THIRD SECTION

CASE OF EASTERBROOK v. THE UNITED KINGDOM

(Application no. 48015/99)

JUDGMENT

STRASBOURG

12 June 2003

FINAL

12/09/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Easterbrook **v. the** United Kingdom**,**

The European Court of Human Rights (Third Section), sitting as a Chamber composed of

Mr G. Ress, *President*,
Sir Nicolas Bratza,
Mr L. Caflisch,
Mr P. Kūris,
Mr J. Hedigan,
Mrs M. Tsatsa-Nikolovska,
Mrs H.S. Greve, *judges*,
and Mr V. Berger, *Section Registrar*,

Having deliberated in private on 26 September 2002 and 22 May 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 48015/99) against the **United Kingdom** of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a **United Kingdom** national, Mr Ronald **Easterbrook** ("the applicant"), on 13 April 1999.

2. The applicant, who had been granted legal aid, was represented by Mr S. Creighton, a lawyer practising in London. The **United Kingdom** Government ("the Government") were represented by their Agent, Mr C. Whomersley of the Foreign and Commonwealth Office, London.

3. The applicant alleged, in particular, that his tariff as a discretionary life prisoner had not been set at trial by a judge but had been fixed by the Secretary of State after a long delay and without an oral hearing. He invoked Articles 6 § 1 and 5 § 4 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 26 September 2002, the Court declared the application admissible.

6. The applicant and the Government each filed brief observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1931 and is currently serving a prison sentence in HM Prison Highdown, Surrey.

8. On 30 November 1988, the applicant was convicted at the Central Criminal Court in London of robbery, wounding with intent, possessing firearms with intent to endanger life and possessing ammunition with intent to endanger life.

9. The offences arose out of a single robbery which occurred on 23 November 1987 at a shop in Woolwich. One of the applicant's associates entered the shop, snatched a Securicor bag containing 10,400 pounds sterling and held a loaded revolver to the head of a member of the shop's staff. The applicant, armed with a loaded revolver, kept watch outside. During a changeover of cars in their flight from the crime, the applicant and his associates were intercepted by the police, who surrounded them and told them to lay down their arms. The applicant fired six shots, wounding one

police officer in the leg. The police returned fire and one of the applicant's associates was killed. The applicant received a superficial wound to his shoulder. He was arrested and immediately detained.

10. The applicant was subsequently tried and was not represented at his trial. He stated that he was informed by his counsel that his defence was "political" in nature and could not be put by a professional advocate. His counsel then withdrew. The applicant was sentenced to life imprisonment. In sentencing him, the judge made reference to his long, violent criminal record and the dangerous nature of his character.

11. In June 1990, the Court of Appeal refused the applicant's renewed application for leave to appeal against conviction, leave having already been refused by a single judge. The Court of Appeal also rejected the applicant's appeal against sentence. At this hearing the applicant was again not represented.

12. On 9 December 1992, a certificate was issued on behalf of the Secretary of State, stating that the provisions of the Criminal Justice Act 1991 for certifying the tariffs of discretionary life sentence prisoners would not apply to the applicant. The applicant's release from prison would therefore be at the Home Secretary's discretion, following a favourable recommendation from the Parole Board and after consultation with the Lord Chief Justice and trial judge, if available. The certificate stated that it was Home Office policy that no life sentence prisoner should be detained more that 17 years without a review by the Parole Board. The first review of the applicant's case by the Parole Board would be in November 2004. The applicant stated that he had no record of receiving this document.

13. On 27 July 1995, the Prison Service informed the applicant that, following a judgment of the House of Lords, the Secretary of State would now be setting a specific tariff which would be disclosed to the applicant, along with the judicial recommendations and any reasons for any departure from them. The judicial recommendations - that in the applicant's case " 'life' should mean 'life' " – were disclosed to the applicant and he was invited to make representations.

14. On 5 February 1998, the Home Secretary agreed to certify that the applicant should be subject to the arrangements for the release of discretionary life prisoners, despite having previously qualified the applicant as someone serving a mandatory life sentence. The decision of 5 February 1998 also set the tariff of the applicant's sentence at 16 years, expiring on 24 November 2003.

15. The applicant's solicitors made written submissions as to the appropriate length of the tariff and submitted that the applicant should be entitled to an oral hearing before the Lord Chief Justice. The applicant's solicitors were informed by a letter of 13 August 1998 that the Lord Chief Justice had revised his opinion and that he recommended a tariff of 12-13 years, but that no oral hearing would be allowed. On 27 November 1998, the Prison Service informed the applicant's solicitor that the Home Secretary had decided on a tariff of 12.5 years, to expire in May 2000.

16. On 8 January 1999, the applicant made an application for judicial review of the Home Secretary's decision of 27 November 1998. The application was dismissed on 11 February 1999. A renewed application was dismissed on 22 March 1999.

