COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF STAFFORD v. THE UNITED KINGDOM

(Application no. 46295/99)

JUDGMENT

STRASBOURG

28 May 2002

In the case of Stafford v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Sir Nicolas BRATZA,
Mr A. PASTOR RIDRUEJO,
Mrs E. PALM,
Mr P. KŪRIS,
Mr R. TÜRMEN,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mr M. PELLONPÄÄ,
Mr K. TRAJA,
Mrs S. BOTOUCHAROVA,
Mr M. UGREKHELIDZE,
Mr V. ZAGREBELSKY,

and also of Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 20 February and 24 April 2002,

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

PROCEDURE

1. The case originated in an application (no. 46295/99) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mr Dennis Stafford ("the applicant"), on 24 July 1998.

2. The applicant was represented before the Court by Mr M. Purdon, a lawyer practising in Newcastle-upon-Tyne. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, of the Foreign and Commonwealth Office.

3. The applicant, sentenced to mandatory life imprisonment for murder, alleged that his detention after recall on life licence had ceased to be justified by the original sentence and that he had no opportunity for the lawfulness of that continued detention to be reviewed by a court. He relied on Article 5 §§ 1 and 4 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 29 May 2001 it was declared admissible by a Chamber of that Section, composed of the following judges: Mr J.-P. Costa, President, Mr W. Fuhrmann, Mr P. Kūris, Mrs F. Tulkens, Mr K. Jungwiert, Sir Nicolas Bratza and Mr K. Traja, and also of Mrs S. Dollé, Section Registrar [*Note by the Registry*. The Court's decision is obtainable from the Registry]. On 4 September 2001 the Chamber relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

7. The applicant and the Government each filed written observations on the merits. In addition, third-party comments were received from Justice, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 20 February 2002 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*

Mr D. WALTON, *Agent*,
Mr D. PANNICK QC,
Mr M. SHAW, *Counsel*,
Ms M. MORRISH,
Mr T. MORRIS, *Advisers*;

(b) *for the applicant*

Mr E. FITZGERALD QC,
Mr T. OWEN QC, *Counsel*,
Mr M. PURDON, *Solicitor*.

The Court heard addresses by Mr Fitzgerald and Mr Pannick.

9. On 24 April 2002 Mr B. Zupančič and Mrs H.S. Greve, who were unable to take part in the further consideration of the case, were replaced by Mr V. Butkevych and Mr R. Türmen.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. In January 1967 the applicant was convicted of murder. He was released on licence in April 1979. His licence required him to cooperate with his probation officer and to remain in the United Kingdom unless his probation officer agreed to his travelling abroad.

11. Soon after release the applicant left the United Kingdom in breach of his licence and went to live in South Africa. In September 1980 his licence was revoked and thereafter he was continuously "unlawfully at large".

12. In April 1989 the applicant was arrested in the United Kingdom, having returned from South Africa in possession of a false passport. Possession of a false passport led to a fine. He remained in custody, however, due to the revocation of the life licence. He made written representations to the Parole Board against the 1980 decision to recall him to prison but the Board rejected those representations and recommended a further review in July 1990.

13. In November 1990 the Board recommended the applicant's release subject to a satisfactory release plan. This recommendation was accepted by the Secretary of State. In March 1991 the applicant was released on life licence.

14. In July 1993 the applicant was arrested and remanded in custody on counterfeiting charges. On 19 July 1994 he was convicted on two counts of conspiracy to forge travellers' cheques and passports and sentenced to six years' imprisonment.

15. In September 1994 the Parole Board recommended revocation of the applicant's life licence and further review at the parole eligibility date of his six-year sentence. The Secretary of State accepted the Board's recommendation, revoking the licence under section 39(1) of the Criminal Justice Act 1991 ("the 1991 Act"). The applicant made written representations, but the Board maintained its decision.

16. In 1996 the Parole Board conducted a formal review of the applicant's case and recommended his release on life licence. It said:

> "This case is exceptional in that it is a recall one and he has previously made a successful transition from prison to the community without violent reoffending ... It is felt that the risk of serious reoffending in the future is very low. Recent reports of progress in prison have been favourable and no untoward incidents have been reported; positive links with his family have been maintained. In view of these facts, it is now felt that he could be released safely and appropriately into the community. The Panel took the view after lengthy consideration that nothing further would be gained by a period in open conditions, and the successful return to the community, bearing in mind all risk factors, would be best facilitated by returning to his family directly."

17. By letter of 27 February 1997 to the applicant, the Secretary of State rejected the Board's recommendation in the following terms:

> "... [The Secretary of State] notes with concern the circumstances surrounding your two recalls to prison ... Both these occasions represent a serious and grave breach of the trust placed in you as a life licensee and demonstrate a lack of regard for the requirements of supervision. Against this background the Secretary of State is not yet satisfied that if released on licence for a third time, you would fully comply with the conditions of your life licence. He notes that you have spent the past 3 1/2 years in closed prison conditions and therefore have not on this occasion followed the normal progression of life sentence prisoners. This involves a period in open conditions, giving you the opportunity to demonstrate sustained good behaviour and responsibility in a less secure environment; and to experience the full range of resettlement activities in preparation for release.
>
> For these reasons, the Secretary of State considers that you should be transferred to an open prison for a final period of testing and preparation. Your next formal review by the Parole Board will begin 2 years after your arrival there."

18. On 10 June 1997 the applicant was granted leave to seek judicial review of the Secretary of State's decisions to reject the Board's recommendation for immediate release and to require him to spend a further two years in open conditions before the next review.

19. On 1 July 1997, but for the revocation of his life licence, the applicant would have been released from prison on the expiry of the sentence for fraud, pursuant to provisions whereby prisoners serving determinate sentences of more than four years were released after serving two-thirds of their sentence (section 33 of the 1991 Act).

20. The Secretary of State acknowledged in the proceedings that there was not a significant risk that the applicant would commit further violent offences, but asserted that he could lawfully detain a post-tariff mandatory life prisoner solely because there was a risk that he might commit further non-violent imprisonable offences.

21. On 5 September 1997 Mr Justice Collins quashed the Secretary of State's decision of February 1997, holding that it was beyond his power to detain a post-tariff life prisoner other than on the basis that there existed an unacceptable risk that he might commit a future offence involving a risk to the life or limb of the public.

22. On 26 November 1997 the Court of Appeal allowed the Secretary of State's appeal, holding that section 35(2) of the 1991 Act conferred a broad discretion on the Secretary of State to direct the release of mandatory life prisoners and his decision not to release the applicant was in accordance with the previously stated policy whereby the risk of reoffending was taken into account, such risk not having been expressed as being limited to offences of a violent or sexual nature. Lord Bingham CJ stated, however:

> "The applicant is now serving the equivalent of a determinate sentence of about five years, albeit in open conditions. This term has not been imposed on him by way of punishment, because he has already served the punitive terms which his previous, very

serious, offences have been thought to merit. The term has not been imposed because he is thought to present danger to the public, because that is not suggested. It is not submitted that the term imposed bears any relation to the gravity of any future imprisonable offence which the applicant might commit or that such term is needed to ensure future compliance with the terms of his life licence. While a powerful case can be made for testing in open conditions a mandatory life prisoner who has been institutionalised by long years of incarceration in closed conditions, such a case loses much of its force in the case of a man who has, since serving the punitive term of his life sentence, demonstrated his capacity for living an independent and apparently lawful life by doing so for a number of years. The imposition of what is in effect a substantial term of imprisonment by the exercise of executive discretion, without trial, lies uneasily with ordinary concepts of the rule of law. I hope that the Secretary of State may, even now, think it right to give further consideration to the case."

