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. 37231/97
by Michael John TOOMEY
against the United Kingdom

The European Court of Human Rights (Third Section) sitting on 14 September 1999 as a Chamber composed of

Mr J.-P. Costa, *President*,
Sir Nicolas Bratza,
Mr L. Loucaides,
Mr P. Kūris,
Mr W. Fuhrmann,
Mrs H.S. Greve,
Mr K. Traja, *Judges*,

with Mrs S. Dollé, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 30 October 1996 by Michael John Toomey against the United Kingdom and registered on 4 August 1997 under file no. 37231/97;

Having regard to the reports provided for in Rule 49 of the Rules of Court;

Having regard to the observations submitted by the respondent Government on 18 January 1999 and the observations in reply submitted by the applicant on 23 March 1999;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen, born in 1958 and he is currently in prison in Derbyshire.

A. Particular circumstances of the case

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

On 1 December 1983 the applicant pleaded guilty to assault occasioning actual bodily harm and to wounding with intent. Both charges related to unprovoked and serious assaults on two different women, the latter victim having been beaten and stabbed in the neck three times by the applicant. The applicant received a life sentence on the latter charge and no separate sentence on the former. The trial judge had before him a medical report on the applicant which showed an abnormal encephalogram with symptoms of disturbed behaviour associated with abnormal electrical activity in the temporal lobe of the brain. A psychiatric report dated 21 November 1993 considered that anticonvulsive drugs were required for this condition, that antidepressants were required for his recurrent depression and that he needed observation in secure surroundings where he could have further tests, surveillance and study. The trial judge made it clear that the imposition of the life sentence was to ensure that the applicant would not be a liberty until those responsible for his supervision were satisfied that the risk he posed to the public, and particularly to young women, was gone. The Court of Appeal rejected his appeal against sentence by judgment dated 7 June 1984. That court described the attacks as “horrifying” and noted that, while the applicant had initially denied the attacks, he had then stated that he had committed them in revenge for a sexual assault on him by a man when he was 18 years old.

The applicant was subsequently diagnosed as suffering from a psychopathic disorder within the meaning of the Mental Health Act 1983 and in July 1985 he was transferred under section 47 of the 1983 Act to a psychiatric hospital. In April 1989 the applicant was transferred back to the prison system because he was not deemed suitable for treatment. Following a Parole Board review, he was transferred in January 1992 to HM Channing Wood prison which was a progressive move to less secure Category C conditions. The applicant completed his non-vocational industrial skills qualifications there. Following another Parole Board review, he was transferred in March 1994 to open conditions in HM Leyhill prison where he completed a “supervised resettlement and lifer skills” course.

On 7 September 1995 a discretionary life panel (“DLP”) of the Parole Board reviewed the applicant's case. A number of very positive reports were before the DLP, all referring to his past sexual identity problems and all (but one) recommending without reservation his release on licence. The report of the Governor of HM Leyhill prison noted that the applicant accepted full responsibility for his behaviour and sincerely regretted what he had done and concluded that the risk posed by the applicant on release would be minimal. The principal officer in the “lifer unit” at HM Leyhill prison indicated that the applicant had been working in the community and had had two home leaves all of which had gone well. His behavioural record was excellent and his performance was first class. The psychologist's report dated 20 March 1995 considered the applicant's attitude to his offences to be appropriate. It detailed, under the heading “Insight into offence related behaviour”, the applicant's sexual identity problems which included a prior and long period of transsexualism and a homosexual

relationship in prison. However, it was noted that the applicant had worked through these matters and had now come to terms with his male heterosexual identity.

The psychiatric report dated 27 March 1995 considered that the applicant had been angry because of his frightening childhood, his being sexually assaulted when he was young, his serious speech impediment, he felt trapped at the time of the offences in an unhappy common-law marriage and as a result of his transsexual feelings. It was felt that a combination of this anger and his inability to communicate was the explosive combination that led to the offences. That report detailed the reasons for his sexual identity issues and, noting that these issues had been resolved by the applicant and that he had a stable relationship for a number of years with a woman, the psychiatrist could not see how he could be a danger on release. Two probation officer reports were equally supportive of the applicant's release. A third probation report did provisionally express some reservations about the depth of the applicant's understanding of his offences referring, *inter alia*, to his sexual identity problems and noting that such problems were considered in many previous reports to have been one of the main factors in the applicant's offences. The DLP directed the applicant's release on licence, one of the conditions being that he reside at a probation hostel.

