AS TO THE ADMISSIBILITY OF

Application No. 37231/97
by Michael John TOOMEY
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 10 September 1998, the following members being present:

MM M.P. PELLONPÄÄ, President
N. BRATZA
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
Mrs J. LIDDY
MM L. LOUCAIDES
B. MARXER
B. CONFORTI
I. BÉKÉS
G. RESS
A. PERENIČ
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs M. HION
Mr R. NICOLINI

Mrs M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 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 report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen, born in 1958 and he is currently in prison in HMP Albany, in the Isle of Wight.

A. Particular circumstances of the case

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

On 1 December 1983 the applicant pleaded guilty to assault occasioning actual bodily harm and to wounding with intent. He received a life sentence on the latter charge and no separate sentence on the former. 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 noted the facts surrounding the two convictions (two serious assaults on women) and that the applicant had, at first, denied the attacks but 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.

It appears that release on licence was rejected by the Discretionary Lifer panel of the Parole Board in March 1996. Certain investigations were requested by that panel including a full neurological and neuro-psychological assessment together with an EEG and a CAT scan.

By letter dated 31 October 1996 from the Home Office, the Home Secretary rejected the applicant's request to refer the matter of his sentence back to the Court of Appeal. In that letter it was explained that the appropriate sentence in any given case is, within the limits laid down by law and subject to the right of appeal, entirely for the courts to decide in light of all the circumstances of the offence and the offender. Therefore, it is "only in the most exceptional circumstances" that the Home Secretary would consider it right to refer a sentence to the Court of Appeal which a court, in accordance with law, saw fit to impose."

Having received notification of his transfer to HMP Albany, the applicant formally requested in July 1997 clarification from the prison authorities of whether he was being transferred to Albany prison to take part in a Sex Offender Treatment Programme (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. In or around late 1997 he underwent the Penile Polygraph (PPG) test on two occasions, which tests it appears were part of the assessment of the need for the applicant to take part in the SOTP.

The applicant claims that a female operator conducted the tests and that the tests were conducted as follows: He was put in a room and 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. He then had to attach a clip onto his penis and leave his underpants and trousers at knee level throughout the test.

He was shown slides of young boys, young girls, men and women who were all naked and in different poses. The ages of the boys and girls were between 7 years and teenage years. The adults in the slides were in their mid-thirties and forties. The slides were left on for about 20 seconds and each was shown approximately six times. He was also shown three videos; one of consensual sex, another of a rape scene in a flat and one of a violent attack on a woman. 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. This part of the test lasted an hour and a half. 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.

The second PPG test, conducted subsequently and on a different day, lasted one hour. The applicant was shown slides only and these were of young 'body-builder type' men in their twenties all with erections and in different positions and of young and old women in explicit poses including bondage scenes. Again the slides were each shown six times and in no particular order.

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 makes a number of complaints relating to the conduct and result of his trial and appeal, about surveillance by police and his questioning by police before his trial, about the medical evidence before the trial court and about the sentence imposed.

He also complains about the Penile Polygraph ("PPG") tests to which he had to submit, arguing that the PPG test amounts to cruel, degrading and inhuman treatment and to torture. The applicant claims that his consideration for parole was conditional on his participation in the PPG tests.

THE LAW

1. In the first place, the applicant makes a number of complaints relating to pre-trial matters, his trial, conviction, sentence and appeal. However, the Commission is not required to decide whether or not these complaints disclose any appearance of a violation of the Convention because they are, in any event, inadmissible for the reasons set out below.

The Commission recalls that Article 26 of the Convention provides that the Commission may only consider a matter introduced within a period of six months from the date on which the final domestic decision was taken. Even assuming that the applicant's appeal to the Court of Appeal can be considered to have been an effective remedy in relation to all of these complaints, the judgment of that court is dated 7 June 1984 whereas the above complaints were introduced at the earliest on 30 October 1996. The Commission observes that the Secretary of State subsequently rejected the applicant's request to have the matter referred back to the Court of Appeal by letter dated 31 October 1996. However, a procedure directed towards re-opening a case which depends on leave granted at the discretion of a public authority cannot be taken into consideration for the purpose of applying the six-month time-limit set down by Article 26 of the Convention (see, for example, No. 9136/80, Dec. 10.7.81, D.R. 26, p. 242 and No. 14545/89, Dec. 9.10.90, D.R. 66, p. 238).

In such circumstances, these complaints of the applicant have been introduced outside of the time-limit set down by Article 26 of the Convention and must be declared inadmissible pursuant to Article 27 para. 3 of the Convention.

2. The applicant also complains that the PPG tests conducted on him for the purposes of his assessment for the Sex Offender Treatment Programme were, inter alia, cruel, inhuman and degrading treatment. He claims that he had no choice but to participate in them as without such participation he would not have been considered for parole.

The Commission has noted the applicant's description of the tests conducted on him together with the terms of the explanatory notice of the authorities in relation to the PPG tests. The Commission finds that these complaints raise complex issues of fact and law under Article 3 the Convention. However, it considers that it cannot, on the basis of the file, determine the admissibility of these complaints and that it is therefore necessary, in accordance with Rule 48 para. 2 (b) of the Commission's Rules of Procedure, to give notice of the application to the respondent Government.

For the these reasons, the Commission

ADJOURNS the applicant's complaints as regards the PPG tests; and unanimously
DECLARES INADMISSIBLE the remainder of the application.

M.F. BUQUICCHIO
Secretary
to the First Chamber

M.P. PELLONPÄÄ
President
of the First Chamber