COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION OF HUMAN RIGHTS

Applications Nos. 11787/85, 11978/86, 12009/86

Michael K. Thynne, Benjamin Wilson, Edward J. Gunnell

against

the United Kingdom

Report of the Commission

(Adopted on 7 September 1989)

Strasbourg

TABLE OF CONTENTS

I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The applications

2. The first applicant, Mr. Michael Keith Thynne, is a citizen of the United Kingdom, born in 1951. He is, at present, serving a life sentence at HM Prison, Lewes, United Kingdom.

3. The second applicant, Mr. Benjamin Wilson, is a citizen of the United Kingdom, born in 1916 and currently serving a life sentence at HM Prison, Wormwood Scrubs, London.

4. The third applicant, Mr. Edward James Gunnell, is a citizen of the United Kingdom, born in 1930. At the time of the introduction of his application he was serving a life sentence of imprisonment. He was released on parole on 6 September 1988.

5. The first applicant is represented before the Commission by Mr. P. Ashman, Legal Officer of Justice (British section of the International Commission of Jurists), London. The second and third applicants are represented before the Commission by Mr. P. Hunt, Legal Officer, National Council for Civil Liberties and Mr. E. Fitzgerald, of counsel.

6. The applications are directed against the United Kingdom, whose Government are represented by their Agent, Mr. M. C. Wood, Foreign and Commonwealth Office.

7. The case concerns the availability under the law of the United Kingdom of a judicial procedure to determine the continued lawfulness of the first applicant's detention and the lawfulness of the re-detention of the second and third applicants following release. All three applicants invoke Article 5 para. 4 of the Convention. The second applicant (Mr. Wilson) also invokes Article 5 para. 5 of the Convention.

B. The proceedings

8. The first application (Mr. Thynne) was introduced on 3 June 1985 and registered on 10 September 1985.

9. The second application (Mr. Wilson) was introduced on 1 September 1985 and registered on 1 February 1986.

10. The third application (Mr. Gunnell) was introduced on 24 April 1985 and registered on 12 February 1986.

11. The applications were first examined by the Commission on 1 December 1986 (Mr. Thynne), 1 February 1986 (Mr. Wilson), and on 18 July 1986 (Mr. Gunnell).

12. On these dates the Commission decided in accordance with Rule 42 para. 2 (b) of its Rules of Procedure to give notice of the applications to the respondent Government but not to ask for their observations on the admissibility and merits of the cases until judgment had been handed down by the European Court of Human Rights in the Weeks case (Eur. Court H.R., judgment of 2 March 1987, Series A No. 114).

13. On 1 April 1987, following the judgment of the Court in the Weeks case, the President of the Commission requested submissions on the admissiblity and merits of the applications insofar as they raised issues under Article 5 of the Convention. The Government's observations in all three cases were submitted on 12 June 1987 The applicants' observations in reply were submitted on 21 July 1987 (Mr. Thynne), 23 September 1987 (Mr. Wilson), and 29 October 1987 (Mr. Gunnell).

14. The Commission next considered the applications on 9 March 1988 when it decided to invite the parties to a joint hearing on the admissibility and merits of the case insofar as it raised issues under Articles 5 and 13 of the Convention.

15. The second applicant (Mr. Wilson) was granted legal aid by decision of the Commission on 13 May 1988.

16. The first applicant (Mr. Thynne) was granted legal aid by decision of the President on 19 August 1988.

17. Prior to the hearing the applications were joined pursuant to Rule 29 of the Commission's Rules of Procedure. A fourth application, No. 12000/86 (Mr. Weeks), was also joined at the same time.

18. At the hearing, which was held on 6 September 1988, the first applicant was represented by Mr. P. Ashman, Legal Officer, Justice, and the second and third applicants were represented by Mr. P. Hunt, Legal Officer, National Council for Civil Liberties and Mr. E. Fitzgerald, counsel. The Government were represented by Mr. M. C. Wood, Agent, Mr. A. Moses, Counsel, Mr. C. Osborne and Mrs. V. Harris, Advisers.

19. Following the hearing, the Commission declared the applications admissible and invited the parties to submit any further evidence or additional observations that they wished to put before the Commission.

20. In a letter dated 21 December 1988 the Government indicated that they did not wish to submit any further evidence or additional observations. No further evidence or additional observations were received from the applicants.

21. After declaring the case admissible, the Commission, acting in accordance with Article 28 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. In the light of the parties' reactions, the Commission now finds that there is no basis on which such a settlement can be effected. A friendly settlement was, however, reached in Application No. 12000/86 (Mr. Weeks). The Commission adopted an Article 30 Report in this case on 10 July 1989 and disjoined it from the present applications.

C. **The present Report**

22. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes.

MM. C. A. NØRGAARD, President
S. TRECHSEL
G. JÖRUNDSSON
A. WEITZEL
J. C. SOYER
G. BATLINER
J. CAMPINOS
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY

23. The text of this Report was adopted by the Commission on 7 September 1988 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

24. The purpose of the Report, pursuant to Article 31 of the Convention is:

i) to establish the facts, and

ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

25. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application as Appendix II.

26. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the applications

1. Mr. Thynne

27. On 27 October 1975 the first applicant, then aged 24, pleaded guilty, at the Central Criminal Court to rape and buggery. He was sentenced by the Recorder to life imprisonment on each count on 24 November 1975.

