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Whole Life Sentences

Matt Evans discusses the issues raised by "whole life" or "no minimum term" sentences

The recent conviction of John Sweeney "the canal killer" for the brutal killing of two ex-girlfriends, and the subsequent whole life sentence imposed, has raised the issue of why, in recent years, there appears to have been a significant rise in the use made of what remains the most punitive sentence that can be imposed by a UK court.

Since 2004, 33 such sentences have been imposed (albeit three have been successfully appealed) whilst in the preceding 48 years only 21 such sentences were handed down.

A Brief History of the Life Sentence

No aspect of the criminal justice system provokes more controversy than sentencing. The idea of a life sentence dates back to reforms in the early 19th Century, which took away the death penalty for what today would be considered petty offences - stealing, for example.

Until the enactment of the Homicide Act 1957 the mandatory sentence for murder was death. This was mitigated by an executive power to commute the sentence to imprisonment for life which was in turn subject to an executive power to release the prisoner on licence. There was a long established practice whereby the trial Judge wrote privately to the Home Secretary drawing attention to any features of the case which he considered relevant to the decision on whether or not to commute. The 1957 Act created the category of non-capital murder and prescribed a mandatory sentence of life imprisonment. At the time the abolition of the death penalty for murder was before parliament in 1965, a proposal to replace the mandatory life sentence for murder with a discretionary life sentence was rejected by Parliament. However two concessions were made to those who feared excessive leniency by the executive in the treatment of convicted murderers. The first, was that the trial Judge was given the power to recommend to the Home Secretary the minimum period which should elapse before release. Secondly, that no person convicted of murder would be released on licence until the Home Secretary had consulted the Lord Chief Justice and trial Judge. In 1973 following the creation of the Parole Board by the Criminal Justice Act 1967 a new procedure was devised whereby the case of each life prisoner would be looked at after the first three years of the sentence. This was in order to allow a date to be recommended as to when that prisoner's case could be first reviewed by the Parole Board. This was the origin of the crucial practical distinction between setting a date for release, and setting a date of the first consideration of release. In 1983, the then Home Secretary Leon Brittan, made a series of overtly political changes to the existing policies relating to the release of prisoners on parole and licence, including the release of life prisoners. He made it clear he could set minimum tariffs for prisoners serving mandatory life sentences, and which had to served by a prisoner before his or her release could be considered. The policy identified categories of offences such as the murders of police and prison officers, terrorist murders, sexual or sadistic murders of children and murders by firearm in the course of robbery where the tariff would normally be at least 20 years in custody and, though this policy was applied retrospectively, it was held to be lawful by the House of Lords.

This new practice marked a change in philosophy. The first change was tacit but obvious. Whereas at the outset the power of the trial Judge to recommend a minimum term, and the duty of the Home Secretary to consult the Judges before release, had been a protection against a foreseen risk of excessive leniency by the Executive, the new regime was intended to forestall excessive leniency by the Judges, Parole Board, or both. The second change was made explicit in the following passage from the Home Secretary's announcement;

"These new procedures will separate consideration of the requirements of retribution and deterrence from consideration of risk to the public, which always has been, and will continue to be, the pre-eminent factor determining release ... They will enable the prison and other staff responsible for considering and reporting on life sentence case, the local review committees and the Parole Board, to concentrate on risk. The Judiciary will properly advise on retribution and deterrence. But the ultimate discretion whether to release will remain with me"

The separation between risk to the public and the penal element became firmly embedded in the theory and practice of the release of life prisoners. Judges advice was now to be confined simply to the penal element.

Legal Challenges

The life sentence regime in England and Wales has since been consistently challenged by prisoners in the domestic and European courts. These legal challenges, along with a concerted campaign by groups including the Prisoners Advice Service, have centred on the idea that decisions relating to the setting of minimum terms and release should not be made by politicians but the courts. The argument has

been that with politicians constantly competing to be seen as tough on crime, the chances of a fair and objective decision in such difficult cases were nil. Successive governments on the other hand have argued, as before, that the executive provides a bulwark against lenient courts and tribunals. Over the last 20 years a series of legal challenges have been brought by prisoners relying on both the requirements of procedural fairness under common law and article 5 of the European Court of Human Rights.