The applicant was conditionally released on 18 September 1995. On 22 November 1995 the probation service submitted a report outlining certain concerns about the applicant's behaviour. It was noted that the applicant had been observed by hostel staff taking an undue interest in a woman residing opposite the hostel. The probation service had also found a bread knife, a pair of binoculars, a pair of handcuffs, women's clothing, women's clothing catalogues and a fetishist catalogue in the applicant's room. Concern was also expressed about the applicant's relationship with prostitutes. Given his offences and his history of mental instability, the probation service no longer felt in a position to be able to supervise him safely in the community and recommended his immediate recall.

On 23 November 1995 the applicant's licence was revoked by the Secretary of State under Section 39(2) of the Criminal Justice Act 1991 and he was taken to prison. The DLP confirmed his recall on 1 December 1995. On the applicant's initiative, his case was re-examined by the DLP on 27 March 1996, the DLP hearing the applicant and his counsel together with evidence from a psychologist and psychiatrist. The DLP found no convincing explanation from the applicant for most of the matters noted in the probation service report. At the request of the applicant's counsel, the panel recommended that certain investigations be carried out. These included a full neurological and a full neuro-psychological assessment, EEG and CAT scans, an investigation of the applicant's sexual identity and possible fetishism and, thereafter if appropriate, investigation of a possible sexual motive for the offences for which he had been convicted in 1983. The panel also recommended assessment for the Sex Offenders Treatment Programme ("SOTP") and consideration of the applicant's transfer for treatment if a sexual motive for his offences was established. These recommendations were accepted by the Secretary of State.

Prior to his transfer to HM Albany prison, the applicant requested clarification from the prison authorities of whether he was being transferred to HM Albany prison to take part in the SOTP or to be assessed for such a course. The reply stated that "you are going to do a SOTP course". On 24 July 1997 the applicant was moved to HMP Albany prison. On 8 and 15 September 1997 the applicant requested copies of the results of various tests he had already undergone and information on further tests to be done. He was informed, *inter alia*, that he was on the waiting list for the Penile Polygraph (PPG) assessment. Further to another

query the applicant was furnished, on 1 October 1997, with certain results of previous tests and with the question and answer leaflet on the PPG test (detailed above at “Relevant domestic law and practice”). On 29 September 1997 the applicant met with a senior psychologist who explained to him the proposed PPG procedure and the nature of the material which it was planned to use. The purpose of doing so was to ensure that the applicant agreed to the PPG assessment and was prepared for it in order to avoid extreme reactions during the test which would limit its usefulness. The applicant was reticent but agreed to participate in the test.

On 3 October 1997 the applicant underwent his first PPG test and it lasted 1 hour and 20 minutes. A female trained technician conducted the tests. The applicant was put in a small room without windows and with bolts both inside and outside the door. Two electrodes were attached to his left index and middle finger. A video recorder was adjusted to the level of his face and the operator left the room although monitoring of the applicant was possible via a camera and a microphone. The applicant then had to attach a sensor clip to his penis and to leave his underpants and trousers removed throughout the test.

The applicant was shown three categories of material. The first category (designed to discover any age preferences) was a set of slides comprising nude images of young children, pubescent and adult males and females. The images were produced in the United States for the purpose of the PPG assessment and all images were single frontal nudes, either sitting, standing or prone but not posed in a deliberately erotic fashion. The second category was a set of video sequences depicting consensual sex, rape and non-sexual violence. The sequences were also produced for the PPG assessment. The third category was a set of slides depicting young men and women in more erotic poses than in the first set of slides, elderly naked women in relatively non-erotic poses and women in bondage poses. The latter images were all obtained from soft-core pornographic magazines such as could be openly and legally published in specialist shops. The slides were left on for about 20 seconds and each was shown approximately six times. Each video lasted about a minute. The videos and slides were shuffled, being shown in no particular order. The television on which the slides and videos were shown was at eye level about 18 inches from his face and the applicant's head was kept steady by a headrest on the back of the chair. The test then continued with a 'key score' pad, the applicant being requested to score from 0-9 his sexual attraction to the same slides which he was again shown, each slide being shown six times.

