

## R v SECRETARY OF STATE FOR THE HOME DEPARTMENT ex parte ANDERSON and TAYLOR

This intervention, by JUSTICE, the legal human rights organisation, summarises the history and evolution of the life sentence and its procedures. It compares this to practice in other countries, and to proposals for reform in Northern Ireland and Scotland (where the governments propose to remove the executives' power to set tariffs for mandatory life sentence prisoners).

The main points raised are

- life sentences, created in the 19<sup>th</sup> century, gradually replaced capital punishment (whose deterrent value was increasingly questioned) and were never intended to be lifelong (paras 3-7);
- the 1953 Royal Commission on Capital Punishment suggested that trial judges determine the actual length of detention (para. 5);
- this option was rejected in the 1965 Murder (Abolition of Death Penalty) Act, according to the then Home Secretary, in order to allow flexible review by a Home Secretary to prevent over-long or unnecessary detention which would prevent rehabilitation (paras 9-13). The Home Secretary's powers were not, therefore, put in place in order to protect the 'public interest' or because release was a matter of pure discretion;
- the creation of the Parole Board in 1967 provided an independent judicial body which could make decisions on release, but it did not have final determinative powers (paras 14-18)
- the 1983 changes that created and defined the notion of a 'tariff' fundamentally changed the character of the life sentence, but were put in place by a Parliamentary statement of the Home Secretary, rather than legislation or debate (paras 19-20);
- those procedures, and the justification for them, were altered by subsequent Home Secretaries, once again by way only of Parliamentary statements (paras 21-24); this process lacked transparency and, arguably, legitimacy;
- Parliamentary and independent committees and reports have consistently argued for the removal of the Home Secretary's tariff-setting powers (paras 25-28);
- both the domestic and Strasbourg courts have gradually reduced the Home Secretary's power to determine tariff and release over discretionary lifers and those detained at Her Majesty's Pleasure (paras. 22-23). Importantly, they have now recognised that tariff-setting for mandatory lifers is a sentencing function, which therefore falls to be made by a judicial body (paras 29-30);
- the UK's signature to Protocol 6 ECHR (now obligatory on all member states of the Council of Europe) permanently abolishes the death penalty in peacetime and therefore removes the argument that the Home Secretary's power is needed to prevent pressure to restore capital punishment (para 31);
- current proposals for reform in Northern Ireland, designed to be compliant with the Human Rights Act 1998, will remove the Secretary of State's power to set tariff in all life sentence cases (paras 32-33). It must therefore be questionable whether similar powers can be justified on grounds of public interest or necessity in the rest of the UK;
- in other European countries, such decisions are made by courts or court-like bodies, and in Canada and Australia courts make such decisions, or, in the case of mandatory minima, can mitigate the length of detention (paras 34-37).

## INTERVENTION

1. JUSTICE is a human rights and law reform organisation, founded in 1957, which has long experience of working on life sentence cases, in terms of both policy and practice. For many years, our casework on miscarriages of justice brought us into contact with life sentence prisoners, some of whose cases we took to the European Court of Human Rights (*Weeks, Thynne, Hussain*). Those cases were instrumental in removing the Home Secretary's powers of release over discretionary lifers and those held at Her Majesty's Pleasure. We also intervened in *T & V v UK*<sup>1</sup> in the House of Lords and the ECtHR. In 1996, we published a report, *Sentenced to life*, describing the history of the life sentence, and recommending changes in law and practice based upon a research study of 170 cases. We also carry out research and education to promote human rights standards within the UK through publications, training, and the provision of information to the courts, Parliament, decision-makers, and the public. This intervention was prepared in accordance with leave granted by Lord Justice Rose.
2. The aim of the intervention is to provide the court with assistance in respect of the development of life sentences and the ways in which the Home Secretary's role has changed over time. We seek to put the mandatory life sentence in both a historical context and a wider European and Commonwealth framework.

