

Report into Determination of Life Sentences

Submitted to

Irish Human Rights Commission

By

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EXECUTIVE SUMMARY

This report evaluates the determination of life sentences in the light of the European Convention of Human Rights and the associated jurisprudence of the European Court of Human Rights. The principal conclusion is that current Irish law does not comply with European human rights law.

A mandatory sentence of life imprisonment is imposed on offenders convicted of murder or treason. In addition, life imprisonment is the maximum penalty available for other serious crimes such as manslaughter, rape and certain drug offences. In the case of the latter offences the life sentence is discretionary *i.e.* a court is entitled but not obliged to impose that sanction.

Irish courts have adopted proportionality as the cardinal principle underlying sentencing practice. Sentences must be proportionate to the culpability of the defendant. The courts have rejected the idea that a sentence may reflect preventative concerns: in particular, the Court of Criminal Appeal has ruled that it is not permissible to impose a discretionary life sentence on an offender on the grounds that he or she represents a continuing threat to the public. In practice, the only life sentences in Ireland are those that are imposed on offenders convicted of murder.

It is widely acknowledged that a prisoner sentenced to life imprisonment will not be incarcerated for the rest of his or her natural life. This observation is reinforced by official and quasi-official pronouncements by the Parole Board and the Minister for Justice, Equality and Law Reform. Under Irish law the Minister enjoys the power to order the temporary release of prisoners, including life sentence prisoners, under section 2(1) of the Criminal Justice Act 1960. The Minister acts on the advice of the Parole Board, a non-statutory body but, crucially, the Minister is not obliged to follow the Board's advice. The courts have consistently held that the question of release is an executive matter and that the Minister enjoys a "wide discretion" in this regard: the courts have indicated that they would overturn a refusal to order temporary release only on the limited grounds that the refusal was arbitrary, capricious or unjust. Nevertheless, the Supreme Court has suggested that it is constitutionally possible to enact legislation providing for the regular review of sentences by a parole board.

Article 5 of the European Convention of Human Rights guarantees the right to liberty and security. Under Article 5(4) a person enjoys the right to have the lawfulness of his or her detention reviewed by a court and, if the detention is found to be unlawful, to be released. The European Court of Human Rights has invoked Article 5 in cases of life sentence prisoners and a detailed picture has emerged. A life sentence prisoner is entitled to a frequent and speedy review of his or her case by a court or "court like" (*i.e.* quasi-judicial) body. Where a review is conducted by a "court like" entity, the body reviewing the detention must be invested with the power to determine the lawfulness of the prisoner's detention: it is not sufficient that it acts in an advisory capacity. The review body must be independent of the executive and must adopt appropriate procedures in its hearings. Whether a review is sufficiently speedy or frequent is considered in the light of the circumstances of the particular case. In determining the lawfulness of the prisoner's continued incarceration both domestic law and the Convention are relevant. Prolonged indefinite detention is only justifiable on grounds of risk and dangerousness and the review must be sufficiently broad to allow a determination as to whether the grounds for continued detention still operate.

It is contended in this report that Irish law is incompatible with the European Convention on Human Rights in a number of respects. Firstly, the question of release in Ireland is an executive matter whereas the European Convention of Human Rights guarantees a right of review by a court or “court like” body. Secondly, the Parole Board is not a “court like” body, as that concept is understood in European human rights law. The Parole Board’s role is merely advisory but the Convention demands that the review body has the power to determine cases. Thirdly, the Irish courts will quash an executive decision on release on the limited grounds that it is arbitrary, capricious or unreasonable; the Convention requires a broader form of review that is not satisfied by the domestic remedy of judicial review.

In conclusion, it is suggested that the enactment of legislation placing the Parole Board on a statutory footing and assigning to it the function of determining applications for temporary release would bring Irish law into harmony with the European Convention on Human Rights.

I. INTRODUCTION AND OVERVIEW

Unlike a sentence of imprisonment for a term of years a life sentence is by its very nature indeterminate.¹ Thus, while a person who is sentenced to a fixed term knows the date on which he can expect to be released the life sentence prisoner has no such guarantee.² In Ireland, the current position is that his or her release is a matter for the executive, in the form of the Minister for Justice, Equality and Law Reform, to decide. The Minister in turn is advised by the non-statutory Parole Board but, crucially, the Minister is not bound by that advice: the question of release of a prisoner is for the Minister alone.

This report evaluates the current legal position governing the release of life sentence prisoners in the light of human rights standards, in particular the European Convention on Human Rights (ECHR). The European Court of Human Rights (ECtHR) has in a series of rulings established the entitlement to a speedy and regular review of life sentences by an independent and impartial body. That Court has also identified the type of procedures that should be adopted. It will be contended in this report that current Irish law fails to accord with the standards required by the jurisprudence of the ECtHR and that reform is necessary.

As it happens the bulk of the European Court's case law emanates from the United Kingdom. An appreciation of the development of UK law and practice is necessary in order fully to appreciate the ECtHR decisions, and the opportunity is taken in this report briefly to outline developments in our neighbouring jurisdictions.³ It will be seen that the current law governing life sentences in England and Wales has in large part been shaped by judgments of the ECtHR and domestic decisions implementing ECHR standards into national law.

1. Life Sentences in Ireland.

Since the abolition of the death penalty in 1990⁴ a life sentence is the most severe sanction that the law imposes. By definition those sentenced to life imprisonment have been found guilty of the most serious offences in the criminal calendar and, at first sight, it might seem that their predicament should not elicit too much concern or sympathy. Given the gravity of their offending the law has selected a life sentence as the punishment due and this is matched by the popular sentiment that "life should mean life". On this view, the possibility of release is a privilege rather than a right and, correspondingly, it might be concluded that life prisoners who have not been released have little cause for complaint.

However, things are not as they seem. In fact, most life sentence prisoners will be released at some stage during their sentences, a practice that can be said to give rise to a corresponding

¹ Baker, E., "Dangerousness, Rights and Criminal Justice" (1993) 56 *Modern Law Review*, 528 at 533 writes: "The detention of life sentence prisoners is qualitatively distinct from that of the rest of the prison population in that the duration of the detention is indeterminate and consequently there is no date at which life sentence prisoners are entitled to be released. In this sense their position is more prejudicial than that of other prisoners." By the nineteenth century, life sentences replaced capital punishment as a mode of punishment for specified criminal offences.

² See *The People v Cahill* [1980] IR 8 at 12 where Henchy J observed, albeit in a somewhat different context: "[i]t is desirable that both the prison authorities and the prisoner should be in a position to plan for the date of release. The pre-release rehabilitative procedures necessary to erase the problems inherent in the return of the prisoner to society require to be set in motion and programmed with a particular date of release in view."

³ The United Kingdom consists of three jurisdictions, namely England and Wales, Scotland and Northern Ireland. However, since most of the ECtHR cases originated in England this report will concentrate on English developments and will note divergences in the law of the other two jurisdictions where relevant.

⁴ Criminal Justice Act 1990, s 1; also Art 15.5.2° of the Constitution (inserted by amendment in 2002).

expectation that such prisoners will qualify for release at some point. That expectation is reinforced by recent pronouncements by the Minister for Justice, Equality and Law Reform and by the Parole Board as to the minimum period that life sentence prisoners should serve before they might be considered for release:⁵ the corollary is that once an appropriate period has been served a prisoner would become eligible to have his case for release considered. Moreover, the legislative stipulation that prisoners convicted of treason and certain forms of murder should serve a minimum of 40 years⁶ is based on the assumption that a system of release operates in favour of life sentence prisoners.

In effect, the indeterminate nature of the life sentence is moderated by the exercise of the executive power to release life sentence prisoners. Once that possibility is conceded the regime governing release is crucial both in terms of fairness and penal policy. Broadly speaking, the thrust of human rights law is to the effect that the question of releasing a life sentence prisoner should not be arbitrary or unreasonable. To this end the decision to release should be taken by an independent and impartial body: and a member of the executive (*i.e.* a government minister) lacks that vital quality. Moreover, life sentence prisoners should be afforded speedy and regular reviews of their continued incarceration in order to determine whether the circumstances that justify their imprisonment continue to operate. The ECtHR has also indicated the grounds on which the continued detention of a life sentence prisoner may be justified. Influenced no doubt by English domestic law and the practice of setting tariffs on life sentences,⁷ the Court has accepted that imprisonment may be warranted either by punitive and deterrent considerations or by the need to protect the public.

In general, the appropriate sentence is imposed by the trial judge at the conclusion of the criminal proceedings. In Irish law the principle of proportionality governs the sentence that will be imposed:⁸ that principle insists that the relevant sentence is proportionate to the culpability of the defendant, taking into consideration both aggravating and mitigating factors associated with the defendant's criminal transgressions. For most criminal offences, trial judges enjoy a wide measure of discretion when imposing sentence in individual cases, subject only to the statutory maximum sentence that is prescribed for the particular offence.

Life sentences fall into two categories. For some criminal offences, most notably treason and murder, a mandatory life sentence is prescribed by law.⁹ In these circumstances, the trial judge's hands are tied: he or she enjoys no discretion in the matter but is legally compelled to

⁵ See the remarks of the Minister for Justice, Equality and Law Reform, 24 March 2006 (<http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ6N7FGB-en>; accessed on 7 Nov 2006): "... nobody [convicted of murder] should expect even in the absence of aggravating factors and where guilt has been admitted, remorse shown, good behaviour demonstrated during imprisonment and a capacity for rehabilitation proven that there is a likelihood that he or she will be set at liberty on licence at least before the expiry of 12 to 14 years ... I can tell you that, of those prisoners serving life sentences who have been released over the past ten years, the average sentence served in prison is approximately thirteen and a half years." See also Chairman's Foreword, The Parole Board, *Annual Report* (2005) p 3.

⁶ Criminal Justice Act 1990, s 4.

⁷ Discussed further in text at fnn 22-45.

⁸ Discussed further in text at fnn 123-126; see also Article 49(3) of the Charter of Fundamental Rights of the European Union: "[t]he severity of penalties must not be disproportionate to the criminal offence."

⁹ Criminal Justice Act 1990, s 2. Juveniles (*i.e.* persons aged under 17 years) who are convicted of murder might be sentenced either to a determinate term or to indefinite detention: see O'Malley, T., *Sentencing Law and Practice* (2nd ed, Dublin: Thomson Round Hall, 2006) pp 394-396; also Walsh, D., *Juvenile Justice* (Dublin: Thomson Round Hall, 2005) pp 155-157.

pass the life sentence that the law demands.¹⁰ The mandatory life sentence is an inflexible instrument, as it cannot take account of the culpability of the particular offender and, to this extent, it is difficult to reconcile with the principle of proportionality.¹¹ Thus, the mandatory life sentence is imposed for all murders ranging from the most heinous (*e.g.* serial killings) to those that some might feel merit less condemnation (mercy killing of a loved one is often cited in this regard). On the other hand, it may be contended that the mandatory life sentence amounts to a legislative assessment of the culpability associated with all murders and a corresponding judgment that it is not appropriate to draw a distinction between different types of murder. It might further be suggested that a mandatory life sentence is purely punitive (and perhaps deterrent) and eschews other sentencing goals such as rehabilitation, and significantly, incapacitation. In a word, the mandatory life sentence may be taken to reflect the sentiment that “murder is murder is murder” and deserves the severest punishment without mitigation. However, as noted above, these considerations are not borne out in practice. Most life sentence prisoners are released eventually and this, coupled with official or quasi-official pronouncements, creates an expectation that they will qualify for release.

The second category consists of discretionary life sentences where a maximum sentence of life imprisonment is provided for by law. Discretionary life sentences are prescribed for a number of serious offences including manslaughter, rape, rape under section 4,¹² aggravated sexual assault,¹³ committing a sexual act on a child less than 15 years of age,¹⁴ causing serious harm,¹⁵ syringe attacks,¹⁶ false imprisonment,¹⁷ robbery,¹⁸ aggravated burglary¹⁹ and drugs offences. In these cases the sentencing judge is entitled, but not obliged, to pass a life sentence – hence the discretionary element. Discretionary life sentences are more easily reconciled with the principle of proportionality since the particular sentence imposed can be calibrated to match the culpability of the offender and the circumstances of the offence.²⁰ In such cases the sentencing judge enjoys the wide measure of discretion that is allowed in sentencing generally.

As far as discretionary life sentences are concerned Irish courts have indicated that they are governed by the principle of proportionality and it has been ruled impermissible to include a

¹⁰ Schone, J.M., “The Hardest Case of All: Myra Hindley, Life Sentences, and the Rule of Law” (2000) 28 *International Journal of the Sociology of Law*, 273 at 274 writes: “This sentence is the only permissible in English law following a conviction for murder. After sentencing the trial judge makes a recommendation as to the period of years the prisoner should serve to satisfy the requirements of retribution and deterrence (the ‘tariff’). The Lord Chief Justice, England’s senior criminal law judge, then adds his or her comments and recommendation, if different from the trial judge.”

