IN THE HOUSE OF LORDS
ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL
(CIVIL DIVISION)

BETWEEN:

REGINA

V

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

ex parte

MYRA HINDLEY

INTERVENTION OF JUSTICE

TO THE RIGHT HONOURABLE THE HOUSE OF LORDS

Introduction

1. JUSTICE is an all-party legal human rights organisation, founded in 1957, which carries out research and education in order 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 with the assistance of Stephen Livingstone, Professor of Human Rights Law at Queen's University, Belfast. We are grateful to him.

2. The aim of this intervention is to provide Your Lordships with assistance in respect of relevant international and comparative law and practice relating to four issues germane to this appeal. They are:
   - the use of mandatory life sentences in respect of those convicted of murder
   - the length of life sentences
   - the role of the executive in setting the minimum ('tariff') period of detention
   - judicial supervision of continuing detention.

   We deal with these issues in turn.

The Mandatory Life Sentence for Murder

3. The United Kingdom is unusual in providing for a mandatory life sentence for murder. In some countries, life sentences are not available at all. In Portugal, Brazil and Columbia, the constitution prohibits courts from ordering a life sentence. In other

countries, such as Spain or Norway, sentencing legislation does not make provision for the giving of life sentences.

4. In most countries, there are a range of options for the sentencing court whereby a life sentence is at most reserved for the most serious murders or those involving the most dangerous offenders. The international consensus thus appears to be evolving in the direction of providing a sentencing court with a range of penalties for the offence of murder, with fixed terms of imprisonment being the norm for such offences and the life sentence being an exception. A 1990 report by the Quaker Council for European Affairs observed that England, Scotland and Wales had more serving life sentence prisoners than the rest of Western Europe combined and attributed this primarily to the use of the mandatory life sentence for murder in the United Kingdom.[1]

5. Perhaps the best indication of this developing consensus is reflected in the sentencing provisions of the statute for the International Criminal Court, which was agreed at Rome in June 1998. The statute was subsequently signed by the United Kingdom on November 30 1998. The legislation necessary to enable ratification is included in the Queen's Speech for the current Parliamentary session. This means that the United Kingdom expects to be among the first 60 countries to ratify the statute, and will therefore play a part in deciding on procedures and rules of evidence. This indicates that the UK government fully accepts the framework set out in the statute for the new court and its powers.

6. Article 77 of the statute provides the court with a range of sentencing options. The life sentence is only one of these and Article 77(1)(b) of the Statute provides the a life sentence may only be ordered "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person". That the international community has not provided for a mandatory life sentence even in respect of those convicted of crimes against humanity clearly points to an international consensus in favour of limiting the use of life imprisonment as a punishment. Indeed the final text of the Statute marked a move away from earlier proposals (notably in the Ninth Report of the Special Rapporteur of the International Law Commission in 1991)[2] for a mandatory life sentence, with fixed terms of imprisonment only if exceptional circumstances were present.

7. The debates of the International Law Commission preceding the adoption of the text on which the statute of the International Criminal Court was based also indicate that some of those who endorsed the availability of a sentence of life imprisonment did so primarily on the basis that such a penalty was required for those who presented a continuing risk of such offences. As Van Zyl Smit observes "a number of commissioners supported life imprisonment only with provision for a sufficient degree of flexibility in the imposition and implementation of the sentence". [3] Human Rights Watch observes that such debates continued in the preparatory committees

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[1] *A Fair Deal for Lifers*
[2] Ninth Report of the Draft Code of Crimes Against the Peace and Security of Mankind, UN Doc A/CN.4/435 and Add.1 (1991)
[3] Cite to Van Zyl Smit "Life Imprisonment as the Ultimate Penalty in International Law: a Human Rights Perspective" ? at p.19

leading to the drafting of the statute.[4] It was partially in response to the concerns of those countries that opposed the inclusion of a life sentence among the penalties that the states parties decided to include Article 110 (providing for a review of sentences), which is discussed in more detail below.

The Length of Life Sentences

8. Not only is the United Kingdom unusual in providing for a mandatory life sentence in respect of all murders but it is unusual in providing that, through the operation of the whole life tariff, prisoners can be informed from early in their sentence that they will remain in prison for the rest of their lives. In a number of states the idea that a prisoner might spend the rest of his or her life in prison has been held to be contrary to constitutional provisions which indicate that all prisoners must have an opportunity to improve themselves as a preparation for possible release.[5]

9. A number of principles of international human rights law may be discerned which influence practice in other countries and at the International Criminal Court: they include concepts of the dignity of the person, of the rehabilitative nature of imprisonment, and of the need for proportionality in sentencing.

