IN THE SUPREME COURT OF JUDICATURE,
COURT OF APPEAL (CIVIL DIVISION)
MCCARTNEY'S APPLICATION FOR JUDICIAL REVIEW
APPEAL OF APPLICANT FROM THE ORDER
OF LORD JUSTICE KENNEDY AND
MR. JUSTICE PILL

No. QBCOF 93/1819/D

Royal Courts of Justice,
Strand, London WC2.
Thursday 19th May 1994.

Before:

LORD JUSTICE STUART-SMITH

LORD JUSTICE HOFFMANN

and

LORD JUSTICE SAVILLE

THE QUEEN

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

ex parte

RONALD MCCARTNEY

(Handed-down judgment of John Larking, Chancery House, Chancery Lane, London WC2.
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Official Shorthand Writers to the Court)

MR. EDWARD FITZGERALD (instructed by Messrs. B.M. Birnberg & Co., 14 Inverness Street, London NW1 7HJ) appeared on behalf of the **Appellant**.

MR. DAVID PANNICK Q.C. (instructed by The Treasury Solicitors, Queen Anne's Chambers, 28 Broadway, SW1H 9JS) appeared on behalf of the **Respondent**.

J U D G M E N T
(Handed-down)

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Thursday 19th May 1994.

JUDGMENT

LORD JUSTICE STUART-SMITH: The question in this appeal turns on the correct construction of the transitional provisions contained in the Criminal Justice Act 1991 ("the 1991 Act") relating to the fixing of the tariff or penal element of the sentence of those serving discretionary life sentences.

It is convenient to consider the facts of the Appellant's case and the question of construction against the background of the powers of the Secretary of State for the Home Department contained in the earlier statutory provisions, the impact of judicial decisions upon those provisions and the policy statements made to the House of Commons by the Home Secretary from time to time.

On 7 May 1976 the Appellant, then 22 years old, was convicted of three offences of attempted murder of police officers and sentenced to three concurrent terms of life imprisonment. He was also convicted of conspiracy to cause explosions, using a firearm with intent to endanger life and having a firearm with intent to resist arrest and was sentenced to concurrent terms of 20, 14 and 14 years respectively for those offences. The Crown's case was that the Appellant was a member of a provisional IRA active service unit which had been involved in placing explosive devices at Aldershot and Warminster. A police officer had been called to a flat in Southampton at the request of the landlord who entertained suspicions about the occupants. While the officer was making enquiries of them the two men, one of whom was the Appellant, fearing they had been discovered, threatened the landlord and the officer with guns. The officer escaped to summon help but was shot at as he did so. A second police officer answered the call for help; as he arrived in a police car the Appellant fired several shots at him. Two more police officers arrived in a car, as they

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did so the two men fired at them; one officer got out of the car and chased the two men. Two shots were fired at him by the other man, one of which hit the officer and he was seriously injured. Both men escaped. The Appellant was arrested some months later in Northern Ireland. When interviewed by the police he admitted taking part in the planned bombings and shooting at the police; he said he had panicked and had not intended to kill. At his trial he refused to recognised the Court and took no part in it.

For the first 6 or 7 years of his imprisonment the Applicant was thoroughly uncooperative, unruly and disruptive. However, in about 1983 he seems to have turned over a new leaf; he has become a model, not to say an exemplary prisoner, attracting high commendation from those who have been concerned with him. That is accepted by the Home Secretary.

Until the law was changed by the 1991 Act the position with regard to those sentenced to life imprisonment was governed by s. 61 (1) of the Criminal Justice Act 1967, which provided:

> "The Secretary of State, may if recommended to do so by the Parole Board, release on licence a person serving a sentence of imprisonment for life....but shall not do so....except after consultation with the Lord Chief Justice of England together with the trial judge if available."

The section applies both to cases where the penalty of life imprisonment is fixed by law, usually murder, which are referred to as mandatory life sentences, and those where the sentencing judge has a discretion to impose it, so-called discretionary life sentences. It is well established that a discretionary life sentence can only be lawfully passed if the court is satisfied that the offence or offences in question are in themselves grave enough to require a very long sentence, and secondly that it appears from the nature of the offences or the defendant's history that he is a person of unstable character likely to commit such offences in the future or there is a risk of repetition for some other reason, and thirdly where if the

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offences are committed the consequences to others may be specially injurious, as in the case of sexual offences and crimes of violence: Reg. v. Hodgson [1967] 52 CAR 113, 114. and Reg. v. Walsh unreported, CA Transcript 1.8.91.

It is equally well established that a discretionary life sentence is to be regarded as the sum of two sentences to be served consecutively. First, a determinable number of years appropriate to the nature and gravity of the offence; this is called the tariff or penal element of the sentence. Secondly, an indeterminate period, which the offender begins to serve when the penal element is exhausted. That is the risk element and is designed to protect the public against the danger of re-offending in a similar way. See Doody v. Secretary of State [1993] 3 AER 92 per Lord Mustill at p. 97j and Thynne & Others v. United Kingdom [1990] 13 EHRR 666 at p. 693.

