AS TO THE ADMISSIBILITY OF

Application No. 21387/93
by David WATSON
against the United Kingdom

The European Commission of Human Rights sitting in private on 21 October 1996, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
L. LOUCAIDES
M.P. PELLONPÄÄ
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 14 April 1992 by David WATSON against the United Kingdom and registered on 16 February 1993 under file No. 21387/93;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 13 March 1995 and those of the applicant submitted on 19 January 1996.

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen, was born in 1942, is currently in prison in Devon and is represented before the Commission by B. M. Birnberg, Solicitors practising in London. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Particular circumstances of the case

In April 1975 the applicant was sentenced to a term of discretionary life imprisonment for four offences of buggery of boys aged between 12 and 15. He also received a fixed sentence of 7 years. He appealed unsuccessfully against his life sentence to the Court of Appeal. The Court of Appeal commented that the applicant was better off with a discretionary life sentence than with a fixed sentence.

In 1978 the Joint Committee considered the applicant's case for the first time and decided to review the matter again in March 1984. The Home Office referred the matter to the Joint Committee again in August 1983 when the Joint Committee recommended that the case be referred to the Local Review Committee in August 1985. That latter committee found that the applicant was not fit to be given a provisional release date.

In March 1986 the Minister of State consulted the trial judge and the Lord Chief Justice. The trial judge urged that the applicant not be released "unless there are the strongest grounds for believing he is no longer a menace to boys". The Lord Chief Justice considered that there was no doubt that the applicant would remain a menace to any available boy for some time to come but that it did not seem right to keep him in prison until he lost his libido. He concluded that "At a guess I would suggest 15 years as a minimum. He is intelligent enough to know what will happen if he is caught again". Having considered the papers, the Minister of State set the applicant's tariff at 15 years. The applicant was not informed of these developments. The Parole Board examined the applicant's case in June 1986. They concluded that he still represented a very clear risk of re-offending and they recommended that he should be transferred to Category C conditions with a review two years after the transfer.

On 1 October 1992 section 34 of the Criminal Justice Act 1991 came into force. As part of the certification process envisaged by paragraph 9 of Schedule 12 of that Act, the applicant was informed by certificate dated 29 July 1992 that section 34 applied to his case, that his tariff was 15 years and that it had accordingly expired in September 1989. The applicant submits that he had known informally of the tariff for a number of months previously. On 28 August 1992 the applicant was informed that his case had been referred to the Parole Board and that it would be considered by a Discretionary Lifer Panel in January 1993. Following a hearing on 19 January 1993 by that panel (which by then had the power to direct the applicant's release pursuant to the 1991 Act), a direction was given for the applicant's release.

Accordingly, the applicant was released on licence on 1 February 1993. However, he was subsequently recalled to prison and he has introduced another application to the Commission in relation to his recall and subsequent detention. B. Relevant domestic law and practice

1. Prior to 1 October 1992

Pursuant to section 61 of the Criminal Justice Act 1967 the power to release on licence a person sentenced to life imprisonment lay with the Secretary of State. He could release a prisoner on licence if recommended to do so by the Parole Board and after consultation with the Lord Chief Justice and the trial judge if available. The consultation with the judiciary related to the requirements of retribution and deterrence (the tariff) and to risk assessment.

The Joint Committee, made up of representatives of the Parole Board and the Home Office, was set up in 1973 and its purpose was to recommend to the Home Secretary in each life sentence case a date for the first formal review by the Local Review Committee and thereafter

by the Parole Board. The Joint Committee's consideration of the timing of the first review normally took place when the prisoner had been detained for about three years. When release seemed a realistic possibility (for example, when the Joint Committee had recommended that it was an appropriate time for the case to be referred to the Parole Board), the Secretary of State would seek the views of the judiciary.

Pursuant to section 59 of the 1967 Act, the Secretary of State established for every prison a Local Review Committee with the function of advising him on the suitability for release on licence of prisoners. It was the practice for this assessment to take place before referring the matter to the Parole Board. Before the Local Review Committee reviewed a case, a member of that committee was to interview the prisoner if he was willing. (Local Review Committees were abolished by the Parole Board Rules 1992.)