17. After the tariff expired in May 2000, the applicant became eligible for Parole Board review procedures. He has stated however that he has decided not to participate in the procedures due to his continuing belief that the Government have breached his human rights and still refuses to acknowledge those breaches.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Life sentences

18. Murder carries a mandatory sentence of life imprisonment under the Murder (Abolition of Death Penalty) Act 1965. A person convicted of other serious offences (e.g. manslaughter, rape or robbery) may also be sentenced to life imprisonment at the discretion of the trial judge in certain other cases where the offence is grave and where there are exceptional circumstances which

demonstrate that the offender is a danger to the public and it is not possible to say when that danger will subside.

B. Tariffs

19. Over the years, the Secretary of State has adopted a "tariff" policy in exercising his discretion whether to release offenders sentenced to life imprisonment. This was first publicly announced in Parliament by Mr Leon Brittan on 30 November 1983 (Hansard (House of Commons Debates) cols. 505-507). In essence, the tariff approach involves breaking down the life sentence into component parts, namely retribution, deterrence and protection of the public. The "tariff" represents the minimum period which the prisoner will have to serve to satisfy the requirements of retribution and deterrence. The Home Secretary will not refer the case to the Parole Board until three years before the expiry of the tariff period, and will not exercise his discretion to release on licence until after the tariff period has been completed (per Lord Browne-Wilkinson, *R. v. Secretary of State for the Home Department, ex parte V. and T.*, [1998] Appeal Cases 407, at pp. 492G-493A).

20. Pursuant to section 34 of the Criminal Justice Act 1991, the tariff of a discretionary life prisoner is fixed in open court by the trial judge after conviction. After the tariff has expired, the prisoner may require the Secretary of State to refer his case to the Parole Board which has the power to order his release if it is satisfied that it is no longer necessary to detain him for the protection of the public.

21. A different regime, however, applied under the 1991 Act to persons serving a mandatory sentence of life imprisonment (now replaced by the Crime (Sentences) Act 1997 ("the 1997 Act"), sections 28-34). In relation to these prisoners, the Secretary of State decides the length of the tariff. The view of the trial judge is made known to the prisoner after his trial, as is the opinion of the Lord Chief Justice. The prisoner is afforded the opportunity to make representations to the Secretary of State who then proceeds to fix the tariff and is entitled to depart from the judicial view (*R. v. Secretary of State for the Home Department, ex parte Doody* [1994] 1 Appeal Cases 531; and the Home Secretary's statement to Parliament, 27 July 1993, Hansard (House of Commons Debates) cols. 861-864).

C. Release on licence of life sentence prisoners

22. The Criminal Justice Act 1991 provided in section 35(2) as regarded mandatory life prisoners :

> "If recommended to do so by the [Parole] 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."

23. This was in contrast to the position for discretionary life prisoners, where the Parole Board was given the power of decision. Pursuant to the reforms introduced at this time, these prisoners were also given the opportunity of an oral hearing.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

Article 6 § 1 of the Convention provides as relevant:

> "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..."

A. The parties' submissions

24. The applicant complained of the procedure by which his tariff was set after considerable delay by the Secretary of State. He submitted that it was contrary to Article 6 § 1 for the decision to set the tariff to be taken by the executive in an administrative procedure and not by the judiciary. The decision by the tribunal for the purpose of this provision should be legally binding rather than purely advisory. The procedure was also fundamentally flawed as it failed to provide for a public hearing. It was irrelevant to that failure that his tariff had now expired.

25. The Government accepted that the late fixing of the applicant's tariff was a violation of Article 6. They emphasised however that the delay had not affected the applicant's eventual release date as he was unlikely to be released for some time because of the risk which he presented to the public. In any event, the tariff had been fixed by the Secretary of State in accordance with the judicial view. They submitted that as the applicant's tariff had expired it was no longer relevant to have an oral hearing in regard to the tariff.

B. The Court's assessment

26. The Court recalls that Article 6 § 1 guarantees certain rights in respect of the "determination of ... any criminal charge". In criminal matters, it is clear that Article 6 § 1 covers the whole of the proceedings in issue, including appeal proceedings and the determination of sentence (see, for example, *Eckle v. Germany,* judgment of 15 July 1982, Series A no. 51, pp. 34-35, §§ 76-77). The fixing of the tariff, which is the part of the sentence said to reflect the requirements of retribution and deterrence, has been found to constitute part of the sentencing exercise for young offenders detained during Her Majesty's pleasure (see *V. v. the* ***United Kingdom*** ([GC] no. 24888/94, ECHR 1999-IX, §§ 109-111) and for adult prisoners sentenced to mandatory life sentences for murder (see *Stafford v. the* ***United Kingdom*** [GC], no. 46295/99, ECHR 2002-IV, § 87). The Court finds that the same analysis applies to the fixing of the tariff for adults sentenced to discretionary life sentences. It amounts to a sentencing exercise and Article 6 § 1 is, accordingly, applicable to this procedure.

