

Criminal Law

Let judges fix all life tariffs



Colin Bobb-Semple

Five recent decisions reviewed in this article have highlighted the need for urgent reform of the procedure for fixing tariff periods for life prisoners. It is submitted that the judiciary should fix all life tariffs to avoid the criticism that Home Secretaries would be more susceptible than judges to influence by public clamour and pressure from the media.

YOUNG OFFENDERS

In *R v Secretary of State for the Home Department, ex parte Venables and Thompson* [1997] 3 WLR 23, two boys who were ten years old at the time of the commission of the offence, were convicted of the murder of a two-year old boy, Jamie Bulger. They were sentenced to detention during Her Majesty's pleasure in accordance with s. 53(1) of the *Children and Young Persons Act 1933*. The trial judge recommended a tariff period of eight years, i.e. the minimum period during which it was necessary for them to be detained to satisfy the requirements of retribution and deterrence, taking into account their extreme youth. The Lord Chief Justice recommended that the tariff be increased to ten years, but the Secretary of State fixed the period at fifteen years in each case, having considered the judges' recommendations, petitions, correspondence and newspaper coupons expressing public opinion.

The boys applied for judicial review of the Secretary of State's decisions. The Divisional Court quashed the decisions and the Court of Appeal dismissed an

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appeal by the Secretary of State and upheld the decision of the Divisional Court. On appeal to the House of Lords it was held, by a majority, that the sentences of detention during Her Majesty's pleasure were different in nature from mandatory life sentences imposed on adults; the Secretary of State was required to take into account the welfare of the children under s. 44(1) of the *Children and Young Persons Act 1933* and to consider from time to time whether continued detention was justified. The inflexible policy of setting a minimum tariff at the outset which would, in no circumstances, be varied by reason of matters occurring subsequently to the offence, was unlawful. The Secretary of State had unlawfully exercised his discretion in taking into account public petitions and public opinion expressed in the media.

The court rejected the Secretary of State's policy of treating sentences of detention during Her Majesty's pleasure in the same manner as mandatory life sentences for adults. Section 53(1) provides for detention during Her Majesty's pleasure 'in lieu' of 'imprisonment for life' where the offender appears to the court to have been under the age of eighteen years at the time of commission of the offence:

'A person convicted of an offence who appears to the court to have been under the age of eighteen years at the time the offence was committed shall not, if they are convicted of murder, be sentenced to imprisonment for life ... but in lieu thereof the court shall (notwithstanding anything in this or any other Act) sentence them to be detained during Her Majesty's pleasure, and if so sentenced they shall be liable to be detained in such place and under such conditions as the Secretary of State may direct' (s. 53(1)).

The practical effect of the decision is that where a minor is sentenced to detention during Her Majesty's pleasure, the Secretary of State may adopt a tariff policy, but this must be sufficiently flexible to enable the Minister to take into account the development and progress of the minor.

In addition, the Secretary of State must not take into account the public clamour about the tariff. Lord Steyn observed as follows:

'Plainly a sentencing judge must ignore a newspaper campaign designed to encourage him to increase a particular sentence. It would be an abdication of the rule of law for a judge to take into account such matters. The same reasoning must apply to the Home Secretary when he is exercising a sentencing function. He ought to concentrate on the facts of the case and balance considerations of public interest against the dictates of justice. Like a judge the Home Secretary ought not to be guided by a disposition to consult how popular a particular decision might be. He ought to ignore the high voltage atmosphere of a newspaper campaign. The power given to him requires, above all, a detached approach. I would therefore hold that public protests about the level of a tariff to be fixed in a particular case are legally irrelevant and may not be taken into account by the Home Secretary in fixing the tariff. I conclude that the Home Secretary misdirected himself in giving weight to irrelevant considerations. It influenced his decisions. And it did so to the detriment of Venables and Thompson.'

Following this decision, the new Home Secretary announced, in November 1997, new procedures for reviewing tariff periods fixed in relation to offenders sentenced to detention during Her Majesty's pleasure. He also stated that he would be fixing a new tariff in respect of the boys and confirmed that he would review their progress and the sentence at the halfway stage of the tariff.

In *R v Secretary of State for the Home Department, ex parte Furber* [1997] Crim LR 841, the applicant, aged seventeen years at the time of conviction, had pleaded guilty to manslaughter on the ground of diminished responsibility, for the killing of her great aunt. She was sentenced to detention for life under s. 53(2) of the *Children and Young Persons Act 1933* and the trial judge recommended that she should serve a period of ten years to meet the requirements of retribution and deterrence. The Lord Chief Justice at

that time recommended nine to ten years and the Secretary of State fixed the tariff period at nine years. The case was referred to the Lord Chief Justice's successor who recommended that the tariff be fixed at seven years and the Secretary of State accepted that period.

The applicant applied for judicial review of the decision. It was submitted on her behalf that even if she were an adult, a seven-year tariff equated to a determinate sentence of 10½ to 14 years, which would have been too long. In the case of a young person, it was manifestly excessive. The Divisional Court, applying the House of Lords decision in *ex parte Venables and Thompson*, held that there should be regard to the welfare of the applicant in accordance with s. 44 (1) of the *Children and Young Persons Act 1933*, and that the correct approach in cases where the court sentenced a minor to detention for life was that the court should fix the minimum tariff, which should generally be half the appropriate determinate sentence. This would enable the Parole Board to consider the case sooner rather than later, in accordance with the provisions contained in s. 34 of the *Criminal Justice Act 1991*. In this case the applicant had already served six years in detention, and a declaration was made that, had the Secretary of State directed himself in accordance with the law, as established by *ex parte Venables and Thompson*, he could not have properly certified a period exceeding that period which she had served in detention.

