

Report of the Committee on Serious Violent and Sexual Offenders

ANNEX 8

INDETERMINATE SENTENCES AND CONVENTION RIGHTS

Professor Christopher Gane

Introduction

1. An indeterminate sentence may be imposed in the following cases:
 - (a) the mandatory sentence of life imprisonment (in the case of adults convicted of murder)
 - (b) mandatory detention in a young offenders institution (for persons aged 18-21 convicted of murder)
 - (c) detention without limit of time in such place and under such conditions as the Secretary of State may direct (for persons aged under 18 who are convicted of murder)
 - (d) discretionary life sentence (available for all common law crimes, and certain statutory offences)
2. With the exception of (b) (which is closely analogous to imprisonment in the case of adult offenders convicted of murder) all of the above have been the subject of consideration by the European Court of Human Rights, principally in relation to Article 5 of the Convention, although a number of other articles have been touched upon in the cases which have come before the Court.
3. Discussion of life sentences in the United Kingdom has focussed upon the legality of the discretionary life sentence, and the release procedures for prisoners subject to such sentences. Distinctions are drawn within the Convention case law based upon the differing justifications and purposes of discretionary life sentences and mandatory life sentences.

The justification for life sentences

4. Life (indeterminate) sentences may be justified on two grounds - punitive and protective. In general, mandatory life sentences are justified on the former ground, while discretionary life sentences have both a punitive and a public safety element. The significance of this distinction was explained by the Home Secretary, during the debates on the Criminal Justice Bill¹:

'In a discretionary case, the decision on release is based purely on whether the offender continues to be a risk to the public. The presumption is that once

the period that is appropriate to punishment has passed, the prisoner should be released if it is safe to do so.

The nature of the mandatory sentence is different. The element of risk is not the decisive factor in handing down a life sentence. According to the judicial process, the offender has committed a crime of such gravity that he forfeits his liberty to the State for the rest of his days. If necessary, he can be detained for life without the necessity for a subsequent judicial intervention.'

Life sentences and the ECHR

Are indeterminate sentences as such objectionable?

5. Indeterminate sentences as such are not incompatible with the Convention, provided that, having regard to the circumstances of the offence and the offender, they do not fall to be regarded as inhumane within the meaning of Article 3.

6. In the case of *Weeks v United Kingdom*² the applicant was sentenced to life imprisonment at the age of 17. He had pleaded guilty to the robbery of 35p from a pet shop, while armed with a starting pistol loaded with blank shot. The sentence of life imprisonment was not, therefore, based upon the gravity of the offence. The sentence was based upon the view taken by the trial judge (and upheld by the Court of Appeal) that, having regard to the applicant's antecedents and mental condition, he presented a particular danger to the public. On the nature of the sentence imposed the Strasbourg court had this to say:

'Having regard to Mr Weeks' age at the time and to the particular facts of the offence he committed ... if it had not been for the specific reasons advanced for the sentence imposed, one could have serious doubts as to its compatibility with Article 3 of the Convention, which prohibits, *inter alia*, inhuman punishment.'

7. Without the additional consideration of risk, therefore, discretionary indeterminate sentences may, in certain cases, be incompatible with the Convention. Where the sentence is seriously disproportionate to the offence, the sentence may be open to challenge, and the age of the accused at the time of the offence is also relevant in determining whether or not the sentence is inhumane.³

8. The situation is different in the case of mandatory indeterminate sentences. Here, the gravity of the offence is by itself sufficient to justify the indeterminate sentence, and probably irrespective of the age or circumstances of the accused.⁴

Review of indeterminate sentence

9. The differing justifications of mandatory and discretionary life sentences mean that they are treated differently by the Strasbourg court. The

discussions have centred on the procedures governing release from custody of persons sentenced to life imprisonment, and in particular the question of access to effective means of reviewing the continuing legality of detention under an indeterminate sentence.

10. According to Article 5, everyone has the right to liberty and security of person.⁵ No-one may be deprived of their liberty except in the cases set out in Article 5(1)(a)-(f) (which include 'lawful detention after conviction by a competent court'). Article 5(4) provides that everyone who is deprived of their liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of their detention shall be decided speedily by a court and their release ordered if the detention is not lawful.

11. *Mandatory indeterminate sentence*: Adults upon whom a mandatory life sentence has been imposed are not entitled to invoke Article 5(4) with a view to demanding access to a 'court' to determine the continuing legality of their detention. The legality of that detention, and judicial involvement in the determination of that legality, is to be found in the fact that their detention derives from a sentence imposed by a court. In *Wynne v United Kingdom*,⁶ the applicant was sentenced to life imprisonment for murder in 1964. He was released on licence in 1980, and the following year he was convicted again when he pleaded guilty to the manslaughter of an elderly woman. On this occasion a discretionary life sentence was imposed. In June 1992 he was informed that the 'tariff' period fixed in respect of his 1964 conviction had expired, and that his continued detention was based on the risk he represented. (The tariff fixed by the trial judge in respect of his second offence had expired in 1991).