23. Lord Justice Buxton, concurring with the latter remarks, added:

"The category of imprisonable offence is extremely wide, and can encompass many matters that are wholly unrelated, both in nature and seriousness, to the reasons for the life sentence prisoner being within the power of the State in the first place. I also find it uncomfortable that the criterion should be used as the justification for continued imprisonment. We were told in argument that the test of imprisonable offence, rather than of fault of a purely moral or social nature, was used because faults of the latter nature would be unconnected with the original reasons for the subject's incarceration; but in reality this lack of connection exists, or at least is strongly threatened, by the imprisonable offence criterion also. ..."

24. On 16 December 1997 the applicant was moved to open conditions.

25. By letter dated 21 January 1998, the Secretary of State decided that the applicant should spend only six months in open conditions before his next review.

26. On 23 July 1998 the House of Lords dismissed the applicant's appeal against the Court of Appeal's decision. In his speech, with which the rest of the judges agreed, Lord Steyn held that section 35(2) of the 1991 Act conferred a wide administrative discretion on the Secretary of State to decide upon the release on licence of mandatory life prisoners and that there was no fundamental common-law principle of retributive proportionality which restrained him from detaining a mandatory life prisoner by reference to a risk that he may in future commit a serious but non-violent offence. He expressly repeated Lord Bingham's concern that the imposition of a substantial term of imprisonment by exercise of administrative discretion was hard to reconcile with ordinary concepts of the rule of law.

27. On 22 December 1998 the applicant was released on licence by the Secretary of State.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Life sentences

28. Murder carries a mandatory sentence of life imprisonment under the Murder (Abolition of Death Penalty) Act 1965. A person convicted of other serious offences (such as manslaughter or rape) may also be sentenced to life imprisonment at the discretion of the trial judge 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. Where an offender is under 18 years of age when the offence of murder is committed, he or she is sentenced to detention during Her Majesty's pleasure (section 53(1) of the Children and Young Persons Act 1933).

29. As at 31 December 2001 there were 3,171 male and 114 female mandatory life prisoners, 228 men and 11 women serving a sentence of detention during Her Majesty's pleasure and 1,424 male and 25 female discretionary life prisoners.

B. Tariffs

30. 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. 505-07). 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).

31. According to section 34 of the Criminal Justice Act 1991 ("the 1991 Act"), 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.

32. 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 see the Home Secretary, Mr Michael Howard's, policy statement to Parliament, 27 July 1993, Hansard (House of Commons Debates) cols. 861-64).

33. In the judicial review proceedings in *Ex parte V. and T.* (cited above), the House of Lords gave consideration, *inter alia*, to the nature of the tariff-fixing exercise.

34. Lord Steyn held:

> "The starting-point must to be inquire into the nature of the power to fix a tariff which the Home Secretary exercises. Writing on behalf of the Home Secretary the Home Office explained that: 'The Home Secretary must ensure that, at all times, he acts with the same dispassionate fairness as a sentencing judge.' The comparison between the position of the Home Secretary, when he fixes a tariff representing the punitive element of the sentence, and the position of the sentencing judge is correct. In fixing a tariff the Home Secretary is carrying out, contrary to the constitutional principle of the separation of powers between the executive and the judiciary, a classic judicial function. Parliament entrusted the underlying statutory power, which entailed a discretion to adopt a policy and fix a tariff, to the Home Secretary. But the power to fix a tariff is nevertheless equivalent to a judge's sentencing power."

35. Lord Hope held:

> "But the imposition of a tariff, which is intended to fix the minimum period in custody is, in itself, the imposition of a form of punishment. This has, as Lord Mustill observed in *R. v. Secretary of State for the Home Department, ex parte Doody* at p. 557A-B, the characteristics of an orthodox judicial exercise, which is directed to the circumstances of the offence and those of the offender and to what, having regard to the requirements of retribution and deterrence, is the appropriate minimum period to be spent in custody. The judge, when advising the Secretary of State about the tariff, must and does confine his attention to these matters ...
>
> If the Secretary of State wishes to fix a tariff for the case – in order to replace the views of the judiciary with a view of his own about the length of the minimum period – he must be careful to abide by the same rules ..."

36. In *Ex parte Pierson* [1998] Appeal Cases 539, Lord Steyn stated, in a case concerning mandatory life prisoners:

> "In public law the emphasis should be on substance rather than form. The case should not be decided on a semantic quibble about whether the Home Secretary's function is strictly 'a sentencing exercise'. The undeniable fact is that in fixing a tariff in the individual case the Home Secretary is making a decision about the punishment of the convicted man. In any event, a majority holding in *Ex Parte V.* concludes the matter ... This point is therefore settled by the binding authority of a decision of the House."

37. A whole life tariff may be set in appropriate cases. In *R. v. the Home Secretary*, *ex parte Hindley* [2001] 1 Appeal Cases, where a provisional tariff of thirty years had been replaced by a whole life tariff, Lord Steyn held that "life-long incarceration for the purposes of punishment is competent where the crime or crimes are sufficiently heinous". The decision of the Secretary of State to apply a whole life tariff in her case was found in the circumstances to be lawful. He had been entitled to revise his view of the tariff, which had initially been based on incomplete knowledge of her role in the three murders upon which she had faced trial and in ignorance of her involvement in two other murders, matters which came to light later. According to information provided by the Government, there were twenty-two mandatory life prisoners with whole life tariffs at 31 December 2001.

C. Release on licence of mandatory life prisoners

38. At the relevant time, the Criminal Justice Act 1991 provided in section 35(2):

> "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."

This is in contrast to the position for other life prisoners, where the Parole Board now has the power of decision – pursuant to the provisions of the 1991 Act for discretionary life prisoners and pursuant to the 1997 Act for detainees during Her Majesty's pleasure. Where, however, a mandatory life prisoner was recalled to prison, the Parole Board did have a power to direct the Secretary of State to release the prisoner immediately (section 39(5) of the 1991 Act, now section 32(5) of the 1997 Act).

39. On 27 July 1993 the Secretary of State made a statement in Parliament explaining his practice in relation to mandatory life prisoners. The statement emphasised that before any mandatory life prisoner is released on life licence, the Secretary of State

> "will consider not only (a) whether the period served by the prisoner is adequate to satisfy the requirements of retribution and deterrence and (b) whether it is safe to release the prisoner, but also (c) the public acceptability of early release. This means that [he] will only exercise [his] discretion to release if [he is] satisfied that to do so will not threaten the maintenance of public confidence in the system of criminal justice."

40. In determining the principles of fairness that apply to the procedures governing the review of mandatory life sentences, the English courts have recognised that the mandatory sentence is, like the discretionary sentence, composed of both a punitive period ("the tariff") and a security period. As regards the latter, detention is linked to the assessment of the prisoner's risk to the public following the expiry of the tariff (see, for example, *R. v. Parole Board, ex parte Bradley* (Divisional Court) [1991] 1 Weekly Law Reports

135, and *R. v. Parole Board, ex parte Wilson* (Court of Appeal) [1992] 2 All England Law Reports 576).

