

INTERVENTION BY JUSTICE

R v SECRETARY OF STATE for the HOME DEPARTMENT ex parte PYRAH AND LICHNIAK

Introduction

1. JUSTICE is a human rights and law reform organisation, founded in 1957, which has long practical and policy experience of working on life sentence cases. 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*). These cases were instrumental in removing the Home Secretary's powers of release over discretionary lifers and those detained during Her Majesty's Pleasure. We also intervened in *T&V v UK* in the House of Lords and the ECtHR¹ and were recently granted leave to intervene in ex parte *Anderson & Taylor* in the Administrative Court². 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.
2. The aim of the intervention is to provide the court with assistance in respect of the development of life sentences, and the significance of the mandatory sentence within this framework. We also seek to put it in a wider European and Commonwealth context.

History of the mandatory life sentence

3. The creation of the mandatory life sentence is inextricably linked to the ending of the death sentence over the latter half of the twentieth century. The Homicide Act 1957 abolished the death penalty for most murders; and the Murder (Abolition of Death Penalty) Act 1965³ extended this to all murders and substituted the mandatory life sentence. It was not until 1997 that Parliament voted for the government to sign Protocol 6 of the ECHR, abolishing the death penalty for all crimes in peace time.
4. These developments were the result of more than a century's deliberations, by the Criminal Law Commissioners in the nineteenth century, and a number of expert groups. The influential Royal Commission on Capital Punishment (1949-53)⁴ considered a range of issues, among them the extremely wide range of circumstances that could lead to murder convictions. They reported: "The crime may be human and

¹ Judgment of ECtHR 16 December 1999

² Judgment on 22 February 2001

³ S1(1),(2).

⁴ 1953 Cmnd 8932

understandable, calling more for pity than for punishment, or brutal and callous to an almost unbelievable degree". This theme was developed in Home Office research, published in 1961⁵, which 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". Though these were arguments put forward in favour of the abolition of capital punishment, they apply equally to the notion of a mandatory indeterminate sentence, imposed regardless of individual circumstances.

5. The Royal Commission (see above) had suggested that the trial judge should decide the length of actual detention within a life sentence. This was rejected in the debates on the Murder (Abolition of Death Penalty) Bill as not being flexible enough. Sydney Silverman, who introduced the Bill, dismissed this proposal on the grounds that judges could only know what people were like at the time of sentence; and it was equally important to know what they had become in order to make appropriate decisions as to the timing of release. He listed 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 that society had refrained from destroying at the outset. He recommended the establishment of a Parole Board to perform the task.
6. Sir Frank Soskice, the then Home Secretary, set out the policy that ought to underpin decisions about the length of detention within a mandatory sentence. He was keenly aware of the danger of replacing one barbarous penalty with another; and of the need for flexibility within this new, potentially rigid framework. He emphasised that the Home Secretary must take "the greatest care"⁶ in exercising the discretion he would be given to decide on the period of detention. He should not, except where absolutely necessary, allow deterioration of the personality to set in, nor the chances of reintegration to diminish. 9 or 10 years had been the period that people who escaped the death sentence (for non-capital murders) had usually been detained. It was thought that this 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"⁷.
7. Soskice went on to invite trial judges to write memoranda setting out factors that might be relevant in the future, when release was under consideration. He too was against judges setting a minimum term; and this was on the grounds that the Home Secretary had the advantage of continual reports to exercise the use of his discretion. These were not available to judges, and could not be predicted at the time of sentence.

⁵ Murder: A Home Office Research Unit Report

⁶ Hansard 21 December 1964 col 927

⁷ Hansard 21 December 1964 col 929

8. It is clear, therefore, that at the time of the introduction of the mandatory sentence – perceived to be the only realistic way of discontinuing the death sentence for murder – it was meant to be a flexible arrangement, subject to careful and continuous review to ensure safe release after an appropriate, and not too long, time. In the absence of a Parole Board such procedures seemed a more effective method of achieving these objectives than leaving decisions to the judiciary at the time of trial. The judges' role would, under the Act, be limited to consultation.
9. These are ideas that have since featured in European Court judgements⁸ in relation to other indeterminate sentences. Access to regular, judicial review once the tariff has expired is a function that can now be performed by the Parole Board in relation to discretionary lifers and HMP detainees; and the Home Secretary may not set tariffs in these cases. In Scotland and Northern Ireland these provisions are now being extended to mandatory lifers. We argued in our submissions in *Anderson and Taylor* that this ought also to be the case in England and Wales.
10. Life sentence procedures 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 would assess risk. Any recommendations for release that might then be made would be subject to a veto by the Home Secretary. At the same time he introduced a 20 year minimum tariff for certain types of murder.

Critiques of the mandatory life sentence

11. These changes, together with a number of debates on the reintroduction of capital punishment in the House of Commons during these years, sparked both litigation and debate. A Select Committee of the House of Lords was appointed to report on Murder and Life Imprisonment. Its main recommendation was the abolition of the mandatory life sentence. The Committee understood that the justification of the sentence was that murder was regarded as a uniquely heinous offence, deserving to attract condign punishment. Yet, like the Royal Commission nearly forty years earlier, they agreed, in the words of Lord Hailsham⁹ that: "Murder, as every practitioner of the law knows, is not in fact necessarily so, but consists of a whole bundle of offences of vastly differing degrees of culpability, ranging from brutal, cynical, and repeated offences like the so-called Moors murders to the almost venial, if objectively immoral, 'mercy killing' of a beloved partner".

