

AS TO THE ADMISSIBILITY OF

Application No. 24835/94
by Raymond BAXTER
against the United Kingdom

The European Commission of Human Rights sitting in private on
28 November 1995, following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS
A. PERENIC
C. BÍRSAN
P. LORENZEN
K. HERNDL

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection
of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 20 April 1994 by
Raymond BAXTER against the United Kingdom and registered on
5 August 1994 under file No. 24835/94;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of
the Commission;
- the observations submitted by the respondent Government on
13 March 1995 and the observations in reply submitted by the
applicant on 25 May 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in 1955 and currently
serving a sentence of detention at Her Majesty's pleasure at Long

Lartin Prison, Evesham. He is represented before the Commission by Mr. Michael Pringsheim, a solicitor practising in London.

The facts as submitted by the parties may be summarised as follows.

a. Particular circumstances of the case

The applicant was convicted of murder in 1971 at the age of fifteen. He was sentenced to detention at Her Majesty's pleasure.

In 1978, the Parole Board recommended the applicant's release subject to the satisfactory completion of six months in open conditions and six months on a pre-release employment scheme. He was released on 8 January 1980.

In 1985, the applicant, following a guilty plea, was convicted of rape and sentenced to 10 years' imprisonment. The trial judge did not revoke the applicant's licence. Pursuant to this sentence his earliest date of release was calculated as 5 January 1992 and his parole eligibility as 6 September 1988.

On 4 February 1986, following the recommendation of the Parole Board, the Secretary of State revoked the applicant's licence, pursuant to section 62 of the Criminal Justice Act 1967. On application by the applicant for a review of the revocation, the Parole Board, without giving the applicant sight of the documents before it or an oral hearing, decided not to recommend his release. The applicant had the opportunity of submitting written representations.

The applicant's case was reviewed by the Parole Board in 1991 but it declined to recommend his release. His case was again reviewed in 1994. This review was conducted under the open reporting arrangements introduced in April 1993 and the applicant had full disclosure of the papers which were considered by the Board, to which he had the opportunity to make written representations.

By letter dated 30 August 1994, the applicant was informed as follows:

"The Secretary of State has referred your case to the Parole Board which has not recommended your release on licence for the following reasons:

"The Panel considered that <the applicant> presents too high a risk for release on licence or for open conditions, because his lack of explanation for both offences give rise to grave concern...The Panel noted that no work had been done on his sadistic sexual motivations for these offences. They felt that he would benefit from a period at Grendon as recommended by Dr Sugarman in his report of 8 April 1994, failing this attendance at a sex offenders training programme is essential."

The applicant was informed that his next Parole Board review would begin in August 1996.

b. Relevant domestic law and practice

1. Detention at Her Majesty's pleasure

The notion of detention at Her Majesty's pleasure had its origins in an Act of 1800 for "the safe custody of insane persons charged with offences". Section 1 provided that defendants acquitted of a charge of murder, treason or felony on the grounds of insanity at the time of the offence were to be detained in "strict custody until His Majesty's pleasure" and described their custody as being "during His <Majesty's>

pleasure".

In 1908, detention at His Majesty's pleasure was introduced in respect of offenders aged ten to sixteen and then extended to cover those under eighteen in 1933. The provision in force at present is Section 53 (1) of the Children and Young Persons Act 1933 (as amended) which provides:

"A person convicted of an offence who appears to the Court to have been under the age of eighteen years at the time the offence was committed shall not, if he is convicted of murder, be sentenced to imprisonment for life nor shall sentence of death be pronounced on or recorded against any such person but in lieu thereof the court shall ... sentence him to be detained during Her Majesty's pleasure and, if so sentenced he shall be liable to be detained in such a place and under such conditions as the Secretary of State may direct."