41. In *R. v. Secretary of State for the Home Department, ex parte Doody* ([1993] 3 All England Law Reports 92), the House of Lords observed that, in contrast with the position as regards discretionary life sentences, the theory and practice in respect of mandatory life sentences were out of tune. In his speech, with which the other judges agreed, Lord Mustill explained that the policy whereby murder was treated as an offence so grave that the proper penal element of the sentence was detention for life was inconsistent with the practice adopted by successive Secretaries of State that a mandatory life sentence included a "tariff" period to reflect the requirements of retribution and deterrence. He added:

> "The discretionary and mandatory life sentences, having in the past grown apart, may now be converging. Nevertheless, on the statutory framework, the underlying theory and current practice, there remains a substantial gap between them. It may be – I express no opinion – that the time is approaching when the effect of the two types of sentence should be further assimilated. But this is a task of Parliament, and I think it quite impossible for the courts to introduce a fundamental change in the relationship between the convicted murderer and the State, through the medium of judicial review."

42. On 10 November 1997 the Secretary of State made the following parliamentary statement, *inter alia*:

> "I take the opportunity to confirm that my approach on the release of adults convicted of murder once tariff has expired will reflect the policy set out in the answer given on 27 July 1993. In particular, the release of such a person will continue to depend not only on the expiry of tariff and on my being satisfied that the level of risk of his committing further imprisonable offences presented by his release is acceptably low, but also on the need to maintain public confidence in the system of criminal justice. The position of a prisoner subject to a mandatory life sentence continues to be distinct from that of a prisoner serving a discretionary life sentence, a decision on whose final release is a matter for the Parole Board alone."

43. It was noted by the Court of Appeal in *R. (Lichniak and Pyrah) v. Secretary of State for the Home Department* [2001] 3 Weekly Law Reports (judgment of 2 May 2001) that the criterion of public acceptability of release identified by the Home Secretary (point (c) in paragraph 39 above) had never been a determining factor, although the current Home Secretary followed the policy of his predecessors.

D. Recent domestic case-law and statutory developments

44. On 2 October 2000 the Human Rights Act 1998 came into force, permitting the provisions of the Convention to be relied on in domestic proceedings.

45. In *Lichniak and Pyrah* (cited above), the two applicants challenged the imposition on them for murder of a mandatory life sentence, arguing

that this was disproportionate and arbitrary and contrary to Articles 3 and 5 of the Convention. In dismissing their appeals, the Court of Appeal found that the mandatory sentence of life imprisonment was in reality an indeterminate sentence, rarely involving imprisonment for life, and as such could not be labelled inhuman and degrading. Nor was it arbitrary as in each case the sentence was individualised from the moment it was imposed. The purpose of the mandatory life sentence was, according to the Government's counsel,

> "to punish the offender by subjecting him to an indeterminate sentence under which he will only be released when he has served the tariff part of his sentence, and when it is considered safe to release him ... That is not merely the effect of the sentence, it is the sentence".

Lord Justice Kennedy also cited in his judgment the conclusions of the Committee on the Penalty for Homicide, chaired by Lord Lane, issued in 1993:

> "(1) The mandatory life sentence for murder is founded on the assumption that murder is a crime of such unique heinousness that the offender forfeits for the rest of his existence his right to be set free. (2) That assumption is a fallacy. It arises from the divergence between the legal definition of murder and that which the lay public believes to be murder. (3) The common-law definition of murder embraces a wide range of offences, some of which are truly heinous, some of which are not. (4) The majority of murder cases, though not those which receive the most publicity, fall into the latter category. (5) It is logically and jurisprudentially wrong to require judges to sentence all categories of murderer in the same way, regardless of the particular circumstances of the case before them. (6) It is logically and constitutionally wrong to require the distinction between the various types of murder to be decided (and decided behind the scenes) by the executive as is, generally speaking, the case at present ..."

46. In *R. (Anderson and Taylor) v. Secretary of State for the Home Department*, two prisoners who had been convicted of murder complained that the Home Secretary had fixed a tariff superior to that recommended by the judiciary – twenty years instead of fifteen years and thirty years instead of sixteen years. They relied on Article 6 § 1 of the Convention, alleging that it was incompatible for the executive to carry out what was in fact a sentencing exercise. The Divisional Court dismissed their claims. The Court of Appeal rejected their appeals on 13 November 2001. In doing so, the appellate judges considered the nature of the tariff-fixing exercise for mandatory life prisoners and the significance of Strasbourg case-law.

Lord Justice Simon Brown held, *inter alia*:

> "... I accept of course that the mandatory life sentence is unique. But not all the offences for which it is imposed can be regarded as uniquely grave. Rather the spectrum is a wide one with multiple sadistic murders at one end and mercy killings at the other. Lifelong punitive detention will be appropriate only exceptionally. As for 'broader considerations of a public character', it is difficult to understand quite what these are. Regard must not be had to 'public clamour' – see [*V.*]. There is, of course, 'the need to maintain public confidence in the system of criminal justice' (see the Home Secretary's statement to Parliament on 10 November 1997). To my mind,

> however, this can and should be catered for in the fixing of the tariff. The retributive element of the tariff should reflect the public's moral outrage at an offence. Surely the maintenance of public confidence in the system cannot require longer incarceration than that which properly reflects society's entitlement to vengeance. Sometimes, I recognise that will require a whole life tariff. But why should not the judges determine that? ... [A]s to retrospectively increasing the tariff ... [t]he same problem could presumably arise in a discretionary life sentence case. In truth, however, it begs rather than answers the question whether the initial fixing of the tariff is properly to be regarded as an exercise in sentencing.
>
> In short I find none of Mr Pannick's arguments convincing. Neither singly nor cumulatively do they seem to me to provide a principled basis for treating tariff-fixing in mandatory life cases differently from the similar exercise required for discretionary life prisoners and Her Majesty's pleasure detainees. In all three cases the exercise is in substance the fixing of a sentence, determining the length of the first stage of an indeterminate sentence – that part of it which (subject only to the need for continuing review in Her Majesty's pleasure cases) must be served in custody before any question of release can arise ..."

47. Although he was of the view that the existing mandatory life sentence regime breached Article 6 § 1 and Article 5 § 4, he, and the other two judges, considered that the Strasbourg case-law (in particular, *Wynne v. the United Kingdom*, judgment of 18 July 1994, Series A no. 294-A) had to be regarded as determinative of the Convention issues in the case. He noted that the European Court of Human Rights was about to re-examine the position in *Stafford* and, although considering that the final decision should be the Court's, stated that he would be surprised if the present regime for implementing mandatory life sentences survived that re-examination.

48. In Scotland, the Convention Rights (Compliance) (Scotland) Act 2001 now provides that in the case of mandatory life sentences the trial judge fixes the "punishment part" of the sentence, on the expiry of which the Parole Board decides on possible release on licence. The test applied to determine suitability for release is identical to that applied to discretionary life prisoners in England and Wales, namely, that the Parole Board is satisfied that the prisoner does not present a substantial risk of reoffending in a manner which is dangerous to life or limb or of committing serious sexual offences.

49. In Northern Ireland, the Life Sentences (Northern Ireland) Order SI no. 2564 provides that the trial judge decides on the tariff for a mandatory life prisoner and that release post-tariff is determined by Life Sentence Review Commissioners (with a status and functions very similar to those of the Parole Board operating in England and Wales). The test applied by the Commissioners is one of protection of the public from "serious harm", this term meaning the risk of harm from violent or sexual offences.