28. On 7 August 1975 the applicant, who had just been released from prison, had gained entrance to a flat under the pretence that he was a member of the police force investigating a burglary. The flat was occupied at the time by a 45 year old married woman. The applicant told the woman that he had a knife and would kill her if she made a noise. He then told her to take her clothes off. He took a pair of scissors which were in the flat and raped and buggered her. In the course of this assault he inflicted some minor puncture wounds with the scissors. The applicant had been released from prison the previous day and had been staying with friends in the same block of flats where the offences took place. It was established in the course of the trial that the offence was committed within 36 hours of the applicant's coming out of prison at a time when he had had little sleep, had consumed a certain amount of alcohol and taken drugs. He also had a long criminal record, having served various sentences of imprisonment for theft and burglary.

29. Medical evidence which was presented to the Recorder made it clear that a hospital order was not appropriate in the circumstances of his case. The Recorder considered, however, that an indeterminate life sentence would be the most humane sentence as it would enable the Home Secretary to release him as soon as it was observed that his personality disorder - described by a psychiatrist as a severe psychopathic character disorder - had so improved that it would be reasonably safe to release him. The Recorder stated as follows:

> "But for the psychiatric reports that I have seen I would impose on you a very long prison sentence. As it is, I am going to sentence you to life on each count in order that those in a position to observe any improvement in your personality disorder, those capable of carrying out any operative treatment which may [be] seen to be necessary, with your consent, on your frontal lobe, may judge the time when it is reasonably safe that you should be free."

30. The applicant appealed against the life sentences on the ground that they were manifestly excessive and resulted in custody for a longer time than the appropriate determinate sentence. This appeal was dismissed by the Court of Appeal on 22 March 1976. The Court pointed out that the attack was serious and violent and subjected the victim to "indecency" and "indignities". It did not consider that the life sentence was manifestly excessive and stated as follows:

> "We do not see the life sentence in this case as necessarily involving detention in custodial conditions for a very long period of time. It depends upon the regime to which he is subjected and the treatment he can get. If a determinate sentence were to be substituted, then the court would have to pass such a sentence as would ensure that he was kept in custody for a longer time than he probably will remain under a life sentence."

31. The Court considered that the sentence was correct in principle in the circumstances of the case, adding that:

> "Life sentences are imposed in circumstances where the offence is so grave that even if there is little risk of repetition it merits such a severe, condign sentence and life sentences are also imposed where the public require protection and must have protection even though the gravity of the offence may not be so serious because there is a very real risk of repetition. This case falls within neither of these categories which express extreme situations but undoubtedly the offences here were very grave indeed and undoubtedly in the light of the medical reports on this man, the Court cannot be sure by any means that he would, in society, not give way to outbursts of this nature which would very seriously affect other persons."

32. In May 1977 the applicant was accepted for treatment at Grendon Underwood - a psychiatric prison. He decided not to accept the place offered on being told that he would not automatically be given early release. In the opinion of most of the psychiatrists and other doctors dealing with the applicant his personality disorder was not amenable to either surgery or psychiatric treatment. The Senior Medical Officer at Maidstone Prison diagnosed the applicant as an untreatable aggressive psychopath.

33. The applicant claims that he received only limited therapy between 21 March 1978 and September 1979 which consisted of a short interview by a psychiatrist every two to six weeks.

34. Following representations on the applicant's behalf the Home Secretary decided that the case should be referred to the Joint Parole Board - Home Office Committee the following month. In August 1980 the Committee recommended that it should be referred to the Local Review Committee in September 1981 when the applicant would have been detained for six years. The Local Review Committee (which advises the Secretary of State) did not recommend release.

35. After absconding from an open prison on 1 May 1982 the applicant stole a gold bracelet from a jewelery shop and when pursued by the manager of the shop he had brandished, but not used, a knife. He was arrested on 26 July 1982 and found to be in possession of cannabis. He was placed in a detention room and in an effort to escape he broke a door frame. He was subsequently sentenced to six months' imprisonment on charges of theft, unlawful possession of drugs and criminal damage. The sentence was to run concurrently with the existing life sentence.

36. On 22 October 1982 the Parole Board recommended that the applicant's case be referred to the Local Review Committee nine months after his arrival at Maidstone Prison. However on 16 March 1983, when visiting his mother who was gravely ill, he escaped on an impulse and was recaptured two days later. The date of the referral of his case to the Local Review Committee was put back to June 1984. The applicant was transferred to Blundestone Prison in June 1983 where he was examined by the prison department psychiatrist who found no evidence of mental illness and saw no grounds for recommending psychiatric treatment. The prison's medical officer agreed with these findings. The Local Review Committee did not recommend release.

37. In July 1985 the applicant's case was referred to the Parole Board which recommended that he remain in a category B Prison with a further review in two years time. A further review was carried out by the Local Review Committee in July 1987. It was recommended that he remain in custody. A further review was scheduled for May 1989.

2. **Mr. Wilson**

38. The second applicant, born in 1916 has a long record of sexual offences beginning in 1935 and has served a number of prison sentences. On 29 March 1973 he pleaded guilty to charges of buggery and indecent assault on boys under the age of 16 and was sentenced to life imprisonment for buggery and seven years, to be served concurrently, for, inter alia, indecent assault.

39. In passing sentence the Judge said:

> "I entirely accept that, to a large extent, you cannot help yourself. To that extent, your moral guilt is the less, but I have two duties to perform. One is a duty to find the correct sentence as far as you are concerned, having regard to your make-up, your physical and mental make-up. The other duty I have, and in the circumstances of this particular case, I think it is the more important: I have a duty to the public, and in particular, to the young public, to protect them from people like you who, for one reason or another, can't control themselves.
>
> I hope that, in the course of time a method of treatment for your particular freakish affliction can be found. I think it will be in the best interest of society generally, and yourself in particular, if some form of treatment for you could be found. What I am going to do in your case may sound harsh from your point of view, but it will be explained to you, no doubt, by <your counsel> hereafter, that it may in fact hold out more hope to you than if I merely went up to perhaps 4, 5 or 6 years, or even 7 years in a particular case.
>
> The sentence of the court is that so far as the count of buggery is concerned, that is the eighth count on the indictment, you will go to prison for life. So far as the counts of

> attempted buggery and indecent assault are concerned, you will go to prison for a period of 7 years. All these sentences to be concurrent. Now I am sure that <your counsel> will have a word with you hereafter and will indicate what the situation is with regard to a life sentence, but as I say, I think my main duty in this particular case is to protect the public and the young public, in the light of what I have heard occurred in your case. I only hope that, in due course, some form of treatment, perhaps that to which the doctor refers in the medical report which I have seen, may help you".