¹¹ See O’Malley, T., *Sentencing Law and Practice* (2nd ed, Dublin: Thomson Round Hall, 2006) p 536; also O’Malley, T., “Sentencing Murderers: the Case for Relocating Discretion” (1995) 5 *Irish Criminal Law Journal* 31. The Law Reform Commission, *Consultation Paper on Sentencing* (Dublin, 1993) p 311 queries whether the lack of judicial involvement that a mandatory sentence entails a breach of fair procedures in that it deprives the accused of a right to be heard in the matter of penalty. See also van Zyl Smit, D., “Life Imprisonment: Recent Issues in National and International Law” (2006) 29 *International Journal of Law and Psychiatry* 405.

¹² Criminal Law (Rape)(Amendment) Act 1990, s 4.

¹³ Criminal Law (Rape)(Amendment) Act 1990, s 3.

¹⁴ Criminal Law (Sexual Offences) Act 2006, s 2.

¹⁵ Non-fatal Offences against the Person Act 1997, s 4.

¹⁶ Non-fatal Offences against the Person Act 1997, s 6.

¹⁷ Non-fatal Offences against the Person Act 1997, s 15.

¹⁸ Criminal Justice (Theft and Fraud Offences) Act 2001, s 14.

¹⁹ Criminal Justice (Theft and Fraud Offences) Act 2001, s 13.

²⁰ See further O’Malley, T., *Sentencing Law and Practice* (2nd ed, Dublin: Thomson Round Hall, 2006) pp 114-115.

preventative element in such a sentence.²¹ It may be concluded from this proposition that the imposition by an Irish court of a discretionary life sentence is designed exclusively to reflect the offender's culpability and the gravity of the offence. The appellate courts have ruled that a sentencing judge may not include an element of incapacitation, designed to protect the public from a potentially dangerous offender, in such a sentence. In theory, at least, a life sentence in Ireland is predominantly punitive in nature.

2. Sentencing in England and Wales.

As is the case in Ireland, the life sentence in England and Wales does not necessarily result in incarceration for life.²² That said, the legal regime governing life sentences in England and Wales contrasts significantly with that which pertains in Ireland. In England and Wales sentencing judges are provided with statutory guidance in the imposition of discretionary life sentences and by the practice of setting a tariff, a minimum period of incarceration that must be served before a prisoner can be considered for parole.

Like the position in Ireland, English law traditionally confined the mandatory life sentence to murder.²³ However, in the 1990s English sentencing law moved from a position based principally on punitive considerations to one that incorporates a significant element of incapacitation. This development was based on concerns of public protection and was designed to ensure that potentially dangerous offenders were removed from circulation for an indefinite period. A series of enactments introduced extended sentences and "longer than commensurate" sentence.²⁴ The Crimes (Sentencing) Act 1997 [UK] introduced the concept of automatic life sentences, which were imposed for certain types of re-offending. Judicial discretion was largely circumscribed and the automatic life sentence was mandatory unless "exceptional circumstances", a phrase that was narrowly interpreted by English courts,²⁵ were found to be present. Nevertheless, concerns about the compatibility of automatic life sentences with the ECHR persisted²⁶ and, despite initially favourable judicial pronouncements,²⁷ the application of such sentences was curtailed by the decision in *R v Offen (No 2)* to the effect that an "unduly restrictive"²⁸ approach to exceptional circumstances would be incompatible with the Convention.

²¹ Discussed further in text at fnn 127-139.

²² The English position is explained by the *Royal Commission on Capital Punishment*, (Cmd.8932, 1953), at para. 614: "[p]ersons serving life imprisonment have died in prison before a definite term has been set to their sentences, but there is no case recorded in which it has been decided that a person shall be kept in penal servitude until he dies." See also *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 at 549-550, *per* Lord Mustill: "The sentence of life imprisonment is also unique in that the words, which the judge is required to pronounce, do not mean what they say. Whilst in a very small minority of cases the prisoner is in the event confined for the rest of his natural life, this is not the usual or intended effect of a sentence of life imprisonment..." Samuels, A., "In Denial of Murder: No Parole" (2003) 42(2) *Howard Journal of Criminal Justice*, 176 at 176: "[t]he concept of the 'whole life' sentence, never to be released, seems to be becoming increasingly difficult to justify, as refusal of parole must now be based only on continuing risk to the public." Nevertheless, a whole life tariff was upheld in *R v Secretary of State for the Home Department, ex parte Hindley* [2001] 1 AC 410.

²³ The House of Lords held the mandatory sentence for murder to be compatible with the ECHR: see *R v Lichniak*; *R v Pyrah* [2003] 1 AC 903. The ECtHR has held that the indeterminate sentence of detention during Her Majesty's pleasure was neither unlawful nor arbitrary and accordingly did not breach Article 5(1) ECHR: *V v United Kingdom* [1999] ECHR 24888/94.

²⁴ Criminal Justice Act 1991 [UK]; Powers of Criminal Courts (Sentencing) Act 2000 [UK].

²⁵ See *e.g.* *R v Kelly* [1999] 2 Cr App R (S) 176; *R v Offen (No 1)* [2000] 1 Cr App R (S) 565.

²⁶ See Thomas "Incorporating the European Convention on Human Rights: Its Impact on Sentencing" in *The Human Rights Act and the Criminal Justice and Regulatory Process* (Oxford: Hart Publishing, 1999) pp 82-83.

²⁷ See *R v Drew* [2003] 4 All ER 557.

²⁸ [2001] 2 All ER 154 at 171, *per* Lord Wolfe CJ.

Automatic life sentences were abandoned by Westminster in 2003²⁹ but discretionary life sentences may still be invoked to serve a preventative purpose. Such sentences will be imposed if the offender poses a serious risk to the public. The current position is summarised by Easton and Piper:³⁰

“To impose a discretionary life sentence the court must first find the crime to have been grave and the offender to have been suffering from mental instability. It must then assess the risk posed by the offender and decide that he will probably re-offend and be a danger to the public for some (unforeseeable) time.”

The imposition of discretionary life sentences has been confined to sexual and violent offences: in the main they are imposed for manslaughter and rape.³¹ The Criminal Justice Act 2003 [UK] currently governs the imposition of life sentences, imprisonment for public protection and extended sentences.³² As with the legislation that preceded it, the 2003 Act significantly curtails judicial discretion: once the statutory criteria are found to exist the sentencing judge must impose the relevant sentence.³³ Moreover, the 2003 Act involves a marked departure from the principle of proportionality, at least to the extent that that principle concentrates of the culpability of the particular offender.³⁴

Where a life sentence or a sentence of imprisonment for public protection is imposed the court must specify a minimum term to be served. The latter requirement is a continuation of the practice of specifying tariffs in the case of life sentences.³⁵ Lord Windlesham explained the development of the tariff in sentencing practice in the following terms:³⁶

²⁹ Criminal Justice Act 2003 [UK], s 303.

³⁰ *Sentencing and Punishment* (Oxford: Oxford University Press, 2005) p 141.

³¹ Smith, “Psychiatric Evidence and Discretionary Life Sentences” (1998) 9(1) *Journal of Forensic Psychiatry* 17 cited in Easton and Piper *op cit* p 142.

³² See Ashworth, A. and Player, E., “Criminal Justice Act 2003: The Sentencing Provisions” (2005) 68(5) *Modern Law Review* 822; Thomas, D., “The Criminal Justice Act 2003: Custodial Sentences” [2004] *Criminal Law Review* 702.

³³ Criminal Justice Act 2003 [UK], s 225(1)(b) provides that the court must impose such a sentence where it “is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by [the offender] of further specified offences.” See Ashworth, A., *Sentencing and Criminal Justice* (4th ed., Cambridge: Cambridge University Press, 2005) p 210.

³⁴ See von Hirsh, A. and Roberts, J.V., “Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 relating to Sentencing Purposes and the Role of Previous Convictions” [2004] *Criminal Law Review*, 639 at 652 conclude that: “By calling upon sentencers to take into account multiple (and potentially conflicting) sentencing aims, and by a giving progressively larger role to an offender’s prior convictions, the Criminal Justice Act could, to a significant degree, move sentencing in England and Wales away from a model based on the principle of proportionality. The Act attempts in one provision to preserve proportionate sentencing, while in another seemingly giving an enhanced role to a variety of other sentencing aims, and calling for progressively increasing punishments for recidivist offending. It is significant that this is occurring when, as noted earlier, several other common law jurisdictions have strengthened the role of proportionality in sentencing. How dramatic will the shift from proportionate sentencing be? Much will depend upon the character and quality of the sentencing guidelines developed by the Sentencing Guidelines Council. Whether the courts are provided with workable and fair norms for sentencing now depends to an important degree on the Council’s work.”

³⁵ The 2003 Act uses the expression “minimum term” rather than the “tariff” (this term was preferred by the Sentencing Advisory Panel): Sentencing Advisory Panel (Minimum Terms in Murder Cases: The Panel’s Advice to the Court of Appeal, 2002), para. 2.

³⁶ Lord Windlesham “Life Sentences: The Paradox of Indeterminacy” [1989] *Criminal Law Review*, 244 at 256 (internal references omitted). See also Padfield, N., “Tariffs in Murder Cases” [2002] *Criminal Law Review*, 192 at 193 who writes: “The word ‘tariff’ probably started to be used in Home Office ‘jargon’ in relation to life sentences, long before the courts started to use the term in a new sense, simply to mean the Home Office’s

“The emergence of a specific tariff for lifers is a peculiarly English development, never introduced as part of a logical scheme for deciding upon the amount of time to be spent in custody by offenders convicted of the most serious crimes. Born of uncertain parentage, it took on a life of its own in 1983, being almost unnoticed at first, but before long coming to dominate the whole complex administrative structure of life imprisonment. It should be no surprise that these procedures have attracted the attention both of the European Commission of Human Rights and the House of Lords. A Select Committee of the House of Lords which was set up in July 1988, is considering the scope and definition of the crime of murder, in Scotland as well as in England and Wales, and the disputed question whether imprisonment for life should remain the mandatory rather than the maximum penalty for murder.”

The then Home Secretary, Leon Brittan, first introduced the tariff period of a sentence in November 1983.³⁷ The tariff did not signify the total sentence imposed by the trial court but was the minimum period of imprisonment to be served by the prisoner that was considered necessary to meet the requirements of retribution and deterrence, before being considered by the Parole Board for release on licence. The tariff reflected the punitive³⁸ element of the life sentence with the remainder of that sentence being justified on grounds of public protection.

At first, different arrangements for the setting of the tariff operated for mandatory and discretionary life sentences. Where the latter were concerned the sentencing judge set the tariff. In *R v Mansell*, Lord Taylor CJ explained that:³⁹

“In theory, someone who was addicted to conduct which could cause serious harm to members of the public might need to be prevented from doing so for a very long time. In the ultimate case, an indeterminate sentence might be necessary where the harm was likely to be very serious and the predilection for indulging in such conduct looked likely to continue for an indefinite time. The sentencer in each individual case had to try to balance the need to protect the public on the one hand with the need to look at the totality of the sentence and see that it was not out of all proportion with the nature of the offending.”

However, in the case of mandatory life sentences the Home Secretary determined the tariff, having taken account of the recommendations of the trial judge and the Lord Chief Justice.⁴⁰

estimate of what a lifer should serve. Since the 19th century, both mandatory and discretionary life prisoners have normally been released at some stage, by executive discretion. There is conflicting evidence about the length of time that prisoners served in the late 19th century, but it would seem that most were detained for between 15 and 20 years. In the early years of the 20th century, most prisoners were released after serving between 10 and 20 years. In the succeeding decades it became the practice to treat lifers ‘as for 20 years’, *i.e.* releasing them after 15 years as they would have been had they been sentenced to 20 years. During the Second World War, the rate of remission for determinate sentence prisoners was increased from a quarter to a third. It became the practice to detain the prisoner ‘as for 12 years’, *i.e.* ‘for eight actual years in cases where there were no grounds for clemency’. At this time there was clearly some sort of ‘grading’ of offences” (citing *Home Office to the Royal Commission on Capital Punishment* (1949)).

³⁷ Shute, S., “Punishing Murders: Release Procedures and the ‘Tariff’, 1953-2004” [2004] *Criminal Law Review*, 873 at 881.

³⁸ In fact, English pronouncements on the tariff speak of its satisfying retributive and deterrent requirements, a position that is potentially self-contradictory: it assumes punishment and deterrence demand the same sentence whereas those features might well suggest very different periods of imprisonment.

