

PRISONERS CASE NOTE

Revocation of licence of life sentence prisoner

Stafford v UK
European Court of Human Rights, 28 May 2002
(No 46295/99)

Facts: Dennis Stafford, a mandatory lifer, had been released on life licence and was later recalled to prison following convictions for fraud. The Parole Board ('the board') recommended his release on completion of the determinate sentences imposed, but this recommendation was rejected by the Home Secretary. While the Home Secretary accepted that Mr Stafford did not pose a risk to the physical safety of the public, he relied on the risk of future non-violent offending.

In domestic proceedings (*R v Home Secretary ex p Stafford* [1998] 1 WLR 503), the Home Secretary succeeded in his argument that it was lawful for him to consider the risk of mandatory lifers committing any further imprisonable offences when considering release, whether or not the prisoner was likely to pose a physical threat to the public. This contrasted with the more stringent test applied to other indeterminate prisoners, ie, the 'life and limb test' under Crime (Sentences) Act 1997 s28, and, until Mr Stafford's case, it had always been assumed that the test applied to mandatory lifers as well.

The domestic court agreed that the Home Secretary had a wide degree of discretion in respect of any matters relating to the release of mandatory lifers. Therefore, if he chose to change the parole criteria or reject a release recommendation, this was lawful providing he had not breached any of the traditional judicial review grounds. The European Convention on Human Rights ('the convention') was not deemed relevant to these powers, largely because of a decision of the ECtHR (*Wynne v UK* (1994) 19 EHRR 333), where it had been held that the mandatory life sentence authorised lifelong, punitive detention and that following a lawful conviction, there was no requirement under article 5(4) for judicial control over release decisions.

Decision: In *Stafford v UK*, the ECtHR examined complaints under article 5(1) and (4) of the convention and found breaches of both. In respect of article 5(1), it held that the applicant's continued detention under his original life sentence, after he had served his determinate prison sentence, was arbitrary. There was no causal link between the original murder conviction and the detention on the grounds of committing non-violent offences.

The court also held that in the post-tariff period, article 5(4) applies to the continued detention of mandatory lifers. It expressly overruled the earlier *Wynne* decision on the grounds that domestic law had moved on since that time and it is now clear that the mandatory life sentence does not, in fact, authorise lifelong, punitive detention, save in the few cases where a whole life tariff has been imposed. The court commented that it would be impossible to understand how the applicant could have been released from his life sentence in the first place if it really did authorise life long detention. Mr Stafford received approximately £10,000 in compensation for the non-pecuniary loss experienced because of the additional year that he spent in prison custody as a result of the breach of article 5(1).

Comment: The decision in *Stafford* will impact on the entire administration of the mandatory life sentence. It now means that all post-tariff mandatory lifers are entitled to oral hearings to determine the legality of their detention and that the board will have the power to direct their release from prison custody on a 'life and limb' test. This is a mammoth task for the Home Office and the board, as it will greatly increase the number of oral hearings which the board has to conduct each year, as well as requiring it to hold article 5(4) compliant reviews for all tariff expired mandatory lifers. It seems unlikely that an official announcement will be made about how these new obligations will be implemented for several weeks.

There has, however, been previous precedent for this type of exercise when, in 1996/7, an identical situation arose with Her Majesty's Pleasure (HMP) lifers (ie, those convicted of murder committed when they were under 18). On that occasion, pending a formal change to legislation, interim arrangements were put in place to review all such prisoners using the following priorities, in order, and it seems highly likely that a similar system will be introduced for mandatory lifers:

- (1) All lifers who had a recommendation for release by the board rejected by the Home Secretary were given immediate priority.
- (2) Priority was given to those post-tariff lifers who were in open prison conditions, and who had served longer than their tariff period.
- (3) Those lifers who had served longest over tariff in chronological order.

In terms of potential compensation claims, the inevitable backlog will cause some difficulty for the Home Office. When there were lengthy delays in the implementation of new review arrangements for discretionary lifers and HMP detainees, the ECtHR awarded damages to prisoners whose reviews had taken time to be implemented. A recent domestic case in the Court of Appeal (*Noorkoiv v Home Secretary* [2002] EWCA Civ 770), will add to these administrative pressures as the court accepted that lifers are entitled to reviews that enable release on tariff expiry (so that reviews should be shortly before, not after, tariff expiry), and rejected arguments that lack of resources can justify the failure to provide article 5(4) compliant reviews.

In terms of practical advice to mandatory lifers, practitioners should concentrate challenges on those cases where an article 5(4) compliant procedure is likely to make a real difference to the prospects of release. In cases where the issue is not of release but of a progressive move, for example, to an open prison, it may be in the client's interest to allow a paper review to take

place, especially if the reports are favourable, rather than to delay the consideration of the case by making a legal challenge.

Effect on tariffs

The ECtHR was not asked to examine tariff-setting, although it did observe that this is a sentencing exercise. However, ongoing domestic litigation in this area will, undoubtedly, be affected. In *R (Anderson and Taylor) v Home Secretary* [2002] 2 WLR 1143, it was accepted by the courts that articles 5(4) and 6 are two sides of the same coin for mandatory lifers. Thus, if the mandatory life sentence does not authorise lifelong, punitive detention and article 5(4) applies in the post-tariff stage then, as a matter of logic, the setting of the tariff must also be a sentencing exercise attracting the safeguards of article 6. This would entail judicial tariff-setting as opposed to the current executive role.

Of the six judges who heard *Anderson* in the Divisional Court and Court of Appeal, five considered that, as a matter of substance rather than form, article 6 should apply to tariff-setting and that it should be a judicial rather than an executive function. However, they all felt constrained by *Wynne* and did not feel able to overrule that decision. Now that the ECtHR has expressly overruled *Wynne*, it seems inevitable that the appeal in *Anderson* will be successful. The Home Secretary has stated an intention to retain some control over the sentencing process, and his wish to maintain the concept of a 'whole life' tariff. While it is difficult, if article 6 is held to apply, to see how there can be room for executive interference in tariff-setting, there is no statement of principle from the ECtHR to suggest that whole life tariffs are necessarily unlawful. The *Anderson* appeal is currently listed to be heard by the House of Lords in October 2002.

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