40. The applicant applied for leave to appeal but abandoned his application. He later tried to re-open the appeal in November 1976 and, though the Court of Appeal turned down his application, they also expressed the view that the applicant had better prospects of release under a life sentence than a long fixed term sentence if he used the opportunity to improve his character.

> "There are circumstances in which the Court is empowered to allow the withdrawal of the notice of abandonment. The Court has thought it right, as it would have had to say in the end, simply that the applicant has not established a situation in which this Court could properly allow him to withdraw the notice of abandonment. The Court has thought it right to go to some extent into the history of the matter in order to establish that even if such a withdrawal were permitted, it could not possibly be of advantage to the applicant, if we were to substitute for the life sentence a very long sentence that it really would not be distinguishable from a life sentence. But if he wishes to take advantage of it, build himself up and strengthen his own character, he has far better prospects under an indeterminate sentence than under a long determinate sentence."

41. The applicant's case was first referred to the Joint Committee of the Parole Board and the Home Office after three years of his sentence and they recommended that he should be considered for parole after seven years of his sentence. Thus, on 11 December 1981, the Parole Board recommended, after an interview with the applicant, that he be released into a controlled environment with psychiatric supervision. The Secretary of State decided to release him on licence on 3 September 1982 on condition that he:

i) live at a probation hostel;

ii) co-operate with his probation officer;

iii) attend on appointed medical practitioner and took any prescribed treatment; and

iv) refrained from any activity involving young boys without the permission of his probation officer.

42. The applicant was released on 14 September 1982 and took up residence at a probation hostel. He asked for alternative accommodation on the ground that his room was uncomfortable and rain leaked in through the roof. He also requested permission to join Haringay Athletics Club but this was refused due to possible contact with young boys.

43. On 11 February 1983, the Parole Board recommended his recall and on 14 February 1983 the Secretary of State revoked his licence. The applicant on his return to prison was informed that the reason for his recall was that his conduct gave cause for concern and that he had failed to co-operate with his supervisory officer. The applicant exercised his right to make written representations against his recall but on 16 September 1983 the Parole Board declined to change the decision.

44. On 6 April 1984, the applicant commenced judicial review proceedings to quash this decision on the ground that he had not been provided with adequate details of the reason for his recall as required by S. 62(3) of the Criminal Justice Act 1967 and that he had accordingly been unable to make effective representations.

45. The Home Office conceded the inadequacy of the reasons given and provided a one page statement of allegations on 5 October 1984, which included the allegations that:

i) the applicant had sought to leave the probation hostel;

ii) a school boys' cap had been found in the living room of the hostel;

iii) the applicant had protested against the probation officer's refusal to allow him to take part in sporting activities;

iv) the applicant had shown an interest in watching boys play football and his psychiatrist suspected that he was exploring ways of contacting boys again.

46. The Home Office then agreed to allow the applicant the opportunity to make further representations to the Parole Board, which he did. On 7 November 1984, the applicant's solicitors also requested disclosure of a number of reports which were before the Parole Board when it made its decision.

47. On 20 March 1985 the Divisional Court considered the applicant's case. The court quashed the decision to confirm the applicant's recall made by the Parole Board on 16 September 1983 after referral by the Secretary of State on the ground that it was flawed by a procedural impropriety, in that the applicant had not been given sufficient reasons to enable him to make proper representations. In the course of these proceedings the applicant's counsel expressly abandoned the argument that the applicant's detention following recall had been unlawful.

48. The applicant's lawyer then requested to see the probation report which alleged non co-operation and that the applicant be given an oral hearing with legal representatives. However, the Parole Board did not answer this request and after a meeting on 22 March 1985 maintained the decision not to release the applicant.

49. The applicants' case was reconsidered by the Parole Board in November 1986 without a recommendation to release. He is still in detention.

3. **Mr. Gunnell**

50. The third applicant was found guilty in December 1965 of four offences of rape and two offences of attempted rape, and he was sentenced to life imprisonment. A pattern was discernible in a number of those offences, in that he approached women at their home and in the gardens of their homes and then committed the offence. Although there was uncontradicted medical evidence that the applicant was suffering from a "mental disorder" within the meaning of that term in the 1959 Mental Health Act (namely psychopathy) and that he needed constant care and treatment in a maximum security medical setting, the sentencing judge nevertheless declined to act on the recommendation of the medical experts and concluded that, because of the gravity of the offences, "punishment must be an element in this case" and "punishment can only be achieved by imprisonment". On passing sentence, the trial judge, Mr. Justice Roskill, stated as follows:

> "Edward James Gunnell, you stand convicted of no less than four charges of rape and two of attempted rape, as well as three charges of stealing, two of which were connected with two of the rapes, and all those offences were committed within the period of a month. It is only thanks to the courage of the two women involved, those concerned in counts 1 and 2, that you are not standing convicted on no less than six charges of rape. These must be amongst the worst cases of rape or attempted rape ever to come before a court in this country. But though I accept you have spent much of your early life in mental institutions, and I accept certain evidence I have heard this morning that you are suffering from psychopathic disorder, the evidence leaves no doubt and can leave no doubt in anybody's mind, that you did know what you were doing and you were well aware of the wickedness of what you had done. I have listened with great attention to the medical evidence which I have had the opportunity of hearing this morning, and I have endeavoured to give all the weight to it that I properly can.
>
> It has been urged upon me that I should deal with you by making a hospital order and sending you to Rampton, where you will be kept in secure conditions and receive any treatment which you may require. In many cases it is clearly right for a court in discharging its responsibilities to have regard solely or mainly to the needs of the offender, but the present case in my view is one of such magnitude that I cannot only have regard to such needs. It is true, to send you to Rampton would involve you being kept under secure conditions and to that extent would keep the public from you. But there are other matters which I must take into account in the public interest, not the least of which is to make it clear that crimes of this kind committed against ordinary housewives in their ordinary homes doing their every day business while their men-folk are away at work are such as must, when brought home to a particular offender, be dealt with in such a way as to make plain that the law is concerned and ever will be concerned to protect people who suffer as you caused these women to suffer by these quite appalling sexual attacks that you made upon them. Punishment must be an element in this case, and that punishment can only be achieved by imprisonment.

Imprisonment will afford security to the public from you, and the Home Secretary has ample power if and when the need for treatment arises, to transfer you to any institution where such treatment can be received.

In my judgment there is only one sentence which is appropriate in this case, and I will deal with count 3 first. Upon count 3 the sentence of the court is that you be imprisoned for the term of your natural life. There will be corresponding life sentences on counts 4, 5 and 7, upon which you stand convicted of rape. On the first two counts in the indictment, those of attempted rape the sentence will be one of 7 years imprisonment, such sentences to run concurently with one another and with the life sentence. On count 6 and count 8 there will be sentences concurrent with each other of 3 years' imprisonment and concurrent with the life sentences. On count 9 there will be a concurrent sentence of two years' imprisonment. Those are the sentences of the court on every count."

51. The applicant was refused leave to appeal to the Court of Appeal on 22 June 1966. In the course of his judgment the Lord Chief Justice stated:

"It is a shocking case and there is no conceiviable ground upon which he could succeed in his application for leave to appeal against conviction. Indeed, all he says is that he would like to call three of the women complainants to challenge their evidence all over again. This court refuses the extension of time in which to apply for leave to appeal against conviction.

In regard to the application for leave to appeal against sentence in regard to the rapes and attempted rapes, the applicant is 35 and, though he has committed offences before, none of them have been offences of violence or of a sexual nature, but he has a long mental history. As long ago as 1946 he was committed to Manor Hospital, Epsom, from which he escaped 18 times. In 1950 he was admitted to Farmfield Hospital, Horley. He absconded three times. In 1951 he was transferred to Rampton hospital where he made no attempts to escape, possibly knowing that it is difficult to do so. In 1959, however, he was released on licence from Rampton and in 1960 he was discharged from the operation of the Mental Deficiency Act 1959.

There was evidence, indeed it was uncontradicted, from the doctors that the applicant could be made the subject of a hospital order under the Mental Health Act 1959, in that he was a psychopath who needed constant care and treatment in a medical setting of maximum security such as Rampton and such a vacancy was then available. The learned judge refused to take that course and the ground of appeal here is that he was wrong in principle, when two doctors certified that the applicant was a fit subject for a hospital order and that treatment was warranted, not sending him to hospital but sending him to prison ...

> This court would like it to be known that they agree with every word that the learned judge there said, indeed in an earlier case of Morris [1961] 2 QB 237, it was pointed out that there may be cases where although a court has powers to make a hospital order, yet where a punishment is required it would be right to send the offender to prison, it being recognised that the Home Secretary has ample powers under section 72 of the Mental Health Act 1959 to cause him to be treated in hospital when the need arises.
>
> This court would like to add one further reason justifying the judge's order in the present case. The applicant is obviously a dangerous psychopath. It is clear unless he is kept in circumstances of strict security he is liable to be a menace to the public. True, Rampton is said to be a secure hospital, but it does not mean that he would not get away from there. More important, it has to be observed that this dangerous psychopath has already been released on licence from Rampton. Bearing the interests of the public in mind, this court thinks it far safer that he should be kept in prison for as long as is necessary rather than he should be left to be dealt with as a hospital might deal with him, on a doctor and patient relationship under which it might be considered safe for him to be free, whereas from the public angle he remains a menace.
>
> This court is quite satisfied that the sentence was right and the application is refused."

52. In December 1980 the Parole Board recommended that, subject to continued good conduct, to the satisfactory completion of periods both in open conditions and the pre-release employment scheme, the applicant should be released on licence under the provisions of the Criminal Justice Act 1967. On 7 September 1981 he joined the pre-release employment scheme at Wormwood Scrubs prison. Arrangements were made for him to take anti-libidinal drugs and he was released on licence on 4 March 1982.

53. On 19 February 1983 information was received from Finchley Police that the applicant had been seen watching a woman cleaning her car and had then been found in her back garden. The police said that there had been a similar incident in January 1983, when a woman complained to the police that the applicant was in her back garden looking through her rear window. The police had arrested the applicant on that occasion but did not hold him. Following the second incident, the Minister of State authorised the immediate revocation of the applicant's life licence under Section 62 (2) of the 1967 Act on 19 February 1983 because of the similarities between the applicant's current behaviour and the circumstances in which the original offences were committed. The applicant was taken to Pentonville Prison the same day and was subsequently transferred to Wormwood Scrubs. At no stage of the proceedings was he charged with any criminal offence in relation to the incidents in January and February 1983.

54. The applicant was interviewed by the Assistant Governor on 25 February 1983 and states that he was told that his licence had been revoked "because his behaviour was giving cause for concern". He was also informed of his right under Section 62 (3) of the 1967 Act to make written representations to the Parole Board.

