

Irish Prison Reform Trust

22nd October 2012

Parole

1. European Convention on Human Rights.
2. Convention Rights Compliance (Scotland) Act 2001
3. *Smith, R (on the application of) Parole Board*
4. *James, Wells & Lee v United Kingdom*

Themes

Sentencing: the sentencing judge decides how long an accused shall serve in prison for punitive purposes;

Indeterminate Period - If there is an ensuing period of detention in which new issues affecting the lawfulness of the detention arise who decides:

(i) to review the lawfulness of detention and to refer the prisoner's case to a Parole Board;

(ii) if the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined that should be a binding recommendation

Sentencing

“...the court will take account of all matters relevant to the art and science of sentencing and may, depending on the facts of the particular case, have regard to all the well-known objects of a custodial sentence (retribution, personal and general deterrence, incapacitation, reform, rehabilitation). But the predominant purpose of the sentence will be punitive and the sentence which the court imposes will represent the period which the court considers that the defendant should spend in custody as punishment for the crime or crimes of which he has been convicted. An appellate court reviewing the sentence will act on the same basis.”

Lord Bingham of Cornhill Smith, R (on the application of) Parole Board [2005] UKHL 1 (27 January 2005)

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Anderson, R (on the application of) v Secretary of State for the Home Department [2002] UKHL 46 (25 November 2002)

Under article 6(1) of the convention a criminal defendant has a right to a fair trial by an independent and impartial tribunal.

The imposition of sentence is part of the trial.

Therefore, sentence should be imposed by an independent and impartial tribunal.

The fixing of the tariff of a convicted murderer is legally indistinguishable from the imposition of sentence.

Therefore, the tariff should be fixed by an independent and impartial tribunal.

The Home Secretary is not an independent and impartial tribunal.

Therefore, the Home Secretary should not fix the tariff of a convicted murderer.

Discretionary Life Prisoners

Thynne, Wilson and Gunnell v United Kingdom (1990) 13 EHRR 666

Juveniles

R v Secretary of State for the Home Department, Ex p Venables and Thompson [1998] AC 407; *V v United Kingdom* (1999) 30 EHRR 121.

Hiccup

In *Wynne v UK* (1994) 19 EHRR 333 the European Court of Human Rights held that in mandatory life sentences, the original criminal trial and the appeals system satisfy the guarantee of Article 5(4). Accordingly, there was no additional right to challenge the lawfulness of continued detention.

Corrected in *Stafford v United Kingdom*, Application No 46295/99, 28 May 2002, in particular para.69

Scotland

History

The Scottish Ministers [Executive] had power to release a life prisoner following a recommendation of the Parole Board and after consultation with the Lord Justice General and, if available, the trial judge.

Procedure

The Preliminary Review Committee, ("PRC") recommended to the Scottish Ministers the date for the **first review** by the Parole Board of a life prisoner's suitability for release on life license.

Met in private – chaired by government official and consisted of High Court judge, the chairman of the Parole Board, a psychiatrist who is a member of the Parole Board and a senior official from the Scottish Prison Service.

Parole Board Review

Referral by the Scottish Ministers – informed by the recommendation of PRC.

Recommendation only – Scottish Ministers then had to take advice of judiciary – Lord Justice General and trial judge

20 Year Policy

The policy, announced by the Secretary of State, Mr George Younger, on 18 December 1984, and endorsed by successive administrations, applied to prisoners sentenced to life imprisonment for the murder of a police officer, murders by terrorists, the sexual or sadistic murder of a child and murders committed by use of a firearm in the commission of a crime.

Under the policy prisoners convicted of such murders could expect to spend not less than 20 years in custody unless there were exceptional circumstances.

Convention Rights (Compliance) (Scotland) Act 2001

Correctly predicting the line of travel of Strasbourg jurisprudence, the Act provided for all indeterminate prisoners to be dealt with similarly (Scotland previously having made provision for discretionary lifers and juveniles)

Punishment part

The mandatory life sentence now split into a punishment part and a risk period. The punishment part is set in open court by the sentencing judge and open to appeal.

“to satisfy the requirements for retribution and deterrence (ignoring the period of confinement, if any, which may be necessary for the protection of the public)”

End of: PRC; 20 year policy

Stated aim – to be Article 6 compliant. Therefore all serving lifers given public hearing for fixing of tariff

Practical Advantages

Doing away with superfluous reviews of prisoners' suitability for release.

