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Winner of the Council of Europe Human Rights Prize

CAJ's commentary on the

draft Life Sentences (Northern Ireland) Order 2001 and the draft Life Sentences Commissioners Rules 2001

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What is the Committee on the Administration of Justice (CAJ)?

CAJ is an independent non-governmental organisation, which is affiliated to the International Federation of Human Rights (IFHR). CAJ monitors the human rights situation in Northern Ireland and works to ensure the highest standards in the administration of justice. We take no position on the constitutional status of Northern Ireland, seeking instead to ensure that whoever has responsibility for this jurisdiction respects and protects the right of all. We are opposed to the use of violence for political ends.

CAJ has since 1991 made regular submissions to the human rights organs of the United Nations and to other international human rights mechanisms. These have included the Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, the Human Rights Committee, the Committee Against Torture, the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination, the Special Rapporteurs on Torture, Independence of Judges and Lawyers, and Extra judicial, Summary and Arbitrary Executions, the European Commission and Court of Human Rights and the European Committee on the Prevention of Torture.

CAJ works closely with international NGOs including Amnesty International, the Lawyers Committee for Human Rights and Human Rights Watch.

Our activities include: publication of human rights information; conducting research and holding conferences; lobbying; individual casework and legal advice. Our areas of expertise include policing, emergency laws, children's rights, gender equality, racism and discrimination.

Our membership is drawn from all sections of the community in Northern Ireland and is made up of lawyers, academics, community activists, trade unionists, students, and other interested individuals.

CAJ was awarded the Council of Europe Human Rights Prize in 1998 in recognition of our work in defence of rights in Northern Ireland. Previous recipients of the award have included Medecins Sans Frontieres, Raoul Wallenberg, Raul Alfonsin, Lech Walesa and the International Commission of Jurists.

Introduction

1. The general direction of this Order is in line with the prevailing situation in the rest of Europe and current developments in the rest of the United Kingdom. In nearly all other European countries murder does not attract a mandatory life sentence. More usually prisoners are given a determinate sentence. Even when a life sentence is provided for, decisions as to whether and when a prisoner is released are matters for the judiciary rather than the executive. This reflects a general view that matters regarding the deprivation of liberty should be decided on by independent and impartial judges, operating on the basis of clear criteria. To leave such matters in the hands of politicians is always to risk arbitrariness and decisions being prey to prevailing public opinion. Research on the operation of the life sentence release process in England (notably Justice *Sentenced to Life*, 1996) has confirmed this impression. It is noteworthy that legislation has recently been introduced in Scotland which will remove the discretion of the Justice Minister. In England the power of the Home Secretary to decide on the tariff, preserved by Section 29 of the Crime (Sentences) Act 1997, was recently upheld by the Divisional Court in *R v Secretary of State for the Home Department ex parte Anderson and Taylor.* However two of the three judges hearing this application indicated that if they had been in a position to decide the case without reference to previous authority they might have taken a very different view. The decision will be appealed and the current English position remains vulnerable.

Human Rights Act

2. The need to comply with the provisions of the Human Rights Act also argue for a move towards the sort of regime envisaged in this Order. In the case of *Thynne, Wilson and Gunnell v United Kingdom* (1991) the European Court indicated that decisions on whether discretionary life sentence prisoners remained a risk after they had served the normal sentence for the crime they were convicted of was the sort of decision which should be subject to judicial supervision to comply fully with Article 5(4) of the European Convention on Human Rights. In *V and T v United Kingdom* (1999) the same Court indicated that the process of setting a "tariff" for HMP prisoners (SOSP equivalents in England) in respect of how long they should serve before being considered for parole, was essentially a judicial exercise. Article 6(1) of the Convention hence required that this exercise be conducted by an independent and impartial judicial officer. Although Northern Ireland did not formally operate a system of dividing sentences into "tariff" and "risk" phases it is clear that the old Life Sentence Review Board was relying on similar concepts. This clearly rendered them vulnerable in relation to discretionary lifers and SOSP prisoners. After *V and T* it seemed that the previous 1994 decision of *Wynne v United Kingdom* (which saw no need for judicial involvement in the release of mandatory lifers) was unlikely to be sustained in future. Hence the release procedures for mandatory life sentence prisoners was also vulnerable to Human Rights Act challenge. The NIO is to be commended for anticipating this and seeking to change the legislation.

Critique of proposals

3. Overall therefore this legislation, especially by reducing the role of the Secretary of State for Northern Ireland and establishing a specific body of Life Sentence Review Commissioners, moves in the right direction as regards Human Rights Act compliance. It is also moves in the direction of the approach to release adopted in other European countries. However there are some matters of detail where clarification or change may be appropriate.

4. Article 3(4)(ii) directs the Commissioners to have regard to the desirability of (a) preventing commission by life prisoners of further offences and (b) securing the rehabilitation of offenders when "discharging any functions" under the Order. However this would seem to lead to some confusion with the Commissioners' power under Article 6(4)(b) to release prisoners providing they are satisfied that it is no longer necessary for the protection of the public. It seems to add extra criteria beyond those set out in Article 6(4)(b) and criteria which are uncertain. For example would this lead to life sentence prisoners being detained if Commissioners feel they are likely to comit traffic offences or minor drugs offences but unlikely to put the public at risk? How would the issue of rehabilitation be treated? Some Commissioners might feel a person's chances of rehabilitation are improved by getting out of prison, others might feel a longer spell inside would be more helpful. These criteria appear in Section 32(6)(b) of the Criminal Justice Act 1991 in England but only in relation to what *directions* the Secretary of State might give the Parole Board as opposed to the Board's own powers. They are unnecessary and confusing in the way they are proposed in this Order and it would be better to delete them.