His second PPG test was conducted on 6 October 1997. It lasted 40 minutes, was similar to the first but the applicant was shown slides only. The slides were each shown six times and in no particular order.

The document headed “PPG results” for 3 October 1997 noted that the applicant had consented to the test because he wanted a transfer from Albany Prison. As regards the slides, it was recorded that the greatest response of the applicant was to male children and that his responses to adults was low. As to the videos, it was noted that his response to aggression was higher than would be expected. It was also noted that the applicant was not happy with the violent scenes as it brought back bad memories of the offences. The general remarks recorded in his test results after 6 October 1997 was that his preferences were “non-deviant” given that his greatest responses was to adult females.

In a report dated 19 November 1997 a forensic psychologist from Albany prison assessed the applicant based on the PPG test results and other formal and informal assessment procedures. It was noted that the applicant did not have an "index" conviction including a sex offence, an index offence which included an unconvicted sex offence, a previous conviction for a sex offence nor any other indications that his sexual behaviour could, at any point, be deemed inappropriate. However, given the reasons for his recall, the report focussed upon behavioural trends present which may or may not imply a future sex offence. The test disclosed no strong indication that there were risk factors and indicated that he did not have a deviant PPG profile. In the circumstances, together with the absence of any indication of substance abuse or of any relevant previous convictions of note, the conclusion was that the applicant presented a low risk case of re-offending.

As to the items found in his possession prior to recall, this report noted they provided no substantive evidence on which to base a risk of re-offending. It was noted that the initial PPG assessment demonstrated a mysogynistic profile rather than one which is directly indicative of his deriving sexual pleasure from inflicting aggressive action upon others. Given this initial assessment, the second PPG test had been tailored to focus on that mysogynistic profile and the second test had indicated that his profile was non-deviant. The report therefore concluded that the principle concern in the applicant's case was his resentment of females rather than a pro-active desire to harm them for sexual gratification. As to the applicant's convictions, the psychologist noted that although there was an opportunity for, there was no evidence of, sexual interference with the victims. It was considered not insignificant that the victims were both women but the offences should not be considered for that reason sexual assaults. That psychologist did not consider the applicant a candidate for the SOTP. However, given the applicant's deep seated resentment of females in his life, it was highly recommended that the applicant continue the Enhanced Thinking Skills Programme he had begun and pursue other relevant treatment programmes.

B. Relevant domestic law and practice

A document entitled "Your questions and answers about the PPG" produced by the prison authorities reads as follows:

> "What is the PPG?
> It is a test that helps us to understand the direction and extent of a man's sexual interest.
>
> What is the point of the test?
> It is important for us to know if you are aroused inappropriately, as it will help us to tailor the treatment to best help you.
>
> How does it work?
> You will be asked to put a clip around your penis. You will be able to feel it in place but it will not hurt. The clip can detect changes in the size of your penis.
>
> Who will carry out the test?
> The test will be carried out by a trained psychologist. Your privacy will be respected at all times, and when you are undergoing the test you will be sitting alone in a separate room.

Do I have to do the test?
It is an important part of the Sex Offender Programme. We feel that we cannot successfully treat people's offending if we do not have full information about the nature and extent of their sexual interest.

What will I have to do?
After you have fitted the PPG clip you will sit in front of a television and you will be shown some pictures of males and females of various ages. You will also be shown some movies. The pictures you will be shown are the same for everybody, and nothing is more explicit than the kinds of things you might ordinarily see on the TV or in the newspapers.

Is it safe?
Every care is taken to ensure your safety. The equipment is made to very high standards and is regularly tested. It would be impossible for it to give you a shock - even in the unlikely event of something breaking down the voltages used are very low and quite safe. The equipment is fully sterilised every time it is used and so no diseases can be passed on.

