

CIHRC Case 6/06 The “Lifers” Case (Bruce, Dixon B, Dixon L, Powell, Roper & Thomas)

Final Report of the Cayman Islands Human Rights Committee

Reception of Complaint

1. On 27th March 2006 the complainants wrote to the Human Rights Committee (HRC) and requested that the HRC investigate their case. That letter was received on 29th March 2006 by the HRC. The full HRC also considered the letter on 29th March 2006, when the complaint was formally received and the matter referred to the Procedural Sub-Committee for assessment. This preliminary assessment confirmed that the matter warranted further investigation and updates were provided to the full HRC at its subsequent monthly meetings. On 18th October 2006, this report was presented to the full HRC and approved, pending a couple of minor amendments, which have now been completed.

Nature of Complaint

2. For the purpose of resolving the merits of this complaint there is no need to provide a detailed background of each complainant and the facts can be stated relatively shortly: The complainants are all prisoners serving sentences of life imprisonment at Her Majesty's Prison Northward. All were convicted of offences of murder. At all relevant times (and currently) the sentence for murder in Cayman has been prescribed by law, with the result that there is no judicial discretion in sentencing. Messrs Bruce, Dixon, Dixon and Powell were all sentenced to death and their sentences subsequently commuted to life imprisonment. Messrs Roper and Thomas were sentenced to life imprisonment. The complainants state that they have never been told whether they will be released and as such they assume that they will be obliged to remain in prison for the rest of their lives.

Legal Background/Assessment of Merits of Complaint

3. In accordance with the HRC Terms of Reference an assessment of the merits of any formal complaint will be made against the background of relevant international human rights treaties. In this case of particular relevance is the European Convention on Human Rights (“the Convention”). However, the principles enshrined in the Convention are also reflected in other very important international human rights treaties. The International Covenant on Civil and Political Rights (“The International Covenant”), which came into force on 23rd March 1976, and which has been extended to Cayman, also contains articles relevant to this complaint as does the

Universal Declaration of Human Rights, signed 10th December 1948. Indeed, the Convention itself states that it was drafted with the Universal Declaration of Human Rights in mind.

4. On 24th February 2006 direct petition to the European Court of Human Rights in Strasbourg (not to be confused with the European Court of Justice) was re-extended to the Cayman Islands (See HRC press release on the “Right of Individual Petition to the European Court of Human Rights as Extended to the Cayman Islands” on the HRC website). Accordingly, rights afforded under the Convention can be directly invoked by inhabitants of these islands in the European Court of Human Rights and all of these complainants have the right to petition the Strasbourg court. Additionally, the case law relating to the interpretation of rights under the Convention is more developed than under the other international instruments. It is for these reasons that the Convention is of particular relevance in this case and that the complaint will be considered against a background of its provisions.

5. The relevant articles of the Convention are Articles 3 and 5. Article 3 of the Convention provides:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5 of the Convention provides:

(1) *Everyone has the right to liberty and security of the person. No one shall be deprived of 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...

Although this Final Report primarily focuses on the rights contained in the Convention, it should be noted that similar provisions can also be found in Articles 7 and 9 of the International Covenant.

6. Since 4th November 1950, when the Convention was signed, its various articles have been interpreted and developed in various judgements by the Court. In a number of high-profile rulings the European Court has found that *any* mandatory sentence will be unlawful, violating Articles 3 and 5, if it is arbitrary and disproportionate to the gravity of the crime. The Privy Council in various cases and the final appellate domestic courts of the UK and Jamaica, all considering identically worded provisions of domestic laws, have delivered similar judgements. (Similar rulings have been made in many other jurisdictions including the United States and Canada). To quote the *United States Supreme Court in Commonwealth of Pennsylvania ex rel. Sullivan v. Ashe*, U.S. Supreme Court, 302 U.S. 51, 55 (1937)”



"For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense [sic] together with the character and propensities of the offender".

7. Dealing with mandatory life sentences specifically, in the case of *Stafford v The United Kingdom* (46925/99 [2002] ECHR 470 (28 May 2002)), the European Court of Human Rights cited with approval, at paragraph 45, the comments of the 1993 United Kingdom Committee on the Penalty for Homicide chaired by Lord Lane (former Lord Chief Justice of England and Wales), which noted in its conclusions:

- (1) The mandatory life sentence for murder is founded on the assumption that murder is a crime of such unique heinousness that the offender forfeits for the rest of his existence his right to be set free.

- (2) That assumption is a fallacy. It arises from the divergence between the legal definition of murder and that which the lay public believes to be murder.

- (3) The common-law definition of murder embraces a wide range of offences, some of which are truly heinous, some of which are not.

- (4) The majority of murder cases, though not those which receive the most publicity, fall into the latter category.

