

W 201 The Individual and the State

Study notes on the role of the Home Secretary in sentencing

The background

These notes are of historical interest. They do however illustrate rapid change in this area of law linked to introduction of the Human Rights Act 1998 and the change in status of the European Convention on Human Rights.

The notes seek to explain and place in context important judicial review cases in recent years which have involved challenges to the role of Home Secretaries in sentencing, some of which you will read about in the Manuals.

Several cases have involved the Home Secretary and his setting of mandatory life sentences (eg for adults convicted of murder) or detention during her majesty's pleasure (the mandatory sentence for murder for an offender under 18). The challenges have relied initially on the traditional judicial review grounds of irrationality, fettering discretion, irrelevant considerations and unfairness or a combination of these and more recently on entitlement to a fair trial under Article 6.1 of the European Convention on Human Rights.

Whilst courts have generally been wary of intervening in the area of executive decision making because the Home Secretary was a member of the executive exercising a **judicial** power the interventions of the courts have been more confident.

Two decisions have been decisive in ending any judicial role by the Home Secretary in sentencing in the UK.

The decision of the European Court of Human Rights in **T v UK** and **V v UK** 1999 decided that under the Convention the involvement of a member of the executive in the sentencing process (for children) represented a contravention of Article 6.1 (the right to a fair trial).

In **R (Anderson) v Secretary of State for the Home Department** 2002 Lords the Court found that the setting of a punitive tariff by the Home Secretary for an adult murderer under UK legislation was also in conflict with Article 6.1 which requires an "independent and impartial tribunal" where a criminal charge is being dealt with. The House of Lords made a declaration of incompatibility under Section 4 of the Human Rights Act 1998 which the Home Secretary accepted. He has as a result introduced (in the Criminal Justice Act 2003) statutory sentencing guidelines to ensure that judges (who in future will set the tariffs themselves) are appropriately severe.

The sentencing background prior to 2003

In England life sentences for adults are of two types:

a) mandatory - ie for murder where the sentence is fixed by law and the judge has no choice but to impose life imprisonment.

b) discretionary - ie for manslaughter rape or robbery . Normally a discretionary life sentence is reserved for a case of homicide where there is a background of mental instability but detention under the Mental Health Act is not available and the offender represents a danger to the public at large.

Since 1991 in the case of discretionary life sentences the period served was determined principally by the trial judge and the Parole Board. The Home Secretary had no significant role.

In the case of mandatory life sentences the period was determined by judges the Home Secretary and the Parole Board.

The system for mandatory life sentences until the **Anderson** case was as follows - the sentence was divided into two parts - the first part (the tariff) for retribution and deterrence the second part for public protection. The judges fixed the tariff and the Parole Board dealt with the second part but both were subject to an overseeing role by the Home Secretary. He had had this role by statute since 1965 when capital punishment was abolished.

1. The trial judge imposed a mandatory life sentence. He also recommended how long the tariff should be. The Lord Chief Justice received the recommendation and added his own tariff recommendation. The Home Secretary (in accordance with his publicly stated policy which was changed from time to time) set the tariff actually applied. A further development under Michael Howard (Home Secretary 1993-7) was the announcement of a power for the Home Secretary to review his own tariff and increase it.

2. When the tariff expired the Home Secretary could refer the case to the Parole Board and if they so recommended release the prisoner. If the Home Secretary considered there was still a risk of any further offences being committed he could refuse to release the prisoner.

The cases

The first legal intervention in the 1990s involved the failure of the Home Secretary to give reasons for the tariff he had set.

In **R v Secretary of State for the Home Department ex parte Doody** 1994 Lords it was decided that a prisoner should be told if the tariff set by the Home Secretary departed

from that of the trial judge and the reasons. It was felt that :

- it was unfair for a mandatory life sentence prisoner to be in a worse position than a prisoner sentenced to a specified term who would be told the reasons for his sentence in open court
- tariff decisions affected fundamental freedom
- without reasons judicial review was impossible.

Once reasons were given a number of challenges followed.

R v Secretary of State for the Home Department ex parte Pierson 1998 Lords (The Home Secretary fixed the penal element of a mandatory life sentence at 20 years rejecting the trial judge's recommendation of 15 years. Held - Lord Hope - the Home Secretary's decision was unlawful as he was in an area of decision making which normally belonged to the courts and if he was only deciding how long the penal element should be (the same decision as the judge) he should apply the same rules. He misunderstood his power by increasing the period simply because he disagreed with the judge. Held - Lords Steyn and Goff - the decision was unlawful as the policy statement relied on for the decision could not have retrospective effect.)

The Home Secretary's power to fix a tariff where children had been detained during her majesty's pleasure was considered in **R v Secretary of State for the Home Department ex parte Venables & Thompson** 1996 Lords (The trial judge recommended a tariff of 8 years and the Lord Chief Justice 10. The Home Secretary had fixed the penal element for both boys at 15 years. Held -

1 The position with children was different from adults. The Home Secretary had to decide from time to time whether detention was justified and take into account the welfare of the child offender. The Home Secretary could not adopt a policy which treated the progress made by the child as irrelevant. He had therefore ignored a relevant consideration.