³⁹ (1994) 15 Cr App R (S) 771 at 772. See also *R v Edward John Wilkinson and Others* (1983) 5 Cr App R (S) 105 at 109, where Lord Lane C.J. stated: “[I]t is sometimes impossible to say when that danger will subside, and therefore an indeterminate sentence is required, so that the prisoner’s progress may be monitored by those who have him under their supervision in prison, and so that he will be kept in custody only so long as public safety may be jeopardised by his being let loose at large.”

This practice, which was consolidated in section 29 of the Crimes (Sentences) Act 1997 [UK], raised concerns about whether it was appropriate that a member of the executive should determine what in effect is a sentence. As Padfield observed:⁴¹

“Where a tariff is appropriate, it should be a true tariff, imposed by the judiciary, which cannot be increased. Decisions about punishment should be taken by judges. Decisions about risk assessment and release should be taken by the Parole Board...that leaves no room for the Home Secretary...”

Nevertheless, the separate regime for mandatory life sentences was based on the theory that, unlike its discretionary counterpart, the mandatory life sentence was purely punitive. This distinction was to shape early ECtHR decisions on life sentences⁴² but eventually that court came to realise that there was no practical distinction between the two forms of life sentence.⁴³ In time English law came to share this view of the matter. In *R (Anderson) v Secretary of State for the Home Department*,⁴⁴ the House of Lords bowed to the weight of ECtHR jurisprudence and concluded that the fixing of the tariff was legally indistinguishable from imposing a sentence. It followed that Article 6 ECHR applied and that the tariff should be set by a court (“an independent and impartial tribunal”) rather than by the Home Secretary. Accordingly, the House of Lords declared section 29 of the Crimes (Sentences) Act 1997 [UK] to be incompatible with the ECHR. Following the decision in *Anderson*, the Criminal Justice Act 2003 [UK] transferred the function of setting the tariff, or “minimum term” as it is now known, to sentencing judges, a development that has the advantages of being transparent and being undertaken by the official who is most familiar with the offender’s circumstances.⁴⁵

⁴⁰ Schone, J.M., “The Hardest Case of All: Myra Hindley, Life Sentences, and the Rule of Law” (2000) 28 *International Journal of the Sociology of Law*, 273 at 274 writes: “This sentence is the only permissible in English law following a conviction for murder. After sentencing the trial judge makes a recommendation as to the period of years the prisoner should serve to satisfy the requirements of retribution and deterrence (the ‘tariff’). The Lord Chief Justice, England’s senior criminal law judge, then adds his or her comments and recommendation, if different from the trial judge.”

⁴¹ Padfield, N., “Fixing the Tariff, and the Length of Her Majesty’s Pleasure” (1997) 56 *Cambridge Law Journal*, 477 at 480.

⁴² *Wynne v United Kingdom* (1995) 19 EHRR 333.

⁴³ *Stafford v United Kingdom* (2002) 35 EHRR 32. In *V v United Kingdom* (1999) 30 EHRR 121 the ECtHR ruled that the setting of the tariff for children who are detained at Her Majesty’s pleasure (*i.e.* indefinite detention) should be undertaken by judges, not by the Home Secretary. The House of Lords had earlier held the fixed tariff imposed in applicant’s case to be unlawful on the different ground that the Home Secretary was obliged to keep the minimum term under review: *R v Secretary of State for the Home Department, ex parte Venables* [1998] AC 407. The pre-*Stafford* position in England is analysed in Padfield, N., *Beyond the Tariff: Human Rights and the Release of Life Sentence Prisoners* (Cullompton: Willan Publishing, 2002),

⁴⁴ [2003] AC 1.

⁴⁵ Thomas, D., “The Criminal Justice Act 2003: Custodial Sentences” [2004] *Criminal Law Review*, 702 at 703 observes: “[t]hese are welcome developments. The new system places the decision on the minimum term exactly where it belongs--in open court and within the judicial process. In future, the minimum term ordered to be served by any offender will be public knowledge. It will be fixed by a judge who has seen the offender and who is familiar with the details of the case, who has heard appropriate mitigation on his behalf, and whose decision will be fully articulated.”

II. ECHR REQUIREMENTS

The European Convention on Human Rights⁴⁶ was designed to protect human rights and fundamental freedoms. The Convention established the European Court of Human Rights and residents of signatory states who claim that a state party or an emanation of a state has infringed their rights under the ECHR, may petition the ECtHR for redress.

Since the enactment of the European Convention on Human Rights Act 2003, the Convention enjoys an enhanced profile in Irish domestic law.⁴⁷ The jurisprudence of the European Court of Human Rights has a greater purchase in domestic proceedings: Irish courts are now required to take judicial notice of declarations, decisions, advisory opinions and judgments of the European Court of Human Rights and to take “due account” of the principles established by those instruments.⁴⁸ The courts are enjoined, where possible, to interpret national law in a manner that is compatible with the ECHR⁴⁹ and the superior courts are authorised to issue a declaration of incompatibility where a national law falls foul of the ECHR.⁵⁰

1. *The Relevant Provisions.*

A number of provisions of the ECHR have a bearing on the issue of determining life sentences. Article 5 ECHR, entitled “right to liberty and security”, *inter alia* reads:

“(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...”

Article 5(1)(a) permits the lawful detention of prisoners sentenced in accordance with the domestic law of a state. However, the continued detention of a prisoner may constitute a violation of Article 5(1)(a) if the proper procedures for the periodic review of that detention of the prisoner have not been put in place.

Review of the continued indeterminate detention of prisoners is governed by Article 5(4), which reads:

“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.”

⁴⁶ The *European Convention on Human Rights and Fundamental Freedoms*, Rome, November 4, 1950.

⁴⁷ See remarks of Kearns J in *Dublin City Council v Fennell* [2005] 1 IR 604 at 608: “The 2003 Act... does not purport to incorporate the Convention directly into domestic law, but rather imposes an obligation that, when interpreting or applying any statutory provision or rule of law, a court shall, insofar as is possible, and subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions. The 2003 Act also provides that every organ of the State shall, subject to any statutory provision or rule of law, perform its functions in a manner compatible with the State's obligations under the Convention provisions. A party may also seek from the High or Supreme Court a declaration that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions, and where such a declaration is made certain consequences as detailed in the Act then follow.”

⁴⁸ European Convention on Human Rights Act 2003, s 4.

⁴⁹ European Convention on Human Rights Act 2003, s 2.

⁵⁰ European Convention on Human Rights Act 2003, s 5.

In *de Wilde and others v Belgium*,⁵¹ the ECtHR observed that the purpose of this provision is to ensure that an individual has the right to have the lawfulness of his or her detention tested by a court: in that case review by a magistrate, acting in an administrative capacity, lacked the necessary judicial character. The Court further explained matters in *Herczegfalvy v Austria*.⁵²

“According to the Court’s case-law on the scope of Article 5(1) and (4) of the Convention, in order to satisfy the requirements of the Convention such a review must comply with both the substantive and procedural rules of the national legislation and moreover be conducted in conformity with the aim of Article 5, namely to protect the individual against arbitrariness. The latter condition implies not only that the competent courts must decide ‘speedily’...but also that their decisions must follow at reasonable intervals.”

Article 6(1) ECHR *inter alia* stipulates that:

“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.”

This provision guarantees the right to a fair trial, which includes the sentencing process. In *Eckle v Germany*,⁵³ the ECtHR explained that:

“As regards the end of the ‘time’, in criminal matters the period governed by Article 6(1) covers the whole of the proceedings in issue, including appeal proceedings....”⁵⁴

The Court went on to state that:

“In the event of conviction, there is no ‘determination . . . of any criminal charge’, within the meaning of Article 6(1), as long as the sentence is not definitively fixed.”⁵⁵

In *V v United Kingdom*,⁵⁶ the ECtHR held that the fixing of the tariff is part of the sentencing process and must be undertaken by a court. Accordingly the fixing of the tariff by the Home Secretary for juveniles convicted of murder infringed Article 6(1) as the Home Secretary, who is an emanation of the executive, was not ‘an independent and impartial tribunal.’ In this respect the ECtHR in effect departed from its earlier decisions which accepted the propriety of the Home Secretary’s fixing the tariff in murder cases.⁵⁷ Subsequently, in *Stafford v United Kingdom*,⁵⁸ the Court ruled that the setting of the tariff should be the same for all life prisoners and should be undertaken by courts, not by the executive.

Article 7(1) prohibits retrospective criminalisation and punishment in the following terms:

⁵¹ (1979) 1 EHRR 373.

⁵² (1993) 15 EHRR 437 at para.75 (internal reference omitted).

⁵³ (1983) 5 EHRR 1.

⁵⁴ (1983) 5 E.HRR 1 at para.76.

⁵⁵ (1983) 5 EHRR 1 at para.77.

⁵⁶ (2000) 30 E.H.R.R. 121.

⁵⁷ *Wynne v United Kingdom* (1995) 19 EHRR 333; *Thynne, Wilson and Gunnell v. United Kingdom* (1991) 13 EHRR 666.

⁵⁸ (2002) 35 EHRR 32.

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

Article 3 ECHR which stipulates that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment” might also be relevant. In general, sentencing matters are considered to fall outside the scope of the ECHR but the ECtHR has indicated that an arbitrary or disproportionately lengthy sentence might attract Convention censure.⁵⁹ In *V v United Kingdom*,⁶⁰ the Court opined that an unjustified and persistent failure to set a tariff, which leaves the detainee in a state of uncertainty over many years, might amount to a breach of Article 3.

2. Review of Life Sentences: the Case Law.

The ECtHR has been presented with a growing number of cases concerning the determination of life sentences in recent years. This has provided the Court with the opportunity to spell out in some detail the requirements of the ECHR on the matter. Accordingly it is incumbent on signatory states to align their procedures governing the conditional release on licence of life sentence prisoners with rulings of the Strasbourg Court.

In general, European human rights law accepts that the detention of a prisoner following his or her being sentenced by a court of competent jurisdiction is lawful. However, the ECtHR has acknowledged that in some circumstances a prisoner may invoke the provisions of Article 5 to review his or her sentence.⁶¹ In the context of the review of life sentences the Court has clearly established that the fact that a person has been convicted does not preclude future review of his or her continued incarceration: in this regard the prisoner may invoke the review provisions of Article 5(4).

Two key themes can be disinterred from the ECtHR’s jurisprudence. First, the underlying purpose of Article 5 is to protect individuals from being deprived of their liberty arbitrarily: in the context of life sentences prisoners a decision to continue their detention should not be taken arbitrarily. The required protection is achieved through the review mechanism prescribed by Article 5(4). Second, it may be inferred from the jurisprudence that prolonged detention can be justified on the limited grounds of risk and dangerousness. The second theme reflects the English tariff system⁶² under which a life sentence is in effect divided into punitive and preventative components. The thrust of the case law is to the effect that once the punitive element of the life sentence (as reflected in the tariff) has been served the continued detention of the prisoner can only be justified on the basis that he or she represents a continuing danger to the public, a matter that must be open to periodic review. Moreover, there must be a causal connection between the offence for which the prisoner has been convicted and the potential for re-offending.⁶³ Although it has not been required to rule on the matter directly, it is significant that the Court has indicated that public acceptability is not a relevant criterion on which to base a decision relating to a prisoner’s release.⁶⁴

⁵⁹ *Sawoniuk v United Kingdom* 63716/00 ECHR (29 May 2001).

⁶⁰ (2000) 30 EHRR 121.

⁶¹ See e.g. *Iribarne Perez v France* (1996) 22 EHRR 153.

⁶² Outlined above in text at fnn 35-45.

⁶³ *van Droogenbroeck v Belgium* (1982) 4 EHRR 443.

⁶⁴ *Stafford v United Kingdom* (2002) 35 EHRR 32 at para. 80.

