EUROPEAN COMMISSION OF HUMAN RIGHTS

FIRST CHAMBER

Application No. 20448/92

A. T.

against

the United Kingdom

REPORT OF THE COMMISSION

(adopted on 29 November 1995)

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is a British citizen, born in 1949. He was represented before the Commission by Mr. S. Creighton, solicitor, of Prisoner's Advice Service, and Mr. B. Emmerson, counsel.

3. The application is directed against the United Kingdom. The respondent Government were represented by their Agent, Ms. Susan Dickson of the Foreign and Commonwealth Office, London.

4. The case concerns the length of proceedings to determine the lawfulness of the applicant's detention. The applicant invokes Article 5 para. 4 of the Convention.

B. The proceedings

5. The application was introduced on 10 October 1991 and registered on 6 August 1993.

6. On 7 September 1993 the Commission (First Chamber) decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on the admissibility and merits of the applicant's complaints under Article 5 para. 4 of the Convention. It declared the remainder of the application inadmissible.

7. The Government's observations were submitted on 17 November 1993. The applicant replied on 30 December 1993. On 7 December 1994, the Commission granted the applicant legal aid for the representation of his case.

8. On 31 August 1994 the Commission decided to hold a hearing of the parties. The hearing was held on 2 December 1994. The Government were represented by Ms. S.J. Dickson, Agent, Messrs. N. Garnham, Counsel, H. Carter and J. Page, Advisers. The applicant was represented by Messrs B. Emmerson, Counsel and S. Creighton, Solicitor.

9. At the Commission's request, the Government submitted further observations on 30 January 1995, to which the applicant replied on 31 March 1995.

10. On 28 June 1995 the Commission declared admissible the applicant's complaints under Article 5 para. 4 of the Convention. The text of the Commission's decision on admissibility was sent to the parties on 19 July 1995 and they were invited to submit such further information or observations on the merits as they wished. Factual information as to the intended hearing in September 1995 was submitted by the applicant on 25 October 1995 and the Government made comments on it on 24 November 1995.

11. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C.   The present Report

12. The present Report has been drawn up by the Commission (First Chamber) in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV

13. The text of this Report was adopted on 29 November 1995 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

14. The purpose of the Report, pursuant to Article 31 of the Convention, is:

(i) to establish the facts, and

(ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

15. The Commission's decisions on the admissibility of the application are annexed as Appendices I and II.

16. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

17. On 3 June 1988 the applicant pleaded guilty to the manslaughter of his mother on the grounds of diminished responsibility. The plea was accepted. On 1 July 1988 he was sentenced at the Central Criminal Court, London, to an indeterminate period of life imprisonment. The Common Serjeant, sentencing, made the following remarks.

> "... All the medical evidence before the Court confirms that you were suffering from a mental illness called schizophrenia, but as no bed was available in any suitable hospital, and I did not have the necessary information to make a hospital order, which was my declared intention, I accordingly postponed sentence for twenty-eight days to see whether or not a bed could be made available.
>
> I am still of the opinion that the proper disposal in your case would be by means of a hospital order, but because of the lack of facilities - the lack of a bed - I am unable to make that order. The only possible alternative order I can make is to sentence you to an indeterminate period of life imprisonment. Now that, in your case, I am confident, does not mean life, it will mean somewhat less. How long you stay in prison depends upon your improvement and how you behave there, but in order that your medical condition shall be fully appreciated by staff at

hospital ... I shall invite the prison authorities to consider whether, in the light of [... medical opinions ...] it would be possible to transfer you to a hospital where you could receive proper treatment for your illness."

18. In 1991 the applicant applied for an extension of time in which to apply for leave to appeal against sentence. The single judge refused and, on 29 July 1991, the full Court of Appeal also refused, finding the approach of the trial judge to be entirely correct.

19. By letter of 8 June 1992 the applicant was informed that Section 34 of the Criminal Justice Act 1991 applied to his case, and that the "tariff" in his case, that is, his period of confinement necessary to satisfy the requirements of retribution and deterrence, was to expire on 8 December 1992. Section 34, which entered into force on 1 October 1992, provides that it shall be the duty of the Secretary of State to release prisoners to whom the Section applies in cases where, broadly, the "tariff" has expired and the Board is satisfied that continued confinement of the prisoner is no longer necessary. The applicant was also told that he would be informed of the date on which his case would be referred to the Parole Board under the new arrangements.