2 The Home Secretary like a judge must remain detached from public opinion. Public clamour was an irrelevant consideration. The Home Secretary's decision was unlawful and would be quashed.

The Divisional Court applied the Venables and Thompson decision in **R v Secretary of State for the Home Department ex parte Furber** 1997. The Home Secretary's decision to set a tariff of 7 years for a young person convicted of manslaughter was excessive. If **Venables and Thompson** had been applied the Home Secretary could not have reached the decision he did.

In **R v Secretary of State for the Home Department ex parte Hindley** 1997 Div Ct The Home Secretary's right to set a whole life tariff was upheld (ie no release ever) as the Home Secretary (now Jack Straw) had taken into account progress made by the offender in reaching the decision. The Court were however uneasy about the principle of the Home Secretary being involved at all and said so. Lord Chief Justice Bingham stated:

"There was room for serious debate whether the task of determining how long

convicted murderers should serve in prison as punishment for their crimes should be undertaken by the judiciary, as in the case of discretionary life prisoners, or as now, by the executive.

That was in large measure a political and constitutional debate: not a question for the court”.

Hindley’s appeals to the Court of Appeal in 1998 and the Lords in 2000 were both dismissed.

In **R v Secretary of State for the Home Department ex parte Stafford** 1998 Lords it was held that the Home Secretary had power to refuse to release a mandatory life sentence prisoner after the expiry of his tariff due to the risk of the prisoner committing a further imprisonable offence or not complying with the terms of his life sentence licence. Significantly in this case at the Court of Appeal stage Lord Bingham repeated his concern about the Home Secretary (Michael Howard in 1996) taking an active sentencing role as a member of the executive:

“ The imposition of what was in effect a substantial term of imprisonment by the exercise of executive discretion, without trial, lay uneasily with ordinary concepts of the rule of law”.

In 2002 Stafford’s case reached the ECHR in **Stafford v UK** where the Court found a breach of Art 5.4 as the renewed detention required consideration by a **judicial** body (and not just the Home Secretary, a member of the executive).

The **Thompson and Venables** case came before the European Court of Human Rights in **T v UK** and **V v UK** 1999. (Two boys aged 10 at the time of their offence and 11 at the time of their trial were convicted of murder of James Bulger aged 2. The trial judge ordered that they be detained indefinitely at her majesty’s pleasure. Under English sentencing law they were required to serve a tariff period to satisfy the requirements of retribution and deterrence. After that they had to be released unless the Parole Board considered they represented a danger to the public. The Home Secretary set a tariff of 15 years. The decision was quashed by the Lords. A new tariff was awaited. Held - There were breaches of Article 6.1 (Fair trial) and Article 5.4 (absence of proceedings to test lawfulness of detention). Article 6.1 guaranteed that sentence would be fixed by an independent tribunal. The Home Secretary had been involved in sentencing and was not independent of the executive therefore there was a breach. Article 5.4 entitled children detained indefinitely to a periodic review by a judicial body such as the Parole Board but this had not happened since conviction in November 1993 and therefore there was a further breach.)

The consequence of this decision was that any exercise of a sentencing role by the Home Secretary in the case of a child serving either a mandatory or discretionary indeterminate sentence would fall foul of Article 6.1. Jack Straw later announced that in future the tariff for those under 18 would be set by the trial judge and announced in open court.

At the invitation of the Home Secretary the Lord Chief Justice Lord Woolf fixed the tariff

for Venables and Thompson at just under 8 years in **Re Thompson and Venables** 2000 C of A. Lord Woolf stated that in reviewing the tariff he took into account the welfare of the child offenders and the progress they had made while in detention. It then became a matter for the parole board to decide any release date.

This left the position regarding adult mandatory life sentence prisoners to be clarified. The **Anderson** case in the House of Lords in November 2002 demonstrated that the courts were prepared to make a declaration of incompatibility where important constitutional principles were at stake and there was a clear conflict between a UK statute and the Convention incorporated into UK domestic law by the Human Rights Act 1998.

In his judgment Lord Bingham (the senior Law Lord) stressed “the fundamental principle of separation of powers” and said that the separation of judiciary and executive was fundamental as the rule of law depended on it. This meant that the prisoner Anderson did not receive a ‘fair trial’ under Article 6.1 as this included being sentenced by an “independent tribunal”. The Home Secretary was not independent of the executive nor was he a tribunal.

This is a good example of a constitutional change introduced into the UK by the European Court of Human Rights (in **T v UK** and **V v UK**) and by the Lords (in **Anderson**) by applying the Convention which in turn is based on the separation of powers between the executive and the judiciary.

The speed of the change is significant - in 1994 the Home Secretary could fix a lengthy prison sentence for a prisoner convicted of murder without giving his reasons. By 2003 his power to fix any sentence with or without reasons had passed into history.