In 1983 in a Statement to Parliament the then Home Secretary, Leon Brittan, laid down that life sentences would be served in two phases: firstly, the tariff period to mark the gravity of the offence and satisfy the requirements of retribution and deterrence, and secondly the post tariff period when the primary considerations are the risk to the public. He also indicated that the tariff period would be determined after consultation with the Lord Chief Justice and the trial judge and that the first review would normally be fixed three years before the expiry of the tariff period. This statement applied to both mandatory and discretionary life sentences.

In a further statement in 1985 Leon Brittan said that where the tariff period exceeded 20 years, the first review would take place after 17 years detention. This should not be taken to imply that the tariff was set at no more than 20 years.

In 1985 the judiciary were consulted as to the length of the Appellant's tariff. The question they would then have been asked was this:

> "The case of the undermentioned life prisoner is currently under consideration with a view to determining the date of the first formal review by the Parole Board. To assist in this determination, the views of the trial judge, if he is available, and of the Lord Chief Justice are requested on the case and on the

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period of detention necessary to meet the requirements of retribution and general deterrence, it would be helpful if the comments could be provided overleaf."

The view of the trial judge is not relevant because he did not specify a period and referred to, the dangerous character of the Appellant. Lord Lane CJ said "If I had to put a term of years I would say a minimum of 25". I think it is clear, both from the policy statement and the question posed that this period is the period to be served in prison and not the appropriate determinative sentence which would of course attract remission of one third.

In March 1987 the Divisional Court gave judgment in R. v. Secretary of State for the Home Department ex parte Hanscomb & Others [1988] 86 CAR 59. The Court held first that the proper `tariff in the discretionary life sentence case is the appropriate fixed term punishment for the crime in the absence of the mental element, the existence of which led to the imposition of the life sentence' per Watkins L.J. at p. 79. This part of the decision was later followed in Reg. v. Walsh D.C. unreported, Transcript 16 December 1991. Secondly, it held that in determining the tariff period, the Home Secretary should not exceed the period recommended by the judiciary. This second holding has subsequently been doubted, in particular by the members of this Court in Doody's case [1992] QB 157: see per Glidewell L.J. pp. 179-183, per Staughton L.J. at p. 190H and per Farquharson L.J. at p. 200H, though these observations were obiter, since that case concerned a mandatory life sentence. In the House of Lords the appellants argued that the Secretary of State was bound to accept the judge's view of the tariff in mandatory life sentences, but this was rejected. Lord Mustill drew a clear distinction between mandatory and discretionary sentences and I do not think that he expressed any opinion on the correctness of Handscomb on this point in relation to discretionary sentences (see p. 104f -105e).

What is important is that the Secretary of State did not appeal the decision in Handscomb and accepted it. In a statement to Parliament on 23 July 1987 he accepted that the tariff period necessary to satisfy the requirements of retribution and deterrence should be `related to the determinate sentence that would have been passed but for the element of

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mental instability and/or public risk which led the judge to pass a life sentence' less the notional one third period of remission for good behaviour. He also stated that the date for the first formal review by the Parole Board in the case of discretionary life sentences - as opposed to mandatory ones - would be set in accordance with the judicial view of the appropriate tariff.

There was no further review of the appellant's tariff following the decision in Hanscomb or the 1987 Statement.

On 25 October 1990 the European Court of Human Rights gave judgement in Thynne's case. It was held that the existing provisions in English law for the review of the continuing detention of discretionary life sentence prisoners after expiry of the tariff period was in breach of Article 5 (4) of the European Convention on Human Rights; but it did not deal with the position of discretionary lifers at the tariff stage, since in each case that had expired and I am not persuaded that Article 5 (4) has any bearing on the present problem. Nevertheless, it was this decision that led to an alteration of the law and the relevant provisions are now to be found in s. 34 of the 1991 Act (in relation to cases after the Act came into force on 1 October 1992) and the transitional provisions relating to other cases which are contained in Schedule 12, paragraph 9.

Section 34, so far as is material, provides:

> "(1) A life prisoner is a discretionary life prisoner for the purposes of this Part if -
>
> (a) his sentence was imposed for a violent or sexual offence the sentence for which is not fixed by law; and
>
> (b) the court by which he was sentenced for that offence ordered that this section should apply to him as soon as he had served a part of his sentence specified in the order.
>
> (2) A part of a sentence so specified shall be such part as the court considers appropriate taking into account -
>
> (a) the seriousness of the offence, or the combination of the offence and other offences associated with it; and

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> (b) the provisions of this section as compared with those of section 33 (2) above and section 35 (l) below."

Section 33 (2) requires the Secretary of State to release on licence a long term prisoner who has served two thirds of his sentence. Once the prisoner has served the relevant period of his sentence specified in the order and the Parole Board has directed his release, the Secretary of State must release him on licence (s. 34 (3)). The discretionary life prisoner may require the Secretary of State to refer his case to the Parole Board after he has served the tariff part of the sentence (s. 34 (5)).