Will I be given electric shocks.
No. Electric shock treatment IS NOT USED.

Are the results confidential?
The PPG is an important part of the Sex Offender Programme and it is important that the Tutors have as much information about the people on the programme as is possible. The programme staff however will NOT gossip about your results to other staff or to inmates.

What if the test shows an interest that does not exist?
Men can have an abnormal sexual interest for a lot of reasons, and just because they have an unusual interest it does not necessarily mean that they will act on it. But if someone has offended in a particular way and his PPG results show a sexual interest in that direction we know that to help him avoid further offending we must help him to do something about the sexual interest.

Can the PPG prove that I did (or didn't) commit an offence?
NO. It is not possible to say that someone is guilty of an offence simply because they show sexual interest in that direction. The point of a PPG is to help plan the treatment of someone who is known to have committed an offence."

COMPLAINTS

The applicant complains under Article 3 of the Convention about the PPG tests arguing that they constituted cruel, degrading and inhuman treatment and torture.

PROCEDURE

The application was introduced on 30 October 1996 and registered on 4 August 1997.

On 10 September 1998 the European Commission of Human Rights decided to communicate the applicant's complaint under Article 3 of the Convention, concerning the conduct of the PPG tests, to the respondent Government and to declare the remainder of the application inadmissible.

The Government's written observations were submitted on 18 January 1999, after an extension of the time-limit fixed for that purpose. The applicant replied on 23 March 1999.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

THE LAW

The applicant maintains that his participation in the PPG tests constituted treatment contrary to Article 3 of the Convention, which Article reads as follows:

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

In the first place, the Government describe the PPG test itself. They point out that the PPG test is used to assess the presence and severity of any sexual preferences which may be of relevance to the commission of offences. It is widely recognised as the most direct physiological index of sexual response and has been used for at least 20 years in research and clinical practice as a way of investigating male sexual preference and is widely used as part of assessment and treatment in Canada, New Zealand and the United States. The prison service in the England and Wales has undertaken over 400 assessments over the past 8 years. The SOTP is available in 25 establishments in England and Wales. Only 7 of these establishments have the facilities and equipment available to undertake PPG assessments and only 3 carry out these assessments as a matter of course. The Government submit (citing relevant studies) that the predictive value of the PPG assessments as regards future sexual offending is higher than any other psychological assessment. Measurement of other physiological indicators, such as heart rate and skin conductance, are not as satisfactory such factors being too responsive to non-sexual forms of arousal. Moreover, the PPG test is of particular use in measuring suitability for treatment where the rehabilitative treatment uses behavioural or cognitive behavioural techniques which is the type of treatment given in the SOTP. Such techniques rely for success on developing an understanding of the offending behaviour and providing the offender with strategies to avoid it.

The Government point out that the PPG test can identify and measure the causes of deviant arousal in individuals. In particular, research (also cited by the Government) has shown that this test can identify both gender and age preference, it can assess the degree to which men's sexual arousal is inhibited by victim distress and it can identify those rarer cases where men have a specific preference for coercive sex. For all these reasons the PPG test is particularly effective in both assessing with some precision an individual's suitability for the

SOTP and in tailoring the SOTP to that individual's needs. The absence of a PPG test would not prevent participation in the SOTP but judgments about suitability for that programme would have to be based on other less accurate evidence, and any programme subsequently followed would be less tailored to the individual's specific needs.

Secondly, the Government argue that the PPG assessment was carried out with the applicant's consent, a consent which was by no means academic. Whilst the failure to undergo the PPG assessment would have made his assessment for suitability for the SOTP more difficult, that would not have prevented him from progressing through the prison system. Moreover, the applicant did not raise any objections prior to or after the PPG tests in question.