III. THIRD-PARTY INTERVENTION

50. Justice, a human rights and law reform organisation founded in 1957, submitted written comments regarding domestic law and practice, following the leave granted to it by the President of the Court to intervene as a third party (see paragraph 7 above). Its submissions may be summarised as follows.

51. The mandatory life sentence imposed by the 1965 Act (see paragraph 28 above) applied to all convictions for murder, covering a whole bundle of offences of vastly differing degrees of culpability, ranging from brutal serial killings to the mercy killing of a beloved partner. It could not be said that murder was a uniquely heinous offence. The mandatory application of life sentences therefore made the arrangements for release all the more critical in terms of fairness and just deserts. Access to regular judicial review once the tariff expired had been extended to discretionary life prisoners and child murderers and the Secretary of State could no longer set tariffs in these cases. Similar provisions were now being extended to mandatory life prisoners in both Scotland and Northern Ireland under legislation to ensure compliance with human rights.

52. There had been substantial criticism of the current system. In 1989, a Select Committee of the House of Lords, appointed to report on murder and life imprisonment, recommended the abolition of the mandatory life sentence. In 1996 the Home Affairs Select Committee of the House of Commons took evidence and deliberated on the same issues. Their report (Murder: The Mandatory Life Sentence) recommended that the tariff and release decisions be removed from the Home Secretary and left with the trial judge and Parole Board. Lord Lane, formerly Lord Chief Justice, chaired a Committee on the Penalty for Homicide, which also produced a critical report in 1993.

53. The diversity of circumstances that could lead to a murder conviction meant that murderers as a class of offender did not pose special problems of dangerousness. They had a lower recidivism rate than discretionary life prisoners and the general prison population. The system of tariff-fixing was not easily understood by the prisoners concerned and was subject to delays and uncertainty, both of which factors impinged on the quality of work with life prisoners at the crucial early stages of their sentences.

54. The United Kingdom had more serving life prisoners than the rest of Europe together, which was attributable primarily to the mandatory life sentence for murder. While some countries, such as Germany, France and Italy, had mandatory life sentences, these were only applied where there were aggravating factors or for a particular type of murder. Article 77 of the Statute for the International Criminal Court provided that a life sentence

could only be ordered "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

55. Article 5 § 1 of the Convention provides in its relevant part:

> "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;
>
> ..."

A. The parties' submissions

1. The applicant

56. The applicant submitted that it was obsolete under domestic law to regard a mandatory life prisoner as having forfeited his liberty for life. On analysis, the parole exercise could no longer be regarded as a matter of leniency to a post-tariff prisoner. In recent cases (*Ex parte Doody*, *Ex parte V. and T.* and *Ex parte Pierson*, cited above), the House of Lords had moved to a recognition of the clear similarity between the fixing of a tariff and a sentencing exercise. Therefore, references to notions of "public acceptability" of release could not support the proposition that the Secretary of State could rely on the wholly undefined and uncertain concept of the "public interest" as a reason for not releasing a mandatory life prisoner who had completed his tariff and who was no longer considered to be a risk to the public in the sense of being likely to commit further violent offences.

57. The applicant claimed that to detain a post-tariff mandatory life prisoner by reference to concerns about the prisoner which bore no necessary relationship to the nature of the criminal conduct which resulted in the imposition of the sentence in the first place produced a form of detention which had no sufficient connection with the object of the legislature and the sentence of the court, such that it amounted to an arbitrary detention in breach of Article 5 § 1 of the Convention. He pointed out that no Secretary of State had ever sought to justify post-tariff detention of a mandatory life prisoner who was no longer a risk to the public on the

basis of a general need to maintain public confidence in the system of criminal justice. The Government could not convincingly rely on the domestic courts' decisions where those judges had expressed unease about the imposition of a substantial term of imprisonment by the exercise of executive discretion. Nor could they rely on the recent case-law of this Court in *V. v. the United Kingdom* ([GC] no. 24888/94, ECHR 1999-IX), which concerned minors detained during Her Majesty's pleasure and did not address developments in domestic law concerning adult mandatory life prisoners. The domestic courts identified no practical distinction between these two categories and have clearly found that the fixing of tariffs in both was akin to an exercise of sentencing or imposing punishment which attracted the same procedural safeguards as applied to a judge when passing sentence.

58. The applicant disputed that the true objective of the mandatory life sentence was life-long punishment. He remained the only mandatory life prisoner who had been detained post-tariff on the basis that the Secretary of State believed that he might commit a non-violent offence if released. Different considerations might apply where a risk of drug trafficking was concerned, as such activity was clearly capable of causing physical or psychological harm to others. To justify indefinite imprisonment by reference to a belief that he might on release commit a non-violent crime involving no conceivable physical harm to others was arbitrary, encompassing matters wholly unrelated in nature and seriousness to the reasons for the prisoner being within the power of the State in the first place.

2. The Government

59. The Government submitted that the imposition of a mandatory life sentence for murder satisfied Article 5 § 1 of the Convention. In their view, this continued to provide a lawful basis for the applicant's detention after the expiry of the six-year sentence for fraud as his life licence had been revoked. They rejected the applicant's argument that this detention, based on a concern that he might commit serious non-violent offences of dishonesty, bore no proper relationship to the object of the original mandatory life sentence. They argued that the original sentence was imposed because of the gravity of the offence of murder. A mandatory life sentence for murder fell within a distinct category, different from a discretionary life sentence, as it was imposed as punishment for the seriousness of the offence. It was not governed by characteristics specific to a particular offender which might change over time, factors such as dangerousness, mental instability or youth. A trial judge was required by Parliament to impose a life sentence for murder whether or not the offender was considered dangerous.

60. The object and purpose of the sentence was to confer power on the Secretary of State to decide when, if at all, it was in the public interest to

allow the applicant to return to society on life licence and to empower the Secretary of State to decide, subject to the applicable statutory procedures, whether it was in the public interest to recall the applicant to prison at any time until his death. Whether or not the concern was about risk of further offences of violence or further non-violent offences, a refusal to release on life licence, or a decision to revoke the life licence, was closely related to the original mandatory life sentence by reason of the gravity of the offence and to the need to ensure that the prisoner could only be released when the public interest made it appropriate. The sentence also provided flexibility, since it allowed reconsideration of the tariff if it had been set in ignorance of relevant factors, a possibility not available to a judge (see, for example, *Ex parte Hindley*, referred to in paragraph 37 above).

61. The Government submitted that, in deciding whether it was in the public interest to release the applicant, the Secretary of State was therefore entitled to have regard to the risk of serious non-violent offending. It would not be logical or rational if he was unable to refuse to order the release of a prisoner where there was an unacceptable risk of his committing serious non-violent offences such as burglary or trafficking in heroin, which attracted far longer prison sentences than some offences of a violent nature (wounding, for example) and which caused far more harm to the public interest. The Government referred to the previous case-law of the Court which found that continued detention of life prisoners was justified by their original trial and appeal proceedings (see, for example, *Weeks v. the United Kingdom*, judgment of 2 March 1987, Series A no. 114, and *Wynne v. the United Kingdom*, judgment of 18 July 1994, Series A no. 294-A). The fact that the applicant had been released on life licence and had been free for some time had no relevance to the lawful basis of his detention after revocation of that licence. Nor had there been any relevant developments in either domestic or Convention case-law which altered the statutory basis of the mandatory life sentence or its proper meaning and effect.

