

V. against the UNITED KINGDOM
T. against the UNITED KINGDOM

WRITTEN COMMENTS OF JUSTICE

1. The purpose of this intervention is to provide the Court with a brief survey of how international Conventions apply to juveniles in serious criminal cases; and to consider how the principles in those Conventions are applied in practice in particular countries. We attach copies of the JUSTICE report, *Children and homicide*, published to coincide with the Court's judgment in *Hussain and Singh v UK* (21 February 1996), and copies of JUSTICE's intervention in the present case when it was before the House of Lords.

International law principles

2. Certain principles in regard to the age and extent of criminal responsibility, the appropriate mode of trial, and the sentencing of juveniles can be drawn from international law, as it has developed.

Criminal responsibility

3. The Convention on the Rights of the Child points to the importance of the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.¹ Rule 4 of the Beijing Rules urges that "the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental, and intellectual maturity". The Commentary to the Rules makes it clear that "In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority etc.) Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally".
4. The Committee on the Rights of the Child has commented that "even cases where the child was aware that its action was wrong might well reflect the fact that it was not in full control of its situation. Very young child offenders should be seen more as victims than as culprits, since statistics showed that almost all came from difficult family backgrounds.....the overwhelming majority of countries had set the age of criminal responsibility much higher [than 10], and even 14 was considered too low..."²

Mode of trial

5. Mode of trial is closely connected with these concerns. Article 12(2) of the Convention on the Rights of the Child states that the child shall be provided with the opportunity to be heard in judicial and administrative hearings. This implies that the trial environment must be conducive to understanding and participation, and that it should not be too overawing. The Convention on the Rights of the Child, the Beijing Rules, and the International Convention on Civil and Political

¹ Article 40(3)(a)

² Initial report of UK dependent territory :Hong Kong, SR.329,para 79

Rights insist on the child's right to privacy at all stages of the proceedings. The Commentary to the Rules stresses that young people are particularly susceptible to stigmatisation, and refer to the detrimental effects of labelling as 'delinquent' and 'criminal', and of publicity.

Sentencing

6. The relevant principles on the sentencing of juveniles were first set out in detail in the UN's Beijing Rules. The Commentary notes that the conflicts between rehabilitation and just deserts, assistance and punishment, and general deterrence and individual loss of liberty, are more pronounced in a child criminal justice context. It acknowledges that the Rules do not attempt to prescribe the preferred approach, beyond setting out basis principles, such as proportionality and the fact that there should be limited use of deprivation of liberty. However, this apparent conflict has now been resolved by the later UN Convention on the Rights of the Child. This establishes as the aim of juvenile justice the entitlement of children to be treated in a manner consistent with 'the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society'.³ This approach is strengthened further by Article 3, which also governs criminal justice, and declares that the best interests of the child shall be a primary consideration.
7. International law takes a holistic approach to child criminal justice: in other words, it does not lay down one set of principles for less serious offences and another for offences such as murder. This is also evidenced by the legal principles governing the most heinous offences under the Statute of the International Criminal Court, which remove from its jurisdiction those under the age of 18.
8. International law does not ignore the needs of society, but considers that they are satisfied if the child is shown how to reintegrate and assume a constructive role in society. The Convention on the Rights of the Child emphasises the 'promotion of a child's sense of dignity and worth', and this cannot be undertaken where a State Party adopts a policy which is characterised as being of general deterrence and punitive.
9. The twin principles of proportionality and a State's duty to take into consideration the child's well-being underline much of the detail found in international law concerning the aims, restrictions and prohibitions on the sentencing of children. A further fundamental principle is that deprivation of liberty, if used at all, should be a measure of last resort, and should be for the shortest appropriate period of time.⁴ Consequently, international law regulating the sentencing of children is characterised by an emphasis on the constructive purpose of the disposition, rather than its punitive side.
10. Deprivation of liberty is thus the least favoured alternative, International law recognises the findings of criminological research, demonstrating the many adverse effects of institutionalisation. These are not always remedied by treatment. According to the research, children are particularly vulnerable to negative influences, because the combined effect of loss of liberty and separation from their accustomed daily social life may have acutely deleterious consequences. By aiming for the reintegration of children, international law

³ Article 40

⁴ Article 37(b) Convention on the Rights of the Child; Rule 17(b) Beijing Rules

seeks to assist them in beginning to believe that they are valued members of the community: whereas institutionalisation risks alienating them.⁵ Indeed, Article 40 of the Convention on the Rights of the Child (see above) indicates that the child needs to be reintegrated as a child, not as an adult: this cannot happen in the context of excessive sentences.