Paragraph 9 (l) of Schedule l2 provides:

> "This paragraph applies where, in the case of an existing life prisoner, the Secretary of State certifies his opinion that, if -
>
> (a) section 34 of this Act had been in force at the time when he was sentenced; and
>
> (b) the reference in subsection (l) ((a) of that section to a violent or sexual offence the sentence for which is not fixed by law were a reference to any offence the sentence for which is not so fixed,
>
> the court by which he was sentenced would have ordered that section should apply to him as soon as he had served a part of his sentence specified in the certificate."

Pursuant to this provision, during the summer of l992 the Secretary of State carried out the certification process in relation to existing discretionary life prisoners. These included not only the Appellant but a group of Provisional IRA bombers who were convicted and sentenced in May l976 at Manchester Crown Court; they can conveniently be referred to as "the Dowd group". The cases were linked to those of the Appellant and there was at one time a possibility that they would be tried together, but that did not happen.

It is accepted by the Secretary of State that the offences of these men were at least as

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bad as those of the Appellant. Indeed, there is some force in Mr. Fitzgerald's submission that Lord Lane considered them to have been worse since when he commented on the tariff in their cases in 1985 he said that life should mean life. But since he had not specified a determinate period in the Dowd cases, the Secretary of State referred them to Lord Taylor of Gosforth CJ, who recommended 20 years as the appropriate tariff in their cases and that was the period which the Secretary of State certified for them. In the case of the Appellant, however, he did not at that stage seek Lord Taylor's views, but adopted the period of 25 years which his predecessor had recommended. This decision was notified to the Appellant. This is the first decision under challenge.

In two letters dated 2 September and 1 October 1992 the Appellant's solicitors made representations to the Secretary of State. They drew attention in particular to the following matters:

1. the Appellant's account of events and his reasons for not contesting the charge of attempted murder at the time of his trial;
2. the significance of the decisions in Hanscomb and Walsh with regard to the importance of setting the tariff in accordance with the appropriate determinate sentences and the fact that the range of determinate sentences passed in the 1970's did not exceed 20 years;
3. the Appellant's exceptionally good behaviour in prison since 1983;
4. the disparity between the 20 year tariff in the case of the Dowd group and the 25 years in relation to Appellant.

In drawing attention to this latter point, the solicitors relied upon the decision in Walsh. In giving the judgment, with which Pill J. agreed, Nolan L.J. said:

> "Equally, in my judgment, the length of the terms served by the applicant's co-defendants (unless their release is attributable to compassionate or other factors which are not reflected on the applicant's case) is a material consideration which the Secretary of State is obliged to take into account

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> when considering whether the initial determination of the review date should be revised. Considerations of broad parity must always come into the reckoning of the terms of imprisonment to be served by those who have committed the same offence. I cannot believe that Parliament, when enacting section 61 (1), intended or authorised the Home Secretary to leave this consideration out of account when fixing release dates."

In the light of these representations from the Appellant's solicitors, the Secretary of State agreed to reconsider the Appellant's tariff. In November 1992 he referred the matter to Lord Taylor, sending copies of the Appellant's solicitors' letters, together with a factual summary of the case, including the record of the Appellant's interview with the police.

Lord Taylor rejected the solicitors' representation on point 1, stating that the Appellant's present version of events was at variance with his admissions to the police and the fact that the jury must have been satisfied that the Appellant had the intention to kill. He concluded "Nevertheless there seems no reason to differentiate between him and the group of Dowd and others. Accordingly, I would recommend 20 years".

Notwithstanding this recommendation, the Secretary of State, in April 1993, reaffirmed his decision to certify the tariff at 25 years. This is the second decision under challenge. The Secretary of State's reasoning for this decision is set out in the affidavit of Mr. Page, who is the responsible official in the Home Office, in the following passage:

> "The Secretary of State so concluded because, in the light of the circumstances of the offence for which the Applicant was sentenced to life imprisonment, he believed that 25 years was the appropriate period which the Applicant should serve by way of retribution and deterrence. As the Lord Chief Justice pointed out the jury must have been satisfied that the Applicant had an intention to kill the police officers. It was only by reason of the bad aim of the Applicant, and the good fortune of the police officers, that the police officers were not killed. The offences were committed as part of a deliberate attempt to avoid being caught in the Applicant's preparations to commit serious terrorist offences.
>
> The Secretary of State accepted that the circumstances of these

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offences were very similar to those which lead to a 20 year tariff in the cases of Dowd and others. However, the Secretary of State (before reaching his conclusions in the light of the advice of the Lord Chief Justice) looked again at the cases of Dowd and others, and concluded that he had, regrettably, made an error of judgment in accepting the Lord Chief Justice's advice in those cases that 20 years was the appropriate tariff. He believed that such a tariff was too low in the light of the nature of the offences involved. He therefore determined to form a fresh judgment about serious terrorist cases of this kind. Were he determining the cases of Dowd and others afresh he would have certified 25 years.

The Secretary of State carefully considered whether equity required him to accord a tariff of 20 years to this Applicant. He concluded that, having regard to his public responsibilities in this context, the requirements of equity were outweighed, in his judgment, by the need to ensure that this Applicant is punished for the appropriate period of time merited by the offences of which he was convicted and that the appropriate tariff was 25 years. The Secretary of State did not believe, in all the circumstances, that the tariff which he now considers too low set in the cases of Dowd and others should be perpetuated in another case."