Thirdly, and as to whether the tests constituted a violation of Article 3 of the Convention, the Government submit, with reference to the case-law of the Commission and the Court, that the applicant's treatment did not meet the threshold necessary for it to constitute degrading treatment within the meaning of Article 3 of the Convention. They note, in particular, that the PPG test was explained well in advance to the applicant so he had the opportunity to object if he wished and, rather than objecting, he consented to the tests taking place. Indeed the test was conducted, in part, at his own counsel's instigation during the DLP hearing in March 1996. In addition, it is observed that the applicant was not required to be completely naked; he attached the sensor to his own penis; the sensor would not have provided any stimulus to the applicant; the tests were conducted in private, he could have stopped them at any time, and the physical surroundings of the tests were not uncomfortable.

The Government also point out that the applicant has not produced any evidence to indicate that he suffered any physical discomfort or psychological ill effects and there is nothing to indicate that the applicant suffered or claimed that he was embarrassed or degraded at the time. Moreover, the assessment took place in a prison where day to day dignity is inevitably less complete than in society generally and the environment was one where a number of other prisoners would also be undergoing the same assessment so that the applicant would not have felt isolated in taking the test. The Government also argue that other inmates who have taken the tests did not report the same reactions as the applicant. Moreover, the Government point out that the images shown were of a type that might be publicised in the mass media and shown on terrestrial television, they were not hard core pornography or images that might cause offence in the minds of ordinary thinking people and they cannot be considered of a form that was likely to offend the applicant, given the nature of the sexually explicit fetish publication found in the applicant's possession immediately prior to his recall.

The Government further argue that the fact that the applicant was considered for inclusion in the SOTP was not because he was considered a sex offender, but rather because he was being considered for treatment to tackle the underlying causes of his offending behaviour which were considered at the time of his recall in 1995 possibly to be of a sexual nature. Professional advisors considering the applicant's case wished to carry out a clinical investigation to help establish whether these causes, in fact, existed.

The applicant underlines in his observations that he was not a sexual offender, has never been convicted of any sexual offences and any difficulties he had as regards his sexual identity had nothing to do with the offences for which he was convicted. His sexual identity issues were resolved in prison and he is a normal heterosexual now involved in a

heterosexual relationship for years. However, he was treated as a sexual offender in prison by, *inter alia*, his transfer to HM Albany prison which is a recognised sexual offender's prison. He also submits that the EEG findings relied upon by the trial judge should have been complimented by supplementary tests which had been, in fact, requested by a doctor prior to his trial. However, those additional tests were not carried out, leaving an unverifiable EEG scan as the basis for his discretionary life sentence imposed by the trial judge. The alleged abnormality shown up by this EEG scan was subsequently shown to be false by the numerous psychological and other tests conducted on him since his trial and prior to his release on licence. The material found in his possession prior to his recall, which was not in breach of any of his parole conditions, does not provide any basis to consider him as a sexual offender or someone in danger of committing sexual offences.

The applicant argues that the PPG assessment was not carried out even partly at his request as alleged by the Government. It was a suggestion of a forensic psychologist in a report submitted for the DLP review in March 1996. However, the applicant points out that that psychologist considers that anyone who attacks women is, by definition, a sex offender. Moreover, he submits that it is a known fact in prisons that a failure to co-operate in the PPG test once proposed will mean that one will not progress though the prison system towards open conditions and eventual release on licence, and the applicant claims that many persons within the prison system confirmed this to him orally. He did raise numerous relevant queries with the prison authorities prior to and after his transfer to HM Albany prison and he also orally objected to the PPG test thereafter. The applicant also considers it noteworthy that, on the one hand, the Government state that his consent was requested, necessary and obtained and yet, on the other hand, there was no standard consent form to be signed by him.

As to the Government's allegation that he should not have been shocked by the images shown during the PPG tests, he points out that it is only in recent years that terrestrial television was introduced into the prison system (he was in prison since 1983) and that the fetish magazine to which the Government refer was not sexually explicit. Contrary to the Government's suggestion, the applicant was appalled by the test and, in particular, by the rape scene, of which crime he had been a victim in his late teenage years. Moreover, the applicant considers it pertinent to note that the constant repeating of images of a sexual nature will necessarily produce a reaction from a person who has been locked up for approximately 14 years without female company or a sexual relationship. In such conditions, it is impossible to draw any clear conclusions from the sexual responses of the subject of the PPG test.