55. The applicant was subsequently seen by a member of the Local Review Committee on 1 March 1983. On 4 March 1983 the Parole Board confirmed the revocation of the applicant's licence when the case was referred to them under Section 62 (4) of the 1967 Act. On 25 March the Parole Board rejected the applicant's representations but recommended that, subject to satisfactory re-settlement arrangements being made and to continuing psychiatric supervision he should be released in a month's time. The Secretary of State decided not to accept the Board's recommendation after consultations with the Lord Chief Justice and the trial judge in accordance with Section 67 (1) of the 1967 Act. The applicant subsequently petitioned the Secretary of State, complaining that he had not been allowed to defend himself. The petition was rejected in a reply dated 3 August 1983. The applicant states that the reply contained the first written explanations of the reasons for his recall and the first official account in any detail of the allegations made against him.

56. On 9 August 1983 the applicant applied for leave to move for judicial review of the decisions of the Parole Board and the Home Secretary, confirming the initial revocation of the licence. The applicant was granted leave to move for judicial review on 18 August 1983. His application was eventually dismissed on 2 November 1983. An appeal against this decision to the Court of Appeal was also dismissed on 30 October 1984. The applicant's case was reviewed again by the Parole Board and the Home Secretary in 1984 but he was not released. He was released on licence once more in September 1988.

B. Relevant domestic law

1. Discretionary life sentences

57. A life sentence for murder is mandatory. Life sentences for other offences are at the discretion of the court and are reserved for exceptional cases. Guidelines for the imposition of a discretionary life sentence have been laid down by the Court of Appeal from time to time. The cases establish that a discretionary life sentence is imposed (1) where the offence is a grave one and (2) where the accused is regarded as mentally unstable and dangerous (e.g. Picker (1970) 54 Cr. App. R 330; Wilkinson (1983) 5 Cr. App. R (S) 105; Headly (1979), 1 Cr. App. R (S) 159).

58. A statement of recent practice concerning the imposition of discretionary life sentences appears in the following extract from the judgment of Lord Lane C.J. in R. v. Wilkinson (loc. cit.):

> "It seems to us that the sentence of life imprisonment, other than where the sentence is obligatory, is really appropriate and must only be passed in the most exceptional circumstances. With few exceptions, of which this case is not one, it is reserved broadly speaking as Lawton L.J. pointed out, for offenders who for one reason or another cannot be dealt with under the provisions of the Mental Health Act, yet are in a mental state which makes them dangerous to the life or limb of members of the public. It is sometimes impossible to say when that danger will subside, and therefore an indeterminate sentence is required, so that the prisoner's progress may be monitored by those who have him under their supervision in prison, and so that he will be kept in custody only so long as public safety may be jeopardised by his being let loose at large".

59. In a recent decision of the Divisional Court (R. v. Secretary of State for Home Department, ex parte Handscombe and Others (1988) 86 Cr. App. R. 59) the court recognised that every discretionary life sentence contains within it an authority to detain a prisoner for the purposes of punishment for no longer than he would have served if he had been sentenced to a fixed-term sentence as punishment for his offence rather than to an indeterminate sentence because of his danger to the public. It further contains an additional authority to detain the prisoner beyond this "tariff" or punitive period if he continues to remain a danger to the public. The court regarded the "tariff" in a discretionary life sentence as the appropriate fixed-term sentence which would have been handed down in the absence of a mental element and which would be necessary to satisfy the requirements of retribution and deterrence. A prisoner, on receiving a discretionary life sentence, will not be informed by the trial judge of the length of the tariff period (loc. cit., p. 75). Nor will it be communicated to him during the course of his imprisonment.

60. Since the introduction in 1983 of a new parole policy in respect of life sentences, the Home Secretary will consult the Lord Chief Justice and the trial judge on a confidential basis as to the period of detention necessary to satisfy the requirements of retribution and deterrence, i.e. the tariff period. As indicated in the Handscombe judgment (loc. cit., p. 74-75),

> "the Lord Chief Justice and the trial judge are being asked to provide ... a figure (the tariff) representing a term of years during which a prisoner should be detained to serve only the twin purposes of retribution and deterrence. They are in other words asked to say what would have been an appropriate tariff in the circumstances of the case if a determinate and not a life sentence could have been and had been passed when the prisoner was sentenced, without considering risk. The risk element is of course present in the judicial mind when a discretionary life sentence is passed. The element of continuing risk, I should add, is the concern of the prison authorities and doctors, the local review committee, the Parole Board and finally the Home Secretary. Fourthly, the views of the judges as to tariff are intended to have a decisive bearing in all cases upon the decision as to when the first reference to the local review committee will take place, i.e. three years before the end of the tariff period. Special circumstances may serve to bring forward that time."

61. A prisoner sentenced to either a mandatory or discretionary life sentence may be detained in prison, by virtue of the original order of the court, for the rest of his life. A sentence of life imprisonment can never be altered, substituted or terminated, save if there is a free pardon or an exercise of the Royal Prerogative remitting the remainder of the sentence.

2. Sentencing law and policy

62. By virtue of section 37 of, and Schedule 2 to, the Sexual Offences Act 1956 the maximum punishment for rape is life imprisonment. The maximum penalty for buggery with a boy under the age of 18 is life imprisonment by virtue of Section 37 of, and Schedule 2 to, the 1956 Act.

63. Evidence from Dr. D. A. Thomas, a recognised expert at sentencing policy in the United Kingdom, establishes that the upper limit in the practice of the Court of Appeal for offences of buggery against minors in the absence of evidence of mental instability, at the time Mr. Wilson was sentenced, was ten years. The upper limit in cases of serious rape, based on the practice of the Court of Appeal, is 18 years (Affidavit of Dr. D. A. Thomas, dated 29 July 1988).