Article 5

Article 5 (4) may require, where there has been a break in the 'causal link' between the detention and the objectives of the sentencing court, a court like body to examine whether detention remains lawful (whatever the domestic arrangements) and to direct release if it is not (*Winterwerp v. The Netherlands* ((1979) 2 EHRR 387). This process was first applied to life sentences in *Weeks v. UK* ((1987) 10 EHRR 293) and applied in T*hynne Wilson and Gunnell* ((1990) 13 EHRR 666) where the ECHR considered discretionary life sentences and recognized the theoretical distinction between mandatory and discretionary life sentences. They held that in the case of a discretionary life sentence once the penal element had been served prisoners was entitled to "judicial control" of their continued detention. This led to a change in the existing practice embodied in s.34 of the Criminal Justice Act 1991 the gist of which was that as soon as the prisoner had served the penal element (tariff) of his sentence, he could then have his release considered by the Parole Board.

Article 5 (4) was then held to be engaged in relation to detention at Her Majesty's Pleasure following conviction for murder committed when under the age of 18 (*Hussain & Singh v. United Kingdom* (1996) 22 EHRR 1). At this stage however, the discretionary life sentence was distinguished from the mandatory life sentence on the basis that a conviction for murder resulted in a sentence authorizing lifelong punitive detention, so release from that sentence was purely a matter of executive discretion (*R. v. Secretary of State for the Home Department ex parte Doody* (1993) 1 AC 531). The ECtHR accepted that even though the domestic practice was to set a punitive term, this formal analysis of the sentence was correct (*Wynne v. UK* (1994) 19 EHRR 333). The Secretary of State was not bound by any judicial recommendation on tariff and art.5(4) issues were satisfied by the original trial and appeal processes. When Parliament introduced automatic life sentences in the Crime Sentences Act 1997, it recognized that this was indistinguishable in nature from the discretionary life sentence, comprising distinct components serving the ends of retribution and deterrence and thereafter public protection. From the outset the statutory regime made provision for the Parole Board, rather than the Home Secretary, to determine release.

It was not long after *Wynne* that the European Court was invited to consider again the nature of the mandatory life sentence. It did so in 2002 in the case of *Stafford v. UK* ((2002) 35 EHRR 32) and was persuaded not to follow *Wynne*. Instead, basing itself on developments in the administration of the sentence in domestic law in the period since Wynne was decided, it considered that there was in truth no distinction between the nature of the mandatory life sentence and other indeterminate sentences imposed under English law. The result was that the court held that the executive recall of Mr Stafford breached art.5(4), which required that his re-detention following release on licence, be decided by an independent judicial body. The court further held that since the punitive element of the original sentence had been served, any decision to re-detain had to have a causal link to that sentence, otherwise the detention would be arbitrary and breach art.5(1). For such a causal link to be preserved his redetention could only be justified on the basis that he continued to pose a risk of danger to life or limb. A risk of re-offending in a less serious manner could not justify recall. When *Stafford* was decided mandatory lifers were already challenging the other sentencing function which was vested in the executive, namely the fixing of the tariff, or punitive period. In 2002, shortly after the decision in *Stafford* the House or Lords held the fixing of the tariff was a sentencing exercise for the purpose of art.6 of the Convention and as such was required to be done by the courts not the Home Secretary (See *R. v. SSHD ex parte Anderson* (2003) 1 AC 837). These legal challenges resulted in the introduction of Pt.8 of the 2003 Criminal Justice Act which judicialized both the tariff fixing and release decisions in relation to mandatory life sentences. At the same time it unified the decision making process on release for all indeterminate sentence prisoners.

