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. 36946/03
by Brian UTTLEY
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 29 November 2005 as a Chamber composed of:

Mr J. CASADEVALL, *President*,
Sir Nicolas BRATZA,
Mr M. PELLONPÄÄ,
Mr R. MARUSTE,
Mr K. TRAJA,
Ms L. MIJOVIĆ,
Mr J. ŠIKUTA, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 11 October 2003,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Brian Uttley, is a British national who was born in 1933 and lives in Leeds. He was represented before the Court by Mr S. Creighton of Messrs Bhatt Murphy, solicitors in London.

A. The circumstances of the case

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

The applicant committed a series of sexual offences before 1983: three rapes, six indecent assaults, one act of sexual intercourse with a girl under sixteen, four acts of gross indecency with a child, and three offences involving photographs or pseudo-photographs of a child. He was tried and convicted in 1995, and on 24 October 1995 was sentenced to 11 years' imprisonment on one count of rape and to two periods of 9 years' imprisonment on the other two counts. On each of the six counts of indecent assault on a woman he was sentenced to two years' imprisonment. On the count of sexual intercourse with a girl under the age of sixteen he was sentenced to one year's imprisonment, and on three of the counts of committing gross indecency with a child he was sentenced to 18 months' imprisonment, and on the other to 12 months' imprisonment. On the count relating to the taking of the indecent photograph of a child he was sentenced to one year's imprisonment and he was also sentenced to one year's imprisonment on one of the two counts relating to distribution of such a photograph. All the above periods of imprisonment were to run concurrently. In respect of the second of the counts relating to distribution of such a photograph he was sentenced to one year's imprisonment to run consecutively to the other offences. The overall effect was that he was sentenced to a total of 12 years' imprisonment. No appeal against sentence was made.

At the time when the applicant committed the various acts, they all constituted offences under their respective statutory provisions, and at that same time the court would have been entitled to impose periods of imprisonment for the offences which exceeded the periods actually imposed in 1995. In particular, by reason of section 34(3) of, and § 1(a) of Schedule 2 to, the Sexual Offences Act 1956, the maximum sentence for rape in 1983 was life imprisonment. The maximum sentence at the time for distributing an indecent photograph or pseudo-photograph of a child was three years' imprisonment. The position remained the same for both offences in 1995.

At the time the applicant committed the offences the combined effect of section 25(1) of the Prison Act 1952, rule 5 of the Prison Rules 1964 and section 60 of the Criminal Justice Act 1967 meant that a person sentenced to 12 years' imprisonment would have been entitled, provided he had been of good behaviour, to be released when he had completed two thirds of his sentence, and the sentence would then have expired. Release on licence would have been possible after expiry of one third of the sentence, that is, after four years.

As a result of the relevant provisions of Criminal Justice Act 1991, which entered into force in 1992, release on licence is an entitlement after two thirds of the sentence, and the licence remains in force until the expiry of three quarters of the sentence. In the applicant's case, this meant that he was released on licence on 24 October 2003, when he had completed two thirds

of his 12 year sentence, and the licence remained in force until 24 October 2004. During that period, he was liable to be recalled to prison if he failed to comply with the conditions. After the end of the licence period, he could be required to serve, in whole or in part, the remainder of the 12 year sentence if convicted of an imprisonable offence.

The applicant took the view that the changes brought about by the Criminal Justice Act 1991, which had the effect of imposing licence conditions on release for an additional year, with a continuing residual liability to serve the outstanding term if convicted of further offences, amounted to a heavier penalty than the one that was applicable at the time the criminal offences were committed. On 19 December 2002 he therefore applied for judicial review on that ground, referring to Article 7 of the Convention.

The claim was considered by Mr Justice Moses in the High Court on 8 April 2003. Moses J held that the purpose of the licence was "to enable the prisoner to stay out of trouble for his own benefit and for the benefit of the community ... True it is that, if he breaches the licence, he is at risk of recall, but the licence is itself designed to avoid the risk of further offences and a return to prison". The court held that the imposition of a licence as part of the sentence did not amount to a penalty, and dismissed the claim.

On 4 July 2003 the Court of Appeal held that Article 7 had been violated and made a declaration that the relevant sections of the 1991 Act were incompatible with the applicant's Article 7 rights. Lord Justice Pill stated:

> "... a sentence which includes a period of licence inevitably extending beyond two thirds of the term imposed is, in my judgment, a heavier penalty than a sentence without that requirement. The fiction that the penalty is one of 12 years in custody in each case must not be allowed to obscure the reality of the effects of the licence. While licence conditions vary, and in some cases will be more onerous than others, it is not and cannot be disputed that conditions will inevitably be imposed which are impediments on the offender's freedom of action. Moreover, the conditions create a potential liability to serve a further substantial period in custody, as to the provisions dealing with the effects of reconviction. Arguments that the purpose of the licence conditions is rehabilitative and preventative, as they undoubtedly are, do not detract from their onerous nature when viewed as part of the sentence. Whatever the purpose, the effect is onerous."