It is plain, therefore, that the Secretary of State considered that he was free to set the tariff period in accordance with his own views of what was appropriate in 1993, unrelated to sentence in comparable cases passed at the time of conviction. He also considered that the period recommended by Lord Taylor and accepted by him in the Dowd cases was too lenient and fairness did not require him to apply a similar tariff to the Appellant, since considerations of policy outweighed considerations of equity.

To complete the factual picture, it is now accepted by the Secretary of State that no other discretionary lifers sentenced in the 1970's for terrorist offences have received tariff sentences set as high as 25 years and in no other case has the Secretary of State imposed a tariff higher than that recommended by the Lord Chief Justice.

Mr. Fitzgerald's submissions on behalf of the Appellant are these:

1. His primary submission is that the Secretary of State misdirected himself in law in the certification process which he carried out under paragraph 9 (1) of Schedule 12 of the 1991 Act. He was not free, submits Mr. Fitzgerald, to fix a figure which he considered appropriate

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according to his own judgment and perceptions of deterrence and retribution; he is required to fix as the tariff the equivalent fixed term sentence which the court would have imposed in 1976, if there had not been a risk element justifying life imprisonment. If that submission is correct, then both decisions of the Secretary of State must be quashed.

2. Alternatively, if the Secretary of State was not required to certify his opinion as to what the sentencing court would have done in 1976, he was bound, as a matter of law, to accept the figure set by Lord Taylor. Reliance is based on the second ground to which I have referred in Hanscomb.

3. In the further alternative, the decisions were irrational and perverse because

(a) the Secretary of State disregarded the tariffs he had himself set in the Dowd cases and departed from them without good reason; and

(b) he had set a tariff which was disproportionately high and in excess of fixed term sentences imposed for like offences, the tariff of 25 years being the equivalent of a determinate sentence of 37½.

4. If he was wrong on the first submission, Mr. Fitzgerald submitted that the Secretary of State should have considered the Appellant's exceptional progress in prison since 1983 in fixing the tariff.

These submissions were rejected by the Divisional Court.

5. In the further alternative, Mr. Fitzgerald submits that there were procedural irregularities in that:

(a) before the first decision was taken, no representations on behalf of the Appellant were considered,

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(b) the views of Lord Lane and Lord Taylor were not communicated to the Appellant,

(c) there should have been disclosure to the Appellant of the factual statements put before the Lord Chief Justices.

The Divisional Court accepted these submissions, but in the exercise of their discretion refused to grant relief on the basis that there had now been full disclosure of these matters and the Secretary of State had undertaken to reconsider the tariff in the light of any further representations based on the matters now disclosed. Mr. Fitzgerald submitted this was a wrong exercise of discretion.

I turn to the construction of paragraph 9 (1) of Schedule 12. Mr. Pannick QC submits:

1. That the words `would have ordered' govern only the question whether, if s. 34 had been in force at the time, the court would have ordered s. 34 (1) (a) to apply. It does not govern the part of the sentence that has to be specified under s. 34 (2).

2. Had Parliament intended this, it would have said so. Moreover, Parliament would not have intended the Secretary of State to express an opinion as to what the court would have done years earlier, since this is not within his competence. If it required him to consult the judiciary again, it would have said so, especially since it would know that the judiciary will have already expressed a view on tariff in the case of all existing discretionary lifers.

3. Parliament must be taken to know that in the case of discretionary life sentences the Secretary of State was not bound to accept the view of the judiciary as to tariff any more than he is in mandatory cases. He relied on the views of the Court of Appeal in Doody to which I have referred, in preference to the decision in Hanscomb.

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4. While asserting that conduct in prison is primarily relevant to risk and not tariff, he accepted that in some cases, though not in this one, behaviour after conviction may be relevant if it throws light on motivation or contrition, which are normally matters taken into account in fixing the length of a determinable sentence. If the Appellant's contention is correct, Mr. Pannick submitted that the Secretary of State could not take these matters into account in favour of the Appellant in certifying the tariff period.

I do not accept these submissions. In my judgment, if s. 34 had been in force at the material time, the Secretary of State, as a matter of plain construction, is required to certify his opinion as to what the court would have done in respect of two matters, namely, whether the section would have applied and the part of the sentence, which, as soon as he had served it, the provisions of s. 34 should apply to him. He cannot do one without the other as they are inextricably linked. The words `part of his sentence specified in the certificate' is simply a description of a term of years, for example 2O years. The Secretary of State has to certify his opinion that the court would have ordered the section to apply after the prisoner had served that term and not some other indeterminate period. Furthermore, if the opinion is not required to cover both matters which the court would have done, there is no authority or power conferred on the Secretary of State at all by the Act. It would, in my judgment, be very surprising if Parliament intended the Secretary of State to have a wholly unfettered discretion to set whatever tariff he thought fit in the light of his own view on deterrence and retribution, such power being based on s. 6l of the 1967 Act which was repealed by the 1991 Act. This would be contrary to his declared policy in 1987 that he would accept the views of the judiciary. It would be contrary to the spirit, if not the letter, of the European Court's decision in Thynne that both parts of the sentence should be subject to judicial control independent of the executive; it would also probably be contrary to Article 7 (l) of the Convention which requires that no `heavier penalty shall be imposed than the one that was applicable at the time the criminal offence was committed'. It also seems to be contrary to

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the general intention manifested in s. 34 that the tariff part of the sentence is to be set by the judges and the risk part by the Parole Board.