Provide prisoners with greater clarity as to the minimum period that they will require to serve in custody before consideration is given to their release;

Allows the Scottish Prison Service to manage the prisoner's sentence efficiently and effectively.

Greater clarity for the public and the victim's family, since the punishment and minimum period required in prison will be apparent from the outset.

Article 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - a. the lawful detention of a person after conviction by a competent court;
 - ...
4. 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 detention must be "lawful", That is to say, it must be in accordance with domestic law and not arbitrary.

The review under article 5(4) must then be wide enough to bear on the conditions which are essential for a determination of this issue.

Where the decision about the length of the period of detention is made by a court at the close of judicial proceedings, the requirements of article 5(1) are satisfied and the supervision required by article 5(4) is incorporated in the decision itself.

Giles, R(on the application of) v. Parole Board & Anor [2003] UKHL 42
(31 July 2003)

But where the responsibility for decisions about the length of the period of detention is passed by the court to the executive, the lawfulness of the detention requires a process which enables the basis for it to be reviewed judicially at reasonable intervals.

This is because there is a risk that the link between continued detention and the original justification for it will be lost as conditions change with the passage of time.

If this happens there is a risk that decisions which are taken by the executive will be arbitrary. That risk is absent where the length of the period of detention is fixed as part of its original decision by the court.

Giles, R(on the application of) v. Parole Board & Anor [2003] UKHL 42
(31 July 2003)

Application in two immediate sets of circumstances:

1. Prisoners post-tariff – where continued detention is decided upon by Executive administrative arrangements – as to timing of review; *recommendation* for release and advisory roles of judiciary

2. When prisoners released on license are recalled to custody – both to ascertain whether there is justification (breach) and the period of continued detention (to review the lawfulness of continued detention)

What Does Article 5(4) Require?

‘Court like body’: (i) Power of Decision

Weeks v United Kingdom (1988) 10 EHRR 293

“However, where the Board does recommend release of such prisoners, the Home Secretary must also consult the Lord Chief Justice, together with the trial judge if available; and, as demonstrated by the facts of Mr. Weeks’ own case the Home Secretary is free, in the light of all the material before him, not to accept the Board’s recommendation. Quite apart from any consideration of procedural guarantees, **the Board therefore lacks the power of decision required by Article 5 para. 4 (art. 5-4)** when dealing with this category of case.”

(ii) Procedural Guarantees

E.g. Disclosure

Weeks

“.....there remains a certain procedural weakness in the case of a recalled prisoner.the duty on the Board to act fairly, as required under English law by the principles of natural justice, does not entail an entitlement to full disclosure of the adverse material which the Board has in its possession. The procedure followed does not therefore allow proper participation of the individual adversely affected by the contested decision, this being one of the principal guarantees of a judicial procedure for the purposes of the Convention, **and cannot therefore be regarded as judicial in character**”

Smith, R (on the application of) Parole Board [2005] UKHL 1
(27 January 2005)

Recalled prisoners – applications fell to be dealt with invariably by a consideration on papers by parole board members.

Challenged their recall to custody and procedures adopted to deal with that. Argued that an evolution of public law duty to act fairly, combined with arguments on Articles 5 & 6, meant that an oral hearing, accompanied by legal representation, was required

[35]Even if important facts are not in dispute, they may be open to explanation or mitigation, or may lose some of their significance in the light of other new facts. While the Board's task certainly is to assess risk, it may well be greatly assisted in discharging it (one way or the other) by exposure to the prisoner or the questioning of those who have dealt with him. It may often be very difficult to address effective representations without knowing the points which are troubling the decision-maker. The prisoner should have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society.

...

[37] Its review will in my opinion satisfy the requirements of article 5(4) provided it is conducted in a manner that meets the requirement of procedural fairness already discussed.

Lord Bingham of Cornhill

taylor & kelly

[75]article 5(4) requires that the proceedings themselves must be conducted in the way a court would be expected to conduct them. From this it follows that, to satisfy article 5(4), the Board's procedure for conducting reviews must embody the procedural fairness that the common law requires of a court. Procedural fairness is a requirement of the common law. It is not in itself a Convention requirement. But it is built into the Convention requirement because article 5(4) requires that the continuing detention must be judicially supervised and because our own domestic law requires that bodies acting judicially, as a court would act, must conduct their proceedings in a way that is procedurally fair. As Lord Bingham has explained, the common law duty of procedural fairness required that the appellants be offered an oral hearing into their representations against revocation of their licences. As this was not done, the review of their detention was not conducted as a court would be expected to conduct it, so there was, in my opinion, a violation of their article 5(4) Convention rights.