The dignity of the human person

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[4] Human Rights Watch, *Summary of the Key Provisions of the ICC Statute*, available at http://www.hrw.org/hrw/campaigns/icc/icc-statute.htm
[5] For example Italy, Namibia, Germany

10. The desire to promote human dignity underlies many of the rights under post-war international human rights principles. German constitutional law is founded on the idea of human dignity; and the 1996 South African constitution "affirms the democratic values of dignity, equality, and freedom". Article 10 states "Every person has inherent dignity and the right to have their dignity respected and protected".

11. Professor David Feldman (in Public Law, Winter 1999) argues that "Similar reliance on the dignity of the human person as a justification for enforcing human rights appears from many other instruments, including the European Convention on Human Rights (ECHR), which refers in its Preamble to the UN Declaration on Human Rights and in respect of which the Strasbourg organs have frequently referred to human dignity as one of the values underpinning the rights." Article 3 ECHR has as its object the protection of a person's dignity as well as his or her physical integrity. For example, in *Tyrer v UK* [6] it was held that Article 3 was breached, at least in part, because of the circumstances of indignity and humiliation in which a judicial birching was administered. It degraded both the applicant and society as a whole.

12. Germany has a mandatory life sentence for certain types of murder, essentially where there are aggravating factors. This sentence was challenged in 1977, on the basis that it destroyed the personality and was inconsistent with inherent human dignity. The German Constitutional Court held (21st June 1977):

    "the essence of human dignity is attacked if the prisoner, notwithstanding his personal development, must abandon any hope of ever regaining his freedom… It

belongs to the preconditions of imprisonment which is based on human dignity that also persons sentenced to life imprisonment shall have in principle a chance to be free again. The possibility of clemency alone is not sufficient; rather the principle of the legal state demands to lay down by statutory law the preconditions by which the execution of life imprisonment may be suspended as well as the procedure regulating the suspension".[7]

13. As a consequence, those given life sentences for murder in Germany must now serve a minimum 15 year sentence. This can be increased by a Penal Execution Court where the existence of specific facts indicates that this is a crime of particular severity (for example a multiple murder).

14. In some other countries, where a mandatory sentence is provided for in respect of particular murders, this is expressed in a term of years rather than a whole life period, and in the case of particularly long sentences, is reviewable. In Canada, for example, Section 745 of the Criminal Code provides that those convicted of first degree murder will be ineligible for parole for 25 years. However, an offender may apply for judicial review of this after he or she has served 15 years. In Ireland those convicted of a murder of a police officer are required to serve at least 40 years of a life sentence. However, remission of one quarter of this is automatically available.

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[6] E CtHR judgment April 25 1978
[7] BverfeGE 45 (1977) 187 at 245

15. There are very few countries where a whole life sentence can be imposed. They were introduced ten years ago in New South Wales, under Section 19A of the Crimes (Life Sentences) Amendment Act 1989. However, this does not necessarily mean that "life means life". Offenders may nevertheless apply to the Supreme Court for a determination of a minimum term after 8 years, or after 20 years if a recommendation that someone should never be released is made (which it never has been).

16. Hence it appears that 25-30 years is the upper limit of life sentences in most of those countries which utilise such a sentence.

Rehabilitation

17. The idea that the prison system must be orientated towards rehabilitation, which finds reflection in England and Wales in Prison Rules 3, 4 and 5[8], is also a consistent theme of international human rights law provisions in relation to imprisonment.

18. Article 10(3) of the International Covenant on Civil and Political Rights, to which the United Kingdom is a party, indicates that

> "The penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation."

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[8] Prison Rule 3 "The purpose of the training and treatment of convicted prisoners shall be to encourage and assist them to lead a good and useful life"

Prison Rule 4(2) "A prisoner shall be encouraged and assisted to establish and maintain such relations with persons and agencies outside prison as may, in the opinion of the governor, best promote the interests of his family and his own social rehabilitation"

Prison Rule 5 "From the beginning of a prisoner's sentence, consideration shall be given, in consultation with the appropriate after-care organisation, to the prisoner's future and the assistance to be given him on and after his release"

In its general comment on Article 10 (General Comment 21/44 of 1992), the Human Rights Committee observed that “no penitentiary system should only be retributory. It should essentially seek the reformation and social rehabilitation of the prisoner”.