- (5) It is logically and jurisprudentially wrong to require judges to sentence all categories of murderer in the same way, regardless of the particular circumstances of the case before them.

- (6) It is logically and constitutionally wrong to require the distinction between the various types of murder to be decided (and decided behind the scenes) by the executive as is, generally speaking, the case at present ...

8. Later in the same judgement, at paragraph 46, the European Court of Human Rights noted, also with approval, the judgement of Lord Justice Simon Brown in the UK Court of Appeal:

"...I accept of course that the mandatory life sentence is unique. But not all the offences for which it is imposed can be regarded as uniquely grave. Rather the spectrum is a wide one with multiple sadistic murders at one end and mercy killings at the other. Lifelong punitive detention will be appropriate only exceptionally...Regard must not be had to 'public clamour' – see [V.]. There is, of course, 'the need to maintain public confidence in the



system of criminal justice' (see the Home Secretary's statement to Parliament on 10 November 1997). To my mind, however, this can and should be catered for in the fixing of the tariff. The retributive element of the tariff should reflect the public's moral outrage at an offence. Surely the maintenance of public confidence in the system cannot require longer incarceration than that which properly reflects society's entitlement to vengeance. Sometimes, I recognise that will require a whole life tariff. But why should not the judges determine that?"

9. The same sentiments were reflected by the Privy Council sitting on appeal from a case in Belize (*Reyes v The Queen* [2002] UKPC 11), in which they noted at paragraph 11:

"It has however been recognised for very many years that the crime of murder embraces a range of offences of widely varying degrees of criminal culpability. It covers at one extreme the sadistic murder of a child for purposes of sexual gratification, a terrorist atrocity causing multiple deaths or a contract killing, at the other the mercy-killing of a loved one suffering unbearable pain in a terminal illness or a killing which results from an excessive response to a perceived threat. All killings which satisfy the definition of murder are by no means equally heinous."

10. In the UK House of Lords, Lord Bingham giving judgement in *R v Lichniak* [2002] UKHL 47, at paragraph 8, held:

"If the House had concluded that on imposition of a mandatory life sentence for murder the convicted murderer forfeited his liberty to the state for the rest of his days, to remain in custody until (if ever) the Home Secretary concluded that the public interest would be better served by his release than by his continued detention, I would have little doubt that such a sentence would be found to violate articles 3 and 5 of the European Convention on Human Rights ("the convention") as being arbitrary and disproportionate."

Findings

11. From the review of the case law above it is clear that legislation which imposes a mandatory sentence of life imprisonment for all offences of murder, and prevents the court from considering the circumstances of both the offence and the offender is contrary to the Convention as well as to the other two international treaties referred to.
12. Accordingly, the HRC finds that there are prima facie violations of both Articles 3 and 5 of the Convention in the complainants' cases. The HRC notes that should the complainants bring their cases to the European Court of

Human Rights they would be highly likely to succeed. They would probably be awarded damages and a change of Cayman's law required. The HRC hopes that appropriate legislative changes here in Cayman may avoid this necessity.

Proposals

13. The legal systems of the UK and Cayman are very similar. As in Cayman, in the UK the only sentence available for murder is one of life imprisonment. However the current regime for the sentencing of murder cases in the UK has, following various successful challenges in the European Court of Human Rights, been adapted to comply with the requirements of the Convention. Accordingly, the HRC believes that it may provide an appropriate model for how the Cayman procedure for sentencing murderers might be modified to bring it within the requirements of the Convention.
14. Although since 1965 the UK has had only one sentence for murder (as indicated above), over the years there developed a "tariff" system. Under this system each prisoner's sentence is broken down into two component parts: The first (the tariff) being for retribution and deterrence and the second being for the protection of the public. The tariff, now called the "minimum term" is set by the trial judge when sentencing the defendant following his conviction, it represents the minimum period that an offender must serve before he can be considered for release. Once this period has expired the continued detention of an offender depends on whether he is considered a danger to the public. This assessment of danger must be performed by an independent body with judicial procedures and safeguards. In the UK this is the Parole Board and the offender is entitled, amongst other safeguards, to be present at the hearing, to make representations, and to have the decision reviewed periodically. The Parole Board must comply with the requirements of Article 6 of the Convention which requires (amongst other things) a fair hearing from "...an independent and impartial tribunal established by law..." Having been released an offender is liable to recall to prison for the rest of his life if it is considered that he has become a danger to the public. The full sentencing procedure can be found in Practice Direction (Criminal Proceedings: Consolidation), para. IV.49 (as substituted by Practice Direction (Crime: Mandatory Life Sentences) (No.2)) [2004] 1 W.L.R. 2551.
15. In the case of these complainants (and all other prisoners currently serving sentences for murder) the HRC proposes that new legislation is passed to allow their sentencing Judges (or the Chief Justice) to review the full circumstances surrounding their crimes and, having heard submissions from counsel, determine what their 'minimum term' should be. When that term expires, (or immediately if it already has) their cases should be



referred to either the Parole Board or a Grand Court Judge to determine whether they pose a risk to the public; the complainants must be released if the Parole Board or Grand Court Judge is satisfied they are not a danger to the public.