2. Categorisation of detention "at Her Majesty's pleasure"

In the case of *ex parte Prem Singh* on 20 April 1993, Evans LJ in the Divisional Court held as follows in respect of detention "at Her Majesty's pleasure":

"At the time of sentencing, the detention orders under section 53 were mandatory. It is indeed the statutory equivalent for young persons of the mandatory life sentence for murder. But the sentence itself is closer in substance to the discretionary sentence of which part is punitive (retribution and deterrence) and the balance justified only by the interests of public safety when the test of dangerousness is satisfied. The fact that the mandatory life prisoner may be given similar rights as regards release on licence does not alter the fact that the mandatory life sentence is justifiable as punishment for the whole of its period: see *R. v. Secretary of State, ex.p. Doody & others* [1993] Q.B. 157 and *Wynne v. UK* (E.C.H.R. 1st December 1992). The order for detention under section 53 is by its terms both discretionary and indeterminate: it provides for detention 'during Her Majesty's pleasure'. (Section 53(4) which expressly authorised the Secretary of State to discharge the detainee on licence 'at any time' was repealed by the Parole Board provisions of the Criminal Justice Act 1967, but this does not, in my judgment, alter the nature of the sentence in any material respect.) I would decide the present case on the narrow ground that, notwithstanding Home Office and Parole Board practice, the applicant should be regarded as equivalent to a discretionary life prisoner for the purpose of deciding whether Wilson rather than Payne governs his case."

The Court accordingly held that the applicant in the case, detained at Her Majesty's pleasure, should be afforded the same opportunity, as would be given a discretionary life prisoner, to see the material before the Parole Board when it decided upon whether he should be released after his recall to prison on revocation of his licence.

3. Release on licence and revocation of licences

Persons sentenced to mandatory and discretionary life imprisonment, custody for life and those detained at Her Majesty's pleasure have a "tariff" set in relation to that period of imprisonment they should serve to satisfy the requirements of retribution and deterrence. After the expiry of the tariff, the prisoner becomes eligible for release on licence. Applicable provisions and practice in respect of the fixing of the tariff and release on licence have been subject to change in recent years, in particular, following the coming into force on 1 October 1992 of the Criminal Justice Act 1991 (the 1991

Act).

i. Prior to 1 October 1992

Section 61 (1) of the Criminal Justice Act 1967 provided, inter alia:

"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 or a person detained under section 53 of the Children and Young Persons Act 1933 (young offenders convicted of grave crimes), but shall not do so in the case of a person sentenced to imprisonment for life or to detention during Her Majesty's pleasure or for life except after consultation with the Lord Chief Justice of England together with the trial judge if available."

Section 62 of the 1967 Act provided inter alia:

"1. Where the Parole Board recommends the recall of any person who is subject to a licence under section 60 or 61 of this Act, the Secretary of State may revoke that person's licence and recall him to prison.

2. The Secretary of State may revoke the licence of any such person and recall him as aforesaid without consulting the Board, where it appears to him that it is expedient in the public interest to recall that person before such consultation is practicable.

3. A person recalled to prison under the foregoing provisions of this section may make representations in writing with respect to his recall and shall on return to prison be informed of the reasons for his recall and of his right to make such representations...

4. The Secretary of State shall refer to the Board the case of a person recalled under subsection (1) of this section who makes representations...

5. Where the Board recommends the immediate release on licence of a person whose case is referred to it under this section, the Secretary of State shall give effect to the recommendation, and where it is necessary for that purpose to release that person under subsection (1) of the last foregoing section, the Secretary of State shall do so without the consultation required by that subsection..."

ii. From 1 October 1992

On 1 October 1992, Part II of the Criminal Justice Act 1991 (the 1991 Act) came into force.

The 1991 Act instituted changes to the regime applying to the release of discretionary life prisoners following the decision of the Court in the Thynne, Wilson and Gunnell case (Eur. Court H.R., judgment of 25 October 1990, Series A no. 190).

For the purposes of the 1991 Act, persons detained at Her Majesty's pleasure are not regarded as discretionary life prisoners. In relation to these prisoners, the Secretary of State continues to decide the length of the tariff.

As regards release on licence, detainees at Her Majesty's pleasure are subject to section 35 of the 1991 Act, which provides as relevant:

"(2) If recommended to do so by the Board, the Secretary of State may, after consultation with the Lord Chief Justice together with the trial judge if available, release on licence a life prisoner who is not a discretionary life prisoner."