It is true that the Secretary of State cannot be expected to be expert in the range of determinate sentences current at the time of sentence. But he can ask for advice from the Lord Chief Justice, as he did in the case of the Dowd group and eventually in the Appellant's case. I see no need for there to be an express direction in the section to this effect. In the case of post-Hanscomb sentences, the tariff will have been set by the judiciary, having regard to the equivalent determinate sentence, less remission. In the pre-Hanscomb cases, it is by no means clear that this was the criterion: see per Watkins L.J. in that case at p. 79.

Mr. Pannick submitted that the Secretary of State could not know what the sentencing court would have done, because there might be a divergence of view between the trial judge and Lord Chief Justice. In my judgement the concept of the court in paragraph 9 (l) is a depersonalised one and connotes that the court acts lawfully and properly specifying a period within the appropriate bracket, neither out of line with comparable cases as being too lenient or too severe.

For these reasons, in my judgment the Secretary of State misdirected himself in law and applied the wrong test.

Accordingly, it is not necessary to deal with the alternative arguments advanced by Mr. Fitzgerald, although in deference to the arguments these have been very fully canvassed I think I should briefly express my views.

The Divisional Court was correct in my judgment to hold that, if the Secretary of State's construction of paragraph 9 (l) was right, he was not bound as a matter of law to accept the tariff set by Lord Taylor. If this was itself out of line with comparable determinate sentences passed at the time, he might have good reason to depart from it. Nor need he accept the tariff in a comparable case if it could be said to be too lenient adopting the same criterion. But in my view it was Wednesbury unreasonable of the Secretary of State in this case to reject the opinion of Lord Taylor. It cannot be said that 2O years is out of line or too

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lenient when compared with determinate sentences passed at the relevant time and it cannot be said that the sentences in Dowd were too lenient adopting the same criterion. This seems to me to follow from the decisions of Hanscomb and Walsh. I cannot regard the equivalent of an additional seven and a half year determinate sentence as **de minimus** even in the context of a very long sentence and it is well outside the bracket for comparable sentences.

It remains only to consider the relevance, if any, of the Appellant's good conduct in prison since 1983. Should the Secretary of State take this into account when certifying under paragraph 9 (1)? Mr. Fitzgerald accepted that the logic of his argument on the construction of this paragraph meant that he could not. I agree with him. Section 34 (2) itself is, so far as the matters which the Court should take into account, drafted in an apparently restrictive way. It is limited to the "seriousness of the offence, or the combination of the offence and other offences associated with it". But it is clear in my judgment that questions of motivation, remorse and contrition, especially if the latter are reflected in a plea of guilty, are always regarded as reflecting on the seriousness of the offence and behaviour after the offence but before sentence should be taken into account by the trial judge in fixing the part under s. 34. But it appears to me that once this part has been set, the Secretary of State has no discretion to alter it, either upwards or downwards, having regard to the Appellant's conduct in prison. This will therefore only be relevant to the risk factor which is a matter for the Parole Board. Both Counsel accepted that this was so. In this respect the position of the discretionary lifer is different from that of those serving mandatory life sentences: see s. 35 (2). I consider, however, that this does not affect the Secretary of State's power to grant early release on compassionate grounds.

Although this is not determinative of the question in relation to paragraph 9 (1) of Schedule 12, it is consistent with my view of the construction of the paragraph which seeks to put the test back to what the sentencing court would have done had s. 34 been in force at the time. I do not see how it could have taken into account matters either in favour of or against the prisoner, which **ex hypothesi** it would have known nothing about.

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For these reasons I would allow the appeal and quash the two decisions and the certificate issued by the Secretary of State.

LORD JUSTICE HOFFMANN: I agree. Except on one short point at the very end, I am in complete agreement with the judgment of Stuart-Smith L.J. But as we are differing from the Divisional Court, I shall state my own reasons.

The appeal raises what is, after the background has been examined, a fairly short point of construction on section 34 and paragraph 9 of the 12th Schedule to the Criminal Justice Act 1991. These provisions concern the release on parole of prisoners serving discretionary life sentences. They were enacted to enable the United Kingdom to comply with Article 5(4) of the European Convention on Human Rights which the previous law and practice had been held to infringe: *Thynne, Wilson and Gunnell* v. *United Kingdom* (1990) 13 E.H.R.R. 66. To put the provisions of the 1991 Act in their proper setting, I must briefly describe the previous law and explain why the European Court of Human Rights thought that it needed to be changed.