### Historical background

3. The roots of life sentences as we know them are embedded in the nineteenth century. The progressive abolition of the death sentence for a wide range of offences at that time led to a somewhat more selective use of the life sentence. This was largely due to the work of the Criminal Law Commissioners, first appointed in 1833 to reform the system as a whole, and reporting at intervals throughout most of the century. The Offences Against the Person Act 1861 was a product of their deliberations, and represented a contemporary effort to rationalise the law relating to violent offences. It remains the primary statutory source for such offences, and imposes the life sentence as a maximum for a considerable number of them. Such sentences were not expected to last for natural life. This was confirmed in the 1953 Report of the Royal Commission on Capital Punishment, which reads:  

'Persons serving life imprisonment have died in prison before a definite term has been set to their sentences, but there is no case recorded in which it has been decided that a person shall be kept in penal servitude until he dies'<sup>2</sup>

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<sup>1</sup> Judgment of ECtHR 16 December 1999

<sup>2</sup> *Royal Commission on Capital Punishment*, 1953 Cmd 8932 para.614

4. The 1864 Royal Commission into the death penalty was in favour of abolishing it. However, because it was thought that public opinion was not ready for such a step, the Commission suggested that murders should be categorised into capital and non-capital offences. Those convicted of the latter would, by definition, be exempt from hanging, and thus progress towards full abolition would be made. These arguments were not to find practical expression for nearly a hundred years.
5. A Select Committee in 1930 also favoured abolition; and the Royal Commission on Capital Punishment of 1953<sup>3</sup> concluded that the death penalty was no more effective as a deterrent than any other measure. The Commission had examined experience in different states of the USA, where the death penalty had been abolished and then reintroduced; and had found that the figures afforded no reliable evidence, but certainly did not suggest any significant increase or decrease in numbers. The Commission's remit did not include deciding on the merits of abolition or retention of the death sentence; but it did suggest that the trial judge should decide the length of actual detention within a life sentence. This now appears prescient, in that it is an argument at the heart of this application.
6. Finally, in 1956, the Government introduced a Death Penalty (Abolition) Bill, promising each of the Houses of Parliament that their decisions would be accepted. The Commons voted for abolition and the Lords against, producing the compromise solution of the Homicide Act 1957. This abolished the death penalty for most murders, categorising them as capital (attracting the death sentence) and non-capital; but it was soon observed that this led to many anomalies. Capital murders were not necessarily the most serious or abhorrent: and the arbitrariness of the consequences brought the Act into disrepute.
7. Home Office research, published in 1961,<sup>4</sup> found that "from the point of view of saving life, and especially the lives of children, seeking a deterrent penalty is less important than investigating the kind of mental breakdown that leads to family murders". This was a new angle, and contributed to the pressure for review that led to the new Labour government allowing time for a private member's Bill – the Murder (Abolition of Death Penalty) Bill 1965 - so that it could remain neutral and allow a free vote on what was regarded as a matter of conscience.
8. Before the virtual abolition of the death penalty in 1965, therefore, Royal Commissions, inquiries and research had both cast doubt upon the deterrent nature of capital punishment and had shown that the alternative, an indeterminate sentence of 'life' imprisonment, had never been intended to imply that a person should spend the rest of his or her life in prison.

#### The 1965 Murder (Abolition of Death Penalty) Bill

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<sup>3</sup> Royal Commission on Capital Punishment, 1953 Cmnd 8932 para 614