Section 39 provides as relevant:

"(1) If recommended to do so by the Board in the case of a long term or life prisoner who has been released on licence under this Part, the Secretary of State may revoke his licence and recall him to prison...

(3) A person recalled to prison under subsection (1) or (2) above

(a) may make representations in writing with respect to his recall; and

(b) on his return to prison, shall be informed of the reasons for his recall and of his right to make representations.

(4) The Secretary of State shall refer to the Board -

(a) the case of a person recalled under subsection (1) above who makes representations under subsection (3) above...

(5) Where on a reference under subsection (4) above the Board -

(a) directs in the case of a discretionary life prisoner;

or

(b) recommends in the case of any other person,

his immediate release on licence under this section, the Secretary of State shall give effect to the direction or recommendation."

COMPLAINTS

The applicant complains that he had never had the opportunity of obtaining a review of the lawfulness of his continued detention by a body complying with the requirements of Article 5 para. 4 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 20 April 1994 and registered on 5 August 1994.

On 28 November 1994, the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the application.

By letter dated 23 December 1994, the Government requested that the case be adjourned pending the case of Prem Singh v. the United Kingdom which had been referred to the Court.

On 14 January 1995, the Commission rejected the Government's request having regard to the fact that the applicant was serving a sentence of imprisonment.

The Government's observations were submitted on 13 March 1995 and the applicant's observations in reply were submitted on 25 May 1995 after an extension in the time-limit.

THE LAW

The applicant, who is serving a sentence of detention at Her Majesty's pleasure, complains of the absence of any procedure under domestic law by which he can have reviewed by a court the lawfulness of his continued detention. He invokes Article 5 para. 4 (Art. 5-4) of the Convention which provides:

"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 respondent Government submit that detention at Her Majesty's pleasure is to be equated with the term of mandatory life imprisonment for adults and is in effect the equivalent sentence imposed on juveniles. It is therefore to be regarded as a sentence fixed by law in respect of the gravity of the offence concerned. They submit that mandatory and discretionary life sentences differ in fundamental respects, both in nature and applicable procedures. Pursuant to the judgments of the Court, Article 5 para. 4 (Art. 5-4) does not grant an entitlement to a prisoner serving a mandatory life sentence to periodic judicial assessment of the grounds for his detention after the expiry of his tariff (cf. Eur. Court H.R., Weeks judgment of 2 March 1987, Series A no. 114, and Thynne, Wilson and Gunnell judgment of 25 October 1990, Series A no. 190-A). The requirements of Article 5 para. 4 (Art. 5-4) are accordingly satisfied by the original trial and appeal proceedings of the applicant.

The applicant submits that detention at Her Majesty's pleasure is a wholly indeterminate sentence based on the special factor of youth. It should be assimilated to discretionary life sentences for adults in respect of which the European Court of Human Rights has held that Article 5 para. 4 (Art. 5-4) of the Convention requires judicial rather than executive control after the expiry of the punitive or "tariff" part of the sentence. Since the only justification for his detention is risk or "dangerousness", which is a factor susceptible to change, the applicant submits that he should have a review of the lawfulness of his continued detention by a body satisfying the guarantees of Article 5 para. 4 (Art. 5-4) of the Convention.

The applicant submits that the procedure for release on licence of detainees at Her Majesty's Pleasure does not satisfy the requirements of Article 5 para. 4 (Art. 5-4) since the Parole Board, save immediately after recall, is unable to order release, the ultimate decision resting with the executive. An applicant also has no right to an oral hearing before the Board or to call his own witnesses or to question the witnesses against him.

The Commission has taken cognizance of the submissions of the parties concerning the complaints raised by the applicant. It considers that the complaints raise serious issues of fact and law the determination of which should depend on an examination of the merits. The application cannot therefore be regarded as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Secretary to the Commission

(H.C. KRUGER)

President of the Commission

(S. TRECHSEL)