20. The applicant was informed on 5 August 1993 that his case had been referred to the Parole Board and would be considered by a Discretionary Lifer Panel (DLP) on 11 or 12 January 1994. The referral had in fact taken place on 11 January 1993. The DLP considered the case on 12 January 1994. The applicant was informed by letter of 17 January 1994 that the DLP was not satisfied that it was no longer necessary for the protection of the public that he be confined. The DLP did not, therefore, direct his release. The DLP noted that the applicant "remain[ed] vulnerable to the pressures of independent living and [had] not developed sufficient appreciation of [the] need for assistance from professional agencies including forensic psychological and psychiatric services. They could not be satisfied that without some experience of living in open conditions [his] release would not present a risk to the public."

21. The DLP recommended that the applicant should be transferred immediately to a Category D prison and that his case should be further reviewed in not more than 12 months.

22. On 28 February 1994 applicant was told that he would be transferred to a Category D prison when a suitable vacancy arose, and that his case would be reviewed internally within the Prison Service nine to twelve months after transfer, in order to determine the date of his next DLP hearing. The letter continued that the date of his next review would be decided on the basis of his performance in open conditions and would be held no later than January 1996. He was transferred to an open prison on 26 April 1994.

23. On 3 March 1995 the applicant was informed by letter that his case had been referred back to the DLP. His next review was due to take place in September 1995, but it did not take place.

B. Relevant domestic law

24. Section 34 of the Criminal Justice Act 1991 makes provision for the Parole Board (known, in this context, as the Discretionary Lifer Panel) to have power to direct the Secretary of State to release discretionary life prisoners where certain conditions are fulfilled. Its operation was discussed in a letter of 14 November 1994 from the Prison Service to the applicant's representative:

> "... Referral of cases to the Board
>
> Section 34 (5) of the 1991 Act enables a discretionary life prisoner to require the Secretary of State to refer his case to the Board after he has served the relevant part of his sentence and every two years thereafter beginning with the disposal of that reference.
>
> In practice, it is never necessary for a prisoner to invoke this provision because, as a matter of policy, the Secretary of State refers a case to the Board on, or shortly after, expiry of the relevant part. The DLP hearing then follows some 23 weeks (see the next paragraph) later. (In certain very exceptional cases where the prisoner has made rapid and impressive progress and has already been adequately and successfully tested in open conditions before expiry of the relevant part, the Secretary of State may exercise his discretion to refer such cases to the Board before expiry so that the hearing may be held on or shortly

after the relevant part expires.)

The significance of the 23 week period is that this is the time generally required for the timetable of events leading up to a DLP hearing. ...For any second and subsequent reviews, the case is referred to the Board some 81 weeks following the previous hearing (ie 104 weeks minus 23 weeks), thus enabling that hearing to take place on the second anniversary of the disposal of the previous reference.

Timing of subsequent reviews

In some cases, the DLP may recommend to the Secretary of State that the next review should be held before the period of two years has elapsed. The Panel might specify that this should be an internal review by the Prison Service; a DLP review under Section 34 of the Act; or simply an early review, leaving the precise form of the review open. It is for the Secretary of State to decide whether or not to accept such a recommendation and the type of review which should take place."

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

25. The Commission has declared admissible the applicant's complaints that neither the first nor the second review of the lawfulness of his detention after the expiry of his "tariff" was taken "speedily".

B. Points at issue

26. The issues to be determined are whether there has been a violation of Article 5 para. 4 (Art. 5-4) of the Convention by virtue of:

- the period which elapsed before he was given an initial hearing before the DLP in January 1994, and

- the period which elapsed before a subsequent hearing.

C. As regards Article 5 para. 4 (Art. 5-4) of the Convention and the

initial hearing

27. Article 5 para. 4 (Art. 5-4) of the Convention 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."

28. The applicant puts the beginning of the period to be considered in determining whether the lawfulness of his detention was decided "speedily" by the DLP at 8 December 1992, when his tariff expired, at the latest. He accepts that the priorities which were applied in dealing with existing life prisoners were reasonable in themselves, but does not agree that any particular delay was necessarily involved in introducing the DLP system. Mere lack of resources does not, in his view, justify a 13 month delay in bringing before a court - for the first time - the case of a person whose detention may no longer be justified.