The principle that the lawfulness of a life sentence prisoner's continued detention must be periodically reviewed once the punitive element of the sentence has been served and the corresponding entitlement to challenge that detention in accordance with Article 5(4) was established in the late 1980s. In *Weeks v United Kingdom*⁶⁵ the applicant, who had been convicted of robbery, received a discretionary life imprisonment on the grounds that he was a dangerous offender. He was subsequently released on licence but the licence was revoked when he committed a further offence. The court accepted that the freedom of a prisoner released on licence was "more precarious" than that of a normal citizen. However, the restrictions on the applicant as an "on licence" prisoner did not mean that he was not at liberty within the meaning of Article 5. Accordingly, he was entitled to invoke that provision. Nevertheless, the Court concluded that the decision to re-detain the applicant in this case was neither arbitrary nor unreasonable since it was based on his unstable and aggressive behaviour and it followed that there was no violation of Article 5(1). However, the Court went on to hold that once he was returned to custody the applicant was entitled to the review specified in Article 5(4) and in the circumstances it concluded that the procedures in the instant case were deficient.⁶⁶

European human rights law governing the determination of life sentences has evolved over the past decade or so. At first the ECtHR drew a distinction between discretionary life sentences and mandatory life sentences, which coincided with the theory underpinning English law that the latter were exclusively punitive whereas the former incorporated a preventative element.⁶⁷ Hence in *Wynne v United Kingdom*⁶⁸ the court held that a periodic review of a mandatory life sentence was not required: in these circumstances the review requirements of Article 5(4) were sufficiently complied with by both the trial court and appellate courts. The facts of this case merit consideration. The applicant, who had been convicted of murder and sentenced to a mandatory life sentence, was released on licence. Some time later he killed a woman. Ultimately, he pleaded guilty to manslaughter on the grounds of diminished responsibility and received a discretionary life sentence. His licence was also revoked so he continued to serve the life sentence for murder. Arguing that he was in reality serving the discretionary life sentence, the applicant contended that he was entitled to have that sentence reviewed. The court dismissed that claim concluding that his conviction for manslaughter did not alter the validity of his original sentence for murder or the revocation of his licence. He continued to serve the mandatory life sentence and the discretionary life sentence for manslaughter merely added a supplemental basis for his detention. The court reasoned that a review of the manslaughter sentence would be "devoid of purpose"⁶⁹ since the applicant would continue to be held under the mandatory life sentence.

In *Thynne, Wilson and Gunnell v United Kingdom*,⁷⁰ the applicants, convicted sex offenders, were serving discretionary life sentences but their continued post-tariff detention had not been periodically reviewed. They claimed that this state of affairs violated Article 5(4) ECHR due to the absence of a review procedure to determine the lawfulness of the continued detention of the prisoners after the tariff period of the sentence had been served. This was not a challenge to the lawfulness of the imposition of the original sentence but rather against their

⁶⁵ (1988) 10 EHRR 293.

⁶⁶ See further in text at fn 95.

⁶⁷ Discussed above in text at fnn 39-45.

⁶⁸ (1995) 19 EHRR 333.

⁶⁹ (1995) 19 EHRR 333 at paras. 37-38.

⁷⁰ (1991) 13 EHRR 666.

continued indeterminate post-tariff detention. The ECtHR held that since the circumstances that gave rise to the applicants' initial detention may have since changed they were entitled to periodic reviews of their continued indeterminate detention after the punitive element of their respective life sentences had been served. The ECtHR explained that:⁷¹

“...the factors of mental instability and dangerousness are susceptible to change over the passage of time and new issues of lawfulness may thus arise in the course of detention. It follows that at that phase in the execution of their sentences, the applicants were entitled under Article 5 para.4 (art. 5-4) to take proceedings to have the lawfulness of their continued detention decided by a court at reasonable intervals and to have the lawfulness of any re-detention determined by a court.”

The ECtHR eventually came to realise that the distinction between mandatory and discretionary life sentences lacked substance. The initial change in tack occurred in several cases dealing with juvenile offenders who had been convicted of murder. The mandatory sentence for such offenders was detention during Her Majesty's Pleasure – in effect, they were sentenced to indefinite detention with their release being determined by the Home Secretary. In *Hussain v United Kingdom*,⁷² the applicant prisoner had been detained during Her Majesty's Pleasure for a murder he committed when he was a juvenile. The ECtHR held that under Article 5(4) ECHR prisoners detained during Her Majesty's Pleasure were entitled to have the lawfulness of their continued indeterminate detention considered by a court or quasi-judicial body. Subsequently, in *V and T v United Kingdom*,⁷³ the ECtHR effectively removed the Home Secretary's power to decide on the release date and, therefore, to set the tariff period of those detained at Her Majesty's pleasure. The ECtHR held that an “independent and impartial tribunal”, not the Home Secretary (an emanation of the executive), should set the tariff for juveniles convicted of murder. The setting of the tariff by the Home Secretary amounted to an infringement of the right to a fair trial under Article 6(1) ECHR.

Eventually, in *Stafford v United Kingdom*,⁷⁴ a uniform regime was adopted for mandatory and discretionary life sentences and for juvenile murderers. The applicant was a convicted murderer whose tariff period had been set by the Home Secretary in accordance with English domestic practice at the time. He had been released on licence but that was revoked on his later conviction for fraud. On completion of his fraud sentence the Parole Board recommended that the applicant be released but the Home Secretary rejected that advice on the grounds that there was a risk that the applicant would engage in further fraud offences. The ECtHR ruled that the applicant's rights under the provisions of Article 5(1) and (4) ECHR had been violated in that the setting of the tariff was a sentencing exercise for judges, not members of the executive. The ECtHR also held that the Home Secretary's power of veto over a recommendation by the Parole Board to release a post-tariff life prisoner contravened Articles 5(1) and 5(4) ECHR.

In *Stafford*, the ECtHR was particularly influenced by the fact that at this stage it had become widely accepted that the view that a mandatory life sentence amounts to punishment for life

⁷¹ (1991) 13 EHRR 666, at para. 76.

⁷² (1996) 22 EHRR 1.

⁷³ (2000) 30 EHRR 121.

⁷⁴ (2002) 35 EHRR 32.

no longer corresponds with practical reality.⁷⁵ The UK government had sought to maintain the distinction between mandatory and discretionary life sentences by arguing that, unlike the latter, the former was not based on individual characteristics of dangerousness: accordingly, the argument ran, there was no issue of changing circumstances that might undermine the basis for continued detention. The Court rejected that argument, concluding that mandatory life sentences contain a punitive element that is reflected in the tariff. Once that period had been served, the Court reasoned, the grounds for continued incarceration, “as in discretionary life and juvenile murder cases must be considerations of risk and dangerousness.”⁷⁶ Since those elements are liable to change over time, as in the case of other life sentence prisoners, the continued lawfulness of a prisoner’s detention cannot be assumed. Departing from its judgment in *Wynne v United Kingdom* the ECtHR concluded that “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 Art 5(1) of the Convention.”⁷⁷

Following the decision in *Stafford* it is settled that, irrespective of the form the indeterminate life sentence takes, once the punitive element of the sentence has expired Article 5(4) demands that a prisoner may have lawfulness of his continued indeterminate detention reviewed by a “court.”⁷⁸ The concept of lawfulness embraces both domestic and Convention law: it requires the detention to conform with domestic substantive and procedural rules and to be “in keeping with the purposes of Art 5, namely to protect the individual from arbitrariness.”⁷⁹ In the context of life sentences continued detention after the expiry of the punitive element has been served is justifiable only on grounds of risk and dangerousness. Factors that the Court has indicated that are relevant in assessing whether the continued detention is lawful include mental instability,⁸⁰ unstable, disturbed and aggressive behaviour,⁸¹ youth and level of maturity⁸² and personality factors such as anger, alcoholism and ability to maintain relationships.⁸³ Given that these factors are liable to change over time a life sentence prisoner is entitled to frequent review of his or her sentence.⁸⁴

It is also clear that the notion of lawful imprisonment insists that there is a sufficient connection between the prisoner’s continued detention and the offence for which he or she was convicted. Thus, in *Stafford v United Kingdom*,⁸⁵ the Court condemned the imprisonment of a convicted murderer where his continued detention was based on a fear that he would commit fraud offences in the future. On the other hand, the circumstances of the original offence might be relevant to the issue of connection: in *Waite v United Kingdom*,⁸⁶ the Court held that there was a sufficient connection where the accused, who killed his grandmother

⁷⁵ In both Scotland and Northern Ireland the law had been altered to assign the function of setting the tariff to the trial judge: Convention Rights (Compliance) (Scotland) Act 2001; the Life Sentences (Northern Ireland) Order 2001, S.I. No. 2564 of 2001.

⁷⁶ (2002) 35 EHRR 32 at para. 80.

⁷⁷ (2002) 35 EHRR 32 at para. 87.

⁷⁸ What amounts to a “court” is considered below in text at fnn 94-100.

⁷⁹ *Stafford v United Kingdom* (2002) 35 EHRR 32 at para. 63.

⁸⁰ *Thynne, Wilson and Gunnell v United Kingdom* (1991) 13 EHRR 666; *Stafford v United Kingdom* (2002) 35 EHRR 32.

⁸¹ *Weeks v United Kingdom* (1988) 10 EHRR 293.

⁸² *Waite v United Kingdom* [2002] ECHR 53236/99.

⁸³ *Oldham v United Kingdom* [2000] ECHR 36273/97.

⁸⁴ Discussed further in text at fnn 87-93.

⁸⁵ (2002) 35 EHRR 32.

⁸⁶ [2002] ECHR 53236/99.

while addicted to glue-sniffing has his licence revoked following his arrest for possession of drugs.

3. Frequency of Review.

While Article 5(4) requires a speedy decision it allows a measure of procedural flexibility. The ECtHR has acknowledged that the review period may vary according to the individual circumstances of the prisoner. In *Oldham v United Kingdom*,⁸⁷ the ECtHR held that an interval of two years between assessments did not fulfil the requirements of Article 5(4). The applicant attended a number of prescribed courses that were designed to deal with his problems of anger, alcoholism and relationships. He completed these courses within eight months of his earlier review and a further 16 months passed before the next review. The UK government contended that the delay was necessary to monitor the applicant's progress but did not explain the nature or duration of that process. The Court concluded that:⁸⁸

“...in the circumstances of this case that the two year delay between reviews was not reasonable and that the question of whether his continued detention was lawful was not decided ‘speedily’ within the meaning of Article 5(4) of the Convention. There has, accordingly, been a violation of this provision.”

The ECtHR also considered the issue of frequency in *Blackstock v United Kingdom*,⁸⁹ which involved a gap of 22 months between reviews. The applicant received a discretionary life sentence for wounding a police officer. On the expiry of his minimum term (*i.e.* tariff) his detention was reviewed by the Parole Board who in June 1998 recommended that he be transferred to an open prison or, if that recommendation was not accepted by the Home Secretary, a further review in 12 months.⁹⁰ The Home Secretary rejected the recommendation and in September 1998 ruled that the applicant be transferred to a Category C prison.⁹¹ The appropriate transfer instructions were issued the following month but the applicant objected to the proposed prison to which he was to be sent, indicating his preference to be sent to one of several other named prisons. In December 1998 it was decided to transfer him to one of those prisons but that did not happen until April 1999 when a place became available. His next review took place in April 2000 with the Parole Board again recommending his transfer to open conditions. The Home Secretary accepted the latter recommendation.

⁸⁷ [2000] ECHR 36273/97.

⁸⁸ [2000] ECHR 36273/97, at para.37.

⁸⁹ [2005] ECHR 59512/00.

⁹⁰ At the time the Crimes (Sentences) Act 1997 [UK], s 28 invested the Parole Board with the power to order the release of discretionary life sentence prisoners once the tariff period had expired; where the Board chose not to order release it could make recommendations to the Home Secretary concerning the prisoner's future progress.

⁹¹ English prisons are placed in four categories (A to D), with Category A attracting the highest security classification while Category D enjoys “open” status. The applicant had been incarcerated in a Category B prison at the time of his initial application to the Parole Board: the Home Secretary took the view that, given the lengthy period he spent in maximum security conditions and segregation units coupled with the need for further offences-related work, the applicant should be transferred to a Category C facility prior to being held in open conditions. Lord Windlesham, “Life Sentences: The Paradox of Indeterminacy” [1989] *Criminal Law Review*, 244 at 254 (internal reference omitted) writes: “Throughout their sentence all life prisoners are subject to careful assessment by trained staff enabling them to follow a career plan moving from a lifer main centre (a maximum security prison such as Wormwood Scrubs, Wakefield or Gartree) to prisons of progressively lower security where there are opportunities for greater trust and responsibility. Towards the end of his time in custody a life prisoner will typically move towards release on licence via an open prison and a period of several months in a pre-release employment scheme hostel. In this way, targets can be set which fall outside the artificial confines of a closed institution enabling an assessment to be made as to how the prisoner is likely to react when eventually he attains a state of conditional liberty.”

In ruling in favour of the applicant, the Court's starting point was that the frequency of reviews required by Article 5(4) ECHR must be determined in the light of the circumstances of each case and it refused to lay down a firm rule stipulating a maximum period between reviews. Instead, the Court recognised that a flexible approach is to be preferred since the personal circumstances of prisoners will differ markedly. Thus the Court had ruled in some earlier cases that gaps of between 15 months and two years were unreasonable⁹² while accepting a two-year lapse in another case.⁹³ In the instant case the UK government had sought to justify the delay on a combination of the delay (almost six months) in finding a place in the prison nominated by the applicant and a desire that he should spend 12 months in that facility before being considered for transfer to open conditions. The Court was not persuaded by that argument: no formal courses had been prescribed for the applicant when he was transferred and there was no evidence that, in the light of the administrative delays, consideration had been given to whether it was necessary to insist on the usual 12 months in Category C before reviewing his case.