19. The same theme is reflected in Article 5(6) of the American Convention on Human Rights which indicates that “Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of prisoners”. In respect of juveniles, Article 37 of the United Nations Convention on the Rights of the Child expressly prohibits the use of life imprisonment without possibility of release in respect of offences committed by persons under 18. UN recommendations on Life Imprisonment, prepared by the UN Crime Prevention and Criminal Justice Branch, suggest that life sentence regimes should "provide each prisoner with the possibility of release, upon the fulfillment of certain conditions framed by law".

20. These provisions of international human rights law suggest that there exists a growing international consensus in favour of the idea that sentences of imprisonment must be orientated towards the rehabilitation of the prisoner and preparation for a return to society. Providing that any prisoner will spend the rest of his or her natural life in prison, without any hope of release, would appear to run contrary to this consensus.

21. Once again, the statute of the International Criminal Court can be seen as reflecting this developing consensus. Article 110(2) of this provides that "When the person has served two thirds of the sentence or *25 years in the case of life imprisonment*, the

court shall review the sentence to determine whether it should be reduced". A series of criteria are provided in Article 110(4) as to whether a sentence ought to be reduced and Article 110(5) provides that where the court decides that it is not appropriate to reduce the sentence "it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence".

Proportionality

22. The use of a whole life tariff also raises questions regarding the proportionality of sentences. The use of such a tariff means that, in practice, the length of time an offender will spend in prison is dependent on their age at the time of conviction and their state of health. If two co-accused, one aged 22 and the other 52, were convicted of murder and given whole life tariffs for the same offence it is likely that the younger would spend a considerably longer time in custody.

23. The issue of the proportionality of sentences has been considered by the European Commission and Court of Human Rights in the context of Article 3 of the Convention's prohibition on torture, inhuman and degrading treatment or punishment. The Commission has indicated that "the Convention does not provide as such any general right to call into question the length of sentence imposed by a competent court"[9] but also that "an exceptionally harsh punishment for a trivial offence might

[9] X v United Kingdom (1975) 1 D & R 54, 55

raise a question under Article 3".[10] The Convention position would therefore appear to be that while Article 3 does not provide a general power to review sentences for exact proportionality, cases of gross disproportionality may amount to inhuman or degrading treatment.

24. The Commission and Court have applied this analysis to the use of life sentences for criminal offences. In the case of *Kotalla v Netherlands*, the Commission took the view that Article 3 could not be read as "requiring that an individual serving a lawful sentence of life imprisonment must have that sentence reconsidered by a national authority, judicial or administrative, with a view to its remission or termination".[11] However this decision appears directed more to the question of whether Article 3 incorporates a particular philosophy of imprisonment than to the issue of proportionality.[12] Moreover, as the Court has frequently stated, "the Convention is a living instrument which must be interpreted in the light of present-day conditions".[13]

25. In subsequent decisions the Court has suggested that lengthy sentences may be sufficiently disproportionate as to be contrary to Article 3. In the case of *B, H and L v Austria*[14] the Commission appeared to indicate that *Kotalla* involved special circumstances in that the applicant there had originally been sentenced to death, which had subsequently been commuted to life imprisonment. It went on to add that

[10] X v United Kingdom , application 5471/72, (1973) 43 Collection 160
[11] (1979) 14 D & R 238, 240
[12] The passage of the opinion quoted follows a discussion of the German and Italian Constitutional Court decisions referred to earlier in this section.
[13] See *Tyrer v United Kingdom*, Series A No.26 (1978), p.16
[14] (1989) 64 D & R 264, 270

"The Commission is not required to pronounce itself on the question whether the same reasoning would apply with regard to a "normal" life sentence in one of the Convention states". Moreover in *Hussain v United Kingdom*[15]the Court suggested that imposing an indeterminate sentence on a juvenile, which did not allow for considerations of a young person's development to be taken into account, and hence to offer a possibility of release, would be to treat such persons as having "forfeited their lives". The Court went on to indicate that this state of affairs "might give rise to questions under Article 3". In the recent case of *V v United Kingdom* a majority of the Court concluded that the six years the applicant had spent in custody till then could not be said to amount to inhuman or degrading treatment, but would appear to point to the necessity of an early Parole Board review.