Whole Life Tariffs

So what about whole life tariffs? Under the regime that predated the 2003 Act it was the Home Secretary's practice to review the position of prisoners serving a whole life tariff after they had served 25 years with a view to reducing the tariff in "exceptional circumstances." On November 10, 1997 Jack Straw as Home Secretary explained this policy (which was the same as that adopted by his Conservative predecessors) in respect of whole life cases and in response to the House of Lords decision in *R. v. Secretary of State for the Home Department ex parte Pierson* ((1998) AC 539).

> "So far as the potential for a reduction in tariff is concerned, I shall be open to the possibility that, in exceptional circumstances, including for example, exceptional progress by the prisoner whilst in custody, a review and reduction of the tariff may be appropriate. I shall have this possibility in mind when reviewing at the 25 year point the cases of prisoners given a whole life tariff and in that respect will consider issues beyond the sole criteria of retribution and deterrence described in the answer given on December 7, 1994. Prisoners will continue to be given the opportunity to make representations and to have access to the material before me."

In March 2000, Myra Hindley (*R.v. Secretary of State for the Home Department ex parte Hindley* (2000) 1 QB 152) sought to challenge the whole life tariff and the Secretary of State's role in its setting. Five law lords unanimously ruled that the Home Secretary's decision that her life sentence "must mean life" was both lawful and justified in view of her "exceptionally wicked and uniquely evil" crimes. Lord Steyn said: "There is nothing logically inconsistent with the concept of a tariff by saying that there are cases where the crimes are so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution and deterrence".

What made it ultimately lawful was that such tariffs were always open to review. The importance placed on the ability to

review a sentence (often irrespective of its real practical effect) would be something which the courts would continue to come back to when looking at the justification for whole life terms (renamed "no minimum term" in 2002, with the then lord chief justice, Lord Woolf in May of that year, suggesting to Judges that such sentences should be reserved for prisoners convicted of the most heinous murders where they felt no definite period can properly be set). Since December 18, 2003, the Criminal Justice Act 2003 s.269 has required the court which imposes a mandatory life sentence, to either to specify a minimum period to be served before the offender is considered for early release by the Parole Board or, to order, pursuant to s.269(4), that the early release provisions are not to apply. An order made under s.269(4) has the result that the prisoner is sentenced to serve the remainder of his life in prison. Lifers can, under paras.4 of sch.21 to the 2003 Act, receive a whole life sentence meaning they will never be eligible for release if they were over 21 at the time the offence was committed and the offence involved:

(a) The murder of two or more persons, where each murder involves any of the following
  (i) a substantial degree of premeditation or planning,
  (ii) the abduction of the victim, or
  (iii) sexual or sadistic conduct,
(b) The murder of a child involving the abduction of the child or sexual or sadistic motivation,
(c) A murder done for the purpose of advancing a political, religious or ideological cause, or
(d) A murder by an offender previously convicted of murder.

Guidance as to the approach to be adopted to sentencing is contained in sch.21, and makes clear, by para.9 (which provides that "detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order") that despite the starting points, the Judge has a discretion to determine any term of any length as being appropriate because of the particular aggravating and mitigating circumstances that exist in that case. In *R. v. Jones* ((2006) 2 Cr App R (S) 19 Lord Phillips at [8] added: "The starting points give the Judge guidance as to the range within which the appropriate sentence is likely to fall having regard to the more salient features of the offence, but even then, as para.9 recognizes, 'detailed consideration of the aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point) or in the making of a whole life order'. The starting points must not be used mechanistically so as to produce, in effect, three different categories of murder. Full regard must be had to the features of the individual case so that the sentence truly reflects the seriousness of the particular offence".

Paragraph 10 of the sch.21 sets out the aggravating features which include the degree of premeditation and planning, the vulnerability of the victim, the abuse of a position of trust and the fact that a victim was providing a public service or performing a public duty. Mitigating factors set out in para.11 include provocation, self defence a belief that the murder was an act of mercy and the age of the offender.