4. What Constitutes a 'Court'?

The ECtHR has reflected on what constitutes a "court" for the purposes of Article 5(4). In *Thynne, Wilson and Gunnell v United Kingdom*,⁹⁴ the ECtHR ruled that a "court-like body" should determine the release date of life sentence prisoners. For these purposes a "court" does not *per se* have to be a permanent court in the legal system of a signatory state. In *Weeks v United Kingdom*, the ECtHR explained that:⁹⁵

"The 'court' referred to in Article 5 para.4 (art. 5-4) does not necessarily have to be a court of law of the classic kind integrated within the standard judicial machinery of the country....The term 'court' serves to denote 'bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case...but also the guarantees' – 'appropriate to the kind of deprivation of liberty in question' – 'of a judicial procedure', the forms of which may vary from one domain to another....In addition, as the text of Article 5 para.4 (art. 5-4) makes clear, the body in question must not have merely advisory functions but must have the competence to 'decide the 'lawfulness' of the detention and to order release if the detention is unlawful. There is thus nothing to preclude a specialised body such as the Parole Board being considered as a 'court' within the meaning of Article 5 para.4 (art. 5-4), provided it fulfils the foregoing conditions...."

Thus, a quasi-judicial body, such as a parole board, is a "court" within the meaning of Article 5(4) ECHR provided that its deliberations are determinative rather than advisory. It is also clear that the body charged with deciding on whether the life prisoner should be released must be independent of executive and of the parties involved.

In *Neumeister v Austria*, the ECtHR addressed the issue of independence of the Court from the procedures adopted in the following terms:⁹⁶

⁹² Citing *Herczegfalvy v Austria* (1993) 15 EHRR 437; *Oldham v United Kingdom* [2000] ECHR 36273/97; *Hirst v United Kingdom* [2001] ECHR 40787/98.

⁹³ Citing *Dancy v United Kingdom* no 55768/00, 21 March 2002, where the applicant having benefited from previous 12-month reviews failed to make progress and considerable offence-related work had been identified as being necessary.

⁹⁴ (1990) 13 EHRR 666.

⁹⁵ (1988) 10 EHRR 293 at para. 61.

⁹⁶ (1979) 1 EHRR 91 at para. 24.

“Nor is it possible to justify application of the principle of ‘equality of arms’ to proceedings against detention on remand by invoking Article 5(4) which, while requiring that such proceedings shall be allowed, stipulates that they should be taken before a ‘court’. This term implies only that the authority called upon to decide thereon must possess a judicial character, that is to say, be independent both of the executive and of the parties to the case; it in no way relates to the procedure to be followed.”

The central principle set out in *Neumeister* was amplified in *de Wilde and others v Belgium*,⁹⁷ where the ECtHR insisted that the procedures adopted must be judicial in nature and must provide “the individual concerned [with] guarantees appropriate to the kind of deprivation of liberty in question.”⁹⁸

The decision in *Campbell and Fell v United Kingdom*,⁹⁹ which concerned a prison disciplinary hearing conducted by the Board of Visitors, is instructive. The Court outlined the general approach:¹⁰⁰

“In determining whether a body can be considered to be ‘independent’ - notably of the executive and of the parties to the case ... the Court has had regard to the manner of appointment of its members and the duration of their term of office ... the existence of guarantees against outside pressures ... and the question whether the body presents an appearance of independence”

The applicants challenged the authority of the Board on a number of grounds: (i) that the fact that members were appointed by the Home Secretary deprived the Board of the independence required of a quasi-judicial body; (ii) that the issuing by Home Office of guidelines to the Board “in the performance of their functions” compromised its independence; (iii) that the term of office served by Board members (three years or such lesser period stipulated by the Home Secretary) was problematic; and (iv) that the fact that there was no stipulation governing the removal of Board members or a guarantee against their being removed undermined their independence.

The Court rejected each of the foregoing arguments. As to the first, the Court stated that the fact of appointment by the Home Secretary does not in itself compromise the independence of the Board: the Court equated the position of Board members with that of judges who are nominated to office by the executive. The central point was whether members of the Board were protected against external pressures. In this regard the Court, addressing the second point canvassed by the applicants, found that the Home Office guidelines did not amount to instructions as to how the Board would adjudicate their judicial function.

As to the “admittedly relatively short” term of office the Court accepted that there were considerable reasons for the short period of appointment: members were not remunerated and it was difficult to find willing individuals to serve on the Board for longer periods. On the question of removal of Board members the Court noted that a guarantee against being removed is generally a key feature of judges’ independence; however, the Court took the

⁹⁷ (1979) 1 EHRR 373.

⁹⁸ (1979) 1 EHRR 373 at para.76.

⁹⁹ (1985) 7 EHRR 165.

¹⁰⁰ (1985) 7 EHRR 165 at para. 78

view that the lack of a formal guarantee against removal did not in itself deny the independence of the Board.

A final concern raised in *Campbell and Fell* related to the dual role of the Board, which acts in both adjudicatory and supervisory capacities. In its supervisory guise the Board provided independent oversight of the administration of the prison, a function which of its nature would include frequent contact with prison officials. When acting in an adjudicative capacity the Board would be required to determine, *inter alia*, disciplinary complaints brought against prisoners by the same prison officials. In short, it was contended that the Board's close association with the prison administration compromised its independence when it came to resolving disputes in that same institution. The ECtHR acknowledged the importance of justice being seen to be done but concluded that the fact that prisoners believed the Board to be partial did not in itself establish a lack of independence on its part. The court observed that it would reach a different conclusion "if prisoners were reasonably entitled, on account of the frequent contacts between a Board and the authorities, to think that the former was dependent on the latter."

5. Procedures and the Scope of Review.

It is essential that the body reviewing a prisoner's detention adopts procedures that are judicial in nature. In *E v Norway*, the ECtHR outlined the general position under this provision in the following terms:¹⁰¹

"Article 5(4) does not guarantee a right to judicial review of such a scope as to empower the court on all aspects of the case, including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the 'lawful' detention of a person according to Article 5(1)."

Nevertheless, the ECtHR has held that domestic judicial review proceedings do not satisfy Article 5(4) ECHR on the ground that that procedure is not sufficiently wide to determine whether the prisoner's continued imprisonment was justified by the objectives of the indeterminate sentence.¹⁰² The Court has also taken the opportunity to provide some procedural detail. It has held that the review proceedings must be adversarial¹⁰³ with the prisoner being afforded an opportunity to attend an oral hearing the respects the rights to be legally represented and to call and question witnesses.¹⁰⁴ The Court has also ruled that a failure to disclose adverse material that the review body had in its possession did not satisfy the requirements of Article 5(4) ECHR.

6. The ECHR Position Summarised.

The cardinal principles of ECHR law relating to the determination of life sentences can be summarised thus:

- a life sentence is not *per se* a breach of Convention rights;

¹⁰¹ (1994) 17 EHRR 30 at para.50.

¹⁰² *Weeks v United Kingdom* (1988) 10 EHRR 293; see also *Singh v United Kingdom* [1996] EHRC 23389/94.

¹⁰³ *Hussein v United Kingdom* (1996) 22 EHRR 1; *Singh v United Kingdom* [1996] EHRC 23389/94.

¹⁰⁴ *Hussein v United Kingdom* (1996) 22 EHRR 1; *Singh v United Kingdom* [1996] EHRC 23389/94; *Stafford v United Kingdom* [2002] ECHR 46295/99; *Waite v United Kingdom* [2002] ECHR 53236/99.

- once the punitive element of the sentence has been served a life sentence prisoner is entitled to a speedy and frequent review by a court or quasi-judicial body of the lawfulness of his continued detention;
- whether a review is sufficiently speedy or frequent is to be determined in the light of the circumstances of the particular case;
- the concept of “lawfulness” embraces both domestic law and ECHR considerations; the permitted grounds for continued detention are risk and dangerousness; the review must be sufficiently broad to allow a determination as to whether the grounds for continued detention still operate; and
- the body reviewing the detention must be invested with the power to determine the lawfulness of the prisoner’s detention rather than acting in a merely advisory capacity; the body must be independent of the executive and of the parties and must adopt appropriate procedures in its hearings.

III. INTERNATIONAL CONVENTIONS

International Human Rights standards aim to ensure government accountability for alleged violations of fundamental human rights. They include declarations, treaties, protocols, and other international human rights instruments, thus providing a global legal framework for the protection of human rights. While not binding in the domestic law, they may nevertheless offer persuasive authority in the adjudication of the determination of life sentences as this issue arises before national courts.

1. International Covenant on Civil and Political Rights

This United Nations Treaty¹⁰⁵ and its first Optional Protocol¹⁰⁶ allow individuals to submit complaints under the provisions of the Covenant to the Human Rights Committee. The Committee monitors the implementation of the ICCPR and protocols thereto by signatory states. Article 2 of the first Optional Protocol *inter alia* provides that:

“...individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.”

Article 40.1 of the ICCPR requires:

“The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights.”

¹⁰⁵ The International Covenant on Civil and Political Rights was signed by Ireland on 1 October 1973 and subsequently ratified on 8 December 1989.

¹⁰⁶ The first Optional Protocol was ratified by Ireland on 8 December 1989.

The Committee, however, is not a judicial body and does not make binding judgments analogous to those issued by a court of law.¹⁰⁷ Nevertheless, with regard to the determination of life sentences, the following provisions of the ICCPR may be influential before the national courts of state parties to the Covenant.

Article 9 (1) provides:

“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

Thus, an individual may be lawfully detained as long as this detention is in accordance with domestic law and is not deemed arbitrary. However, the continued indeterminate detention of prisoners beyond the punitive element of the sentence would constitute a violation of this provision.

Article 9 (4) requires a mechanism of review of detention by a court:

“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

In *Weismann and Perdomo v Uruguay*,¹⁰⁸ the Human Rights Committee found that the applicants’ continued detention violated both Article 9(1) because they were not released for five and ten months respectively, and Article 9(4) because the applicants were unable to mount an effective challenge to their arrest and detention.

While the determinations of the Human Rights Committee are not binding, an extract from *General Comment 8* clearly recognises that preventative detention may be justified in the appropriate circumstances where public safety is an issue of concern in the sentencing of a dangerous offender:¹⁰⁹

“...if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, *i.e.* it must not be arbitrary, and must be based on grounds and procedures established by law (para.1), information of the reasons must be given (para.2) and court control of the detention must be available (para.4) as well as compensation in the case of a breach (para.5)...”

Accordingly, once proper procedures are in place for periodic reviews of the continued indeterminate detention of prisoners sentenced under the provisions dangerous offender legislation, as may be enacted by state parties, such continued indeterminate detention may be justified in the appropriate circumstances.

¹⁰⁷ McGoldrick, D., *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1994), p. 151 para. 4.39 writes: “It is clear from the drafting work that the views of the HRC do not constitute a legally binding decision as regards the State party concerned.”

¹⁰⁸ Human Rights Committee, Communication No. 8/1977, para. 16.

¹⁰⁹ Human Rights Committee, *General Comment 8*, Right to Liberty and Security of the Person, Article 9 (Sixteenth session, 1982), para. 4.

Article 15(1) *inter alia* provides:

“Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.”

This provision was considered in *ARS v Canada*,¹¹⁰ where the Human Rights Committee determined as follows:

“The Committee notes also that mandatory supervision cannot be considered as equivalent to a penalty, but is rather a measure of social assistance intended to provide for the rehabilitation of the convicted person, in his own interest. The fact that, even in the event of remission of the sentence being earned, the person concerned remains subject to supervision after his release and does not regain his unconditional freedom, cannot therefore be characterized as the imposition or re-imposition of a penalty incompatible with the guarantees laid down in article 15 (1) of the Covenant.”

It follows that the imposition of conditions on a prisoner who is allowed parole will not trigger Article 15(1) since those conditions do not amount “to a heavier penalty ...than the one that applicable at the time the offence was committed.”

IV. CURRENT IRISH LAW

The ECtHR jurisprudence on the review of life sentences has been sculpted against the background of English sentencing law and practice. Because of this it is important to appreciate the difference between the structure of life sentences in England and Ireland.¹¹¹ In contrast to the position in England, Irish sentencing law and practice has been largely shaped by judicial decisions and there is a comparative paucity of legislation regulating sentencing policy and processes. Irish law has conventionally avoided the use of sentencing tariffs, *i.e.* specifying the minimum period of imprisonment to be served by the prisoner reflecting the punitive element of the sentence, with the remainder of the sentence being regarded as serving the purpose of public protection. Exceptions to Irish law’s stance against tariffs are the statutorily mandated minimum periods of 40 years’ imprisonment for the treason and certain forms of murder¹¹² and ten years for possession of drugs contrary to section 15A of

¹¹⁰ Human Rights Committee, Communication No. 91/1981, para. 5.3.