29. The Government point to the large amount of work which had to be done before the DLPs could operate, from providing the statutory framework to creating procedures and staff for a body which would, in an initial phase, have to consider the cases of all 600 discretionary life prisoners. They consider that the backlog was precisely of the temporary nature referred to by the European Court of Human Rights in the case of Zimmermann and Steiner (Eur. Court H.R., judgment of 13 July 1983, Series A no. 66), in the context of civil cases. They consider that in ensuring that the first DLP hearings could be held in early October 1992, and the applicant's case in January 1994, they acted diligently and speedily.

30. The Commission recalls that the review required by Article 5 para. 4 (Art. 5-4) of the Convention is generally incorporated in the decision depriving a person of his liberty when that decision is made by a court at the close of judicial proceedings, but that the provision may require the possibility of subsequent review of the lawfulness of detention by a court. This is so in the case of the continuing detention of a person sentenced to an discretionary life sentence in the United Kingdom (see Eur. Court H.R., Iribarne Pérez judgment of

24 October 1995, to be published in Series A no. 325-C, para. 30, with reference back to inter alia the Thynne, Wilson and Gunnell judgment of 25 October 1990, Series A no. 190-A).

31. The "tariff" in the applicant's case, that is, the period of confinement necessary to satisfy the requirements of retribution and deterrence, expired on 8 December 1992. From that date the applicant was entitled to take proceedings by which the lawfulness of his detention would be determined speedily be a court (see, in this connection, No. 18757/91, Dec. 14.10.92, unpublished, where the Commission found that the complaint by a discretionary life prisoner that he could not challenge the lawfulness of his detention was premature because his tariff had not expired).

32. The regime created by Section 34 of the Criminal Justice Act 1991 in reply to the findings of the Court in the above-mentioned Thynne, Wilson and Gunnell case provided that those affected by the provisions could "require" a review of their detention by the Discretionary Lifer Panel of the Parole Board (which had power to release if it considered that the detention was no longer justified). In practice, however, the regime operates on the basis of reference by the Secretary on or soon after the expiry of the "tariff". To that extent it is de facto an automatic periodic review of a judicial character (see Eur. Court H.R., Herczegfalvy judgment of 24 September 1992, Series A no. 244, p. 24, para. 75 with further references).

33. The first review of the lawfulness of the applicant's detention by a court with power to release was held on 12 January 1994. The Commission must therefore decide whether that decision was taken "speedily" within the meaning of Article 5 para. 4 (Art. 5-4) of the Convention.

34. The initial review of 12 January 1994 was the first review after the expiry of the applicant's "tariff". It was therefore the first time that the question of risk, or danger, was before the DLP. Such a first review must, in the Commission's opinion, be dealt with particularly expeditiously.

35. The Commission recalls that the European Court of Human Rights has considered the "speediness" of review under Article 5 para. 4 (Art. 5-4) on several occasions. For example, in its E. v. Norway

judgment the Court recalled - in the context of a first challenge to a newly decided ground for detention - that the notion "promptly" in Article 5 para. 3 (Art. 5-3) of the Convention indicated greater urgency that the notion "speedily" in Article 5 para. 4 (Art. 5-4) (Eur. Court H.R., E. v. Norway judgment of 29 August 1990, Series A no. 181-A, p. 13, para. 30 and p. 27 para. 64). Having examined the circumstances of the case, it nevertheless found that a period of eight weeks could not be reconciled with the notion of "speedily" (p. 28, paras. 65 - 67).

36. In the present case, the entire system of court review of the lawfulness of discretionary life prisoners' detention was new. The system was brought into being by the Criminal Justice Act 1991, which was enacted on 25 July 1992 and the relevant parts of which entered into force on 1 October 1992. The Commission does not underestimate the size of this operation, and appreciates the need for criteria to determine the order in which to deal with the "old" cases - that is, the cases of those whose tariff expired before or (like the applicant's) soon after 1 October 1992. The Commission has already commented, in its final decision on admissibility in the present case, that there is no indication that the priorities were unreasonable.