Recent Case

One case has explored the whole life tariff in some detail. In *Kafkaris v. Cyprus* (ECHR App No 21906/04) the European Court considered the case of a man was found guilty of three counts of pre-meditated murder in 1989 and given life sentences on each count. Initially and in accordance with national regulations in force at the time a life sentence amounted to a term of imprisonment of 20 years and a date for his release was set for July 2002 conditional upon good conduct and industry during detention. After the regulations were declared unconstitutional by the domestic courts, the prisoner was told that a life sentence was now effectively a whole life sentence without remission. Any early release could now only take place if the President exercised his discretion and the Attorney-General agreed. The prisoner submitted that his continued detention for life was a breach of art.3 of the European Convention prohibiting torture or inhuman or degrading treatment. The prisoner's argument was twofold:

- First, that in imposing a whole life sentence this amounted to a period of punitive detention that exceeded the reasonable and acceptable standards for the length of punitive detention as required by the Convention, as there was now no possibility of parole. This meant that domestic law now effectively deprived the courts of any discretion in setting sentences, and this made the domestic courts in Cyprus out of kilter with the practices of most other member states of the Council of Europe, which did allow such prisoners to be considered for release;
- Secondly, that the unexpected reversal of his legitimate expectation for release in 2002, and his continuous detention beyond this date, had left him distressed and uncertain over his future amounting to inhuman and degrading treatment.

The European Court restated that art.3 of the Convention enshrines one of the most fundamental values of democratic society but, to meet the standard required, the suffering and humiliation involved must go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment and punishment. The imposition of a sentence of life imprisonment was not in itself prohibited by or incompatible with art.3 or any other article of the Convention (among many authorities cited was *Bamber v. the United Kingdom* (ECHR App No 13183/87)), but, the imposition of a whole life sentence which is irreducible, may raise an issue under art.3 (see *Wynne v. UK* (ECHR App No 67385/01)). In determining whether a life sentence in a given case can be regarded as irreducible the court, has to ascertain whether a life prisoner can be said to have any prospect of release, and that where national law affords the possibility (even if limited) of review, this will be sufficient to satisfy art.3. The mere fact that in practice a sentence may be served in full does not make it irreducible. In applying the above principles to the facts of this case the court concluded that although limited, life sentences in Cyprus were not irreducible and that life sentenced prisoners in Cyprus had been released since the changes imposed. (To be concluded.)

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Whole Life Sentences - Part 2

Matt Evans concludes his article on issues raised

In the last issue, (p.547 *ante*), the case of *Kafkaris v. Cyprus* was discussed, a few months later the domestic courts had the chance to consider the "whole life tariff" in *R. v. David Francis Bieber (aka Coleman)* ((2008) EWCA Crim 1601). In that case the Court of Appeal, Criminal Division allowed an appeal by David Francis Bieber against a whole life prison sentence (at that stage he had become the 25th prisoner to face a life in prison with no possibility of release) imposed at Newcastle upon Tyne Crown Court on December 2, 2004. This had followed his conviction for murder of a police officer, two counts of attempted murder of police officers and two counts of possession of a firearm and ammunition with intent to endanger life. A 37-year minimum term was substituted for the whole life term. However Bieber had also argued, relying on the decision of the European Court in *Kafkaris v. Cyprus*, that an irreducible life sentence, without any prospect of release or any reconsideration of the facts and regardless of any changes which might occur in the mind or behaviour of the inmate or progress made by him towards rehabilitation, amounted to inhuman treatment, contrary to art.3 of the Convention. In the Court of Appeal's judgment, where a whole life term was specified, that was because the Judge considered that the offence was so serious that, for purposes of punishment and deterrence, the prisoner must remain in prison for the rest of his days. Having considered *Kafkaris*, the court did not consider that the Strasbourg court had ruled that an irreducible life sentence, deliberately imposed by a Judge in such circumstances, would result in detention that violated art.3:

