Justice Committee

Criminal Cases (Punishment and Review) (Scotland) Bill

Letter from the Scottish Human Rights Commission

Part 1

Thank you for your letter of 1 March 2012 in relation to the Committee’s consideration of the Criminal Cases (Punishment and Review) (Scotland) Bill: Part 1.

The Commission notes the significant amount of work that the Committee has already undertaken on this Bill and addresses the specific questions raised as follows:

- whether Part 1 of the Bill is ECHR compliant;
- whether the alternative approaches suggested in evidence by the Law Society, the Faculty of Advocates, Sir Gerald Gordon QC and James Chalmers are ECHR compatible.

Human Rights Framework

A number of provisions of the European Convention of Human Rights (ECHR) are relevant to the issue of determining life sentences, including:

- Article 3 - torture
- Article 5 - liberty and security
- Article 6 - fair trial
- Article 7 – non retrospective application of the criminal law

Also of particular relevance is Article 9 of the International Covenant on Civil and Political Rights (which also relates to liberty).

In relation to Part 1 of the Bill, the key consideration is Article 5 of ECHR which guarantees the right to liberty and security and *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.

The 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.”

The European Court of Human Rights (ECtHR) has explained that:

“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.” ¹

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.

In the context of life sentence prisoners a decision to continue their detention after the punishment part should not be taken arbitrarily. The required protection is achieved through the review mechanism prescribed by Article 5(4). 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.

Article 6(1) ECHR inter alia states 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 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....”²

The Court went on to state that:

¹ Herczegfalvy v Austria (1993) 15 EHRR 437.
² (1983) 5 E.HRR 1 at para.76.
“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.”

More recent cases have determined that the fixing of the tariff is part of the sentencing process and must be undertaken by a court rather than the Executive and that the setting of the tariff should be the same for all life prisoners.

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

“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 stipulates that

“[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”

In V v United Kingdom the Court suggested 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, however in the recent cases of Vinter and Others v. the United Kingdom the Court held that the particular all-life sentences were not grossly disproportionate nor amounted to inhuman or degrading treatment.

Also relevant is ICCPR Article 9 which provides similar protection to those set out in Article 5 of ECHR.

The position in Scotland and the current Bill

The current legislation governing discretionary sentences of life imprisonment in Scotland is contained in Section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”) as amended.

As the Committee has discussed during evidence sessions, the 1993 Act was a response to the decision in Thynne, Wilson and Gunnell v United Kingdom. The applicants in that case were convicted sex offenders 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 continued indeterminate post-tariff detention. The ECtHR held that since the circumstances that gave rise to the applicants’ initial detention

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3 (1983) 5 EHRR 1 at para.77.
6 Application nos. 66069/09, 130/10 and 3896/10
7 (1991) 13 EHRR 666.
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:

“…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 1993 Act provided for this by drawing a distinction between the punishment part of the sentence and any additional period of custody for the purpose of public protection.

While at that stage the Court allowed a distinction between mandatory and discretionary life sentences, a series of cases culminating in Stafford v United Kingdom, determined that such distinctions were no longer relevant. The Court concluded 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.” 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. This decision had been anticipated in Scotland and amendments had been made to the 1993 Act by the Convention Rights (Compliance)(Scotland) Act 2001 which brought the sentencing and release of adult mandatory life prisoners into line with those of discretionary life prisoners.

The Convention Rights (Compliance)(Scotland) Act 2001 also enhanced the security and tenure of Parole Board members to ensure their independence from Scottish Ministers in compliance with the right to a fair hearing in Article 6.

The decision in Petch & Foye v HM Advocate related to the proper approach to the determination of the punishment part, for non-mandatory life sentences. The court recognised the complexity of the issue and the perceived anomaly that that would create, whereby an indeterminate sentence prisoner could become eligible for parole at an earlier stage than a determinate sentence prisoner sentenced for the same

11 The sentencing and release arrangements for children convicted of murder had already been brought into line with discretionary life prisoners following the decisions in Hussain and Singh — through the Crime and Punishment (Scotland) Act 1997.
crime, because of the need to strip out the element of public protection from the notional determinate sentence. However, the judgment did not find any breach of Convention rights in the current system.

The Bill that is before the Committee seeks to remedy the perceived anomaly. The Commission notes that the Faculty of Advocates and the Law Society of Scotland have raised concerns in relation to the complexity of procedure set out in the Bill. However, bearing in mind the principles considered above and in particular:

- a life sentence is not *per se* a breach of Convention rights;
- 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 permitted grounds for continued detention are risk and dangerousness;
- 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.

The Commission considers that the proposal set out in the Bill is consistent with current ECHR jurisprudence.

The Commission’s understanding is that none of the alternative approaches suggested in evidence by the Law Society, the Faculty of Advocates, Sir Gerald Gordon QC and James Chalmers suggest any deviation from the principles set out above and therefore considers that they would also be consistent with current ECHR jurisprudence.

- Whether the apparent potential for “double-counting” (ie considering the same set of factors at two stages of the determination of a sentence) may raise ECHR concerns;

The Commission notes this concern raised by the Law Society of Scotland amongst others in relation to double counting and the submission from the Faculty of Advocates speculating on the approach that the courts might take. Given the complexity of the proposed procedure and the lack of clarity as to how the provisions would be interpreted, the Commission finds it difficult to address this issue without further investigation.

Scottish Human Rights Commission
9 March 2012