¹¹¹ Discussed above in text at fnn 4-45.

¹¹² Criminal Justice Act 1990, s. 4 specifies minimum periods that must be served by those convicted of treason and certain forms of murder (listed in s 3). The forms of murder in question are broadly speaking political in nature: murder of a member of An Garda Síochána in the course of his duty; murder of a prison officer in the course of his duty; murder done in the course or furtherance of an offence under section 6 of the Offences against the State Act 1939, or in the course or furtherance of the activities of an unlawful organisation; and murder, committed within the State for a political motive, of the head of a foreign State or of a member of the government of, or a diplomatic officer of, a foreign State. Attempts to commit such murders attract a minimum sentence of twenty years’ imprisonment with a minimum of twenty years to be served: s 4(b). No minimum period is specified for other murders, which in fact constitute that overwhelming bulk of murders that are tried by the courts.

the Misuse of Drugs Act 1977.¹¹³ Furthermore, Irish courts have consistently emphasised proportionality as the governing principle in sentencing matters, thus inviting the conclusion that in Irish law sentences, and *ergo* life sentences, are purely punitive with no element of preventative detention being incorporated.

The focus of European human rights jurisprudence is on continued imprisonment after the punitive period has been served. A prisoner's further detention is justifiable only on grounds relating to public protection and the circumstances leading to that detention are liable to change over time: hence the need for speedy and frequent reviews.¹¹⁴ It might be inferred from this that since Irish life sentences do not explicitly contain a preventative element they are unaffected by existing ECtHR jurisprudence. Moreover, that court at first accepted that mandatory life sentences were different in kind to discretionary ones and it initially held that review of former was satisfied by the trial and appeal: in other words, once the legal process had terminated a mandatory life prisoner had no further right of review under Article 5(4) ECHR.¹¹⁵ However, the Court reversed that ruling in *Stafford v United Kingdom*,¹¹⁶ when it was persuaded that any distinction between the two forms of life sentence had evaporated.¹¹⁷ In this, the Court was influenced by changes in English sentencing practice and by pronouncements by various Home Secretaries outlining their approach to mandatory life sentences.¹¹⁸

It is contended that the same conclusion must be drawn in relation to life sentences in Ireland. While such sentences may be purely punitive in theory, in practice matters are different. Life sentence prisoners in Ireland do not necessarily remain in prison for the remainder of their natural life but may be conditionally released following the completion of a significant term of the sentence (usually a minimum of 12-14 years).¹¹⁹ Lord Mustill's observations, quoted above,¹²⁰ on the usual and intended effect that a life sentence apply with equal force in the Irish context.

The statutory authority to grant release is invested in the Minister for Justice, Equality and Law Reform who is advised by the Parole Board,¹²¹ a non-statutory body. It would appear that the Minister accepts the recommendations of the Parole Board in the vast majority of cases. Thus, in 2005 the Minister accepted 80 percent of the Board's recommendations in full (37 cases) and a further 4 percent (2 cases) in part: just 2 percent of recommendations (amounting to one case) were rejected.¹²²

While the executive has the authority to decide on the conditional release of life sentence prisoners, the absence of an adequate supervisory role by a court or "court-like" body over this process conflicts with the jurisprudence of the ECtHR.

¹¹³ Misuse of Drugs Act 1977, s 27 restricts the power to commute or remit punishment or to allow temporary release in s 15A cases.

¹¹⁴ See above in text at fnn 87-93.

¹¹⁵ See above in text at fnn 67-73.

¹¹⁶ (2002) 35 EHRR 32.

¹¹⁷ See above in text at fnn 74-77.

¹¹⁸ (2002) 35 EHRR 32 at paras 30-37.

¹¹⁹ This practice is reinforced by official and semi-official pronouncement by the Minister for Justice, Equality and Law Reform and the Parole Board: see fn 5.

¹²⁰ See fn 22.

¹²¹ The current Interim Parole Board was established on an administrative basis in 2001, replacing the former Sentence Review Group.

¹²² The Parole Board, *Annual Report 2005*, p 29, Appendix G(i) (Dublin, 2005).

1. Sentencing Policy.

The principle of proportionality dominates Irish sentencing policy.¹²³ It stipulates that the actual sentence imposed should be proportionate not only to the gravity of the offence committed but also to the personal circumstances of the particular offender.¹²⁴ There is little scope for taking account of the probability that the defendant will re-offend at some future unspecified date or that he or she presents a continuing danger to the public.¹²⁵ Thus, in *The People (DPP) v WC Flood* J stated:¹²⁶

“In my view the selection of the particular punishment to be imposed on an individual offender is subject to the constitutional principle of proportionality. By this I mean that the imposition of a particular sentence must strike a balance between the particular circumstances of the commission of the relevant offence and the relevant personal circumstances of the person sentenced. It is not open to a judge in a criminal case when imposing sentence, whether for a particular type of offence, or in respect of a particular class of offender, to fetter the exercise of his judicial discretion through the operation of a fixed policy, or to otherwise pre-determine that issue.”

The dominance of the proportionality principle in the Irish sentencing process would appear to preclude the imposition of preventative sentences along the lines practised in the United Kingdom.¹²⁷ Indeed, several recent decisions of the Irish courts have ruled against the imposition of discretionary life sentences as a form of preventative detention.¹²⁸ In *DPP v Jackson*,¹²⁹ Carney J had imposed a discretionary life sentence on the defendant, a serious sex

¹²³ On the principle of proportionality in sentencing see O'Malley, T., *Sentencing Law and Practice* (2nd ed., Thomson Round Hall, 2006), ch 5. See also von Hirsh, A. and Ashworth, A., *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2004).

¹²⁴ In *The People (Attorney General) v Driscoll* (1972) 1 Frewen 351 at 359, Walsh J. explained that: “It is therefore the duty of the courts to pass what are appropriate sentences in each case having regard to the particular circumstances of that case – not only in regard to the particular crime but in regard to the particular criminal.”

¹²⁵ The Law Reform Commission, *Consultation Paper on Sentencing* (Dublin, 1993), chapter 17, para. 3., made the following recommendation: “We provisionally recommend that the legislature set out by way of statute a clear statement that the sentence to be imposed on an offender be determined by reference to the ‘just deserts’ principle of distribution whereby the severity of the sentence be measured in proportion to the seriousness of the offending behaviour, and the sentence not be more severe than the sentence for more serious offending behaviour nor less severe than the sentence for less serious offending behaviour”.

¹²⁶ [1994] 1 ILRM 321 at 325.

¹²⁷ The difficulties in principle that are associated with preventative sentencing are outlined by Ashworth, A. and von Hirsh, A., “Protective Sentencing Under Section 2(2)(B): The Criteria for Dangerousness” [1996] *Criminal Law Review*, 175 at 176-177 (internal references omitted) who write: “[t]here is, moreover, a more fundamental difficulty: that of imposing extra punishment on persons on account of crimes that they may commit in the future. Punishment is a moralising sanction: it imposes its deprivations in a manner that conveys that the conduct is wrong. Since punishment involves censure, its amount should fairly reflect how wrong the conduct is - that is, how serious it is. Proportionate sentences are designed to reflect the conduct's blameworthiness, whereas sentences based on prediction have no such foundation. To the extent that future offending can be forecast at all, the predictive criteria have little to do with the current offence. Instead, they reflect such ulterior matters as the number of previous arrests or convictions, age at first conviction, employment, education history, and so forth. There is, it is true, some overlap: previous convictions (but not previous arrests) bear on an offender's deserts and may also, to some extent, serve as a predictive factor. The emphasis, however, is wholly different. A proportionate sanction should chiefly reflect the seriousness of the current crime, and may give only modest weight to previous offending. Risk prediction, on the other hand, depends chiefly on previous criminal history, together with certain social factors”

¹²⁸ See Bolger, M., “Judicial Discretion to Sentence Rapists to Life” (1997, April) *Bar Review* 249.

¹²⁹ Unreported, Court of Criminal Appeal, 26th April 1993.

offender but the Court of Criminal Appeal subsequently overturned that sentence on the basis that it constituted one of preventative detention. The Court clearly rejected the notion that preventative detention is a feature of Irish sentencing law, stating that:¹³⁰

“The Court is satisfied that preventative detention is not known to our judicial system and that there is no form of imprisonment for preventative detention”.

The decision in *Jackson* was applied in *The People (DPP) v Bambrick*,¹³¹ where the Central Criminal Court refused to impose a sentence of preventative detention. Carney J explained that he was:

“...precluded from approaching the case on the basis that over and above any considerations of punishment this dangerous accused should be preventively detained until in the opinion of the most qualified experts he is safe to be let back into the community”.¹³²

In view of this general policy, the sentencing process should not be concerned with the potential for future re-offending at an unspecified date.¹³³

The judicial resistance to sentencing on a preventative basis matches the approach that the courts had adopted to the granting of bail, which they ruled could not be refused on the grounds that it was feared that the accused would commit further offences if released. The rationale was stated in clear terms in *The People (Attorney General) v O’Callaghan*.¹³⁴ Refusal of bail on those grounds would be:¹³⁵

“...a form of preventative justice which has no place in our legal system... it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted or that in any circumstances he should be deprived of his liberty upon only the belief that he will commit further offences if left at liberty ...”

As it happens, the position in relation to bail was altered by the Sixteenth Amendment to the Constitution and by the Bail Act 1997, thus reversing the immediate impact of the earlier decisions on bail. Nevertheless, for present purposes that body of jurisprudence remains relevant in that it might be invoked in support of a broader underlying principle concerning the constitutionality of preventative detention.¹³⁶ The question is whether the case law points to a general constitutional prohibition on preventative detention, which extends *inter alia* to sentencing matters.

The decision in *O’Callaghan* was subsequently endorsed by the Supreme Court in *Ryan v DPP*,¹³⁷ but it is unclear whether the opposition to preventative detention is constitutionally

¹³⁰ Unreported, Court of Criminal Appeal, 26th April 1993, *per* Hederman J at p 2 of the unreported judgment.

¹³¹ [1996] 1 I.R. 265.

¹³² [1996] 1 I.R. 265 at 276-277.

¹³³ However, preventative considerations may feature in the decision to allow a prisoner temporary release; see further in text at fnn 139-140.

¹³⁴ [1966] IR 501.

¹³⁵ [1966] IR 501 at 516-517, *per* Walsh J.

¹³⁶ See further Hogan, G. and White, G., *Kelly’s The Irish Constitution* (4th ed, Dublin: Butterworths, 2003) pp. 1600-1601.

¹³⁷ [1989] IR 399.

mandated. It is true that part of the judgment in *O'Callaghan* spoke of preventative detention in the context of the right to personal liberty, which would invite the conclusion that the prohibition on preventative detention is constitutional in nature. If this is the proper interpretation it would have far-reaching consequences: it would preclude the Oireachtas from enacting legislation that authorises preventative detention, at least in the sphere of criminal justice,¹³⁸ and would present a compelling case impeding the courts from re-considering their views on sentencing on preventative grounds.

On the other hand, the courts have not firmly ruled that there is a constitutional bar to preventative detention: the language in their judgments is more oblique. Moreover, in *O'Callaghan* Walsh J alluded to the possibility that in the “most extraordinary circumstances carefully spelled out”¹³⁹ legislation authorising preventative detention would be permitted. However, the examples he provided of such circumstances were “the preservation of public peace and order or the public safety and preservation of the State in a time of national emergency or in some such situation akin to that”:¹⁴⁰ it is a matter of speculation whether sentencing on preventative grounds would be included.

A related issue is whether the principle of proportionality is constitutionally embedded. If it is mandatory sentencing, and especially the mandatory life sentence for murder, would be open to constitutional challenge. Moreover, a constitutional rule mandating proportionate sentencing would prohibit the enactment of legislation that sought to incorporate other features, in particular rehabilitation and incapacitation, into sentencing practice. The status of the principle of proportionality awaits judicial clarification¹⁴¹ and all that safely be said at this stage is that current Irish sentencing is based on firm punitive grounds and eschews public protection as a legitimate ground on which to base a sentence of imprisonment. For the reasons alluded to earlier¹⁴² this state of affairs should not preclude the application of European human rights jurisprudence to the issue of reviewing life sentences.

2. The Constitutional and Legislative Framework.

The pardoning of offenders and the commutation and remission of punishment is governed by Article 13.6, which provides that:

“The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may also be conferred by law on other authorities.”

The Criminal Procedure Act 1993 prescribes the procedure to be followed by a person who seeks a presidential pardon. The power of pardon cannot be delegated but it is clear that the powers of commutation and remission are delegable. Section 23(1) of the Criminal Justice

¹³⁸ Preventative detention in non-criminal circumstances is a different matter and the indications are that there is no constitutional impediment in those cases: see *re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360.