5. Article 5(3) seems to preserve the possibility of "whole life" tariffs. The Home Secretary's power in England to set "whole life" tariffs was upheld by the House of Lords in *Ex parte Hindley* (2000). However such a power seems at variance with Article 10(3) of the International Covenant on Civil and Political Rights which indicates that "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation". Whole life tariffs are out of line with prevailing practice in other European countries and offer little hope of rehabilitation for any prisoner.

6. Article 5(5) appears to preserve the possibility of a whole life tariff even in respect of SOSP prisoners. This would clearly run into problems with Article 3 of the European Convention as the Court in *Hussain v United Kingdom* (1996) indicated a view that whole life tariffs for juveniles would raise serious questions in respect of amounting to inhuman or degrading punishment. Providing in Article 5(6) that the Secretary of State should refer the case to the Commissioners when he has formed the opinion that it is appropriate to do so is not an adequate safeguard: he or she may conclude that it is never appropriate to do so. We therefore believe this provision should be deleted or amended accordingly.

7. Overall Article 5 is not clearly expressed. It would appear that the aim of Article 5(1) is that in all cases judges should set a tariff but that in cases where they feel a whole life tariff is appropriate they can direct that the early release provisions should not be employed. However one could read Article 5(3) as suggesting that in such cases courts should not set a tariff, in which case there is no direction to take effect in respect of Article 5(4) and 5(5). Also Article 5(4) appears to envisage the Secretary of State deciding not to refer a prisoner to the Commissioners even after he or she has decided that it is appropriate to make such a reference. It is difficult to see why this should be so.

8. The criteria for early release in Article 6(4)(b) require a prisoner to establish that he or she is not at risk of causing serious harm to the public. There is evidence from studies of Discretionary Lifer Panels in England that this has encouraged a very cautious approach to release, (see Padfield and Liebling *An Exploration of Decision Making at Discretionary Lifer Panels*, Home Office Research Study 213). In our view, full respect for the right to liberty requires the onus being on the authorities to satisfy the Commissioners that someone does pose a risk of serious harm to the public.

9. Article 6(5)(b) envisages prisoners being able to refer cases back to the Commission after two years from the refusal of a previous release application. There is some indication from the European Court that 2 years may be too long to comply with Article 5(4) and that a shorter period might be envisaged, see *Oldham v United Kingdom* (2000). Consideration should therefore be given to reducing this period.

10. Article 9(2) permits recall by the Secretary of State where "it appears expedient in the public interest to recall that person". Although presumably taken from equivalent English legislation, this envisages a different test being applied by the SOS as regards recall than that applied by the Board under Article 6(4)(b) when deciding on release. At the very least there is a need for the Secretary of State, as in England, to make directions as to when this power may be used. However it does not appear that the Order gives him or her power to do this.

11. Schedule 1 makes it clear that Commissioners will be appointed by the Secretary of State. While this is not automatically contrary to Article 6 of the ECHR there is a need to offer "sufficient safeguards" of the independence of those appointed. An obvious way of doing this is to set out their tenure (perhaps for 5 years). However the Schedule currently gives no indication as to how long they might be appointed for.

12. Article 3 of Schedule 2 and Rule 15 of the Commissioners Rules envisage the Secretary of State certifying that certain information should not be disclosed to the prisoner or to his or her representative. While much of the proposed Commissioner's Rules appears to draw upon the English Parole Board Rules, this provision finds no equivalent in the English rules. Moreover it is disturbingly wide in its scope, including even permitting the Secretary of State to refuse to disclose information where it would "cause substantial harm to the public interest". The European Court

has indicated concern as to whether the "equality of arms" requirement of Article 6 can be complied with in such situations of non-disclosure (*Tinnelly v United Kingdom* 1996, *Fitt and Jasper v United Kingdom* 2000). While the provision for a "Special Advocate" in Rule 17 may go some way towards complying with Article 6 (a majority in *Jasper* appeared inclined to this view) there remains the problem that the initial certification by the Secretary of State appears to be beyond review.

At the very least to ensure compliance with Article 6 it might be better if the Commissioners were entitled to decide upon the issue of whether such material should be certified confidential, in the light of representations by the Secretary of State and the prisoner's representatives. We would also argue that Rules 15(1)(e) and (f) should be deleted.

13. The English provisions on release of discretionary lifers and recall of mandatory lifers provide for guidance to be given to the Parole Board on how they exercise their discretion regarding risk assessment for release. While some doubts have been expressed as to how valuable these are and also to what extent they are used, it would seem useful to offer Commissioners some guidance in dealing with a difficult question. It might also be helpful to prisoners to see the sort of criteria that might be employed by the Commissioners. At the moment however no guidance appears in the Order or the Rules, nor is there power for the Secretary of State to issue the same. Although there may be doubts as to whether it is appropriate for the SOS to be issuing guidance it might be helpful to allow the Commission to consult on and publish the guidance it is seeking to act upon

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