In cases in which life is the maximum but not mandatory sentence, the practice was and remains that it should be imposed only in exceptional circumstances. These are cases in which the accused, although not suitable for treatment under the Mental Health Act, appears likely to remain for an indeterminate period a danger to the life and limb of the public. The life sentence enables his progress in prison to be monitored so that the period which he spends in custody for reasons only of public safety should be no longer than necessary: *R.* v. *Wilkinson* (1983) 5 Cr.App.R. 105, 108.

Section 61(1) of the Criminal Justice Act 1967 gave the Secretary of State, acting on the recommendation of the Parole Board and after consultation with the Lord Chief Justice and the trial judge if available, power to release on licence a prisoner serving a sentence of

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life imprisonment. This power was used to give effect to the purpose of a discretionary life sentence. In a Policy Statement in 1983 the then Home Secretary, Mr Leon Brittan, said that he looked to the judiciary (i.e. the trial judge and the Lord Chief Justice) for advice on the time which the prisoner should serve "to satisfy the requirements of retribution and deterrence". This period is commonly called the tariff. Thereafter, he looked to the Parole Board for advice on risk.

This practice led to a recognition in *R.* v. *Secretary of State for the Home Department* ex parte *Hanscombe* (1988) 86 Cr.App.R. 59 that the normal discretionary life sentence is in substance two consecutive sentences: a determinate sentence which would have been imposed to satisfy the requirements of retribution and deterrence if there had been no question of continuing risk to the public, followed by an indeterminate sentence for such period as the risk continues. The only exception is the case in which imprisonment for the whole of the prisoner's natural life is thought necessary for retribution and deterrence.

What *Hanscombe* decided was , first, that the tariff ought to be fixed by the Home Secretary in consultation with the judiciary as soon as possible after sentence and secondly, that the tariffs apparently fixed for the applicants were so far in excess of the determinate sentences likely to have been imposed for their offences, after taking into account remission, as to be *Wednesbury* unreasonable. In addition, the judgement commented on two further matters. First, it drew attention to the possibility of misunderstanding in the process of judicial consultation. There was a risk that the judge's view as to the determinate sentence he would have passed might be used to fix the tariff without taking into account that it would have been subject to a one-third remission for good behaviour. Secondly, the judgment contained a passage which suggested that the Home Secretary would be *Wednesbury* unreasonable if he did not accept the advice of the judiciary on the tariff. Cases since then have shown a division of opinion on whether the judgment was intended to go so far and

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unanimity in holding that if it did, it was wrong.

In response to *Hanscombe* the then Home Secretary, Mr Douglas Hurd, made a further Policy Statement in 1987. He said that in future the judiciary would be consulted on fixing the tariff as soon as possible after sentence had been passed. (The previous practice had been to wait three years.) The trial judge would be asked for his view on the period necessary to meet the requirements of retribution and deterrence:

> This view will be related to the determinate sentence which would have been passed but for the element of mental stability and/or public risk which led the judge to pass a life sentence and will also take account of the notional period of the sentence which a prisoner might expect to have been remitted for good behaviour had a determinate sentence been passed".

Mr Hurd also said that in future the date for the first review of the sentence by the Parole Board would be fixed in accordance with the *judicial* view of the tariff and would not be postponed for other reasons.

This was the state of the law and practice at the time of the decision in *Thynne, Wilson and Gunnell* in the European Court. The complaint in that case was that the law infringed Article 5(4) of the Convention, which provides as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".

The jurisprudence of the European Court had established that in the case of a determinate sentence the requirements of this Article were satisfied by the judicial imposition of the sentence. The same would be true of a mandatory life sentence. Earlier release would be a matter of executive clemency which did not require judicial determination. But the applicants

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urged that in the case of a normal discretionary life sentence, release after the expiry of the tariff period was not a mere matter of executive clemency. It was their right to be released if there was no longer a risk to the public. Therefore they were entitled under Article 5(4) to a judicial determination of the question of risk.

The Court accepted this argument and held under the existing law by which release was a matter for the discretion of the Secretary of State, Article 5(4) was infringed after the tariff period had expired. The Commission went further and said that Article 5(4) was infringed throughout the discretionary life sentence because of ''the uncertainty surrounding the length of the 'tariff' period.''

This was the background to section 34 of the Criminal Justice Act 1991, of which the material parts read as follows:

"(1) A life prisoner is a discretionary life prisoner for the purposes of this part if -

(a) his sentence was imposed for a violent or sexual offence the sentence for which is not fixed by law; and

(b) the court by which he was sentenced for that offence ordered that this section should apply to him as soon as he had served a part of his sentence specified in the order.

(2) A part of the sentence so specified shall be such part as the court considers appropriate taking into account -

(a) the seriousness of the offence, or the combination of the offence and other

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offences associated with it; and

(b) the provisions of this section as compared with those of section 33(2) above [which requires a prisoner serving a long determinate sentence to be released on licence when he has served two-thirds of his sentence] and section 35(1) below [which gives the Secretary of State power, on the recommendation of the Parole Board, to release such a prisoner on licence after he has served half his sentence]

(3) As soon as, in the case of a discretionary life prisoner -

(a) he has served the part of his sentence specified in the order ("the relevant part"); and

(b) the Board has directed his release under this section,

it shall be the duty of the Secretary of State to release him on licence.