B. The Court's assessment

1. Preliminary considerations

62. The question to be determined is whether, after the expiry on 1 July 1997 of the fixed-term sentence imposed on the applicant for fraud, the continued detention of the applicant under the original mandatory life sentence imposed on him for murder in 1967 complied with the requirements of Article 5 § 1 of the Convention.

63. Where the "lawfulness" of detention is in issue, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. This primarily requires any arrest or detention to have a legal basis in domestic law but also relates

to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. In addition, any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness (see, among many other authorities, *Amuur v. France*, judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, pp. 850-51, § 50).

64. It is not contested that the applicant's detention from 1 July 1997 was in accordance with a procedure prescribed by English law and otherwise lawful under English law. This was established in the judicial review proceedings, where the Court of Appeal and House of Lords found that the Secretary of State's decision to detain the applicant fell within his discretion as conferred by section 35(1) of the 1991 Act. This is not however conclusive of the matter. The Court's case-law indicates that it may be necessary to look beyond the appearances and the language used and concentrate on the realities of the situation (see *Van Droogenbroeck v. Belgium*, judgment of 24 June 1982, Series A no. 50, pp. 20-21, § 38). In *Weeks* (cited above, p. 23, § 42), which concerned the recall to prison by the Secretary of State of an applicant who had been released from a discretionary life sentence for robbery, the Court interpreted the requirements of Article 5 as applying to the situation as follows:

> "The 'lawfulness' required by the Convention presupposes not only conformity with domestic law but also, as confirmed by Article 18, conformity with the purposes of the deprivation of liberty permitted by sub-paragraph (a) of Article 5 § 1 (see, as the most recent authority, the Bozano judgment of 18 December 1986, Series A no. 111, p. 23, § 54). Furthermore, the word 'after' in sub-paragraph (a) does not simply mean that the detention must follow the 'conviction' in point of time: in addition, the 'detention' must result from, 'follow and depend upon' or occur 'by virtue of' the 'conviction' (ibid., pp. 22-23, § 53, and the Van Droogenbroeck judgment ..., p. 19, § 35). In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue (see the above-mentioned Van Droogenbroeck judgment, p. 21, § 39)."

65. The Court notes that in *Weeks* it was found that the discretionary life sentence imposed on the applicant was an indeterminate sentence expressly based on considerations of his dangerousness to society, factors which were susceptible by their very nature to change with the passage of time. On that basis, his recall, in the light of concerns about his unstable, disturbed and aggressive behaviour, could not be regarded as arbitrary or unreasonable in terms of the objectives of the sentence imposed on him and there was sufficient connection for the purposes of Article 5 § 1 (a) between his conviction in 1966 and his recall to prison in 1977 (see *Weeks*, cited above, pp. 25-27, §§ 46-51).

66. Much of the argument from the parties has focused on the nature and purpose of the mandatory life sentence as compared with other forms of life sentence and whether the detention after 1 July 1997 continued to conform with the objectives of that sentence. And since the procedures applying to

the varying types of life sentences have generated considerable case-law, both on the domestic level and before the Convention organs, there has been extensive reference to the judicial dicta produced as supporting the arguments on both sides.

67. Of particular importance in this regard is *Wynne*, decided in 1994, in which this Court found that no violation arose under Article 5 § 4 in relation to the continued detention after release and recall to prison of a mandatory life prisoner convicted of an intervening offence of manslaughter, the tariff element of which had expired. This provides strong support for the Government's case, while the applicant sought to argue that this decision did not succeed in identifying the reality of the situation for mandatory life prisoners which subsequent developments have clarified still further. The Court in *Wynne* was well aware that there were similarities between the discretionary life and mandatory life sentences, in particular that both contained a punitive and a preventive element and that mandatory life prisoners did not actually spend the rest of their lives in prison. The key passage states:

> "However, the fact remains that the mandatory life sentence belongs to a different category from the discretionary sentence in the sense that it is imposed automatically as the punishment for the offence of murder irrespective of considerations pertaining to the dangerousness of the offender ..."(p. 14, § 35)

68. While the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases. Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved (see, among other authorities, *Cossey v. the United Kingdom*, judgment of 27 September 1990, Series A no. 184, p. 14, § 35, and *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I). It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.

69. Similar considerations apply as regards the changing conditions and any emerging consensus discernible within the domestic legal order of the respondent Contracting State. Although there is no material distinction on the facts between this case and *Wynne*, having regard to the significant developments in the domestic sphere, the Court proposes to reassess "in the light of present-day conditions" what is now the appropriate interpretation and application of the Convention (see *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, pp. 15-16, § 31, and subsequent case-law).

2. Legal developments

70. The mandatory life sentence is imposed pursuant to statute in all cases of murder. This position has not changed, although there has been increasing criticism of the inflexibility of the statutory regime, which does not reflect the differing types of killing covered by the offence, from so-called mercy killing to brutal psychopathic serial attacks (see, for example, the 1993 report of the Committee on the Penalty for Homicide, cited by Lord Justice Kennedy in *Lichniak and Pyrah*, paragraph 45 above, the recommendations of the Select Committee of the House of Lords concerning murder and life imprisonment and the comments of Lord Justice Simon Brown in *Anderson and Taylor*, paragraph 46 above; see also the third-party intervention by Justice, paragraphs 51-54 above).

71. The inflexibility of this regime was, from a very early stage, mitigated by the approach of the Secretary of State, who in all types of life sentences – mandatory, discretionary and detention during Her Majesty's pleasure – adopted a practice of setting a specific term known as the "tariff" to represent the element of deterrence and retribution. This was generally the minimum period of detention which would be served before an offender could hope to be released. It was never anticipated that prisoners serving mandatory life sentences would in fact stay in prison for life, save in exceptional cases. Similarly, the decision as to the release of all life prisoners also lay generally with the Secretary of State. The tariff-fixing and release procedures applicable to life sentences have however been modified considerably over the past twenty years, to a large extent due to the case-law of this Court. It is also significant that the domestic courts were frequently called upon to rule on lawfulness issues arising out of the Secretary of State's role in fixing the tariff and in deciding the appropriate moment for release, the courts requiring the establishment of proper and fair procedures in his exercise of those functions. Between Strasbourg and the domestic courts, a steady erosion of the scope of the Secretary of State's decision-making power in this field may be identified.

72. The first examination of the Court in this area focused on the situation of discretionary life prisoners. In *Weeks* (cited above) and *Thynne, Wilson and Gunnell v. the United Kingdom* (judgment of 25 October 1990, Series A no. 190-A), the Court analysed the purpose and effect of the discretionary life sentence, imposable for very serious offences such as manslaughter and rape. It was held that since the grounds relied upon in sentencing to a discretionary life term concerned risk and dangerousness (see paragraph 28 above), factors susceptible to change over time, new issues of lawfulness could arise after the expiry of the tariff which, in the context of Article 5 § 4, necessitated proper review by a judicial body. As a result, the Criminal Justice Act 1991 provided that the question of release, after expiry of the tariff of a discretionary life prisoner, was to be decided not by the Secretary of State but by the Parole Board in a procedure with

judicial safeguards. The same Act also gave statutory force to the Secretary of State's policy of accepting the judicial view of the tariff in discretionary life cases. The judges then took on the role, in open court, of setting the punishment element of the sentence. Although no significant changes were made by statute to the regime of mandatory life sentences, the procedure whereby the tariff was fixed was shortly afterwards modified following the House of Lords' decision in *Ex parte Doody*, where it was found that procedural fairness required that mandatory life prisoners be informed of the judicial view of the tariff in order that they could make written representations to the Secretary of State before he reached his decision (see paragraph 32 above). This reflected a growing perception that the tariff-fixing function was closely analogous to a sentencing function.