In 1983 the then Home Secretary announced a change in the tariff setting procedures whereby the Home Secretary would seek the judiciary's views on tariff usually after the prisoner had been detained for three years and the first review by the Local Review Committee normally took place three years before the expiry of the tariff at which stage the judiciary would again be consulted.

In March 1987 the Court of Appeal gave judgment in the Hanscomb case (R v. Secretary of State for the Home Department ex parte Hanscomb and Others [1988] 86 Cr. Rpts 59). It was decided that the Home Secretary's consultation with the judiciary should take place as soon as possible after sentencing. In addition, the tariff should correspond strictly to the punitive fixed-term sentence that would be imposed by way of punishment alone (taking account of a notional period which would be remitted due to good behaviour).

Following this judgment, the Home Secretary issued a policy statement in 1987 stating that the date of the first formal review would be fixed in accordance with the judicial view of the requirements of retribution and deterrence. The judgment in the case of McCartney (judgment of the Court of Appeal of 19 May 1994) which followed noted that it would be "surprising" if Parliament intended the Secretary of State to have a wholly unfettered discretion to set whatever tariff he thought fit in the light of his own view on deterrence and retribution because that would be contrary to the declared policy in 1987 that the Secretary of State would accept the views of the judiciary.

2. After 1 October 1992

Following the judgment of the Court in Thynne, Wilson and Gunnell (Eur. Court HR, Thynne, Wilson and Gunnell v. the United Kingdom judgment of 25 October 1990, Series A no. 190), the Criminal Justice Act 1991 ("the 1991 Act") came into force on 1 October 1992.

The 1991 Act instituted changes to the regime applicable to the release of discretionary life prisoners. Pursuant to section 34 of the 1991 Act, the tariff of a discretionary life prisoner is fixed in open court by the trial judge after conviction. After the tariff has expired, the prisoner may require the Secretary of State to refer his case to the Parole Board which has the power to order his release if it is satisfied that it is no longer necessary for the protection of the public that he be detained.

Under paragraph 9 of Schedule 12 to the 1991 Act, which is a transitional provision of that Act, the Secretary of State can apply the provisions of section 34 to discretionary life prisoners who were sentenced before the Act came into force. This is done by issuing a certificate stating that, if the 1991 Act had been in force when the person was sentenced, section 34 would have applied.

Three members of the Parole Board are appointed by that board's

chairman to consider discretionary life cases and they constitute a Discretionary Life Panel ("DLP"). Pursuant to the Parole Board Rules 1992 (which came into effect on 1 October 1992) a prisoner before the DLP is entitled to, inter alia, an oral hearing before the DLP, to have relevant papers (including prison reports) in advance of the hearing, to comment on the evidence in advance of the hearing, to attend the hearing, to be legally represented and to be legally aided if he qualifies under the normal rules. A prisoner can also apply to call witnesses on his behalf and to cross-examine other witnesses who have written reports about him. A reasoned decision by the DLP is delivered within seven days of the hearing.

COMPLAINTS

1. The applicant complains that he was unlawfully deprived of his liberty. He also complains about the manner in which his tariff was fixed and about the length of that tariff period. He invokes Article 5 paras. 1, 4 and 5 and Article 6 para. 1 of the Convention.

2. The applicant also complains that the review procedure applicable after the expiry of his tariff did not conform with Article 5 para. 4 of the Convention as it was neither speedy nor conducted by a body satisfying the requirements of that provision. He also invokes Article 5 para. 5 of the Convention in this respect.

3. The applicant further complains about not being released from prison in order to pursue his complaint before the Commission. He also submits that the decision of the Commission dated 30 August 1994 should be re-opened in light of his initial lack of legal representation before the Commission, the subsequent inadequate nature of his legal representation and on the basis of certain evidence which has come to light.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 14 April 1992 and was registered on 16 February 1993.

On 30 August 1994 the Commission decided to communicate to the respondent Government the applicant's complaints concerning the review procedure applied to the applicant as a discretionary life prisoner and the role played by the executive in fixing the applicant's tariff and to declare the remainder of the application inadmissible.