(4) The Board shall not give a direction under sub-section (3) above with respect to a discretionary life prisoner unless -

(a) The Secretary of State has referred the prisoner's case to the Board; and

(b) The Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

(5) A discretionary life prisoner may refer the Secretary of State to refer his case to the

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Board at any time -

(a) after he has served the relevant part of his sentence..."

This section, it will be observed, deprives the Secretary of State of his discretion both as to the fixing of the tariff and the decision to release on licence at the end of the tariff period. The tariff is to be fixed by the judge when passing sentence and the decision to release is entrusted to the Parole Board. The first change meets the concern of the Commission as to the uncertainty surrounding the fixing of the tariff period and the second meets the need found by the European Court for a judicial decision on risk after the tariff period has expired.

Paragraph 9 of the 12th Schedule, with which this appeal is concerned, makes transitional provision for those discretionary life prisoners who had already been sentenced before section 34 came into force on 1 October 1992:

> "(1) This paragraph applies where, in the case of an existing life prisoner, the Secretary of State certifies his opinion that, if -
>
> (a) section 34 of this Act had been in force at the time when he was sentenced...
>
> the court by which he was sentenced would have ordered that that section should apply to him as soon as he had served a part of his sentence specified in the certificate.
>
> (2) In a case in which this paragraph applies, Part II of this Act except section 35(2) shall apply as if -
>
> (a) the existing life prisoner were a discretionary life prisoner for the purposes of that Part; and
>
> (b) the relevant part of his sentence within the meaning of section 34 of this Act were the part specified in the certificate".

The argument turns on the nature of the opinion which the Secretary of State must certify.

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Mr Pannick QC for the Secretary of State says that he must certify his opinion, first, that the sentencing court would have ordered that section 34 should apply after some unspecified period of imprisonment had been served, and secondly, his own opinion as to what that period should be. In forming the latter opinion he is not confined to considering what a court at the time of passing sentence would have thought appropriate but what "having regard to his public responsibilities" he now thinks that the seriousness of the offence deserves. Mr Fitzgerald, for the applicant, says that the Secretary of State must certify his opinion that if section 34 had been in force, the sentencing court would have ordered that the section should apply to him after the expiry of the tariff period specified in the certificate.

The Divisional Court said that the wording of the paragraph was "not easy" but favoured Mr Pannick's construction. With all respect to the Divisional Court, it seems to me plain and obvious that Mr Fitzgerald must be right. The last four words of paragraph 9(1) - "specified in the certificate" are a past participial phrase which qualifies "part of his sentence-". The Secretary of State must certify that the court would have ordered that section 34 should apply as soon as the prisoner had served, not just some part of his sentence, but a part "specified in the certificate". Thus the Secretary of State must certify what in his opinion the tariff would have been if the court had been applying the criteria in section 34(2).

Mr Pannick says that Parliament cannot be supposed to have required the Secretary of State to form an opinion as to what determinate sentence would have been passed by the sentencing court if a discretionary life sentence had not been imposed. For one thing, there is no right answer to that question. All one can say with certainty is that the sentence would have been within a certain range. And for another, the best people to answer that question would be the judiciary. But paragraph 9 does not entrust the decision to the judiciary. It requires the opinion of the Secretary of State.

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These arguments might carry more weight if what seems to me to be the ordinary meaning of paragraph 9 did not mirror almost precisely what was happening in practice at the time when the 1991 Act was passed. At that time, as Mr Pannick pointed out, almost all discretionary life prisoners would have had a tariff fixed on the advice of the judiciary in accordance with Mr Hurd's 1987 Policy Statement. That tariff would have been fixed according to criteria which were substantially the same as those set out in section 34(2). So in most cases the Secretary of State would have had, ready to hand, the material on which to form an opinion as to what tariff would have been imposed if section 34 had been in force at the time of the trial. Only in cases in which for some reason no tariff had yet been fixed, or in which there was some doubt as to whether the judges had applied the correct criteria, or some relevant new circumstances had emerged, would the Secretary of State need to look any further. Thus the Secretary of State was the appropriate person to entrust with what in most cases would be the virtually administrative task of certifying the tariff periods already on the books. There was no need for Parliament to require the judges to fix them all over again. Only in those cases in which the existing advice was for one reason or another inadequate, would the obvious first step be for the Secretary of State to consult the judiciary again, in accordance with existing practice. Having done so, he would then have the best material on which to advise. All of this fits in perfectly well with the object of the exercise being to determine what tariff would have been fixed at the trial if section 34 had been in force.

There are also in my view other objections to Mr Pannick's construction. If a discretionary life sentence by its nature contains within it a notional determinate sentence, I think it offends against basic principles of justice that the sentence should be fixed retrospectively 15 years later by reference to the view taken of the seriousness of the offence in the circumstances then prevailing. It offends even further if the Home Secretary is, as Mr Pannick submitted, not even required to apply the section 34(2) criteria but can take into

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account other matters such as current public confidence in the way the criminal justice system deals with the I.R.A. The applicant has been in prison since 1976 and cannot be held responsible for what the I.R.A. has been doing since that date. Whatever effect this has upon the appropriate level of sentences for similar offences today, it cannot justify a retrospective increase in his.