11. International law prohibits specific forms of punishment from being imposed on children. The Convention on the Rights of the Child states that life imprisonment without the possibility of release is a form of prohibited punishment in the case of those who have committed offences below the age of 18. This is included in the same Article (Article 36) as the prohibition on torture, cruel, inhuman and degrading treatment, and the prohibition on the death penalty.
12. Although under 18 year olds can be sentenced to detention for an indeterminate period, the sentence must be proportionate to the offence and offender, and there must be an effective mechanism for reviewing the sentence. The undoubted trend in international law is for sentences of imprisonment on children to be imposed for the shortest appropriate period. This points to a sparing use of indeterminate sentences, and for the period of detention within such sentences to be as short as possible.
13. The key principles of international law are therefore:
 - a child-centred approach, recognising a child's needs and developmental stage
 - proportionality and flexibility in sentencing
 - the use of detention only as a last resort and for the shortest appropriate period
 - the child's right to privacy

Principles in practice

14. We go on to examine the way that these principles find effect in two other Council of Europe states, Germany and Spain, and in the common law jurisdiction of Canada.

Germany

15. The German approach to criminal responsibility may be instructive, and contrasts with England and Wales, where children are now fully criminally responsible from the age of 10. Germany recognises three separate levels of responsibility, based upon age. Those under 14 are not criminally responsible. Article 1 of the Juvenile Justice Act (Jugendgerichtsgesetz, JGG) then distinguishes between juveniles (14-18 year olds) and young adults (18-21 year olds). Juveniles are regarded as criminally responsible if they are morally and intellectually mature enough to understand the unlawfulness of the offence (Article 3). Those suffering from grave mental, psychological or developmental disorders will not be regarded as responsible (Article 20), and in less serious offences where responsibility is diminished, sentence will be mitigated (Article 21). Young adults may be dealt with either as juveniles or as adults, depending upon an assessment of their circumstances (Article 105).

⁵ Commentary to Beijing Rules

16. In continuation of this approach, 14-21 year olds are dealt with in specialised juvenile courts. More serious offences, including murder, will be tried in the juvenile chambers of the regional courts, staffed by three professional and two lay judges. All the judges, as well as the prosecutors, are specially trained, and the proceedings are in private.
17. German law also defines the purpose and sets limits to the duration of youth custody. Article 91 defines the purpose of youth custody as to educate the convicted to lead a law-abiding and responsible life. Juveniles (including young adults assessed as juveniles) cannot be sentenced to life imprisonment – the mandatory sentence for adults convicted of certain types of murder – but only to the upper limit of youth custody, which is 10 years (Article 105). Young adults assessed as being mature may be sentenced to 10-15 years (Article 106) and can also be sentenced to life, but this is rare.
18. In cases of murder where there is no criminal responsibility, the juvenile court acts as a guardianship court, and may transfer the young person to a residential home. This can only be until the age of 18. Alternatively, there can be transfer to a psychiatric hospital for an indeterminate time, but with annual judicial review. Under 14 year olds are dealt with by guardianship courts under civil law provisions, and in cases of murder would be sent to a residential home for rehabilitative purposes.
19. Youth custody is entirely separate from adult prisons, and transfer to an adult establishment must take place if the sentence is not due to expire until after the young person is 24 years old. Otherwise, it may be done at any appropriate stage from the age of 18, as the juvenile judge decides (Article 92). Article 88 provides for judicial re-examination of sentences, and their possible suspension. Thus, if the juvenile judge is satisfied that the juvenile will lead a law-abiding life, after a percentage of the sentence has been served, conditional release may be authorised.

Spain

20. In Spain also, there are clear distinctions in the Penal Code between the sentences available for children (those under 16), juveniles (16-18 year olds), and young adults (those over 18).
21. Under 16 year olds are not criminally responsible (Article 8.2). If convicted of murder can be confined only for a maximum of two years, on an educational programme. If they commit an act punishable by law, they will be dealt with by the Juzgados de Menores (juvenile courts), introduced in 1992 (Ley 4/92 reguladora de los Juzgados de Menores). The judges in these courts are specialists in law relating to young people, and are assisted by psychologists and teachers. The State has no role in the proceedings, which are conducted in private.
22. No punishments or penalties may be imposed, but the child may be required to undertake a rehabilitative or educational programme (medida). The purpose is education rather than punishment. In order to decide the length and nature of the educational programme, the court takes into account both the nature of the offence and the character of the young offender. The most severe measure possible is closed confinement for a maximum of two years. Confinement will be imposed for serious offences only.