26. The jurisprudence of the European Court of Human Rights on the proportionality of sentences would appear to be at an early stage. In general the Court would appear to see sentencing as lying within the discretion of national authorities. However there appears to be a growing indication that it may be prepared to intervene where the use of severe penalties is disproportionate either to the seriousness of the offence or the age of the offender. As the most severe sentences available, the use of the death penalty or life imprisonment without any hope of release stand in particular need of justification as being proportionate. The Court may in future be reluctant to uphold the use of such penalties save in exceptional cases where the nature of the offence and the character of the offender warrant this. It may be especially reluctant to do so when such a sentence is the product of executive discretion as opposed to being decided in

[15] (1996) 22 EHRR 1, para 53

open court with the full application of Article 6 safeguards, and where there is no possibility of such sentences being reviewed at some point by a judicial body. In several decisions where it has declared challenges to the proportionality of sentences to be "manifestly ill founded" the Commission has observed that all the factors referred to by the applicant as justifying a lower sentence had been specifically considered by the sentencing court.[16]

The Role of the Home Secretary in setting tariff

27. In the *V v UK* case the European Court accepted the view of a majority of the House of Lords in *R v Secretary of State for the Home Department ex parte Thompson and Venables* that, in setting a tariff for prisoners detained at Her Majesty's Pleasure for committing an offence of murder, the Home Secretary was essentially performing a sentencing exercise. Taking into account the application of Article 6 of the Convention to all aspects of the criminal trial, including sentencing[17], it went on to find that the Home Secretary could not comply with the requirement of Article 6(1) of the Convention that decisions on matters relevant to the determination of a criminal charge should be taken by an independent and impartial tribunal.

28. The decision in *V.* is of particular significance in that it is the first time the Court has engaged directly with the tariff setting element of indeterminate sentences in the

[16] See, for example, *X v United Kingdom* (1973) 43 Collection 160, *X v Germany* (1977) 6 D & R 127
[17] See *Eckle v Germany*, Decision of the Court 15 July 1982, Series A No 51

United Kingdom. In previous decisions on life sentence prisoners[18] and prisoners detained at Her Majesty's Pleasure[19], the prisoners concerned have passed their tariff date and the government has acknowledged that they continue to be detained primarily on the grounds that they present a continuing danger to the public. In *V.* the Court acknowledges that the HMP sentence contains a punitive element and that Article 6 safeguards should apply to the setting of this. The effect is that the question can now be raised as to whether the role of the Home Secretary in setting the tariff for those sentenced to life imprisonment is in compliance with Article 6(1) of the Convention.

29. In its decision in *Wynne v United Kingdom*, the European Court of Human Rights indicated that a mandatory life sentence was essentially different in character from either a discretionary life sentence or an HMP sentence. The Court indicated that whereas the latter were imposed primarily for reasons of public protection, and hence were based on reasons that might change, the former was essentially punitive and dependent on the character of the offence rather than the character of the offender. In the Commission decision of *Bromfield v United Kingdom*, this reasoning was followed to suggest that Article 6(1) was not applicable to the tariff setting exercise in respect of custody for life sentences (imposed on 18-21 year olds).[20] The Commission indicated that "the tariff-fixing procedure in respect of mandatory life prisoners must be regarded as an administrative process governing the

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[18] See *Thynne, Wilson and Gunnell v United Kingdom* (1990) 13 EHRR 666
[19] *Hussain v United Kingdom* (1996) EHRR 1

implementation of the sentence, not as part of the determination of the sentence itself".

30. However in light of the Court's statements in *V v United Kingdom,* and its acceptance of the House of Lords' finding that tariff-setting is a sentencing exercise, the jurisprudence of the Court can be said to have moved on, in accordance with the recognition that the Convention is a "living instrument". It is clear that these issues will now be revisited in the light of the judgment.

31. Moreover, although the Court observed in both *Thynne* and *Wynne* the growing similarity in practice between mandatory and discretionary life sentence prisoners, and the fact that most mandatory lifers could expect to be released at some point, it appeared to treat the mandatory life sentence as essentially one involving the deprivation of liberty for life with only the hope rather than the expectation of release. The Court, for example, notes that

> "release of the prisoner is entirely a matter within the discretion of the Secretary of State, who is not bound by the judicial recommendation as to the length of the tariff period and is free under English law to have regard to other criteria than dangerousness, following the expiry of the "tariff" period, in deciding whether the prisoner should be released".[21]

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[20] (1998) 26 EHRR CD 138. The case actually concerned a sentence of custody for life imposed on those convicted of a murder committed when they were between 18 and 21. However the Commission concluded that this was closer to a mandatory life sentence than to an HMP or Discretionary Life sentence.