37. However, the Commission notes that a two-year period elapsed between judgment in the case of Thynne, Wilson and Gunnell and the entry into force of the relevant parts of the Criminal Justice Act 1991. It considers that there was time for contingency planning of the logistical measures to be taken if the law was passed. Further, it recalls the importance of the right to liberty in a democratic society (cf. in connection with Article 5 para. 1 (Art. 5-1) of the Convention, Eur. Court H.R., Winterwerp judgment of 24 October 1979, Series A no. 33, p. 16, para. 37 with further references): in the context of a first decision on the risk posed by a person whose "tariff" has expired, even the above considerations cannot justify a period of over 12 months before a such a first review.

CONCLUSION

38. The Commission concludes, unanimously, that there has been a violation of Article 5 para. 4 (Art. 5-4) of the Convention in respect of the period which elapsed before the applicant was given an initial hearing before the DLP in January 1994.

D. As regards Article 5 para. 4 (Art. 5-4) of the Convention and the second hearing

39. The Commission must also determine whether the subsequent review was given "speedily".

40. At the admissibility stage of the proceedings, the applicant pointed out that he would not receive his second review before the DLP before September 1995, and that there would therefore have been a period of 19 months between his first and his second reviews. He perceived the problem of delay in this respect as flowing from the statutory period of 24 months between reviews. He has since submitted material from which it appears that the review in September did not take place.

41. The Government point out that risk assessment is a matter requiring prolonged assessment by professional and non-professional staff in a variety of circumstances. They consider that the two year interval between reviews is reasonable as such. They also underline that the Secretary of State in the majority of cases (78% in 1994) follows recommendations of the DLP that a subsequent review should take place in less than two years.

42. As indicated above, the Commission considers that a first review must be dealt with particularly expeditiously. It is already established in the case-law of the Convention organs that where a system of automatic review of the lawfulness of detention has been instituted, the decisions of the courts must follow at reasonable intervals (see the above-mentioned Herczegfalvy judgment, p. 24, para. 75). In considering such a system, where the domestic legislation provided for annual reviews, the European Court of Human Rights has considered intervals of 15 months and two years not to fall within the notion of "speedily". It was silent as to whether an interval of nine months was compatible with Article 5 para. 4 (Art. 5-4) of the Convention (above-mentioned Herczegfalvy judgment, pp. 24, 25, paras. 77, 78).

43. The system for review of the lawfulness of the continued detention of discretionary life prisoners is, notwithstanding Section 34 (5) of the Criminal Justice Act 1991 which provides for a

prisoner to "require" reference to the DLP, in effect a system of automatic review, in which the automatic review by the DLP takes place every two years. The Commission is not, however, required to consider whether this interval is reasonable as such, because in the present case the DLP indicated that the case should be reviewed within a shorter period.

44. When the DLP heard the applicant in January 1994, it recommended that he should be transferred to a Category D prison, and that his case should be reviewed in not more than 12 months. The Prison Service interpreted this statement to mean that his case should be reviewed internally by the Prison Service within 12 months of his transfer to a Category D prison.

45. Whatever the DLP in fact meant when it recommended that the applicant's case should be reviewed in not more than 12 months, the last DLP review of the lawfulness of the applicant's continued detention took place in January 1994. A review was planned before the DLP for 19 September 1995, but had to be deferred.

46. The position in the present case is therefore that the DLP recommended in January 1994 that the applicant's case should be reviewed in under 12 months (although it did not expressly say by whom), and that almost two years later, his case has still not been examined for a second time by the DLP.

47. The Commission finds that the circumstances of the case do not justify the period of almost two years before this second review.

CONCLUSION

48. The Commission concludes, unanimously, that there has been a violation of Article 5 para. 4 (Art. 5-4) of the Convention in respect of the period which has elapsed before a subsequent hearing.

E. Recapitulation

49. The Commission concludes, unanimously, that there has been a violation of Article 5 para. 4 (Art. 5-4) of the Convention in respect of the period which elapsed before the applicant was given an initial hearing before the DLP in January 1994 (para. 38).

50. The Commission concludes, unanimously, that there has been a violation of Article 5 para. 4 (Art. 5-4) of the Convention in respect of the period which has elapsed before a subsequent hearing (para. 48).

Secretary to the First Chamber   President of the First Chamber

(M.F. BUQUICCHIO)   (C.L. ROZAKIS)