The Government's written observations were received on 13 March 1995 after two extensions of the time-limit fixed for that purpose.

On 13 April 1995 the Commission granted the applicant legal aid and the applicant's observations were received on 19 January 1996 after two extensions of the time-limit fixed for that purpose.

THE LAW

1. The applicant complains under Article 5 paras. 1, 4, 5 and Article 6 para. 1 (Art. 5-1, 5-4, 5-5, 6-1) of the Convention about the lawfulness of his original detention. He also complains under these Articles about the manner in which his tariff was fixed and about the length of that tariff period.

Article 5 (Art. 5), insofar as relevant, reads as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a

competent court...

4. 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.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

Article 6 para. 1 (Art. 6-1) provides, insofar as relevant, as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

At the outset the Commission notes the announcement of the Home Secretary in 1983, the judgment in the Hanscomb case (R v. Secretary of State for the Home Department ex parte Hanscomb and Others [1988] 86 Cr. Rpts 59) and the subsequent announcement of the Home Secretary in 1987. Insofar as these developments may give rise to an issue as to non-exhaustion of domestic remedies, the Commission recalls that it is its normal practice, where an application has been communicated to the respondent Government in part or as a whole, not to declare the relevant complaint inadmissible for failure to exhaust domestic remedies unless this matter has been raised by the Government in their observations (No. 23924/94, Dec. 27.6.96, unpublished).

In the present case, the Government have not objected to the admissibility of the complaint on grounds of non-exhaustion of domestic remedies and, accordingly, the Commission finds that the application cannot be declared inadmissible on such grounds.

As to the substance of the complaints, the Government submit that the determination of the criminal charges against the applicant took place at his original trial by the imposition of the life sentence since it was the life sentence which provided the justification for the subsequent tariff. Any period fixed by the executive as a tariff was imposed as a direct consequence of the sentence of life imprisonment imposed by the sentencing court which court was fully aware that the tariff would be fixed by the executive after consultation with the judiciary. The Government also argue that, in any event, the safeguards (particularly the fixing of the tariff in accordance with judicial advice) inherent in the tariff fixing system were sufficient to assure the fairness requirements of Article 6 para. 1 (Art. 6-1) of the Convention.

The applicant maintains that the Convention organs recognise that the determination of the sentence constitutes as much a part of the determination of the criminal charge as the finding as to guilt or innocence. Accordingly, the fixing by the Home Secretary of the tariff period amounted to a determination of the length of the punitive period of the applicant's sentence and, as such, Article 6 para. 1 (Art. 6-1) of the Convention is clearly applicable. However, his tariff was fixed secretly by the executive, approximately eleven years after the trial. He had no opportunity to comment and no hearing. He was not copied with any reports, the advice of the judiciary or informed that his tariff had been fixed or even expired. He also refers to expert evidence in arguing that a tariff of 15 years (equivalent to a 22 and a half year sentence) was excessive.

These matters, according to the applicant, demonstrate a violation of Article 6 para. 1 (Art. 6-1) of the Convention as regards the fixing and length of his tariff. The applicant argues, in the

alternative, that the tariff-fixing exercise attracts the safeguards of Article 5 para. 4 (Art. 5-4) of the Convention which guarantees were clearly not satisfied by that procedure and that the absence of any enforceable right to compensation for the unjustifiably long tariff gives rise to a violation of Article 5 para. 5 (Art. 5-5) of the Convention. The applicant maintains his complaint under Article 5 para. 1 (Art. 5-1) of the Convention as to the unlawfulness of his detention.

The Commission finds, in the light of the parties' submissions, that this part of the application raises complex and serious issues under the Convention which require determination on their merits. It follows that it cannot be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring it inadmissible has been established.

2. The applicant also complains that, following the expiry of his tariff in 1989, he did not have available a speedy review of the lawfulness of his continued detention by a court-like body, as required by Article 5 para. 4 (Art. 5-4) of the Convention. He also claims that he did not have an enforceable right to compensation.