¹³⁹ [1966] IR 501 at 517.

¹⁴⁰ [1966] IR 501 at 517.

¹⁴¹ See O'Malley, T. *Sentencing Law and Practice* (2nd ed, Dublin: Thomson Round Hall, 2006) p 536. See also van Zyl Smit, D., “Life Imprisonment: Recent Issues in National and International Law” (2006) 29 *International Journal of Law and Psychiatry* 405 at 408-410.

¹⁴² See text above at fnn 114-120.

Act 1951, duly conferred the “power to commute or remit punishment” on the executive.¹⁴³ Section 23A of the 1951 Act, inserted by section 17 of the Criminal Justice (Miscellaneous Provisions) Act 1997, allows the government to delegate its powers of remission to the Minister for Justice, Equality and Law Reform.

The courts have considered the nature of the power of remission. In *The State (O) v O’Brien*,¹⁴⁴ Ó Dálaigh CJ drew a distinction between an act of sentencing and one that “just” effects a remission.¹⁴⁵ Walsh J, drawing the same distinction, spoke of the judicial character of the power of remission:¹⁴⁶

“The power of commutation and remission ... is a power which, although a power of a judicial character, is nonetheless expressly conferred by the provisions of the Constitution upon the President and, in certain instances, upon the Executive or members thereof. It was, of course, quite open to the People when enacting the Constitution to confer powers of a judicial character upon the Executive or to provide by the Constitution means whereby it could be done by Act of the Oireachtas: but that does not alter the nature of the power.”

In a dissenting judgment, McLoughlin J expressed a different view. He saw the power of commutation and remission as corresponding to the royal prerogative of mercy and, there, as being executive in nature. In *Brennan v Minister for Justice*,¹⁴⁷ Geoghegan J also preferred the views that the power of remission is executive in nature. However, he went on to state that that power should be exercised sparingly and, given the special nature of the power, the evidence supporting a decision to remit and the reasons for it should be recorded. Moreover, he concluded that the exercise of the power of remission is open to judicial review.

The constitutionally based powers of commutation and remission are complemented by the statutory power to order the temporary release of prisoners: in practice it is the latter power that is employed to effect the release of life sentence prisoners. A comprehensive statutory regime governing the temporary release was adopted in 2003 when section 2 of the Criminal Justice Act 1960 was amended by section 1 of the Criminal Justice (Temporary Release of Prisoners) Act 2003:

“The Minister may direct that such person as is specified in the direction (being a person who is serving a sentence of imprisonment) shall be released from prison for such temporary period, and subject to such conditions, as may be specified in the direction or rules under this section...”

This provision establishes a clear legislative basis for the power of the Minister for Justice, Equality and Law Reform to grant temporary release of prisoners by setting down the principles that will apply to its exercise.¹⁴⁸ The Act stipulates the purposes for which temporary release may be ordered: to assess the prisoner’s ability to be re-integrated into society, to prepare him or her for release on the expiry of his or her sentence or to assist the

¹⁴³ Section 23(1) of the 1951 Act *inter alia* reads: “[t]he Government may commute or remit, in whole or in part, any punishment imposed by a court exercising criminal jurisdiction, subject to such conditions as they may think proper.”

¹⁴⁴ [1973] IR 50.

¹⁴⁵ [1973] IR 50 at 60.

¹⁴⁶ [1973] IR 50 at 70.

¹⁴⁷ [1995] 1 IR 612.

¹⁴⁸ Criminal Justice (Temporary Release of Prisoners) Bill 2001, explanatory memorandum.

Garda Síochána in investigating crime;¹⁴⁹ where release is warranted on health or humanitarian grounds;¹⁵⁰ on the grounds of good prison management;¹⁵¹ and where the Minister is of the opinion that the prisoner has been rehabilitated and is ready for re-integration into society.¹⁵²

Section 2(2) of the Criminal Justice Act 1960 requires the Minister to take account of a range of factors in reaching a decision on temporary release:

“(a) the nature and gravity of the offence to which the sentence of imprisonment being served by the person relates.

(b) the sentence of imprisonment concerned and any recommendations of the court that imposed that sentence in relation thereto,

(c) the period of the sentence of imprisonment served by the person,

(d) the potential threat to the safety and security of members of the public (including the victim of the offence to which the sentence of imprisonment being served by the person relates) should the person be released from prison,

(e) any offence of which the person was convicted before being convicted of the offence to which the sentence of imprisonment being served by him relates,

(f) the risk of the person failing to return to prison upon the expiration of any period of temporary release,

(g) the conduct of the person while in custody, while previously the subject of a direction under this section, or during a period of temporary release to which rules under this section, made before the coming into operation of the *Criminal Justice (Temporary Release of Prisoners) Act 2003*, applied,

(h) any report of, or recommendation made by—

(i) the governor of, or person for the time being performing the functions of governor in relation to, the prison concerned,

(ii) the Garda Síochána,

(iii) a probation and welfare officer, or

(iv) any other person whom the Minister considers would be of assistance in enabling him to make a decision as to whether to give a direction under subsection

(1) that relates to the person concerned.

(i) the risk of the person committing an offence during any S.1 period of temporary release,

(j) the risk of the person failing to comply with any conditions attaching to his temporary release, and

¹⁴⁹ Criminal Justice Act 1960, s 2(1)(a).

¹⁵⁰ Criminal Justice Act 1960, s 2(1)(b).

¹⁵¹ Criminal Justice Act 1960, s 2(1)(c).

¹⁵² Criminal Justice Act 1960, s 2(1)(d).

(k) the likelihood that any period of temporary release might accelerate the person's reintegration into society or improve his prospects of obtaining employment.”

The Minister is prevented from ordering temporary release if he or she is of the opinion that it would not be appropriate to do so for reasons connected with any of the foregoing factors or if the prisoner has been remanded in custody by a court.¹⁵³ Moreover, section 2(3)(b) stipulates that a prisoner may not be released if another statute prohibits such release, a provision that is relevant in the case of those serving sentences for treason, certain forms of murder and section 15A drugs offences.¹⁵⁴

The power to order temporary release applies to life sentence prisoners and those serving a fixed term alike. It is noteworthy that both punitive and preventative considerations feature in the decision to allow temporary release. In particular, the factors listed in section 2(2)(a), (b) and (c) relate to the offender's culpability while the provision in paragraph (d) is clearly preventative in nature. Therefore, despite the courts' determination to avoid sentencing on a preventative basis the Minister for Justice, Equality and Law Reform is statutorily obliged to take preventative considerations into account when deciding on the question of temporary release. As far as life sentence prisoners are concerned the net effect of this state of affairs is that the determination of their sentence is, in part, shaped by preventative concerns. To this extent, the fate of the life sentence prisoner in Ireland differs little from his or her English counterpart, despite the formal differences in sentence structure between the two jurisdictions.¹⁵⁵

The power to grant temporary release has been distinguished from the power to commute or remit punishment. In *Kinahan v The Minister for Justice, Equality and Law Reform* the Supreme Court, *per* Hardiman J, stated:¹⁵⁶

“It does not appear ... that temporary release is a specific exercise of the general power of commutation or remission envisaged in the Constitution. Rather, it appears to be a statutory creation administered under the Prisoners (Temporary Release) Rules, 1960, which instrument was in turn made under the powers conferred by the Criminal Justice Act, 1960.”

3. Judicial Consideration of Temporary Release.

The Irish courts have been consistent in their reluctance to engage in the review of sentences. Inspired by separation of powers considerations they have indicated that the question of early release is an executive matter and that the courts should exercise caution in encroaching on that territory. The executive enjoys a wide discretion in the matter of release, which is seen as a privilege that is extended to prisoners rather than a right.¹⁵⁷ Judicial review of a refusal to

¹⁵³ Criminal Justice Act 1960, s 2(3)(a) and (c).

¹⁵⁴ See text above at fnn 111-113.

¹⁵⁵ Discussed in text above at fnn 4-45.

¹⁵⁶ [2001] 4 I.R. 454 at 457 (S.C.).

¹⁵⁷ See *Ryan v Governor of Limerick Prison* [1988] IR 198 at 200, *per* Murphy J: “... temporary release is a privilege or concession to which the person in custody has no right...”; *Dowling v Minister for Justice, Equality and Law Reform* [2003] 2 IR 535 at 538, *per* Murray J: “... temporary release of a prisoner before the sentence imposed by the court has expired is a privilege accorded to him at the discretion of the executive.”

order temporary release would be successful only on the limited grounds that the refusal was arbitrary, capricious or unjust.¹⁵⁸

In *The People (DPP) v Tiernan* it was held that a court should not take account of the possible release of an offender when determining the appropriate sentence to impose. Finlay CJ emphasised the discretionary nature of temporary release.¹⁵⁹

“What is described in this ground as the conventional period a person who has been sentenced to life imprisonment might expect to serve is a matter of a policy pursued by the Executive at given times and subject to variation at the discretion of the Executive. It cannot, therefore, in my view, properly be taken into consideration by a court in imposing sentence.”

In *Murray v Ireland*,¹⁶⁰ the Supreme Court refused to direct the executive to grant temporary release to the plaintiffs, a married couple serving life sentences for murder. Finlay CJ stated:¹⁶¹

“...it was said that a court should direct the executive to grant temporary release for this purpose....The length of time which a person sentenced to imprisonment for life spends in custody and as a necessary consequence the extent to which, if any, prior to final discharge, such a person obtains temporary release is a matter which under the constitutional doctrine of the separation of powers rests entirely with the executive...”

Finlay CJ continued:¹⁶²

“The exercise of these powers of the executive is of course subject to supervision by the courts which will intervene only if it can be established that they are being exercised in a manner which is in breach of the constitutional obligation of the executive not to exercise them in a capricious, arbitrary or unjust way. It is not, however, in my view, permissible for the court to intervene merely on the grounds that it would...have reached a different conclusion on the appropriateness...of temporary release.”

The Supreme Court has consistently reiterated this view. In *McHugh v Minister for Justice*¹⁶³ the Court stressed that temporary release and any form of release under escort are exclusively matters within the Minister’s discretion. In *Kinahan v Minister for Justice and Law Reform*¹⁶⁴ the Court took the view that the same legal position governs the release of life sentence prisoners and those serving determinate sentences alike. Referring to the decision in *Murray*, Hardiman J stated:¹⁶⁵

¹⁵⁸ This broadly corresponds with the grounds on which the courts will overturn an administrative decision: see *The State (Keegan) v Stardust Victims Compensation Tribunal* [1986] IR 642; *O’Keeffe v An Bord Pleanala* [1993] 1 IR 39; see further Hogan and Morgan, *Administrative Law in Ireland* (3rd ed Dublin: Round Hall Sweet & Maxwell, 1998) pp 641-649.

¹⁵⁹ [1988] IR 250 at 256.

¹⁶⁰ [1991] 2 ILRM 465.

¹⁶¹ [1991] 2 ILRM 465 at 472.

¹⁶² [1991] 2 ILRM 465 at 473.

¹⁶³ [1997] 1 IR 245.

¹⁶⁴ [2001] 4 IR 454.

¹⁶⁵ [2001] 4 IR 454 at 459.

“In my view, this decision properly emphasises the importance of the constitutional separation of powers in dealing with the implementation by the executive of a judicially imposed sentence of imprisonment. It also correctly identifies the sole circumstances in which the court would be justified in interfering with a decision in relation to temporary release.”

As to the exercise of the executive discretion in the matter the Court rejected the notion that there is a presumption that a prisoner is entitled to temporary release.¹⁶⁶

The Criminal Justice (Release of Prisoners) Act 1998 was enacted in the aftermath to the “Good Friday Agreement” to provide a mechanism for the early release of prisoners. The Supreme Court, again emphasising the discretionary nature of the power to release, has held that the Act did not create a right to be released. In *O’Neill v Governor of Castlereagh Prison* Keane CJ spoke for the Court:¹⁶⁷

“The power to release itself, whether exercised on what might be called conventional grounds of a compassionate or humanitarian nature or for purely political considerations, as in the case of releases effected for the purpose of giving effect to the Belfast Agreement, is a quintessentially executive function”

The broad nature of the discretion to grant temporary release was central to the decision of the High Court in *Breathnach v Minister for Justice, Equality and Law Reform*,¹⁶⁸ where the applicant was granted temporary release on condition that he remained handcuffed during his release. He challenged that condition as being unreasonable and argued that since the respondent had not presented material to the court to show why handcuffing was necessary the court should conclude that there was no basis to support that condition. Rejecting the claim, Ó Caoimh J concluded that it was within the respondent’s discretion “to release the applicant subject to any conditions which he chose to impose.”¹⁶⁹ The Court also took the view that in the circumstances it was not necessary to give reasons for the imposition of the condition.¹⁷⁰

The revocation of temporary release where a prisoner had been charged with, but not convicted, of another offence was condemned by the Supreme Court in *The State (Murphy) v Kiehl*.¹⁷¹ While the Court acknowledged the executive’s discretion in the matter it ruled that in the circumstances the applicant should have been afforded the opportunity to refute the allegation. Griffin J explained:¹⁷²

“...the fact that the [applicant] had been charged with an offence is an insufficient reason for the revocation of his temporary release. Charges are frequently dropped or not proceeded with and, if temporary release can be revoked merely or solely because the person released has been charged with an offence, what of the apparent injustice

¹⁶⁶ The Court also dismissed the argument that the recommendations of the Council of Europe of the Committee of Ministers to Member States on European Prison Rules were binding.