64. An offender sentenced to a fixed-term sentence benefits from one third remission of sentence for good behaviour.

3. Criminal Justice Act 1967

65. Under the Criminal Justice Act 1967 the Secretary of State may only release on licence a person sentenced to life imprisonment if recommended to do so by the Parole Board, and after consultation with the Lord Chief Justice of England and the trial judge if available. By virtue of section 62 (1) the Secretary of State may revoke the licence of a person, whose recall to prison is recommended by the Parole Board. A prisoner recalled in such circumstances is entitled to be informed of the reasons for his recall and of his right to make representations. If he makes representations the Secretary of State must refer his case to the Board. If the Board recommends the immediate release of a re-called prisoner, the Secretary of State is bound to give effect to the recommendation.

66. Under section 62 (2) the Secretary of State may himself revoke the licence of a life licensee without consulting the Parole Board if it appears expedient in the public interest to do so before such consultation is practicable; but the case of a prisoner so recalled must be referred to the Board. If the Board recommends the immediate release of a re-called prisoner, the Secretary of State is bound to give effect to the recommendation.

67. Under Section 59 of the 1967 Act the Secretary of State has established for every prison a Local Review Committee with the function of advising him on the suitability for release on licence of prisoners. It is the practice to obtain a Local Review Committee's assessment before referring the case to the Parole Board.

68. Section 59 of the 1967 Act sets out the role of the Parole Board:

> "59. (1) For the purposes of exercising the functions conferred on it by this part of this Act as respects England and Wales there shall be a body known as the Parole Board ... consisting of a chairman and not less than four other members appointed by the Secretary of State.
>
> ...
>
> (3) It shall be the duty of the Board to advise the Secretary of State with respect to:
>
> (a) the release on licence under section 60(1) or 61, and the recall under section 62, of this Act of persons whose cases have been referred to the Board by the Secretary of State;

(b) the conditions of such licences and the variation or cancellation of such conditions; and

(c) any other matter so referred which is connected with the release or recall of persons to whom the said section 60 or 61 applies.

(4) The following provisions shall have effect with respect to the proceedings of the Board on any case referred to it, that is to say:

(a) the Board shall deal with the case on consideration of any documents given to it by the Secretrary of State and of any reports it has called for and any information whether oral or in writing that it has obtained; and

(b) if in any particular case the Board thinks it is necessary to interview the person to whom the case relates before reaching a decision, the Board may request one of its members to interview him and shall take into account the report of that interview by that member; ...

(5) The documents to be given by the Secretary of State to the Board under the last foregoing subsection shall include;

(a) where the case referred to the Board is one of release under section 60 or 61 of this Act, any written representations made by the person to whom the case relates in connection with or since his last interview in accordance with rules under the next following subsection;

(b) where the case so referred relates to a person recalled under section 62 of this Act, any written representation made under that section.
..."

69. A recalled prisoner, in addition to the right to make written representations to the Parole Board also has the opportunity of making oral representations to a member of the Local Review Committee.

III. OPINION OF THE COMMISSION

A. Points at issue

70. The following are the principal points at issue in the case:

Article 5 para. 4 of the Convention

- Were the second and third applicants (Messrs. Wilson and Gunnell) able to have the lawfulness of their re-detention determined by a court?

- Were the applicants able to have the lawfulness of their detention reviewed at reasonable intervals throughout their imprisonment?

Article 5 para. 5 of the Convention

- Did the second applicant (Mr. Wilson) have an enforceable right to compensation under United Kingdom law?

Article 5 para. 4 of the Convention

71. The second and third applicants (Messrs. Wilson and Gunnell) submit that they ought to have been able to challenge the lawfulness of the decision to re-detain them before a court. All three applicants submit that there ought to be a periodic review by a court of the continued lawfulness of their detention.

72. Article 5 para. 4 provides as follows:

> "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."

73. All three applicants emphasise that they were convicted of offences for which they would normally receive a long determinate sentence as opposed to life imprisonment. They state that they were given a discretionary life sentence because they were considered to be mentally unstable and thus a danger to the public. They contend that such a sentence falls into the special category of sentences recognised by the Court in the Weeks case as attracting the judicial safeguards of Article 5 para. 4 of the Convention (see Eur. Court H.R., judgment of 2 March 1987, Series A No. 114).

74. The Government do not accept that these cases fall into the special category described by the Court in the Weeks case. It was essential to the Court's reasoning in that case that the offences were not particularly serious and that punishment was not a significant element in the sentence. However, all three applicants in the present case were convicted of offences of the utmost gravity in circumstances where the courts had underlined the need for punishment.

75. The Government maintain that unlike the Weeks case, the gravity of the offences remains the continuing justification for the applicants' re-detention or, as in the case of Thynne, who has never been released on parole, his continued detention. Moreover, the gravity of the offences remains relevant when the Home Secretary is called on to assess, in a manner which maintains public confidence in the system, the risk posed to the public by the applicants' release. It follows that Article 5 para. 4 is not applicable to the applicants' detention in whose cases the judicial determination provided for by this provision is incorporated in the decision of the trial court and any decision given on appeal (see Eur. Court H.R., De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A No. 12, p. 40, para. 76).

76. The Commission reiterates its constant case-law that where an accused receives a sentence of imprisonment, based solely on the gravity of the offence he has committed and the need for retribution and deterrence, the supervision of the lawfulness of such detention under Article 5 para. 4 is incorporated at the outset in the criminal trial and possible appeals against conviction and sentence.