<sup>4</sup> Murder: A Home Office Research Unit Report

9. There are many arguments in the Commons debates on the Bill which resonate today. Sydney Silverman, who presented it, rejected the Royal Commission (1953) idea that the trial judge should decide the length of actual detention within a life sentence. He noted that judges did not claim omniscience about the future; and that although it was important to know what people were like when they were sentenced, it was equally relevant to know what they had become in order to achieve appropriate and safe release. He went on to list the three elements that should be considered in the determination of the length of detention: the gravity of the offence, the safety of the public, and the danger of destroying by degrees over long years a life which society had refrained from destroying at the beginning. Silverman recommended the establishment of a parole board to help carry out the task. This was another suggestion that would bear fruit.
10. Sir Frank Soskice, the then Home Secretary, went on to set out in the Parliamentary debates the policy that ought to underpin decisions about the length of detention. He was keenly aware of the danger of replacing one barbarous penalty with another, and insisted that the Home Secretary must take “the greatest care”<sup>5</sup> in exercising the discretion he would be given in administering the mandatory life sentences that the Act introduced for all murders. The Home Secretary should not, except where absolutely necessary, allow deterioration of the personality to set in, nor the chances of reintegration to diminish. It was known that 9 or 10 years was the maximum that “normal human beings can undergo without their personality decaying, their will going, and their becoming progressively less able to re-enter society and look after themselves and become useful citizens”<sup>6</sup>. This was a clear recognition of the public interest in rehabilitation.
11. In conducting this testing and sensitive exercise, the Home Secretary said he would like to have the benefit of trial judges’ views, indicating that it would be helpful if they wrote memoranda setting out factors that might be relevant in the future, when release on licence was under consideration. He too was against judges deciding on a minimum term; and this was on the grounds that the Home Secretary had the advantage of continual reports to assist the exercise of his discretion. These were not available to judges and their content could not be predicted at the time of sentence.
12. This was the background to the Act’s stipulation that the Lord Chief Justice and the trial judge (if available) should be consulted before the Secretary of State could order the release of anyone convicted of murder. Trial judges were able to make minimum recommendations as to time to be served before the Home Secretary ordered release, but these were used sparingly.
13. The debates on the 1965 Act are therefore illuminating in terms of Parliament’s intention in giving the determinative power of release to the

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<sup>5</sup> Hansard 21 December 1964 col 927

<sup>6</sup> Hansard 21 December 1964 col 929

Home Secretary, rather than the trial judge, as suggested by the 1953 Royal Commission. It was not, as now is often assumed, because the Home Secretary brought to the decision the consideration of a broader public interest in detention or release; nor was it because only the exercise of executive discretion could mitigate the expectation of imprisonment for life. Rather, it was for reasons which have now been endorsed by the domestic courts and the European Court of Human Rights: that the detention of those imprisoned for indeterminate periods should be subject (after a certain period) to regular review, during which the progress of the offender could be assessed, with a view to rehabilitation. This is now, of course, a function that the Parole Board can undertake.

#### The 1967 Act, the Parole Board, and release

14. Conditional release from life sentences had always been possible. Those transported to Australia had been able to get a “ticket of leave” eventually; and at home release had been achieved by the exercise of the Royal Prerogative of Mercy, authorised in practice by the Home Secretary. These arrangements had been put on a statutory basis by the Criminal Justice Act 1948, which provided for release on licence subject to such conditions as the Secretary of State (alone) might determine, and to recall<sup>7</sup>. The Lord Chief Justice was sometimes consulted in practice, but this was not required by the Act.
15. The 1967 Criminal Justice Act extended the requirement for consultation in all life sentence cases. Importantly, it created the Parole Board, and put the discretionary early release of all prisoners on a statutory footing. A Parole Board recommendation was, from now on, essential for release. Such a recommendation would have to be accepted by the Home Secretary for release to take place; and it was open to him to reject the recommendation and use his veto. However, he could not authorise release himself in the absence of a recommendation from the Board.
16. If a recommendation were accepted, consultation with the judiciary would follow. Thus the Secretary of State would look to the judiciary for advice on the length of time to be served to meet the needs of retribution and deterrence, and to the Parole Board for advice on risk. There was, at this stage, no separation between the two processes of deciding on a minimum term of imprisonment and deciding on when and whether it was safe to release someone.
17. This is the basic statutory scheme, although it has been subject to changes in operation over time. Originally all life sentences were referred to the local review committee and then to the Parole Board not later than seven years after the commencement of custody. If release were thought (by the Home Office) to be a realistic possibility at this stage, the views of the judiciary were sought and communicated to the Board.