In the House of Lords, the Secretary of State made four principal contentions:

- That the penalty imposed was well within the maximum allowed by law in 1983;
- That the applicant was complaining about early release provisions, which concern the administration of sentences and are not covered by Article 7;
- That the trial judge was required, by a Practice Statement which was issued on the day when the 1991 Act came into force (*Practice Statement:*

(Crime: Sentencing) [1992] 1 WLR 948[1]), to take changes in early release provisions into account when sentencing, and

- That licensing provisions are not a penalty, but are designed to assist the offender in his rehabilitation and to protect the public against the risk of his re-offending.

The House of Lords allowed the Secretary of State's appeal on 22 July 2004. Referring to *Coëme and Others v. Belgium* (nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII), the Lords considered that the contention that they had to resolve was whether the word "applicable" in the second sentence of the first paragraph of Article 7 referred to the sentence that would have been actually applied at the time, or the maximum sentence that was available in law. They concluded that Article 7 only prohibited a retrospective increase in the maximum penalty that was available following conviction and not a particular penalty that might be awarded within that maximum. Lord Phillips summarised the position thus:

> "It follows that Article 7 § 1 will only be infringed if a sentence is imposed on a defendant which constitutes a heavier penalty than that which **could** have been imposed on the defendant under the law in force at the time the offence was committed ... The maximum sentence that could be imposed for rape at the time the respondent committed the rapes for which he was committed was life imprisonment. That was the applicable penalty for the purposes of Article 7 § 1. The sentence of 12 years imposed on the respondent would seem manifestly a less heavy penalty than life imprisonment."

B. Relevant domestic law and practice

The position before the Criminal Justice Act 1991

Prison Act 1952, section 25(1)

> "Rules made under section 47 of this Act may make provision whereby, in such circumstances as may be prescribed by the rules, a person serving a sentence of imprisonment for such a term as may be so prescribed may be granted remission of such part of that sentence as may be so prescribed on the ground of his industry and good conduct, and on the discharge of a person from prison in pursuance of any such remission as aforesaid his sentence shall expire."

[1] "From 1 October 1992, it will be necessary, when passing a custodial sentence in the Crown Court, to have regard to the period likely to be served, and as far as practicable to the risk of offenders serving substantially longer under the new regime than would have been normal under the old"

Prison Rules 1964 - Rule 5

"(1) A prisoner serving a sentence of imprisonment for a term of more than one month may, on the ground of his industry and good conduct, be granted remission in accordance with the provisions of this Rule:

Provided that nothing in this Rule shall authorise the reduction of the term which the prisoner is serving to less than 31 days.

(2) Remission granted under this Rule shall not exceed one-third [of the sentence] ... .

(...)

(4) This Rule shall have effect subject to any disciplinary award of forfeiture of remission and shall not apply –

(...)

(b) to a prisoner serving a sentence of imprisonment for life."

In practice, remission was invariably granted of a period of one third of the sentence, subject to the power of a governor to award loss of remission for commission of a disciplinary offence.

Criminal Justice Act 1967 - section 60

"(1) The Secretary of State may, if recommended to do so by the Parole Board, release on licence a person serving a sentence of imprisonment, other than imprisonment for life, after he has served not less than one third of his sentence or twelve months thereof, whichever expires the later."

The position after the Criminal Justice Act 1991

A long term prisoner (that is, a prisoner serving four years or more) is entitled to apply for early release once he has served half (not one third) of his sentence (section 35 of the Criminal Justice Act 1991 ("the 1991 Act").

By section 33 (2) of the 1991 Act, a long term prisoner is entitled to be released as soon as he has served two thirds of his sentence. Such a prisoner must be released on licence, and the licence (like a licence under section 35 of the 1991 Act) remains in force until the expiry of three quarters of the sentence.

A long term prisoner who is released on licence and recalled must be re-released as soon as he has served three quarters of the sentence (section 33(3)).

Section 116 of the Powers of Criminal Courts (Sentencing) Act 2000, which replaces section 40 of the 1991 Act, empowers a court to make an order returning an offender to custody to serve the balance of his sentence if he commits an offence after his release but before the date on which the sentence would have been served in full.

COMPLAINT

The applicant complained that there had been a breach of Article 7 of the Convention resulting from his release at the two thirds point of his sentence on licence. He underlined that the Court of Appeal found that a sentence incorporating a condition that release will be on licence is a harsher sentence than one which provides for unconditional release, and he notes that that finding was not overturned by the House of Lords. The question for determination is therefore whether the protection of Article 7 § 1 prohibits retrospective increases in actual sentences imposed, or whether it only prohibits retrospective increases in the maximum penalties that can be imposed.

THE LAW

The applicant alleged a violation of Article 7 of the Convention. Article 7 § 1 provides as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

Article 7 embodies, *inter alia*, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (see *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII).