73. It was at this stage that the Court, in *Wynne*, directly addressed the position of mandatory life prisoners and took the view that the mandatory life sentence was different in character from the discretionary life sentence. In reaching that decision, it concentrated on the automatic imposition of the mandatory life sentence, which was perceived as pursuing a punitive purpose.

74. Not long afterwards, the situation of post-tariff juvenile murderers (detained during Her Majesty's pleasure) was the subject of applications under the Convention. Although this type of sentence, as with the adult mandatory life sentence, was imposed automatically for the offence of murder, the Court was not persuaded that it could be regarded as a true sentence of punishment to detention for life. Such a term applied to children would have conflicted with United Nations instruments and raised serious problems under Article 3 of the Convention. Considering that it must be regarded in practice as an indeterminate sentence which could only be justified by considerations based on the need to protect the public and therefore linked to assessments of the offender's mental development and maturity, it therefore held that a review by a court of the continued existence of grounds of detention was required for the purposes of Article 5 § 4 (see *Hussain v. the United Kingdom* and *Singh v. the United Kingdom*, judgments of 21 February 1996, *Reports* 1996-I).

75. The issues arising from the sentencing process for juvenile murderers at the tariff-fixing stage were then examined both in the domestic courts and in Strasbourg. In *Ex parte V. and T.* (cited above), the House of Lords made very strong comment on the judicial nature of the tariff-fixing exercise and quashed a tariff fixed by the Home Secretary which, *inter alia,* took into account "public clamour" whipped up by the press against the offenders in the case. This Court found that Article 6 § 1 applied to the fixing of the tariff, which represented the requirements of retribution and deterrence and was thus a sentencing exercise. The fact that it was decided by the Secretary of State, a member of the executive and therefore not independent, was found to violate this provision (see *T. v. the United*

Kingdom [GC], no. 24724/94, 16 December 1999, and *V. v. the United Kingdom*, cited above).

76. By this stage therefore, there were further statutory changes, which assimilated the position of juvenile murderers to that of discretionary life prisoners in giving the courts the role of fixing the tariff and providing the Parole Board with decision-making powers and appropriate procedures when dealing with questions of release.

77. While mandatory life prisoners alone remained under the old regime, the coming into force on 2 October 2000 of the Human Rights Act 1998 provided the opportunity for the first direct challenges to the mandatory life regime under the provisions of the Convention in the domestic courts. In *Lichniak and Pyrah* (see paragraphs 43 and 45 above), the prisoners' arguments that the mandatory life sentence was arbitrary due to its inflexibility were rejected. It may be observed, as pointed out by the applicant, that the Government in that case contended that the mandatory life sentence was an indeterminate sentence by which an individualised tariff was set and that after the expiry of the tariff the prisoner could expect to be released once it was safe to do so. They expressly departed from the position that the mandatory life sentence represented a punishment whereby a prisoner forfeited his liberty for life. On that basis, the Court of Appeal found that there were no problems of arbitrariness or disproportionality in imposing mandatory life sentences. Then, in the case of *Anderson and Taylor* decided in November 2001, which concerned a challenge under Article 6 § 1 to the role of the Secretary of State in fixing the tariffs for two mandatory life prisoners, the Court of Appeal was unanimous in finding that this was a sentencing exercise which should attract the guarantees of that Article, following on from clear statements made by the House of Lords in *Ex parte V. and T.* and *Ex parte Pierson* (see paragraphs 34-35 above).

78. The above developments demonstrate an evolving analysis, in terms of the right to liberty and its underlying values, of the role of the Secretary of State concerning life sentences. The abolition of the death penalty in 1965 and the conferring on the Secretary of State of the power to release convicted murderers represented, at that time, a major and progressive reform. However, with the wider recognition of the need to develop and apply, in relation to mandatory life prisoners, judicial procedures reflecting standards of independence, fairness and openness, the continuing role of the Secretary of State in fixing the tariff and in deciding on a prisoner's release following its expiry has become increasingly difficult to reconcile with the notion of separation of powers between the executive and the judiciary, a notion which has assumed growing importance in the case-law of the Court (see, *mutatis mutandis*, *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV).

79. The Court considers that it may now be regarded as established in domestic law that there is no distinction between mandatory life prisoners,

discretionary life prisoners and juvenile murderers as regards the nature of tariff-fixing. It is a sentencing exercise. The mandatory life sentence does not impose imprisonment for life as a punishment. The tariff, which reflects the individual circumstances of the offence and the offender, represents the element of punishment. The Court concludes that the finding in *Wynne* that the mandatory life sentence constituted punishment for life can no longer be regarded as reflecting the real position in the domestic criminal justice system of the mandatory life prisoner. This conclusion is reinforced by the fact that a whole life tariff may, in exceptional cases, be imposed where justified by the gravity of the particular offence. It is true that the Court, in its more recent judgments in *V.* and *T.*, citing *Wynne* as authority, reiterated that an adult mandatory life sentence constituted punishment for life (see *V. v. the United Kingdom*, cited above, § 110, and *T. v. the United Kingdom*, cited above, § 109). In doing so it had, however, merely sought to draw attention to the difference between such a life sentence and a sentence to detention during Her Majesty's pleasure, which was the category of sentence under review in the cases concerned. The purpose of the statement had therefore been to distinguish previous case-law rather than to confirm an analysis deriving from that case-law.

80. The Government maintained that the mandatory life sentence was nonetheless an indeterminate sentence which was not based on any individual characteristic of the offender, such as youth and dangerousness, and therefore there was no question of any change in the relevant circumstances of the offender that might raise lawfulness issues concerning the basis for his continued detention. However, the Court is not convinced by this argument. Once the punishment element of the sentence (as reflected in the tariff) has been satisfied, the grounds for the continued detention, as in discretionary life and juvenile murderer cases, must be considerations of risk and dangerousness. Reference has been made by Secretaries of State to a third element – public acceptability of release – yet this has never in fact been relied upon. As Lord Justice Simon Brown forcefully commented in *Anderson and Taylor* (see paragraph 46 above), it is not apparent how public confidence in the system of criminal justice could legitimately require the continued incarceration of a prisoner who has served the term required for punishment for the offence and is no longer a risk to the public. It may also be noted that recent reforms in Scotland and Northern Ireland equate the position of mandatory life prisoners in those jurisdictions to that of discretionary life prisoners in England and Wales, in respect of whom continued detention after expiry of the tariff is solely based on assessment of risk of harm to the public from future violent or sexual offending.

3. The present case

81. In the Court's view, the applicant in the present case must be regarded as having exhausted the punishment element for his offence of

murder – if this were not the case, it is hard to understand why the Secretary of State allowed his release in 1979. When his sentence for the later fraud offence expired on 1 July 1997, his continued detention under the mandatory life sentence cannot be regarded as justified by his punishment for the original murder. Nor, in contrast to the recall of the applicant in *Weeks*, was the continued detention of the present applicant justified by the Secretary of State on grounds of mental instability and dangerousness to the public from the risk of further violence. The Secretary of State expressly relied on the risk of non-violent offending by the applicant. The Court finds no sufficient causal connection, as required by the notion of lawfulness in Article 5 § 1 (a) of the Convention (see paragraph 64 above), between the possible commission of other non-violent offences and the original sentence for murder in 1967.