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<sup>7</sup> S57 Criminal Justice Act 1948, replaced by S27 Prison Act 1952

18. In 1973 a joint committee of Board members and Home Office officials was formed, allowing the Board some input into decisions on earlier reviews in certain cases. Its function was either to fix a date for a first review or to ask for the case to be reviewed again after a specified interval.

#### The 1983 changes and their implementation

19. Life sentence procedures, and the entire operation of the statutory scheme, were fundamentally altered in 1983, as a consequence of changes announced first to the Conservative Party conference and then to Parliament by the then Home Secretary, Leon Brittan, on 30 November. He announced the introduction of a 'tariff': a fixed period of initial detention to be served for retribution and deterrence, on which the judges would be consulted. Release would not be a possibility until that period had been served, after which the Parole Board (and subsequently the Home Secretary) would assess risk of reoffending in order to decide upon whether to release. At the same time, Mr Brittan introduced a 20 year minimum tariff for certain kinds of murder (some of those which had previously been capital murders under the Homicide Act).
20. These changes meant the life sentences were no longer genuinely indeterminate. Arguably, this went against the intention of Parliament in passing the 1965 Act and giving the Home Secretary a duty of continuous review. In practice, also, they retrospectively increased the period of detention expected to be served by those to whom the new 20-year minimum applied (some of whom had been moved to open prisons as a preliminary to release). Yet they were not considered by Parliament, nor were they the subject of legislation; or indeed of any clearly stated policy or guidelines as to their operation (see below). Although this policy was unsuccessfully challenged in the courts<sup>8</sup> it may be that in the light of contemporary human rights standards and more recent judicial decisions this method of effecting major change, with direct effect on the right to liberty, would not be considered lawful.
21. Over the next few years, the lack of clarity and transparency in the newly set out structure became even more apparent. For example, it was only as a result of evidence provided by the Home Office to the House of Lords 1989 Select Committee on Murder and Life Imprisonment that it became apparent that Home Secretaries had set a large percentage of tariffs at levels above the judicial recommendations. For example, in 63 out of 106 mandatory life sentences considered in six months in 1988, the Home Secretary set a higher tariff than that privately indicated to him by the trial judge. This information apparently came as a shock not only to the Committee, but also to the then Lord Chief Justice.
22. Furthermore, the procedures and decision-making powers over life sentence prisoners were subject to continuous revision and refinement by

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<sup>8</sup> Re Findlay (1985)AC 318

successive Home Secretaries, again by way of Parliamentary statement rather than legislative change. On 23 July 1987, for example, following the courts' decision in *Handscomb*<sup>9</sup>, it was announced that discretionary lifers would be treated differently: trial judges' recommendations as to tariff were final, and had to be based on the determinate sentence that would have been imposed had there been no element of mental instability and/or public risk. The European Court of Human Rights, upholding the applications of three other discretionary lifers,<sup>10</sup> ruled that a court-like body (by way of oral hearings before the Parole Board) should alone decide release.

23. In 1993 following the *Doody*<sup>11</sup> case (which itself was a product of the revelation as to how the Home Secretary was in practice using his tariff-setting powers), new procedures were announced (in the House of Commons on 27 July) which provided for the disclosure to prisoners both of judicial recommendations as to tariff, and of the Home Secretary's decision as to setting it. Prisoners were also given the right to make representations. However, there was an important new rider: the Home Secretary would only exercise his discretion to release mandatory lifers if he was satisfied of 'the public acceptability of early release'. This was an entirely new consideration, developed by the then Home Secretary, without Parliamentary debate or discussion. It appeared to bear no relation to the reasons why Parliament had initially entrusted release decisions to the Home Secretary.

24. These further developments illustrate the extent to which, by a process of Ministerial decision-making, announced to Parliament and not set out in any published form, procedures and powers departed from the original intention of the 1965 Act: that life sentences should be subject to continuous review with a view to release at the most appropriate moment.