[21] *Wynne* at paragraph 35

32. In the light of the House of Lords decision in *Pierson*[22] that the Home Secretary is essentially exercising sentencing powers in setting a tariff, and that he or she is not free to depart from a judicial assessment of the tariff save in exceptional circumstances, this conception of the mandatory life sentence can no longer be defended. Rather it would appear that both in theory and practice there is greater similarity between mandatory life sentences, discretionary life sentences and HMP sentences than the decision in *Wynne* acknowledges. Each of these sentences would appear to have elements which are essentially punitive in nature and elements which are based on considerations of protection of the public. It is important that relevant human rights requirements are complied with in the application of all elements of the sentence.

33. The UN Human Rights Committee has also indicated that where a judge has a power to set a (tariff) period before the expiry of which parole of a life sentence prisoner cannot be considered, there will be a violation of Article 14 (1) of the International Covenant on Civil and Political Rights if the defendant is not permitted to make submissions prior to the judge setting such a period.[23] There is therefore, a clear movement against the involvement of the executive in decisions on the length of detention.

Judicial Supervision of Continuing Detention

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[22] *R v Secretary of State for the Home Department ex parte Pierson* [1997] 3 ALL ER 577 per Lords Hope and Steyn

34. It follows from the considerations raised in the previous section that international human rights law may require greater judicial oversight of mandatory life sentences than has hitherto been the case. If it is accepted that all mandatory life sentences contain both a punitive and a preventive element then the position of the European Court of Human Rights in *Wynne*, that the requirements of Article 5(4) of the Convention were satisfied by the decision of the trial court, can no longer be sustained.

35. Instead, it can be argued that a prisoner sentenced to a mandatory life sentence can expect to be released upon the expiry of his or her tariff unless continued detention is justified for the protection of the public. If this is so, the jurisprudence of the European Court suggests that prisoners are entitled to have access to a judicial proceeding to determine whether they continue to pose a risk to the public. Such a proceeding is required by Article 5(4), as the judicial supervision necessary to ensure that continuing detention is not arbitrary cannot be seen as being incorporated in the original decision of the trial court.

36. The development of an international consensus on judicial review of whether someone should continue to be detained after the expiry of a tariff period can again be deduced from the Article 110 of the Statute of the International Criminal Court. Original proposals for this suggested that issues of early release should be left to the legal procedure of the state in which the offender was imprisoned. However, delegates to the Conference establishing the Court finally agreed that it should be for

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[23] *Bailey v Jamaica,* Communication 709/1996, Decision of 17 September 1999.

the court to determine whether a person sentenced to life imprisonment should be released after the expiry of the 25 year minimum.

Conclusions

37. In the light of contemporary material and developing human rights standards it is apparent that the use of mandatory life sentences is being questioned, and in most countries the life sentence is only one of a range of sentencing options available to the court. In countries that do have mandatory life sentences, such as Germany, there are protections - in the form of access to court - that do not at present exist in the United Kingdom. The fact that both these provisions apply to the International Criminal Court, which will try only the most serious offences, reflects the international consensus in favour of such protections.

38. The length of life sentences is subject to developing human rights standards on the dignity of the person, the need for rehabilitation, and the requirements of proportionality. For all those reasons, there is now a reluctance to impose whole life terms, and where they are so imposed, to provide for judicial review during the term of imprisonment.

39. The role of the executive in determining the length of time to be spent in detention is largely, if not totally, absent in other jurisdictions. It is clear from domestic and international jurisprudence (the House of Lords in *Thompson* and *Venables* and the

European Court of Human Rights in *V.*) that it is subject to an accelerating trend of erosion; and it may be predicted that in future it will cease to exist.

40. Detention after the initial tariff period has been increasingly judicialised in respect of other indeterminate sentences. Following the analyses of the House of Lords in *Pierson* and the European Court of Human Rights in *V v UK* it would appear that the arguments for extending these arrangements to the mandatory life sentence are gaining ground.

41. In brief, the arguments from comparative international and human rights law not only call into question the compatibility of whole life tariffs, set by the executive, with international human rights standards; they also point to other mechanisms, such as judicial reviews of indeterminate sentences, or judicial extension of determinate sentences, by which society can be protected from the exceptionally dangerous offender.