⁸ *Thynne Wilson and Gunnell v UK* (1990)13 EHRR 666, *Hussain and Singh v UK* (1996) 22 EHRR 1

⁹ in *R v Howe* (1987) 1AC 417 at 433

12. The idea that murderers posed special problems of dangerousness was disputed by the then Lord Chief Justice, Lord Lane. In giving evidence to the Committee he pointed out that rapists and arsonists may be much more likely to commit repeat offences¹⁰. David Thomas encapsulated the argument: "In so far as the mandatory life sentence is justified by the special problems of estimating the chances of future violence by those who have killed once, the existence of special defences such as diminished responsibility and provocation, introduced in earlier times for different purposes, undermines the logic of the sentence by excepting from its scope just those offenders who are likely to prove dangerous for the future¹¹". This was an argument that had found favour with the 1975 Butler Committee on Mentally Abnormal Offenders, which recommended reviewable sentences for dangerous offenders. It is now well established that the recidivism rate for murderers (around 3%) is much lower than that for discretionary lifers (26%)¹².
13. JUSTICE gave evidence to the House of Lords Select Committee, on the basis of our wide experience at that time of dealing with a large number of those convicted of serious offences. We recommended the abolition of the mandatory life sentence for a number of reasons: "Experience has shown that the great majority of murders are committed in domestic circumstances by persons under immense emotional stress who are unlikely to offend again. In such cases an indefinite power of control is unnecessary. In other cases, where there is a real risk that the murderer might kill again, and he or she is a continuing threat to the public, the appropriate sentence is likely to be one of imprisonment for a long period, even for life. The most heinous murders will surely always attract such a sentence. In this respect we think it difficult to distinguish between such murders and the worst cases of rape and, perhaps, armed robbery. If it is a very bad case, or if the offender is likely to re-offend on release from prison, the sentence is likely to be one of life imprisonment in each case. Equally, if these factors do not apply, life imprisonment would be wrong...For these reasons we recommend that the law should be changed to abolish the mandatory sentence of life imprisonment upon a conviction for murder...The maximum sentence should be one of life imprisonment but the sentencing court should have a complete discretion over sentence in individual cases."

European and Commonwealth jurisdictions

14. The existence of a mandatory life sentence for all murders is unusual in the wider European context. In Germany a mandatory life sentence follows a conviction for murder only if there are aggravating features: killing for base motives (lust or greed), killing particularly maliciously, cruelly, or dangerously, or to facilitate or conceal another offence. In the Netherlands there are no mandatory life sentences, although murder can attract a life

¹⁰ P34 vol1 Report of the Select Committee on Murder and Life Imprisonment

¹¹ *ibid*

¹² An Exploration of decision-making at discretionary lifer panels: Padfield, Liebling, and Arnold Home Office Research Study 2000

sentence at the discretion of the trial judge. The same applies in Austria. When capital punishment was abolished in the Czech Republic in 1990, it was not automatically replaced by the life sentence, but rather life sentences were made discretionary for murders that were particularly brutal or egregious.

15. In Italy there is a mandatory life sentence for intentional homicide, and in practice this operates in a somewhat similar way to the German system. Denmark, too, distinguishes intentional from negligent homicide; and life sentences are discretionary, as they are in France. In Spain and Norway there are no life sentences, but courts in both countries may fix determinate sentences for murder within a prescribed range of years. Portugal and Cyprus have abolished life sentences: although in Cyprus a life sentence may be passed but is subject to an upper limit of 20 years by prerogative of the President.
16. There is an emerging argument that life imprisonment needs to be examined for its compatibility with human rights¹³; and the Maastricht and Amsterdam Treaties may provide the basis for this to be considered, in the light of their provisions for judicial co-operation in justice matters. It has been suggested that maximum sentences should be included on the agenda for judicial co-operation, and that a scrutiny of life sentences has become increasingly important, in the light of developments within Europe. All new member states of the Council of Europe are now required to ratify Protocol 6 of the European Convention on Human Rights (effectively ending capital punishment in Europe). In addition, several European countries have now also abolished life sentences and have provisions which seek to ensure that the sentence is proportionate to the facts of the case or the nature of the murder.
17. Commonwealth jurisdictions are more likely to retain mandatory life sentences. In Canada these exist for both first and second degree murder, although it is possible to request access to the Parole Board earlier than tariff. The mandatory minimum period for first degree murders is 25 years, and for second degree 10 years. However, this may be altered by the trial judge if the circumstances so warrant.
18. In New South Wales a mandatory life sentence was introduced for murder in 1955, when the death penalty was abolished. However, the Crimes (Homicide) Amendment Act 1982 enabled a lesser fixed penalty to be imposed where the offender's "culpability for the crime is significantly diminished by mitigating circumstances"¹⁴. It is true that "life meaning life" was introduced by the Crimes (Life Sentences) Amendment Act 1989 for "the very worst and most serious and heinous examples of this crime": but it is not a mandatory sentence, and had never been imposed up to

¹³ Hartmut Weber and Nicholas McGeorge in a paper for the Dublin conference of the European Association for Law and Psychology July 1999, and Dirk Van Zyl Smit: Life imprisonment as the ultimate penalty in international law: a human rights perspective.

¹⁴ Nicholas Cowdery: Mandatory life sentences in New South Wales (in the University of New South Wales Law Journal Forum January 1999)

January 1999 . If it is imposed it is possible to apply for a court review after 8 years.

19. The changes to the New South Wales legislation have introduced greater flexibility, allowing for more proportionate sentencing, while ensuring that there is access to the courts for review purposes if the sentence is for life.
20. It appears, therefore, that the direction in European countries has been away from the indiscriminate use of life sentences for murder which characterises the English and Welsh system. This may be partly owing to the domestic application of the European Convention, only just achieved in the UK, and its requirement for proportionality in sentencing. The New South Wales legislation shows that this consideration is also gaining acceptance in Commonwealth jurisdictions.

JUSTICE February 2001