#### Pressure for reform

25. From 1983 onwards there was mounting criticism of the Home Secretary's role itself. Lord Lane, the then Lord Chief Justice, summed up the concerns of the judiciary when he wrote in evidence to the House of Lords Select Committee: "Now it is unsatisfactory to say the least, that the length of a prisoner's stay in prison should be determined, or partially determined behind the scenes by someone who has not heard any representations by or on behalf of the prisoner on grounds which the prisoner does not know".

26. This debate has continued. The Committee on the Penalty for Homicide 1993 (the Lane Committee), whose remit was to consider the natural justice and practical ramifications of sentencing and release procedures in mandatory life sentence cases, concluded that logically, jurisprudentially

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<sup>9</sup> R v Secretary of State for the Home Department ex parte *Handscomb* and others (1988)86 Crim App R59

<sup>10</sup> in *Thynne, Wilson, and Gunnell v UK* (1990) 13 EHRR 666

<sup>11</sup> R v Secretary of state for the Home Department ex parte *Doody* and others (1993) 3 All ER 92-113

and constitutionally, the decision on punishment should be made in open court by the judge who passes sentence.

27. The Home Affairs Committee (in *Murder: the Mandatory Life Sentence*<sup>12</sup>) similarly recommended that the responsibility for tariff and release decisions should be removed from the Home Secretary; and that both prosecution and defence should be able to appeal against length of tariff (which should be decided by the trial judge) to the Court of Appeal.
28. JUSTICE (in *Sentenced for Life*<sup>13</sup>), came to a similar conclusion; and we also recommended that there should be no whole life tariffs (the ceiling should be 30 years); that mandatory lifers should – if the sentence were to remain – have oral Parole Board hearings in the same way as discretionary lifers; and that recall procedures and safeguards should be improved.

### Decisions of the courts

29. Court decisions have revealed an increasing concern about the role of the Executive in making decisions on the length of detention. As is well-known, the European Court of Human Rights, in a series of decisions, has removed the Home Secretary's power to decide on the release of discretionary life sentence prisoners<sup>14</sup>, and on the release and later the tariffs of those detained at Her Majesty's pleasure.<sup>15</sup> This last decision drew upon a recent decision in the House of Lords (in *Pierson*<sup>16</sup>), which had declared tariff setting to be a sentencing exercise (thus attracting the protection of Article 6 of the European Convention on Human Rights).
30. The ECtHR's acceptance of this reflects its own, and the domestic courts', developing jurisprudence since the case of *Wynne*<sup>17</sup>. In these circumstances, it is unlikely that the reasoning in *Wynne* would stand. This case will provide the first opportunity for this point to be argued before the domestic courts, following the implementation of the Human Rights Act.

The effect of Protocol 6 ECHR it has frequently been argued (and was indeed part of the reason behind the Brittan statement) that the retention, and fine-tuning, of the Home Secretary's decision-making power was necessary in order to provide a procedure, accountable to Parliament, so that Parliament would not find it necessary to reintroduce the death penalty. This possibility, however, has now been removed by Parliament itself, which in 1997 voted for the UK government to sign Protocol 6 of the ECHR, abolishing the death penalty in peacetime. The UK government has now done so, in conformity with the great majority of other European

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<sup>12</sup> Home Affairs Committee Supplementary Report 15 May 1996)

<sup>13</sup> A 1996 report on reform of the law and procedure for those sentenced to life imprisonment)

<sup>14</sup> *Hussain v UK* 26 February 1996

<sup>15</sup> in *T & V v UK* 16 December 1999

<sup>16</sup> *R v S of S for the Home Department* (1997) 3 All ER 577

<sup>17</sup> *Wynne v UK* (1994) 19 EHRR 353

countries. Adherence to Protocol 6 is now a prerequisite for membership of the European Union, and has been accepted by 39 out of 41 states of the Council of Europe – leading the Secretary General of the Council of Europe to say, on Human Rights Day 2000 that he hoped that Turkey and Russia would abolish “this form of punishment which is unacceptable in a modern democracy”. Insofar as the retention of the Home Secretary’s power was justifiable as a bulwark against pressure to reinstate capital punishment, that justification is no longer needed..