The Court considers that the applicant's complaint under Article 3 of the Convention is most appropriately considered in the context of the prohibition of “degrading treatment” and, in this respect, it recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative depending as it does on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. Ill-treatment may be considered degrading if it is such as to arouse in the victim feelings of fear, anguish and of inferiority capable of humiliating and debasing the victim and possibly breaking physical or moral resistance (Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, pp. 65-66, §§ 162 and 167). The absence of publicity surrounding the ill-treatment in question will not necessarily prevent it constituting treatment contrary to Article 3, since it may well suffice for a victim to feel humiliated in his or her own eyes (*mutatis mutandis* Tyrer v. the United Kingdom judgment of 25 April 1978, Series A no. 26, p. 16, § 32). Moreover, a measure considered to be a therapeutic necessity

cannot be considered degrading, the established principles of psychiatry and psychology being, in principle, decisive in such cases (*mutatis mutandis* Herczegfalvy v. Austria judgment of 24 September 1992, series A no. 244, pp. 25-26, § 82).

The parties do not agree on whether the applicant freely consented to the PPG tests. The Court considers that, whether or not the applicant could have refused to participate at any stage in the PPG tests, it would have been reasonable for him to believe that any such refusal would have significantly prejudiced and delayed his future release on licence given, in particular, the stated reasons for his recall. It is noted that the Government do not suggest that the applicant waived any of his rights under the Convention by so consenting.

The Court accepts that the applicant's participation in the tests was humiliating for him but the question to be decided is whether, given all the relevant circumstances of the case, the PPG assessments amounted to degrading treatment within the meaning of Article 3 of the Convention.

Although the psychiatric report of November 1983 did not point to a sexual motive for the offences and, consequently, neither did the trial court do so directly, the Court notes that the applicant was considered by the trial judge and by the appeal court as a danger to others. He was therefore given a discretionary life sentence which meant that he would be released only when the relevant professionals were satisfied that the danger no longer persisted. It is also noted that the Court of Appeal described the attacks on the women as "horrifying". The psychological and psychiatric experts who advised prior to the applicant's release in 1995 did not conclude that his significant sexual identity issues were the sole and direct cause of his offending, but clearly considered that those issues were closely associated with the applicant's offending behaviour. However, they were of the view that the applicant had made sufficient progress on these and other matters to allow his release on licence. The probation officer's report of 16 August 1995 expressed reservations about his release and considered that previous reports had found the applicant's sexual confusion to have been one of the main factors in his offending. Subsequently, many items found in his possession on release were considered inappropriate in the light of the same sexual identity issues.

In March 1996 the DLP then concluded, on the basis of further expert evidence and pleadings, that the applicant should be assessed in detail (including the PPG test) with a view to establishing as precisely as possible the factors motivating his offending behaviour and, in turn, any necessary treatment and future release possibilities. The authorities did not proceed with the PPG test on the applicant's initial detention in 1983, or immediately prior to his release in 1995, but rather relied on alternative and less invasive forms of assessment until the applicant's behaviour on licence demonstrated that further and more precise analysis by way, *inter alia*, of the PPG test had become necessary. Moreover, the applicant was aware prior to the test of the diagnostic aim of that test and he has not submitted any material to contest the Government's submissions on the recognised diagnostic value of the PPG tests. Accordingly, the Court is satisfied that the authorities reasonably considered that a PPG evaluation was necessary before deciding the appropriate future therapeutic treatment of the applicant. The Court observes that the applicant had to undergo a second PPG assessment but notes that this was aimed at a particular problem area perceived during the first PPG test. As to the conditions of the PPG testing process itself, the Court considers that, while it may have been more reasonable for the test to have been conducted by a male technician, this element is not sufficient, of itself, to render the treatment in question degrading.

Accordingly, the Court does not consider that conducting the PPG assessments on the applicant constituted degrading treatment within the meaning of Article 3 of the Convention. This complaint is, accordingly, manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

For these reasons, the Court, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

S. Dollé
Registrar

J.-P. Costa
President