Lord Hope of Craighead

Gallagher v Parole Board for Scotland [2005] CSOH 126

Downgrade from open conditions on basis of intelligence. Parole Board asked for 'scoring' of intelligence. Refused. Relying simply on adverse nature of intelligence and 'downgrade', Parole Board withdrew previous grant

Birrel v Parole Board for Scotland [2006] CSOH 181

Parole Board entitled to have regard to hearsay evidence

Campbell v Parole Board for Scotland [2008] CSOH 16

Grant of parole 'forward dated'. Allegation that he had breached licence whilst on home leave. Decision quashed on basis that an oral hearing should have been convened

Progression

“All, or almost all, determinate sentence prisoners are expected to return to the community on release from prison after serving their sentences. It is in the interests of society that they should, after release, live law-abiding, orderly and useful lives. For a host of practical, psychological and social reasons, the process of transition from custody to freedom is often very difficult for the prisoner. It is accordingly very desirable that the process of transition should be professionally supervised, to maximise the chances of the ex-prisoner's successful reintegration into the community and minimise the chances of his relapse into criminal activity.”

Lord Bingham *Smith, R (on the application of) Parole Board*
[2005] UKHL 1 (27 January 2005)

James, Wells & Lee v United Kingdom
Application Nos. 25119/09 57715/09 57877/09
18th September 2012

Concerned imposition and management of prisoners subject to IPP
– indeterminate sentence for public protection

Initially mandatory in certain cases – where convicted of ‘serious offence’ and where risk of committing further ‘specified offences’.

A tariff was set – at the expiry of which the Parole Board was given power to direct the release of indeterminate sentence prisoners if it was

‘satisfied that detention was no longer necessary for the protection of the public.’

“48. ... The Crown has obtained from Parliament legislation to allow – rather, require: the court has no discretion – the indefinite detention of prisoners beyond the date when the imperatives of retributive punishment are satisfied. But this further detention is not arbitrary. It is imposed to protect the public. As soon as it is shown to be unnecessary for that purpose, the prisoner must be released (see ss.28(5)(b) and 28(6)(b) of the 1997 Act). Accordingly there must be material at hand to show whether the prisoner’s further detention is necessary or not. Without current and periodic means of assessing the prisoner’s risk the regime cannot work as Parliament intended, and the only possible justification for the prisoner’s further detention is altogether absent. In that case the detention is arbitrary and unreasonable on first principles, and therefore unlawful.

Laws LJ, Divisional Court

Reducing the risk posed by lifers must be inherent in the legislation's purpose, since otherwise the statutes would be indifferent to the imperative that treats imprisonment strictly and always as a last resort. Whether or not the prisoner ceases to present a danger cannot be a neutral consideration, in statute or policy. If it were, we would forego any claim to a rational and humane (and efficient) prison regime. Thus the existence of measures to allow and encourage the IPP prisoner to progress is as inherent in the justification for his continued detention as are the Parole Board reviews themselves; and without them that detention falls to be condemned as unlawful as surely as if there were no such reviews."

Laws LJ

The European Court of Human Rights looked at

- (i) whether there was a causal link between the continuing detention and the original sentence (just);
- (ii) whether the detention complied with domestic law (it did)

The Court then went on to analyse whether the detention was free from arbitrariness

218. The Court reiterates that the right to liberty is of fundamental importance. While its case-law demonstrates that indeterminate detention for the public protection can be justified under Article 5 § 1 (a), it cannot be allowed to open the door to arbitrary detention. As the Court has indicated above, in circumstances where a Government seek to rely solely on the risk posed by offenders to the public in order to justify their continued detention, regard must be had to the need to encourage the rehabilitation of those offenders. In the applicants' cases, this meant that they were required to be provided with reasonable opportunities to undertake courses aimed at helping them to address their offending behaviour and the risks they posed.

“.....courses are provided to prisoners because experience shows that they are usually necessary if dangerous offenders are to cease to be dangerous. While Article 5 § 1 does not impose any absolute requirement for prisoners to have immediate access to all courses they may require, any restrictions or delays encountered as a result of resource considerations must be reasonable in all the circumstances of the case, bearing in mind that whether a particular course is made available to a particular prisoner depends entirely on the actions of the authorities.”

Opens up attack upon possible arbitrariness of detention where based on risk and resources made available to prisoners to reduce the risk they are said to pose