### Northern Ireland

31. It is, we would argue, relevant to the present case that in Northern Ireland the Government has already proposed that executive decision-making powers over mandatory life sentence prisoners should be removed in light of the requirements of the Human Rights Act.

32. The draft of the proposed Life Sentences (Northern Ireland) Order 2001 has now been laid before Parliament; and was explicitly drawn up with compliance with the Human Rights Act 1998 in mind<sup>18</sup>. As well as bringing arrangements for the release of discretionary life sentence prisoners and SOSps (the equivalent of HMPs) into line with the rest of the UK, the draft proposes to remove the Secretary of State’s decision-making powers over mandatory lifers. It will require the courts, rather than the Secretary of State, to set tariffs and will subsequently give the Life Sentence Review Commissioners (the equivalent of the Parole Board) power to direct release where continued detention is not necessary for public protection. The Secretary of State is left with a duty to release on direction of the Commissioners and he has power to direct compassionate release, and to revoke licences directly in urgent circumstances and refer these cases to the Commissioners. All life sentence prisoners will be entitled to oral hearings, in the same way as they currently operate for discretionary lifers and HMP detainees in England and Wales.

### Scotland

33. In Scotland, the Convention Rights (Compliance)(Scotland) Bill - drafted, as the title suggests, to achieve Human Rights Act compliance - has much the same effect. It specifies that, in mandatory life sentence cases, the courts shall decide on tariffs. The Parole Board will be able to direct the Scottish Ministers to release when they are satisfied that public protection does not require further confinement, thus taking away the discretion now vested in the Justice Minister. The new scheme will apply to life prisoners transferred to Scotland from other parts of the United Kingdom; and, as in Northern Ireland, prisoners will be entitled to oral Parole Board hearings in the same way as discretionary lifers and HMP detainees.

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<sup>18</sup> See the Explanatory Document issued on 19 December 2000 by the Legislation Branch of the Northern Ireland Prison Service.

34. It must be questionable, in view of the devolved governments' intention to remove executive decision-making powers in all life sentence cases in Northern Ireland and Scotland, whether their retention can now be justified, on grounds of public interest or necessity, in England and Wales.

#### Life sentences in Europe

35. Although other European countries have mandatory life sentences, they are limited to the worst kinds of murder, and do not apply indiscriminately to all cases. That is the reason why there are more life sentence prisoners in England, Scotland and Wales than the rest of Western Europe combined.<sup>19</sup>

36. Nor do other European countries countenance what the House of Lords has termed sentencing - or indeed release - decisions being made by the executive. It is accepted throughout the European Union that these are judicial functions, subject to the principles of not being arbitrary and being proportionate. It is a matter for serious consideration as to whether, as standards improve, membership of the European Union will become contingent on judicial decision making in this area, as is already the case with the ban on capital punishment.

#### Australia and Canada

37. In most Australian states it is the courts that decide on what is called the nominal sentence within an indefinite or life sentence: that is the equivalent of our tariff. In Queensland there is a fixed non parole period of 13 years for life sentences; and in New South Wales – where life now means natural life – application may be made to the Supreme Court for determination of a minimum term after 8 years, or 20 years if there has been a non-release recommendation. The courts in Victoria review sentences after the expiry of the nominal sentence.

38. In Canada those convicted of first degree murder must normally serve 25 years of a life sentence before they have the opportunity to go before the parole board. However, S745.6 of the Criminal Code allows a prisoner to apply to a judge to go before a jury to request access to the parole board after 15 years. The jury may reduce the number of years to be served before the case can be considered by the parole authorities.

**JUSTICE**  
**January 2001**

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<sup>19</sup> A Fair Deal for Lifers, Quaker Council for European Affairs 1990