I must now apply this construction to the facts of the case, which have been fully stated by Stuart-Smith L.J. In 1985, before the jurisprudence and practice of discretionary life sentences had been clarified by *Hanscombe* and Mr Hurd's 1987 Policy Statement, the trial judge was asked for his view on the tariff and said:

> "I remember this case well. McCartney undoubtedly shot to kill. He is very dangerous and should remain in custody for the foreseeable future".

This reflects the uncertainty of the criteria being applied at the time, because the second sentence was simply an indorsement of what was necessarily entailed by the verdict of the jury and the third was concerned with risk (a matter for the Parole Board) rather than the requirements of retribution and deterrence. The then Lord Chief Justice, Lord Lane, said:

> "If I had to put a term of years I would say a minimum of 25".

On this advice, McCartney's tariff was fixed at 25 years, which would be the equivalent of a determinate sentence of 37½ years. This is greatly in excess of any contemporary sentence for attempted murder.

On 28th July 1992 the Secretary of State, without having at that stage sought any further advice from the judiciary, certified the tariff under paragraph 9 at 25 years. The applicant's solicitors protested that this was excessive and so on 4th November 1992 the Secretary

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of State asked the Lord Chief Justice for fresh advice. In the circumstances, this seems to me to have been the right thing to do. I do not think that the advice already on the file provided a sufficiently safe basis for enabling the Secretary of State to express an opinion as to what tariff the court would have fixed in 1976 if it had been applying the section 34(2) criteria.

The present Lord Chief Justice replied on 17th November 1992 remarking that the applicant's solicitors had understated the seriousness of his offence but concluding:

> "Nevertheless there seems to be no reason to differentiate between him and the group of Dowd and others. Accordingly I would recommend 20 years".

Dowd and others were a group of I.R.A. terrorists sentenced to discretionary life sentences at about the same time as the applicant. It is accepted by the Secretary of State that their offences were at least as serious as those committed by the applicant. The Lord Chief Justice had advised a tariff of 20 years and this had been certified by the Secretary of State.

The Secretary of State rejected the advice of the Lord Chief Justice and once more certified a tariff of 25 years. He said that this reflected his view of the seriousness of the offence and that he now thought that he had been wrong to certify any less for the Dowd group. He was not willing to make the same mistake merely for the sake of conformity.

Mr Pannick accepts that the Secretary of State made no attempt to form an opinion as to what tariff would have been fixed by a court in 1976 and that accordingly, if his submission on construction is rejected, the certificate cannot stand. In my judgment it must therefore be quashed. I therefore find it unnecessary to deal with the complaint of procedural irregularity based upon the fact that the applicant was not given the opportunity to comment on certain material before the Secretary of State when he made his decision. Nor do I wish to say anything about the circumstances in which the Secretary of State could express an

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opinion different from that of the Lord Chief Justice without being *Wednesbury* unreasonable. There is in my view adequate guidance in the subsequent cases which have commented upon *Handscombe.*

There is however the one remaining point on which I would respectfully disagree with Stuart-Smith L.J. Among the matters which the applicant's solicitors said that the Secretary of State should have taken into account in fixing his tariff was the fact, attested by several testimonials, that he had made exceptional progress in prison. Mr Pannick said that it would be inconsistent to fix the tariff by reference to the sentence which would have been passed in 1976 and at the same time to take into account the prisoner's subsequent reform. But I do not think that there is any inconsistency. Mr Pannick accepted that in fixing the length of determinate sentences, judges took into account matters which occurred after the commission of the offence. Co-operation with the police, a plea of guilty, genuine contrition; all may legitimately enter into the calculation. It follows that there is no logical cut-off date which precludes subsequent events from being taken into account. The only cut-off is a purely practical one, which follows from the necessity of having to make a once-and-for-all decision: in normal cases, as to the length of the determinate sentence and now, under section 34 of the Criminal Justice Act 1991, as to the length of the tariff. But since the cut-off is for practical rather than logical reasons, it should in my view be permissible to take into account everything about the prisoner which is known to be the case at the time when the decision has to be made. If for some reason a very long interval has elapsed between the offence and the sentence - for example, because the prisoner has been avoiding justice - I do not see why the fact that the prisoner has done good works in the interval should not be taken into account. Likewise, when a decision has to be made many years later under paragraph 9, the Secretary of State should be able to take into account any information throwing light upon the prisoner's character, such as exceptional progress in prison, which, if it could have been predicted in 1976, might have affected the tariff then imposed. This seems to me both

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rational and fair. It is not to be compared with retrospectively increasing the sentence on account of matters which do not relate to the prisoner and over which he has no control, such as changes in the public perception of I.R.A. offences.

I would therefore allow the appeal and quash the certificate.

LORD JUSTICE SAVILLE: I agree with the judgment given by Lord Justice Stuart-Smith.

(Order: Appeal allowed with costs. Leave to appeal to the House of Lords refused.)8

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