82. The Government have argued that it would be absurd if a Secretary of State were bound to release a mandatory life prisoner who was likely to commit serious non-violent offences. With reference to the present case, however, the Court would note that the applicant was sentenced for the fraud which he committed while on release and served the sentence found appropriate as punishment by the trial court. There was no power under domestic law to impose indefinite detention on him to prevent future non-violent offending. If there was evidence that the applicant was conspiring to commit any such offences, a further criminal prosecution could have been brought against him. The Court cannot accept that a decision-making power by the executive to detain the applicant on the basis of perceived fears of future non-violent criminal conduct unrelated to his original murder conviction accords with the spirit of the Convention, with its emphasis on the rule of law and protection from arbitrariness.

83. The Court concludes that the applicant's detention after 1 July 1997 was not justified in terms of Article 5 § 1 (a) and that there has accordingly been a violation of Article 5 § 1 of the Convention.

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

84. 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."

A. The parties' submissions

1. The applicant

85. The applicant argued that as the only legitimate basis for his continued detention concerned considerations of risk, factors susceptible to change, he was entitled to review of his continued detention by a body satisfying the requirements of Article 5 § 4. He submitted that, since *Wynne* (cited above) was decided, the courts in the United Kingdom have so altered the approach to and understanding of the mandatory life sentence that it is no longer possible to argue that the safeguards mandated by Article 5 § 4 are incorporated into the sentence by the original trial process. The Court should reconsider its judgment in *Wynne*, and determine, in particular, whether the recognition that the mandatory life sentence, like the discretionary life sentence, authorises a two-phase period of detention had implications in terms of Article 5 § 4 in the post-tariff phase. The fact that the Parole Board had power to direct the applicant's release on his initial recall was not sufficient to meet the requirements of Article 5 § 4, which applied to his post-tariff detention as a whole and, when it did later recommend his release, this was not binding on the Secretary of State.

2. The Government

86. The Government considered that the requirements of Article 5 § 4 of the Convention were met by the original trial and appeal proceedings and that no new issues of lawfulness concerning the applicant's detention arose requiring the possibility of recourse to a court or similar body with power to order release. The Secretary of State's determination of the tariff was an administrative procedure governing the implementation of a sentence and not part of the imposition of the sentence itself. Adult mandatory life prisoners convicted of murder were in a distinct category in domestic law, as was recognised in the Court's case-law (see, for example, *Thynne, Wilson and Gunnell* and *V. v. the United Kingdom*, cited above). The sentence was imposed because of the inherent gravity of the offence and not because of the presence of factors susceptible to change with the passage of time, such as mental instability or dangerousness. Parliament had decided that all adult murderers must be sentenced to life imprisonment, whether or not they were dangerous and whatever their circumstances, because such a grave crime deserved to be punished by loss of liberty for life. In any event, the Government pointed out that, when the applicant was recalled to prison on revocation of his life licence, the Parole Board enjoyed a power to direct the Secretary of State that he be immediately released. No such direction was made. That was sufficient in itself to ensure compliance with Article 5 § 4 in the circumstances of the case.

B. The Court's assessment

87. The Court has found above that the tariff comprises the punishment element of the mandatory life sentence. The Secretary of State's role in fixing the tariff is a sentencing exercise, not the administrative implementation of the sentence of the court as can be seen in cases of early or conditional release from a determinate term of imprisonment. After the expiry of the tariff, continued detention depends on elements of dangerousness and risk associated with the objectives of the original sentence of murder. These elements may change with the course of time, and thus new issues of lawfulness arise requiring determination by a body satisfying the requirements of Article 5 § 4. It can no longer be maintained that the original trial and appeal proceedings satisfied, once and for all, issues of compatibility of subsequent detention of mandatory life prisoners with the provisions of Article 5 § 1 of the Convention.

88. The Government contended that the fact that the Parole Board had a power to direct the applicant's release on revocation of his life licence in 1994 was sufficient in itself to comply with Article 5 § 4. However, the Court notes that the applicant's life licence was revoked while he was serving a fixed term of imprisonment for fraud. When the fixed-term sentence expired on 1 July 1997, the applicant remained in prison under the life sentence. Although the Parole Board had recommended his release at that date, the power of decision lay with the Secretary of State. In the circumstances of this case, the power of the Parole Board to direct release in 1994 is not material.

89. From 1 July 1997 to the date of his release on 22 December 1998, the lawfulness of the applicant's continued detention was not reviewed by a body with the power to release or following a procedure containing the necessary judicial safeguards, including, for example, the possibility of an oral hearing.

90. There has, accordingly, been a violation of Article 5 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

91. 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

92. The applicant claimed damages for the period of imprisonment from 1 July 1996 to 22 December 1998. In respect of pecuniary damage, he claimed 38,614.26 pounds sterling (GBP) for loss of earnings, which sum represented a rate of GBP 15,600 per annum over that period of twenty-nine months and twenty-two days. He also claimed that he had sustained non-pecuniary damage through the distress, prolonged uncertainty, and feelings of frustration arising out of this period of detention. For that head, he claimed the sum of GBP 74,260.27, calculated at a rate of GBP 30,000 per annum.

93. The Government pointed out that the calculations for damages were based on the erroneous date of 1 July 1996, whereas the date on which the applicant's sentence for the fraud conviction expired was in fact 1 July 1997. In any event, they argued that the applicant should be awarded no sum, or only a nominal sum for pecuniary damage. The claim for loss of earnings was entirely speculative and based on assertions, which, on the applicant's past history, could not be regarded as reliable. No sum, or only a nominal sum, should be paid for alleged non-pecuniary damage, given his criminal record. In their view, a finding of a violation of the Convention would constitute sufficient compensation.

94. The Court notes that it has found a violation of Article 5 § 1 in respect of the period of detention from 1 July 1997 to the applicant's release on 22 December 1998, a period of seventeen months and twenty-two days, as well as a violation of Article 5 § 4 due to the lack of review of the lawfulness of his continued detention during that period. The Court observes that the applicant has not given any explanation of the basis on which the sums claimed for loss of earnings have been calculated. In the absence of any adequate substantiation of these claims, the Court does not find it appropriate to award a specific sum for pecuniary damage. Nevertheless a claim for pecuniary loss cannot be completely discounted. In addition, the extension of his detention without a proper review procedure being available to him must have caused the applicant feelings of frustration, uncertainty and anxiety. Making a global assessment on an equitable basis, the Court awards the sum of 16,500 euros for pecuniary and non-pecuniary damage together.

B. Costs and expenses

95. The applicant claimed a total of GBP 17,865.10 for legal costs and expenses, inclusive of value-added tax.

96. The Government accepted that this figure was reasonable in the circumstances.

97. Having regard to the complexity of the case and the amounts claimed which appear reasonable in quantum in comparison with other cases, the Court awards the sum claimed by the applicant.