77. In such cases detention is justified under Article 5 para. 1 (a) as the detention of a person after conviction by a competent court. Unlike detention of persons of unsound mind, under Article 5 para. 1 (e), the detention is ordered as a retributive punishment for the immutable fact that the person concerned has been found guilty of an offence (see e.g. No. 9089/80, Dec. 9.12.80, D.R. 24, pp. 227-229; No. 13183/87, Dec. 14.12.88 (to be published in D.R.)).

78. However it is clear that there may be cases of imprisonment where Article 5 para. 4 requires continued supervision of the lawfulness of detention at reasonable intervals throughout imprisonment and a court determination of the lawfulness of recall where a prisoner has been released on parole. The Court in the Weeks case considered, with reference to both the exceptional nature of the facts in that case and the purpose of the sentence of life imprisonment as described by the domestic courts, that the case fell into a special category which attracted the safeguards of Article 5 para. 4 of the Convention. The Court stated as follows (loc. cit., p. 25, paras. 46-47):

> "The intention was to make the applicant, who was qualified both by the trial judge and by the Court of Appeal as a 'dangerous young man', subject to a continuing security measure in the interests of public safety. The sentencing judges recognised that it was not possible for them to forecast how long his instability and personality disorders would endure. According to the very words of Mr. Justice Thesiger and Lord Justice Salmon, they accordingly had recourse to an 'indeterminate sentence': this would enable the appropriate authority, namely the Home Secretary, to monitor his progress and release him back into the community when he was no longer judged to represent a danger to society or to himself, and thus hopefully sooner than would have been possible if he had been sentenced to a long term of imprisonment. In the absence of sufficient medical evidence justifying an order sending him to a mental institution, the only means available under the British

> sentencing machinery to achieve this purpose was a life sentence. In substance, Mr. Weeks was being put at the disposal of the State because he needed continued supervision in custody for an unforseeable length of time and, as a corollary, periodic reassessment in order to ascertain the most appropriate manner of dealing with him. The grounds expressly relied on by the sentencing courts for ordering this form of deprivation of liberty against Mr. Weeks are by their very nature susceptible of change with the passage of time, whereas the measure will remain in force for the whole of his life. In this, his sentence differs from a life sentence imposed on a person because of the gravity of the offence.
>
> In this sense, the measure ordered against Mr. Weeks is thus comparable to the Belgian measure at issue in the Van Droogenbroeck case, that is the placing of a recidivist or habitual offender at the disposal of the Government - although in the present case the placement was for a whole lifetime and not for a limited period (Series A no. 50, especially at pp. 21-22, §40). The legitimate aim (of social protection and the rehabilitation of offenders) pursued by the measure and its effect on the convicted person are substantially the same in both cases."

79. The Commission considers that unlike the Weeks case, the offences committed by all three applicants were grave. However, it is clear that the sentences in these cases do not fall into the normal category of life sentences whose purpose is solely punitive.

80. Each of the applicants was given a discretionary life sentence because the domestic courts considered that, in addition to the need for punishment, they were a danger to the public and that there was a need for supervision by the Home Secretary in order to determine when it would be safe to release them (see paras. 31, 39, 50, 51 above).

81. Unlike mandatory life sentences, a discretionary life sentence in the United Kingdom is handed down not only because the offence is a grave one, but because, in addition to the need for punishment, the accused is considered mentally unstable and a danger to the public. In such cases it is for the Home Secretary to assess the risks involved in granting parole. While it is true that all life sentences often involve both punitive and security elements, the discretionary life sentence belongs to a separate category because the sentencing court recognises that the mental stability or dangerousness of the accused may be susceptible to change over the passage of time (see paras. 57-59 above).

82. The Commission further observes that the domestic courts have openly stated that a discretionary life sentence is composed of a punitive element, i.e. a specific number of years to be served by the prisoner to satisfy the needs of retribution and deterrence (the "tariff" period) and a security element based on the need to protect the public. Furthermore, since 1983 it is the practice of the trial judge in such cases to communicate the length of the "tariff" to the Home Secretary at his request to enable the prisoner's case to be reviewed with a view to parole (see paras. 59 and 60 above).

83. In addition, had it not been for the presence of mental instability and dangerousness, the applicants would have received a determinate sentence under the law of the United Kingdom leading to an earlier release date (see para. 63 above; also the remarks by the domestic courts in the case of Thynne, para. 30).

84. Against the above background the Commission considers that once the notional "tariff" period has been served by the applicants the justification for continued detention depends on whether they remain a danger to the public. The measures ordered against them from this point of view are thus comparable to those in the Weeks case and in the Van Droogenbroeck case (loc. cit.). As in the Weeks case the lawfulness of the applicants' continued detention under Article 5 para. 1 (a) of the Convention will depend on whether they remain a danger to the public (see Weeks judgment of 2 March 1987, loc. cit., p. 29, para. 58).

85. It follows that the applicants are entitled under Article 5 para. 4 to apply to a court to have the lawfulness of their detention reviewed at the moment of any return to custody following release or at reasonable intervals during the course of their imprisonment (see Weeks judgment, ibid.)

86. As the Commission has emphasised above (see paras. 76 and 77), Article 5 para. 4 does not apply in this way to ordinary sentences of life imprisonment or other determinate sentences. The Commission has therefore considered whether this entitlement should only arise in these cases following the expiry of the "tariff" or punitive element in their sentences. It does not, however, find it possible to limit the application of Article 5 para. 4 in this way because of the uncertainty surrounding the length of the "tariff" period. The Commission recalls that the "tariff" is communicated to the Home Secretary at his request by the trial judge on a confidential basis to enable him to determine when the parole procedures should commence and is not communicated to the prisoner at the time of sentencing or in the course of imprisonment.

Accordingly, the guarantee in Article 5 para. 4 must be considered to apply throughout the whole of the applicants' imprisonment.