As far as the "speediness" of the review is concerned the Government consider that only the period after the Court's judgment in the case of Thynne, Wilson and Gunnell (Eur. Court HR, Thynne, Wilson and Gunnell v. the United Kingdom judgment, loc. cit.) can be considered as the relevant period since after that judgment the applicant could have taken his own application before the Commission in order to establish his rights under Article 5 para. 4 (Art. 5-4) of the Convention.

In addition, the Government refer to the complexity and breadth of the changes necessary following the above-mentioned judgment in the Thynne, Wilson and Gunnell application involving introducing primary legislation, dealing with a backlog consisting of an exceptionally large number of cases to whom the new arrangements applied and to large administrative changes required. The effect was that it took over three months after the coming into force of the 1991 Act for the applicant's review to take place which, in the opinion of the Government, was sufficiently swift for the purposes of Article 5 para. 4 (Art. 5-4) of the Convention.

As to the character of the reviewing body, the Government refer to section 34 of the 1991 Act and the procedural rules made under that Act which answer the problems noted by the Court in the Weeks judgment as regards the Parole Board (Eur. Court HR, Weeks v. the United Kingdom judgment of 2 March 1987 Series A Nos. 114). Accordingly, the applicant's review on 19 January 1993 under the system set up by the 1991 Act constituted a review by a court-like body within the meaning of Article 5 para. 4 (Art. 5-4) of the Convention.

The Government therefore submit that these complaints disclose no violation of Article 5 para. 4 (Art. 5-4) or, consequently, of Article 5 para. 5 (Art. 5-5) of the Convention.

The applicant maintains that he was deprived of a speedy determination of the lawfulness of his detention (pointing to a delay between September 1989 and 19 January 1993) by a body satisfying the requirements of article 5 para. 4 (Art. 5-4) of the Convention. As to the speediness of the review and the character of the reviewing body the applicant refers to the E v. Norway case (Eur. Court HR, E. v. Norway judgment of 29 August 1990, Series A no. 181-A) and to the above-mentioned cases of Weeks and Thynne, Wilson and Gunnell as regards the absence of a court-like body.

The Commission finds that, in the light of the parties' submissions, this aspect of the case also raises serious issues of fact and law under the Convention which require determination on their

merits. It follows that it cannot be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring it inadmissible has been established.

3. The applicant also complains about not being released from prison in order to pursue his complaint before the Commission. He also submits that the decision of the Commission dated 30 August 1994 should be re-opened on the basis that he did not have legal representation before the Commission for a long period of time, that his legal representative when appointed did not adequately represent him and on the basis of evidence which has recently come to light.

The Commission has considered the applicant's complaints about his conducting his application to the Commission from prison under Article 25 (Art. 25) of the Convention. However, the Commission considers that there is no evidence that the applicant was prevented in any way by the prison authorities from making his submissions to the Commission. In addition, Article 25 (Art. 25) of the Convention does not guarantee the right to be released from prison while conducting such an application. Accordingly, the Commission considers that no action is required to be taken under Article 25 (Art. 25) of the Convention.

As regards the applicant's request to re-open his application, the Commission notes that pursuant to Article 27 para. 1(b) (Art. 27-1-b) of the Convention it may not reconsider a complaint already examined by the Commission unless the applicant presents relevant new information. Having reviewed the applicant's submissions in this respect, the Commission finds no relevant new information and, accordingly, considers these complaints of the applicant inadmissible pursuant to Article 27 para. 1 (Art. 27-1) of the Convention.

For the these reasons, the Commission, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaints concerning the lawfulness of his detention, the speed of the reviews of his detention after the expiry of the tariff period, the absence of a court-like body conducting those reviews, the length of his tariff and the manner of its fixing;

DECLARES INADMISSIBLE the remainder of the application; and

DECIDES to take no action concerning the applicant's allegation of interference with his right of petition and not to re-open its partial decision as to the admissibility of the application dated 30 August 1994.

H.C. KRÜGER
Secretary
to the Commission

S. TRECHSEL
President
of the Commission