12. The applicant complained that he was unable to have the continued lawfulness of his detention reviewed by a court, and that there was therefore a violation of Article 5(4). This argument was rejected by the Court. The life licence granted in 1980 was revoked by his conviction for manslaughter. The fact that he had committed a further offence (and that he was suffering from a mental disorder) did not affect the continuing validity of his original sentence. Although the applicant attempted to argue that the two types of life sentence were converging, there remained significant differences between them, and the case law of the Court which insisted that discretionary life sentence prisoners should have access to a court under Article 5(4) did not apply to persons serving a mandatory sentence of life imprisonment for murder.

13. *Discretionary life sentences*: Persons serving a discretionary life sentence must have access to a court to determine the continuing legality of their detention, once the punitive element of their sentence has been served.⁷ In *Weeks v United Kingdom*, the Court held that where the stated purpose of detention was the protection of the public, based upon the perceived risks which the offender posed, it was necessary for the accused to have access to a court in order to determine whether or not the grounds for his continued detention remained operative:

"The grounds expressly relied upon by the sentencing courts for ordering this form of deprivation of liberty ... 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."⁸

14. If the decision not to release were to be based on grounds inconsistent with the objective of the sentencing court, the applicant's continuing detention would no longer be 'lawful' for the purposes of Article 5(1), and he would therefore be entitled to apply to a 'court' having jurisdiction to decide speedily whether or not his deprivation of liberty had become unlawful in this sense. This right is exercisable on the expiry of the punitive element of the sentence, and at reasonable intervals thereafter.⁹

15. *The need for a 'court' under Article 5(4)*: Any body which has the responsibility of reviewing the legality of continuing detention must meet the following conditions:

- it must be independent of the executive and impartial;
- it must have more than merely advisory functions, and must have the competence to 'decide' the lawfulness of detention, and to order release if the detention is unlawful¹⁰

16. In the Scottish context, the body which reviews the detention of discretionary life prisoners is the Parole Board, sitting as a 'Designated Life Tribunal', chaired by a judicial member of the Parole Board.¹¹ The Tribunal has the power to order release of the prisoner, and therefore satisfies this aspect of article 5(4). Whether the DLT satisfies the requirements of independence and impartiality depends upon whether or not the parent body, the Parole Board, satisfies these requirements.

17. In *Weeks v United Kingdom*, the applicant argued that the Parole Board for England and Wales was not independent of the Home Secretary, primarily because the Home Secretary appoints members of the Board, staffs the Board and makes the rules under which its procedures are conducted.¹² The Court's view was that the manner of appointment of the Board did not mean that the Board was not independent of the Home Secretary. The Court was also satisfied that in the exercise of their duties the Board remained independent of the Home Secretary. It also concluded that, even from the perspective of the life prisoner, the Board did present an appearance of independence.¹³ There was not, however, in these cases, any detailed consideration of the manner of appointment, terms of office or manner of removal of Parole Board members.

18. In Scotland, the chairman and members of the Parole Board are all appointed by the executive.¹⁴ Scottish Ministers are also responsible for deciding upon the period that individuals should serve, and their remuneration. Remuneration is on a fee basis, and members also receive travel and subsistence at civil service rates. Members of the Board are subject to standard terms and conditions which provide, *inter alia*, that their

appointment may be terminated by Scottish Ministers at any time prior to the expiry of their term of office, on the grounds of ill health, failure to attend regularly to the business of the Board or that they are otherwise unable or unfit to discharge the functions of a member of the Board. Board members may, on expiry of their original term of appointment, be appointed for a further term. There have been occasions when members have not been offered a second term.

19. As was indicated in *Starrs and Chalmers v Ruxton*¹⁵, when considering the independence of a court or tribunal, the manner of appointment to that body is probably of less significance than the security of tenure enjoyed by its members, and any possibility that they might be influenced by personal considerations. While it may well be, as Lord Reed suggested in *Starrs and Chalmers*, that the same standards would not be required of a tribunal as would be required of a court, it is likely, given the role of the Parole Board (and the DLT), that the standards of independence expected of a court would be applicable also in the case of the Board.

20. There is a possibility - albeit a remote one - that the Parole Board might not be seen as satisfying the requirements of a 'court'. The conditions under which Board members serve, and in particular the question of renewal for a further term, over which there appears to be no objective control, might lead to the view that the Board was not sufficiently independent of the executive