- The fact that the person might be detained for the whole of his life did not involve a violation of art.3.
- The imposition of a life sentence that was irreducible might raise an issue under art.3 if it resulted in someone being detained beyond the term that was justified by the legitimate objects of imprisonment. No issue under art.3 appeared to arise provided there was, in law and in practice, a possibility of the person being released. Under the current regime, the Home Secretary had a limited power to release a life prisoner on compassionate grounds under s.30 of the 1997 Act, although it was acknowledged that at present, it was the Home Secretary's practice to use that power sparingly.
- If, however, the position was reached where the continued imprisonment of a prisoner was held to amount to inhuman or degrading treatment, the court could see no reason why, having regard to the requirement to comply with the Convention, the Home Secretary should not use his statutory power to release the prisoner.

Kafakaris suggests that Convention safeguards in relation to to this area can be precarious. The case can also be contrasted with *Stafford* in that there, the ECtHR identified that in the UK a life sentence was divided up, and that once the punitive part of the sentence was completed then detention on the non putative part rests on the concept (albeit that this remains controversial in how one can possibly measure it) of dangerousness which required a fresh determination of legality under art.5. In *Kafkaris,* however, the ECtHR repeated that the lawfulness of detention under the Convention essentially referred to national law, and therefore where the procedure was as arbitrary and ill0defined as in Cyprus, this bizarrely seems to have the effect of affording a prisoner less protection under the Convention not more.

> *"That the lawfulness of detention under the Convention essentially referred to national law."*

Is This the End?

Almost certainly not, because although in agreement with the court, one of the Judges in *Kafkaris (Bratza)* made a strongly worded statement making quite clear that in his view, the court should clearly affirm that as a principle, the imposition of an irreducible life sentence (with no possibility, hope or prospect of release), even on an adult, would be inconsistent with art.3. He went on to suggest that the absence of independent reviews and safeguards (such as a continuous assessment of dangerousness) in national legislation, relating to release arrangements, potentially breached art.5(4) (*Stafford v. the United Kingdom*) and, that such an argument could be applied even where, as in the case of Cyprus, there was no tariff system.

There was also a significant dissenting opinion from five of the 17 Judges in *Kafkaris* who felt that though the prospect of release in Cyprus for life sentenced prisoners

existed in theory, it was so limited and entirely rested with an arbitrary power granted to the President and the Attorney General that, in practice, there was not a genuine possibility of release as art.3 would appear to envisage.

The Position in England and Wales

Although arguably not as arbitrary, the position for prisoners in England and Wales is not wholly different. A whole life order in England and Wales may not *per se* be irreducible because of the possibility of release under s.30 of the Crime (Sentences) Act 1997 but the prospects of the Secretary of State exercising this power appear so limited as to be almost non-existent. It therefore leaves open the possibility of future challenges should the exercise of the powers in the 1997 Act by the Secretary of State become moribund. Indeed I am aware that two further challenges to the whole–life tariff have in fact been lodged with the European Court (including a fresh challenge by Jeremy Bamber)

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Conclusions

What is clear domestically from the above is that, ironically given the concern expressed over the "ramping up" of sentences due to political factors, the 2003 statutory provisions themselves have now led to far more severe sentences being imposed than those received when "tariffs" were fixed by the Secretray of State.

It is debateable as to whether the increase would have happened anyway, as a result of an overall inflation in sentencing, or whether it is a direct response to the loss of executive control over the mandatory life sentence (see Simon Creighton and Hamish Arnott – *Prisoners Law and Practice* 2009 LAG) but the outcome is that the old starting point for sentences has now been significantly and perhaps permanently inflated. The criteria for lawfulness now seems fully and squarley hung on the entitlement to a review in national legislation (however limited in terms of intervals, criteria or it resting within the discretion of the executive). The fact that in England and Wales this review exists, even with the caveats mentioned above, makes it likely that any fresh set of challenges to the "whole–life tariff" may have difficulty in surmounting this particular legal hurdle.

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