87. As regards the scope of judicial control under Article 5 para. 4, the Commission notes the following remarks of the Court in the Weeks case (loc. cit., p. 29, para. 59):

> "Article 5 §4 does not guarantee a right to judicial control of such scope as to empower the 'court', on all aspects of the case, including questions of expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which, according to the Convention, are essential for the lawful detention of a person subject to the special kind of deprivation of liberty ordered against Mr. Weeks (ibid., p. 26, § 49)."

88. The Commission notes that the Government do not contest the Court's finding in the Weeks case that the requirements of Article 5 para. 4 were not met by either the Parole Board or the availability of judicial review before the High Court. The Court found that the

procedure before the Parole Board could not be considered to be judicial in character since the prisoner has no entitlement to full disclosure of the adverse material which the Board has in its possession. It also found that the scope of judicial review was not wide enough to bear on the conditions essential for the "lawfulness" of re-detention in the sense of Article 5 para. 4 of the Convention (loc. cit., pp. 29-33, paras. 60-69).

89. The Commission therefore finds that the second and third applicants (Messrs. Wilson and Gunnell) were not able to have the lawfulness of their detention determined by a court at the moment of their re-detention and at reasonable intervals throughout their imprisonment.

90. The Commission also finds that Mr. Thynne was not able to have the lawfulness of his detention reviewed by a court at reasonable intervals.

91. Conclusion

The Commission concludes:

- by 10 votes to 2 that there has been a violation of Article 5 para. 4 in the case of Mr. Wilson;

- by 10 votes to 2 that there has been a violation of Article 5 para. 4 in the case of Mr. Gunnell;

- by 10 votes to 2 that there has been a violation of Article 5 para. 4 in the case of Mr. Thynne.

Article 5 para. 5 of the Convention (Mr. Wilson)

92. The second applicant (Mr. Wilson) further complains of a violation of Article 5 para. 5 in that he does not have an enforceable right to compensation under the law of the United Kingdom in respect of the violation of Article 5 para. 4 in his case.

93. Article 5 para. 5 reads as follows:

> "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."

94. The Government argue that the aim of Article 5 para. 5 is limited to ensuring that the victim of an "unlawful" arrest or detention should have an enforceable right to compensation and that this provision does not therefore apply to violations of Article 5 para. 4 of the Convention.

95. The Commission observes that the Court in the Brogan and Others case has found that such a restrictive interpretation is incompatible with the terms of paragraph 5 which refers to arrest or detention "in contravention of the provisions of this Article" (Eur. Court H.R., judgment of 29 November 1988, Series A No. 145-B, para. 67).

96. In the present case the Commission has found a breach of Article 5 para. 4 inter alia in the case of Mr. Wilson. It is not contested by the Government that this violation could not give rise to an enforceable claim for compensation before the domestic courts.

Conclusion

97. The Commission concludes, by 10 votes to 2, that there has been a violation of Article 5 para. 5 in the case of Mr. Wilson.

98. Recapitulation

The Commission concludes

(Article 5 para. 4 of the Convention)

- by 10 votes to 2, that there has been a violation of Article 5 para. 4 in the case of Mr. Wilson;

- by 10 votes to 2, that there has been a violation of Article 5 para. 4 in the case of Mr. Gunnell;

- by 10 votes to 2, that there has been a violation of Article 5 para. 4 in the case of Mr. Thynne.

(Article 5 para. 5 of the Convention)

- by 10 votes to 2, that there has been a violation of Article 5 para. 5 in the case of Mr. Wilson.

Secretary to the Commission

(H. C. KRÜGER)

President of the Commission

(C. A. NØRGAARD)

OPINION DISSIDENTE DE M. F. MARTINEZ

A mon grand regret, je ne suis pas en mesure de partager l'avis de la majorité de la Commission et ceci pour les motifs suivants :

A mon avis, les hypothèses analysées dans les présentes requêtes doivent être distinguées de celle qui a fait l'objet d'examen dans l'affaire Weeks, ce à cause de la gravité des faits reprochés aux requérants Thynne, Wilson et Gunnell.

Pour ma part, j'analyse les condamnations qui leur ont été infligées comme revêtant un caractère de condamnations à des peines de prison d'une durée indéterminée.

Or, dans les circonstances de la présente cause, j'estime que le fait qu'aucun recours répondant aux exigences de l'article 5 par. 4 ne soit ouvert aux requérants n'est pas de nature à faire problème sous l'angle de cette disposition.

Etant donné que je suis d'avis qu'aucune violation de l'article 5 par. 4 ne saurait être constatée, j'estime par conséquent qu'il ne subsiste aucun droit à réparation selon l'article 5 par. 5 de la Convention dans le cas Wilson.

APPENDIX I

HISTORY OF PROCEEDINGS

Date	Item
3 June 1985 (Thynne) 1 September 1985 (Wilson) 24 April 1985 (Gunnell)	Introduction of the application
10 September 1985 (Thynne) 1 February 1986 (Wilson) 12 February 1986 Gunnell)	Registration of the application
Examination of Admissibility	
1 December 1986 (Thynne) 1 February 1986 (Wilson) 18 July 1986 (Gunnell)	Commission's decisions to invite the Government to submit observations on the admissibility and merits of the applications
12 June 1987	Government's observations
21 July 1987 (Thynne) 23 September 1987 (Wilson) 29 October 1987 (Gunnell)	Applicant's observations in reply
9 March 1988	Commission's decision to hold an oral hearing
6 September 1988	Oral hearing on admissibility and merits and decision to declare the application admissible
Examination of the merits	
6 September 1988	Commission's deliberations on the merits.
10 July 1989	Adoption of friendly settlement in No. 12000/86 (Weeks) and disjoinder from remaining applications
7 September 1989	Adoption of the Report