27. In the applicant's case however, no tariff was set by the trial judge in sentencing the applicant in open court in November 1988. The Secretary of State issued a certificate to the effect that the Criminal Justice Act 1991 provisions which provided for judicial guarantees in tariff-fixing and release after the expiry of tariff would not apply to the applicant, who was in effect to be treated as a mandatory life prisoner. The Secretary of State then proceeded to fix the tariff, after consulting the judiciary, at 16 years in a decision dated 5 February 1998. Though at the same time, the Secretary of State certified that the discretionary life provisions should apply to the applicant, the further procedure of review of the applicant's tariff was conducted by the Secretary of State again, who reduced it to 12.5 years following the recommendation of the Lord Chief Justice.

28. The Court notes that the Government accept that there was unreasonable delay in the fixing of the applicant's tariff, over nine years, which is not compatible with the requirement under Article 6 § 1 that sentencing, as part of the determination of a criminal charge, be completed within a reasonable time. The Government disputed however that any issue arose from the fact that the tariff was fixed by the Secretary of State since he followed the recommendations of the judiciary. The Court would observe that the sentencing exercise carried out in criminal cases must necessarily be carried out by an independent and impartial tribunal, namely, a court offering guarantees and procedure of a judicial nature. It was not a court that fixed the applicant's tariff in a public, adversarial hearing and in the circumstances it is not sufficient to satisfy the fundamental principle relating to the separation of powers that the member of the executive who issued the decision was guided by judicial opinion (see, *mutatis mutandis*, the above-cited *Stafford* judgment, § 78, and *Benjamin and Wilson v. the* ***United Kingdom***, no. 28212/95, judgment of 26 September 2002.).

29. The Court finds that there has been a breach of Article 6 § 1 regarding the procedure adopted in fixing the applicant's tariff.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

30. Article 5 § 4 of the Convention 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."

31. The applicant submitted that the delay in fixing the tariff prevented him from being able to bring proceedings by which the lawfulness of his continued detention could be reviewed by a court. No mechanism for review was available in the absence of a specified tariff period. The fact that he was not presently co-operating with the Parole Board procedure did not alter the fact that his Convention rights had been breached during the prior period.

32. The Government submitted that the tariff had been fixed by the Secretary of State in accordance with the judicial view. As the applicant's tariff had expired it was no longer relevant to have an oral hearing in regard to the tariff. They pointed out that he was now able to have a review of his continued detention by an independent and impartial tribunal, namely the Parole Board, which had the power to direct his release.

33. The Court recalls that the applicant's tariff expired in May 2000, by which time the Secretary of State had already certified that the provisions for release applicable to discretionary life prisoners should apply to the applicant. To the extent that the complaint is made that no tariff was set until 1998 and the applicant's entitlement to a tribunal for periodic review of the continuing lawfulness of his detention remained inchoate, the Court considers that this complaint relates essentially to the same delay which gives rise to a breach under Article 6 § 1. In the circumstances of this case, it finds no separate issue arising under Article 5 § 4.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

35. The applicant contended that the alleged breaches of the Convention had had a severe impact on his mental and physical health. Feelings of hopelessness and depression had been caused by the notification that he would never be considered for release due to an executive decision. This was only partly ameliorated by the subsequent decision to set a fixed tariff. The breach persisted for 10 years and had left mental scars, as shown by his continuing distrust of the authorities and unwillingness to engage in the parole process. Taking the length of the breach and the aggravating factor that the Government should have been aware of the applicable procedural requirements, he claimed 5,500 pounds sterling (GBP).

36. The Government submitted that a finding of a violation would be sufficient just satisfaction in itself, in particular as in their view the applicant had not been prejudiced as regarded his release by the procedures adopted. If the Court did consider an award of non-pecuniary damage appropriate, they argued that the amount should be a modest one. There was no evidence to support the alleged impact on his health and once the tariff was fixed any uncertainty from delay ceased.

37. The Court observes that in this case there was a delay of over nine years in setting the applicant's tariff. In these circumstances, it considers that the applicant must have suffered feelings of frustration, uncertainty and anxiety which cannot be compensated solely by the finding of a violation. Making an assessment on an equitable basis, it awards 2,200 euros (EUR) for non-pecuniary damage.

B. Costs and expenses

38. The applicant claimed GBP 4,568.40 for the fees and costs of his solicitor, inclusive of value-added tax (VAT), which included 14 hours work billed at GBP 240.

39. The Government considered that the hourly rate was too high and should not be more than GBP 160.

40. Making an assessment on an equitable basis and taking into account the amount of payments made by way of legal aid from the Council of Europe, the Court awards EUR 5,800 for costs and expenses, inclusive of VAT.

C. Default interest

41. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

2. *Holds* that no separate issue arises under Article 5 § 4 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, the following amounts:
      (i) EUR 2,200 (two thousand two hundred euros) in respect of non-pecuniary damage;
      (ii) EUR 5,800 (five thousand eight hundred euros) in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 June 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent Berger Georg Ress
Registrar President

EASTERBROOK v. THE **UNITED KINGDOM** JUDGMENT