When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law and implies qualitative requirements, including those of accessibility and foreseeability (see the *Cantoni v. France* judgment of 15 November 1996, *Reports* 1996-V, p. 1627, § 29; and the *S.W. and C.R. v. the United Kingdom* judgments of 22 November 1995, Series A nos. 335-B and 335-C, pp. 41-42, § 35, and pp. 68-69, § 33, respectively). The Court must therefore verify that at the time when an accused person performed the act which led to his being

prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision (see *Murphy v. the United Kingdom*, application no. 4681/70, Commission decision of 3 and 4 October 1972, Collection 43, p. 1). Since the term "penalty" is autonomous in scope, to render the protection afforded by Article 7 effective the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see *Welch v. the United Kingdom*, judgment of 9 February 1995, Series A no. 307-A, p. 13, § 27).

All the offences of which the applicant was convicted were in force when he committed them. No issue arises in connection with the first sentence of Article 7, or in connection with the general requirement of lawfulness which forms part of Article 7 (see in this connection, for example, *Gabarri Moreno v. Spain*, no. 68066/01, §§ 32, 33, 22 July 2003, in which in the circumstances of the case the penalty imposed on the applicant was greater than that foreseen by the legislation).

The Court must determine whether a "heavier penalty" was imposed on the applicant than the one which was "applicable" at the time he committed the offences.

In the case of *Welch v. the United Kingdom* (cited above, §§ 27–35), the Court took as a starting point, in determining whether a "penalty" had been imposed, whether the measure in question was imposed following conviction for a "criminal offence". It then proceeded also to discuss the nature and purpose of the measure, its characterisation in domestic law, the procedures involved, and the severity of the measure. In that case, which concerned confiscation orders made pursuant to legislation which was passed after the offences in question had been committed, the retrospective effect of the legislation was uncontested, and the Court found that the confiscation order amounted to a "penalty". There had therefore been a violation of Article 7. A similar approach was taken in the case of *Jamil v. France* (judgment of 8 June 1995, Series A no. 317-B, §§ 30, 31).

In the present case, the "penalties" foreseen by law for the offences committed by the applicant were the various sentences of imprisonment imposed by the trial judge, and not challenged by the applicant on appeal. The applicant spent eight years in detention, which is just two thirds of the overall sentence of twelve years' imprisonment imposed by the trial judge.

The essence of the applicant's complaint is that the change in the regime for early release, brought about by the 1991 Act, was a further, or additional, "penalty" within the meaning of Article 7 of the Convention, over and above the "penalty" which was applicable at the time the applicant committed the offences in or before 1983.

The Court recalls that the former Commission considered amendments to a parole regime in the case of *Hogben v. the United Kingdom* (no 11653/85, Commission decision of 3 March 1986, Decisions and Reports (DR) 46 p. 231). In that case, as a result of a change in the policy on release on parole, the applicant was transferred from open to closed prison, and had to serve a substantially longer time in prison that would otherwise have been the case. In answering his Article 7 complaint, the former Commission held:

> "3. The Commission recalls that the applicant was sentenced to life imprisonment in 1973 for committing a murder in the course of a robbery. It is clear that the penalty for this offence at the time it was committed was life imprisonment and thus no issue under Article 7 arises in this respect.
>
> 4. Furthermore, in the opinion of the Commission, the "penalty" for purposes of Article 7 § 1 must be considered to be that of life imprisonment. Nevertheless it is true that as a result of the change in parole policy the applicant will not become eligible for release on parole until he has served 20 years' imprisonment. Although this may give rise to the result that his imprisonment is effectively harsher than if he had been eligible for release on parole at an earlier stage, such matters relate to the execution of the sentence as opposed to the "penalty" which remains that of life imprisonment. Accordingly, it cannot be said that the "penalty" imposed is a heavier one than that imposed by the trial judge."

That decision was confirmed in the case of *Grava*, in which the Court found that a refusal to reduce the applicant's sentence related to questions of enforcement of the sentence, rather than to the "penalty", and as such fell outside the scope of Article 7 (*Grava v. Italy*, no. 43522/98, § 51, 10 July 2003).

The "measure" in the present case, the application of the rules on early release, was not a "measure" in the sense understood by the Court in the case of *Welch*, and was not "imposed" at all, but was part of the general regime applicable to prisoners. The nature and purpose of the "measure", far from being punitive, were to permit early release, and they cannot be considered as inherently "severe" in any ordinary meaning of the word.

Although, as the Court of Appeal found in the present case, the licence conditions imposed on the applicant on his release after eight years can be considered as "onerous" in the sense that they inevitably limited his freedom of action, they did not form part of the "penalty" within the meaning of Article 7, but were part of the regime by which prisoners could be released before serving the full term of the sentence imposed.

Accordingly, the application to the applicant of the post-1991 Act regime for early release was not part of the "penalty" imposed on him, with the result that no comparison is necessary between the early release regime before 1983 and that after 1991. As the sole penalties applied were those imposed by the sentencing judge, no "heavier" penalty was applied than the one applicable when the offences were committed.

It follows that the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, and that it must be declared inadmissible pursuant to Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Josep CASADEVALL
President