¹⁶⁷ [2004] 1 IR 298 at 314; see also *Doherty v Governor of Portlaoise Prison* [2002] 2 IR 252.

¹⁶⁸ [2004] 3 IR 336.

¹⁶⁹ [2004] 3 IR 336 at 343.

¹⁷⁰ *The State (Daly) v Minister for Agriculture* [1987] IR 165 distinguished.

¹⁷¹ [1984] IR 458.

¹⁷² [1984] IR 458 at 473.

done to such a person who, in the period intervening between the charge and the dropping of the charges, has lost the liberty to which he would otherwise have been entitled...”

It would appear that one response to the decision in *The State (Murphy) v Kieft* was to allow shorter periods of temporary release which could be renewed each time the previous period expired. The strategy was considered in *Dowling v Minister for Justice, Equality and Law Reform*.¹⁷³ The applicant in the latter case was a life sentence prisoner who had been granted temporary release on a monthly renewable basis: he was required to sign on at Mountjoy Prison on the 23rd of each month. On 23 December 1999 the applicant was arrested and questioned by Gardaí in relation to a murder and, although he was released from Garda custody without charge, he was returned to prison the same day. The High Court refused to quash the revocation on the grounds that temporary release was a concession to which the prisoner had no right. The Supreme Court allowed the appeal and quashed the revocation. The Court again emphasised that temporary release is a privilege and that the executive enjoys a wide discretion in the matter. Moreover, Murray J, echoing ECtHR pronouncements on the matter,¹⁷⁴ commented on the conditional nature of the liberty of a prisoner on temporary release: it is not “on a par”¹⁷⁵ with that of the ordinary citizen.

The decision in *Dowling* turned on an interpretation of the nature of the release granted to the applicant. Was it, as the respondent contended, a series of separate one month releases with a new one-month period of release being allowed each time? If that was the position it was clear that the executive could not be compelled to grant a fresh period of temporary release on the expiry of any particular period of release. However, the Court reached the different conclusion that in reality the applicant had been granted indefinite temporary release, not a series of separate monthly releases, which was revoked when he was returned to Mountjoy Prison: hence the relevance to his case of the decision in *The State (Murphy) v Kieft*.

4. The Finn decision.

Some trial judges have incorporated a review element into the sentence they impose. Thus, an offender might be sentenced to seven years imprisonment, to be reviewed after 36 months with a view determining whether the remainder of the sentence could be suspended. One purpose served by such a sentencing structure is that it allows the court to take account of the offender’s progress in prison and if it is satisfactory to give him or her the benefit of such progress. However, there is also a suspicion that of a sentence of this type has the darker attraction of preventing the executive from releasing the prisoner prior to the review date and that it amounts to a judicial attempt to counteract the “revolving door” phenomenon. The superior courts have condemned this sentencing practice on the grounds, *inter alia*, that such sentences seek to “freeze” the exercise of executive discretion.¹⁷⁶

The matter was definitively resolved by the Supreme Court in *The People (DPP) v Finn*,¹⁷⁷ where the Court rejected the idea that the trial court when imposing the appropriate sentence

¹⁷³ [2003] 2 IR 535.

¹⁷⁴ *Weeks v. United Kingdom* (1988) 10 EHRR 293.

¹⁷⁵ [2003] 2 IR 535 at 538.

¹⁷⁶ *The People v Cahill* [1980] IR 8; *O’Brien v Governor of Limerick Prison* [197] 2 ILRM 349. A different view was expressed by Walsh J in *The People (DPP) v Alymer* [1995] 2 ILRM 624. See O’Malley, T., “Principles of Sentencing: Some recent Developments” (2001) 1(1) *Judicial Studies Institute Journal* 50 at 56-63.

¹⁷⁷ [2001] 2 IR 25. See O’Connell, M., “The Supreme Court Decision in *DPP v Pdraig Finn*” (2001, April) *Bar Review* 354.

for an individual case could also include a review date for possible release on licence. Keane CJ explained that:¹⁷⁸

“The making of such orders is not merely inconsistent with the provisions of s. 23 of the Act of 1951: it offends the separation of powers in this area mandated by Article 13.6 of the Constitution. That provision expressly vests the power of commutation or remission in the President but provides that the power may also be conferred by law on other authorities. Since under Article 15.2.1 of the Constitution the sole and exclusive power of making laws for the State is vested in the Oireachtas, it was for the legislative arm alone to determine which authorities other than the President should exercise that power. In enacting s. 23 of the Criminal Justice Act, 1951, the Oireachtas conferred the power of commutation or remission on the government or, where it delegated its power, the Minister for Justice...It would seem to follow that the remission power, despite its essentially judicial character, once vested under the Constitution in an executive organ, cannot, without further legislative intervention, be exercised by the courts.”

Nevertheless, he offered the opinion that:¹⁷⁹

“It is also, of course, open to the Oireachtas to provide by legislation, as has been done in other countries, for the regular review of sentences by a parole board and such an approach might well be consistent with modern penological principles. These again, however, are entirely matters for the legislature and not within the competence of the courts, having regard to Article 13.6, to determine.”

This passage provides the Oireachtas with the reassurance that it is constitutionally permissible to enact legislation establishing a system of sentence review by an independent statutory body. It may be inferred that the Court was fully aware of the demands of sentence management and the desirability of providing a mechanism for the determination of life sentences:¹⁸⁰ hence the reference to “modern penological principles.”

5. Compatibility with ECHR.

Jurisprudence emerging from the ECtHR concerning the determination of life sentences is particularly relevant since the enactment of the European Convention on Human Rights Act 2003. Rulings by the Court on the temporary release or release on licence of life sentence prisoners strongly indicate that Irish law is not compatible with the ECHR.

The most significant deficiency in Irish law is that release is treated as an executive matter, a position that is in marked contrast to the position in European human rights law. Article 5(4) ECHR, as interpreted by the ECtHR, demands that a court or “court-like” body should be entrusted with the release of life sentence prisoners. The key features of such a body is that it is independent of the executive and of the parties, that it has the power to determine cases, that it conducts adversarial hearings and accords to the prisoner the procedural rights that

¹⁷⁸ [2001] 2 IR 25 at 46.

¹⁷⁹ [2001] 2 IR 25 at 46.

¹⁸⁰ Samuels, A., “In Denial of Murder: No Parole” (2003) 42(2) *Howard Journal of Criminal Justice*, 176 at 177 writes: “If the mandatory lifer has made good progress, he has made positive efforts to address his attitudes and behavioural problems, he has come to terms with his past, he is contrite, he is anxious to make a fresh start in the community, keen to resettle, to keep out of trouble, so that the risk of danger to the public appears to be low, then the prospects for parole will be good.”

follow from such a hearing. The chasm between the Irish position and that required by the ECHR would appear to be insurmountable given the Irish courts' reliance on considerations of separation of powers as underpinning their reluctance to engage in sentence review. However, this does not mean that there is a constitutional impediment to transferring the power of release from the executive to a body that matches ECHR demands. As it happens the judgment in *The People (DPP) v Finn*,¹⁸¹ quoted above, has opened the door to a development of the type required by ECtHR jurisprudence.

The current Parole Board, which was established in 2001 on an administrative basis replacing the former Sentence Review Group, fails to satisfy ECHR requirements. The difficulty is that the Parole Board has been established on a temporary non-statutory basis and lacks the power to determine cases: its role is merely advisory. Despite its non-statutory basis it is likely that the manner in which the Parole Board conducts its deliberations is open to judicial review. Its predecessor, the Sentence Review Group has been successfully challenged in judicial review proceedings.¹⁸² However, ECtHR decisions have firmly indicated that judicial review proceedings do not provide the form of review required by the Convention:¹⁸³ a mechanism that allows the review body to consider the factual basis for the continued detention of the life sentence prisoner is necessary.

6. Irish Law Summarised.

The position of life sentences in Irish law in relation to the ECHR may be summarised thus:

- Irish sentencing law is centred on the principle of proportionality and rejects the notion that a sentence may incorporate a preventative element in the interests of public protection;
- in theory, life sentences are purely punitive without any preventative element; nevertheless the Criminal Justice Act 1960 provides a framework for temporary release of, *inter alia*, life sentence prisoners: once that possibility exists ECHR requirements apply;
- under Irish law the issue of release is exclusively a matter for the executive, which enjoys a "wide discretion" in the matter: this position conflicts with the ECHR which insists that release be determined by a court or "court-like" body;
- in its current guise, the Parole Board, whose function is merely advisory, is not a court or "court-like" body; and
- Irish law will quash an executive decision on release on the limited grounds that it is "arbitrary, capricious or unreasonable"; the ECHR, as interpreted by the ECtHR, requires a broader form of review that is not satisfied by the domestic remedy of judicial review.

¹⁸¹ [2001] 2 IR 25.

¹⁸² *Barry v Sentence Review Group* [2001] 4 IR 167.

¹⁸³ *Weeks v United Kingdom* (1988) 10 EHRR 293; see also *Singh v United Kingdom* [1996] EHRC 23389/94.

V. CONCLUSIONS AND RECOMMENDATIONS

The central contention in this report is that the current regime governing the determination of life sentences in Ireland is incompatible with the ECHR, principally on the ground that the decision to release is entrusted to the executive rather than a court or “court-like” body as is envisaged by the Convention.

It is clear that legislation is necessary to bring Irish law into line with European human rights requirements. Whether it is open to the Oireachtas to enact a law that authorises the imposition of sentences that incorporate an element of preventative detention, akin to the position in the United Kingdom, is debatable and, in any event, is beyond the scope of this report. Suffice it to say that such a measure is liable to face constitutional challenge, which in turn would involve a consideration of the constitutional status of the principle of proportionality and of the corresponding opposition to preventative sentencing. However, two other measures are available to make Irish law consistent with the ECHR.

The first is to abandon the mandatory life sentence for murder and to replace it with a discretionary sentence. It has been noted that the mandatory life sentence is difficult to reconcile with the principle of proportionality and it is somewhat surprising that it has not yet been the subject of constitutional challenge.¹⁸⁴ The Law Reform Commission has recommended that mandatory sentences be abolished and it has canvassed possible reform measures.¹⁸⁵ Nevertheless, in that event the question of temporary release from a determinate sentence would still fall to be considered in the light of ECHR requirements and, as things stand, the regime is open to the same objections that the current law attracts.

The second strategy, which might be adopted either alone or in conjunction the abolition of the mandatory life sentence, is to enact legislation that transfers the function of release from the executive to an independent body. The Irish courts have invoked the separation of powers in support of their reluctance to engage in the review of sentences but that does not inhibit the enactment of the appropriate legislation. The words of Keane CJ in *The People (DPP) v Finn* are worth repeating:¹⁸⁶

“It is also, of course, open to the Oireachtas to provide by legislation, as has been done in other countries, for the regular review of sentences by a parole board and such an approach might well be consistent with modern penological principles. These again, however, are entirely matters for the legislature and not within the competence of the courts, having regard to Article 13.6, to determine.”

This opinion provides a clear constitutional mandate for the creation of an agency that satisfies the ECHR requirement of being a court or “court-like” body. As it is currently structured, the Parole Board fails to meet that requirement. However, were the Board to be placed on a statutory footing and assigned the function of determining applications for temporary release, rather than merely advising the Minister, Irish law would be brought into harmony with the ECHR. In the absence of legislative action it is only a matter of time before successful proceedings are initiated before the European Court for Human Rights.

¹⁸⁴ See above in text at fnn 141-142.

¹⁸⁵ Law Reform Commission, *Report on Sentencing* (LRC 53-1996) pp 39-41. The Law Reform Commission, *Consultation Paper on Sentencing* (Dublin, 1993) pp 310-316 presents a more detailed consideration of the case for abolishing mandatory sentences: reform options are outlined in the Consultation Paper at pp 317-319.

¹⁸⁶ [2001] 2 I.R. 25 at 45-46.

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