23. Juveniles (16-18 year olds) who are convicted of murder may be given a determinate sentence of between 6 and 12 years. 16 –18 year olds are criminally responsible for their actions, but their youth has the effect of mitigating sentence (Article 9.3) from reclusion mayor (which an adult would receive for murder) to prison mayor (from 6 to 12 years with three intermediate lengths). An assessment is made of the dangerousness of the offender, resulting in a classification into one of three categories which affects the conditions attaching to the sentence. Punishment is a relevant consideration at this stage; and there are special young people's prisons for 16 – 21 year olds.
24. Movement to an open prison may occur after one-quarter of the sentence has been served. Parole is also available: for example, for those serving the middle length (8 years and a day to 10 years), 38 days' parole per annum are allowed. Prison mayor is determinate and is not reviewable; but in practice the whole sentence will not be served, as sentences are reduced by one day for each two days of prison work (Article 100).

Canada

25. The Canadian youth justice system offers an interesting example, because it has been the subject of recent reform (by amendments to the 1984 Young Offenders Act in 1992 and 1995) and considerable public debate. There is now a mode of trial recognising the special needs of children; a trial and sentencing regime graduated according to age; and provisions for regular review. The Declaration of Principle in the 1984 Act requires that the limited maturity and dependency of youth be taken into account, and that decisions about young people should reflect their 'special needs'. Both the protection of society and the rehabilitation of the offender are seen as best achieved by addressing the relevant needs and circumstances of young people.
26. The age of criminal responsibility is 12, and any child under that age is dealt with under child protection legislation. 12–14 year olds charged with first or second degree murder must be tried in the youth court. This consists of trial in private by a specialised judge. The youth court may also try 14–18 year olds, subject to procedures which vary according to age. Broadly, for 14–16 year olds the presumption will be in favour of trial in youth courts. For 16 -17 year olds the presumption is that proceedings will be in ordinary courts in accordance with the law applying to adults. Applications for transfer to and from youth courts can be made by either party, and the point at issue will be whether the interests of society, which includes the protection of the public and the rehabilitation of the young person, can properly be served if the case remains within the youth court's jurisdiction. One murder case involving a girl of almost 18⁶ resulted in a trial in the youth court because of the absence of criminal record, no tendency to violence, the advantages of the youth correctional system, and the belief that an adult sentence was not required.
27. There are no mandatory or indeterminate sentences in the youth court. There is a maximum of 10 years for first degree murder: 6 years' maximum detention, followed by 4 years maximum conditional supervision. For those 14–16 year olds convicted in the adult courts the judge sets a tariff of between 5 and 7 years. 16-18 year olds convicted in adult courts are subject to the mandatory life sentence: but their parole eligibility occurs after 10 years for first degree murder, and after 7 years for second degree murder.

⁶ Nathalie B. N.B. (1985) 21c.c.c. (3d)374(Que.C.A.)

28. All custodial sentences are subject to automatic annual review by the youth court. This allows for arrangements to be modified, and if necessary amended, to reflect the young person's development and change. Reviews require the submission of progress reports. The period of sentence to be spent in detention may be shortened, or indeed lengthened until the end of the maximum period, if circumstances justify it. Additional reviews may be held with the leave of the youth court judge if there is sufficient progress or other circumstances have changed.
29. Following review, the youth court may confirm the disposition, order transfer to open custody, place the young person under conditional supervision, or order continuation of custody until the end of the maximum period.
30. In deciding between open and secure custody, the youth court must take into account the principle that the level of custody should involve the least degree of containment and restraint, having regard to the seriousness of the offence and the circumstances in which it was committed. It must also consider the needs and circumstances of the young person, including proximity to family, school, employment and support services. Applications may be made to alter the level of custody. Young people may remain in youth custody until they are 20, if that is appropriate. Even after transfer to adult prison the Young Offenders Act will continue to apply.

Conclusion

31. The above jurisdictions are all instructive in terms of their application of the key principles identified. They offer examples of how to recognise the particular needs of children in relation to the age of criminal responsibility, mode of trial, and sentence. They meet the requirements of fairness and international law; and assist in the process of examining current procedures in England and Wales.
32. Finally, we draw to the Court's attention the research in *Children and homicide*, which showed that, with the possible exception of Ireland, there was no other European country where the executive, rather than the courts, determined the length of detention or the appropriate time for release.

JUSTICE
July 1999