C. Default interest

98. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

2. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months:
      (i) EUR 16,500 (sixteen thousand five hundred euros) in respect of damage, to be converted into pounds sterling at the date of settlement;
      (ii) GBP 17,865.10 (seventeen thousand eight hundred and sixty-five pounds sterling ten pence) in respect of costs and expenses;
   (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 May 2002.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Rozakis;
(b) concurring opinion of Mr Costa;
(c) concurring opinion of Mr Zagrebelsky and Mrs Tulkens.

L.W.
P.J.M.

CONCURRING OPINION OF JUDGE ROZAKIS

I am in agreement with the conclusion reached by the Grand Chamber that in the circumstances of the case there has been a violation of, *inter alia*, Article 5 § 1 of the Convention. I also agree with the line followed by the Court which led to a finding of a violation of Article 5 § 1, as it is reflected in paragraphs 81 and 82 of the judgment. I would like, however, to make the following remark in so far as the Court's reasoning in paragraph 81 is concerned.

The Court rightly concludes, in this paragraph, that the continued detention of the applicant, after his sentence for the fraud offence expired on 1 July 1997, was not justified, because there was no causal connection between a possible commission of other, future, non-violent offences and the original sentence for murder in 1967. In reaching this conclusion the Court relied, mainly, on *Weeks v. the United Kingdom* (judgment of 2 March 1987, Series A no. 114), where the Court said that "the 'detention' must result from, 'follow and depend upon' or occur 'by virtue of' the conviction ... In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue".

The above excerpt from *Weeks*, which refers back to *Van Droogenbroeck v. Belgium* (judgment of 24 June 1982, Series A no. 50), provides a principled ground upon which the Court may build an identical jurisprudential approach on matters of lawfulness of the detention after conviction, but it leaves open, as the present judgment does, the essential question of the notion of causal connection between the original conviction and the continuation of the detention. In other, simple words, the question which has been left unanswered in the present case, in applying the lessons of *Weeks* and *Van Droogenbroeck*, is whether a causal link only exists when a person commits or presents a threat of committing a crime identical to the original one (in this case murder), or whether the requirement of the causal connection is satisfied with the commission (also, hence, the threat of future commission) of other offences bearing a resemblance with the original offence (in this case, for example, armed robbery, rape, etc.). I think that the answer to this question is that serious violent offences, other than murder, can satisfy the requirement of a causal connection, and hence, allow the Secretary of State to detain the person concerned. After all, this interpretation of the limit of "causal connection" transpires also from the word "sufficient" which appears in the above-cited excerpt from *Weeks*.

CONCURRING OPINION OF JUDGE COSTA

(Translation)

I have not hesitated to conclude that there has been a violation of Article 5 § 1 of the Convention. However, like my colleagues Mrs Tulkens and Mr Zagrebelsky, I have difficulty in fully agreeing with the reasoning set out in paragraph 82 of the judgment.

My opinion is similar to theirs, but differs slightly on account of the fact that the applicant never relied on Article 7 of the Convention, which requires that offences and punishments shall be strictly defined by law, and I do not see how his complaint can be reclassified under that provision, albeit not impossible of course.

However, there appears to me to be a hidden converse implication in paragraph 82 of the judgment. According to my colleagues of "the majority unanimous opinion", a decision-making power by the executive to detain the applicant on the basis of perceived fears of future non-violent criminal conduct (unrelated to his original murder conviction) does not accord with the spirit of the Convention, with its emphasis on the rule of law and protection from arbitrariness.

I agree of course. The fact that it was a Secretary of State who (contrary, moreover, to the Parole Board's recommendation) refused to release Mr Stafford in 1997 (convicted of murder in 1967 and released on licence in 1979 – see paragraphs 10 to 17 of the judgment) reinforces the finding of a violation; the applicant should have been released on 1 July 1997 after serving his sentence imposed in 1994 for conspiracy to forge documents. The Secretary of State decided to keep him in prison for reasons which have quite rightly been censured by our Court for want of a causal link between his initial crime and his supposed dangerousness thirty years later.

The same reasoning would apply, however, even if the impugned decision had been made, not by a member of the executive, but by a judge or a court. I do not doubt that the procedural guarantees would, in theory, have been greater (although the Secretary of State's decision was in this case challenged by the applicant and reviewed by a judge, and subsequently by the Court of Appeal and the House of Lords, in adversarial proceedings). However, in my view, the lack of a causal link would have sufficed to vitiate the decision to keep the applicant in detention from the standpoint of Article 5 § 1 of the Convention, and the rule of law might have been undermined even in that scenario. I therefore consider that paragraph 81 of the judgment was wrong not to envisage it.

CONCURRING OPINION OF JUDGES ZAGREBELSKY AND TULKENS

(Translation)

We have not hesitated to vote in favour of finding a violation of Article 5 § 1 of the Convention and we fully agree with the reasoning of the judgment. We merely wish to add a number of considerations.

The special nature of this case and the Court's concern to confine its examination to the question of compatibility with Article 5 § 1 have led to a conclusion at the end of the judgment that might be interpreted in a way which, if it were to be followed, we would find problematical. We refer to the last part of paragraph 82: "The Court cannot accept that a decision-making power by the executive to detain the applicant on the basis of perceived fears of future non-violent criminal conduct unrelated to his original murder conviction accords with the spirit of the Convention, with its emphasis on the rule of law and protection from arbitrariness." The assertion that the concentration of such power in the hands of the executive is unacceptable is self-evident, but should not imply, *a contrario*, that the same power entrusted to a judge would not give rise to a problem of compatibility with the Convention.

Such an interpretation would go beyond the scope of the decision, which – quite rightly – was intended to be confined to an examination of the case in point under Article 5 § 1, without addressing the issue from the standpoint of Article 7 § 1. If a domestic law conferring on the judiciary the powers exercised by the Secretary of State were to be held to satisfy the requirements of Article 5 § 1, it would leave open the question of its compatibility with Article 7 of the Convention.

The Court, agreeing with the Government's opinion on this point, found that the sentence here was of an indeterminate duration. However, the actual length of a mandatory life sentence is determined in accordance with the Secretary of State's policy of considering (a) whether the period served by the prisoner is adequate to satisfy the requirements of retribution and deterrence; (b) whether it is safe to release the prisoner; and (c) the public acceptability of early release. These are clearly vague criteria, having regard to the rule that punishments shall be strictly defined by law, since the penalty knows no minimum or maximum duration. Furthermore, the second criterion, and above all the third one, do not refer to the offence committed or to the personality of the offender at the time when it was committed, but only to the condition of the prisoner and his dangerousness during his detention. Besides, the third criterion takes absolutely no account of the prisoner's responsibility since it refers to the demands of public opinion. Admittedly, it has been acknowledged that the third criterion is never in actual fact a determining factor in the policy of the Secretary of State, but it

is nonetheless mentioned in the definition of the policy adopted in such cases.

We think that an indeterminate sentence, the duration of which is determined only in the course of its being served and on the basis of the above-mentioned discretionary criteria, could not be deemed to be laid down by law for the purposes of Article 7 § 1 of the Convention. The same reasoning would of course apply even if the power to fix the length of the sentence were entrusted to a judge. The position would be different if it were a question of stipulating the terms of enforcement of a sentence where the duration had already been determined by a court.

The necessity of providing a safeguard, which is satisfied by the rule requiring that offences and punishments shall be strictly defined by law, is a general one and also applies to judges. The requirements of precision, foreseeability and accessibility relating to the consequences of particular conduct cannot, in our opinion, be properly met by a sentencing structure such as the one here.