16. It should be noted that in Cayman there is currently no statutory framework establishing the position of the Parole Board. Clearly this will need to be addressed. Without such a statutory framework the Parole board would not meet the requirements of Article 6 referred to in paragraph 14, above. This requirement exists in all cases that the Parole Board studies, not just life sentence release cases, and the HRC urges the government to address this too as a matter of priority.
17. There is nothing in the case law to prevent His Excellency The Governor exercising his discretionary power to release any of these complainants at any stage (see section 53 of the Cayman Islands Constitution and section 2(d) of the Penal Code 2006), thereby removing the need for the assessment of that complainant's case by either a Judge or the Parole Board. However, such actions are not generally a substitute for the use of procedure set out above. The exercise by the Governor this power does not meet the requirements of Article 6 as he is not "...an independent and impartial tribunal established by law..." within the meaning of the Convention. Accordingly, whether or not a decision is taken by the Governor to release any of the complainants, the law would still need to be modified to reflect the procedure set out in paragraphs 14 – 16 above.

Important Note

18. It is the intention of the HRC that this report is read as a complete document. Further, the HRC hopes that those desirous of quoting from its contents or attempting to summarise it will not do so without making sure they fully place any comments or quotations in their context. To do otherwise may create an entirely misleading impression.
19. This report has deliberately been drafted without knowledge of the circumstances of the individual crimes committed by the complainants. The HRC does not purport to suggest what the appropriate "minimum term" should be in the case of any of the complainants. On the contrary, as will be clear from the contents of the report, it is the HRC's opinion that this must be determined by a judge. The HRC fully accepts that there exist exceptional cases where the gravity of an offender's crime is such that (s)he should never be released.

Appendix: Further Note on Minimum Sentences Generally



20. There exist in the Cayman Islands various offences which carry mandatory minimum sentences for which the sentencing Judge has his discretion fettered by law. These were largely created by a series of new crime laws passed in October 2005. As will be clear from the comments and review of the law, above, the HRC is of the opinion that these sentences may, in many circumstances, fall foul of the Convention, the International Covenant and the Universal Declaration of Human Rights.
21. Firstly, in all these laws there is no provision for tailoring the sentence to the offender or, even more worryingly, for different sentencing of young offenders. A 10 year-old convicted of an offence will receive the same sentence as a 30 year-old man. Sentencing of young people in accordance with these laws would almost certainly also breach Cayman's obligations under the Convention on the Rights of the Child (see the HRC's submissions for the periodic report under the Convention on the Rights of the Child, which are available on the HRC's website). Secondly, there is no consideration of the circumstances or nature of the crime. Wildly differing offences attract the same minimum sentence. To take for example the Firearms Law; there is no distinction between the various classes of firearm. The legislation currently says that a machine gun with armour-piercing rounds is in the same category as an air pistol or a flare gun. All may be "lethal-barrelled weapons" as defined by the law. Finally, there is no provision for reductions in sentences for guilty pleas. It is universally recognized that for sound reasons of public policy, a defendant who pleads guilty should be entitled to some discount on his sentence. Currently the position in the Cayman Islands is that a 12 year-old with an unloaded air gun, who has never been in trouble, and who pleads guilty to an offence under the Firearms Law is sentenced to at least 10 years imprisonment. The HRC respectfully suggests that this is unjust as well as contrary to the four international treaties referred to.
22. The HRC urges the government to take this opportunity, when amending the statutory provisions in relation to life sentences, to amend the Firearms Law and Penal Code to remove sentencing provisions which, in many cases, are not only unlawful under the Convention but which may also be wholly unjustified. It is therefore proposed that all laws containing provisions for minimum sentences should have those provisions removed. Failing that they should be redrafted to include the following:
- "Whoever, being over 18 years of age at the date of the offence, contravenes this section commits an offence and is liable on conviction to a term of at least 10 years except where the court is of the opinion that there are exceptional circumstances which –
- (a) relate to the offence or to the offender; and



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(b) would make it unjust to impose such a term in all the circumstances.”

23. Provision should also be made for the defendant to receive a discount of up to one third (as is currently the position in all other cases) on his sentence for a plea of guilty. The changes proposed would still result in the draconian sentences intended by government draftsmen but would remove the injustice caused by mandatory minimum terms without judicial discretion. The HRC, of course, stands ready to further assist in the drafting of any new legislation and to comment on any proposed bills.