] has demonstrated no remorse for the index and previous offences, and the panel therefore considers his risk is not yet low enough for open conditions."

The next review was set for March 2004.

On 7 June 2002, the Sentence Planning Board met to review the applicant's progress in sentence planning targets over the past twelve months and to agree targets for the next twelve months. It noted that the applicant had indicated a willingness to participate in an anger management course but had not embarked on one because no such course was then being offered at his prison. It also stated that he had also indicated a willingness to participate in a Reasoning and Rehabilitation course but was still awaiting assessment for entry onto the course. It also further noted that in April 2001 he had completed courses in assertiveness and decision making, relationships and money management. Prison and probation officers both reported good behaviour and the Board stated that during the last reporting period, there had been no displays of any of the risk factors earlier identified as obstacles to the release of the applicant.

The Government stated that the Board's report was not wholly accurate. In early 2001, the applicant had in fact attended classes in two elements of

"Social and Life Skills" course, including elements of improving assertiveness and decision-making and healthy living. He did not attend any classes in relationships. Meanwhile, they explained that in November 2001, the applicant's prison offered the Reasoning and Rehabilitation course for the first time. The applicant did not apply. The course ran again in February 2002 but the prisoners who had previously applied unsuccessfully were given priority. The applicant was referred by his personal prison officer for the course in September 2002 but rejected the opportunity, stating at the assessment interview that he had no interest in, or need for, such a course. When he was nonetheless allocated a place on the course, he missed the first session due to a family visit and then, according to the Government, failed to respond to repeated invitations to start the course on 17 February 2003. The applicant stated that he could not attend this course due to illness but that he started this course in August 2003.

In April 2003, the prison psychologist explained to the applicant that he was no longer considered suitable to attend the anger management course as he did not meet the assessment criteria (namely, recent angry or aggressive behaviour). The applicant states that this course nonetheless remains on his sentence plan.

B. Relevant domestic law and practice

1. Release procedures for mandatory life sentence prisoners

The legislation which governed sentencing and release on licence at the time when the applicant was sentenced was the Criminal Justice Act 1991 ("the 1991 Act"). The provisions of this Act were subsequently replaced by the Crime (Sentences) Act 1997 from 1 October 1997.

At the relevant time, the 1991 Act provided in section 35(2):

> "If recommended to do so by the [Parole] 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."

In determining the principles of fairness that apply to the procedures governing the review of mandatory life sentences, the English courts have recognised that the mandatory sentence is, like the discretionary sentence, composed of both a punitive period ("the tariff") and a security period. As regards the latter, detention is linked to the assessment of the prisoner's risk to the public following the expiry of the tariff (see, for example, *R. v. Parole Board, ex parte Bradley* (Divisional Court) [1991] 1 WLR 135; *R. v. Parole Board ex parte Wilson* (Court of Appeal) [1992] 2 AER 576).

Once the tariff period has expired, periodic reviews are conducted by the Parole Board to determine whether the prisoner meets the criteria for a recommendation of release on life licence to be made to the Secretary of

State. According to section 29(1) of the 1997 Act, the final decision on release rests with the Secretary of State. If release is not recommended, the Parole Board sets the date for the next review. It is open to the Secretary of State to bring forward the date of the next review where a prisoner shows unexpectedly rapid progress. However, a prisoner cannot himself apply for a review during the interval set by the Parole Board.

2. Human Rights Act 1998

Section 6(1) of the Act provides:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

COMPLAINTS

The applicant complains that he has been unfairly treated since his next Parole Board review will not be held until March 2004, when he will have served five years more than his tariff.

THE LAW

The applicant complains of the delay elapsing until his next Parole Board review. 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."

Article 35 § 1 – exhaustion of domestic remedies

The Government submitted that the applicant had failed to exhaust domestic remedies in respect of his complaint as he did not apply for judicial review of the decisions of the Parole Board and Home Secretary in March-April 2002 to set his next review at a two year interval. As the Human Rights Act 1998 was in force from 1 October 2000, he could have invoked Article 5 § 4 before the courts which could have quashed the challenged decision and directed that it be retaken in accordance with that provision. They cite two examples where mandatory lifers were granted leave to apply for judicial review of the length of review period, although they were unsuccessful on the facts of their cases, the domestic courts showing that they were applying the Court's principles and case-law in this

area (*The Queen (on application of Duncan MacNeil) v. Her Majesty's Prison Lifer Panel,* 21 March 2001, Court of Appeal, and *The Queen (on application of John Patrick Spence) v. Secretary of State for the Home Department*, 23 May 2003, Court of Appeal, both citing the Court's judgment in *Oldham v. United Kingdom*, no. 36273/97, ECHR 2000-X)).

The applicant stated that he was unaware of the procedures concerning judicial review.

The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate or ineffective (see *Aksoy v. Turkey*, judgment of 18 December 1996, ECHR 1996-VI, §§ 51-52, and *Akdivar and Others v. Turkey,* judgment of 16 September 1996, ECHR 1996-IV, §§ 65-67).

The Court emphasises that the application of the rule of exhaustion of domestic remedies must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting States have agreed to set up. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (see the aforementioned *Akdivar and Others* judgment, § 69, and the *Aksoy* judgment, §§ 53 and 54).

In the present case, the Court notes that at the time of the applicant's last review in March 2002 the Human Rights Act 1998 was in force and that it would have been open to him to apply for leave for judicial review of the decision setting his next review at two years, invoking Article 5 § 4 of the Convention. The Government have provided examples of cases where the domestic courts have granted leave and examined complaints as to whether

the dates set for the review of individual life prisoners conformed with the principles set out in the Court's case-law. While it is true that in the two examples given the courts found that there was no failure to comply with the requirements of Article 5 § 4, it is evident that they decided each case on its particular facts. It accordingly appears that, in the appropriate case, the courts would be able to reach a finding of a violation and afford relief, namely, quashing the decision concerning the date of review and remitting it for re-consideration.

The Court observes that the applicant has not submitted any argument that such an application would not offer an available and effective remedy. Indeed, it appears that the applicant relies only on his lack of awareness of the availability of judicial review. Lack of legal knowledge is not, however, a ground of exemption from the duty to exhaust domestic remedies (see for example, no. 6840/74, Commission decision of 12 May 1977, Decisions and Reports 10, p. 5; *mutatis mutandis*, *E.E. v. Austria*, no. 31697/96, (dec.) 7 September 1999). No special circumstances arise which might indicate that the remedy was not in any practical terms available to the applicant, such as an inability to obtain necessary assistance from solicitors, whether through the refusal of legal aid or otherwise, or to contact the court itself.

The Court concludes that the applicant has failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention and that his application must, therefore, be rejected pursuant to Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Matti PELLONPÄÄ
President