These cases are now subject to the provisions contained in s. 28 of the *Crime (Sentences) Act 1997* by which the court is required to fix the tariff period as if acting under s. 34 of the *Criminal Justice Act 1991*, by reducing the appropriate determinate sentence to half or two-thirds, and the Home Secretary is required to release offenders when directed to do so by the Parole Board.

MANDATORY LIFE PRISONERS

As regards adults sentenced to mandatory life imprisonment, the House of Lords has recently considered the role of the Home Secretary in fixing the tariff period (*R v Secretary of State for the Home Department, ex parte Pierson* [1997] 3 WLR 492). In 1985 the applicant was convicted of the murders of his parents. He was 20 years old at the time of the offences and had lived with his parents at the family home, a small farmhouse in

Wales. He had no previous convictions and was described as of 'positively good character'. His parents were shot more than once at close range with a shotgun, in the middle of the night, while at least one of them was asleep. The applicant called the police and admitted the offences. At his trial he stated that he could not recollect the events, and no motive for the murders could be found.

The trial judge sentenced the applicant to the mandatory sentence of life imprisonment in accordance with s. 1(2) of the *Murder (Abolition of Death Penalty) Act 1965*. The section provides as follows:

'On sentencing any person convicted of murder to imprisonment for life, the court may at the same time declare the period which it recommends to the Secretary of State as the minimum period which in its view should elapse before the Secretary of State orders the release of that person on licence...'

The judge recommended to the Secretary of State that the applicant should serve a tariff period of 15 years' imprisonment, and this was agreed by the Lord Chief Justice. In 1988, however, the Secretary of State fixed the tariff at 20 years and, in accordance with the practice then, the applicant was not informed of this. He was one of the successful applicants in the decision of the House of Lords in *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531, which held that mandatory lifers were entitled to be informed of the tariff and the reasons for the decision to fix the tariff.

Following that decision, the Home Office altered its practice, and the applicant was sent a letter outlining the judicial recommendations and stating that the period of 15 years would have been appropriate for a single premeditated offence, but because a double murder had been committed, the period of 20 years had been fixed by the Secretary of State. The applicant made representations to the Secretary of State, but the Home Office wrote to his solicitors to say that although it was accepted that it would have been wrong to have proceeded on the basis that the murders were premeditated, and that it was further accepted that they were part of a single incident, the Secretary of State at that time came to the conclusion that a tariff of 20 years was appropriate to meet the requirements of retribution and deterrence.

The applicant sought judicial review of

the Secretary of State's decision. The Divisional Court quashed the decision and the Court of Appeal allowed the Secretary of State's appeal. On appeal by the applicant to the House of Lords it was held by a majority, allowing the appeal, that the Secretary of State's decision was unlawful and should be quashed, as he had effectively increased the tariff in deciding to retain the term of 20 years, notwithstanding the fact that he had accepted that it was wrong to proceed on the basis that the murders were premeditated.

The court stated that once the tariff was fixed by the Secretary of State and communicated, there was no general power to increase it in the absence of exceptional circumstances, as that would be in breach of the principle that a lawful sentence should not be increased retrospectively. Furthermore, the Secretary of State must observe normal constraint in making decisions on punishment.

REFORM OF FIXING OF MANDATORY LIFE TARIFFS

The current procedure for the fixing of the tariff for mandatory lifers is contained in s. 29 of the *Crime (Sentences) Act 1997*. The section was brought into force on 1 October 1997 and provides as follows:

'(1) If recommended to do so by the Parole Board, the Secretary of State may, after consultation with the Lord Chief Justice to enter with the trial judge if available, release on licence a life prisoner who is not one to whom s. 28 above applies [s. 28 relates to discretionary life prisoners, automatic life prisoners under s. 2, and minors sentenced to detention during Her Majesty's pleasure].

(2) The Parole Board shall not make a recommendation under subs. (1) above unless the Secretary of State has referred the particular case, or the class of case to which that case belongs, to the Board for its advice.'

It was held by the Court of Appeal in *R v Secretary of State for the Home Department, ex p Stafford*, *The Times* 28 November 1997, that s. 29 of the 1997 Act conferred on the Home Secretary an extraordinarily wide discretion to refuse to direct the release of a mandatory life prisoner following recommendation by the Parole Board as to release. Lord Bingham CJ, delivering the judgment did, however, express the view that the imposition of what was in effect a substantial term of imprisonment by the

exercise or executive discretion, without trial, lay uneasily with ordinary concepts of the rule of law. It was further held by the Divisional Court in *R v Secretary of State for the Home Department, ex parte Hindley*, *The Times* 19 December 1997, that in exercising his broad discretion confirmed by s. 29, the Home Secretary was entitled to fix a whole life tariff to be served by Myra Hindley, a mandatory life prisoner, even though an earlier Home Secretary had considered a provisional tariff of 30 years, as that period had neither been fixed nor communicated to the prisoner. The court considered that the present Home Secretary's policy, announced in November 1997, in taking into account issues such as the prisoner's exceptional progress in custody, was commendable. Lord Bingham CJ, delivering the judgment did, however, state that there was room for serious

debate as to whether the task of fixing the tariff should be undertaken by the judiciary, as in the case of discretionary life prisoners, or as at present by the executive, for Myra Hindley had clearly felt that she was held hostage to public opinion, although no longer judged a danger to anyone, because of her notoriety and the public obloquy which would befall any Home Secretary who ordered her release.

It is submitted that early reform of the procedure ought to be introduced to bring it in line with the procedure under s. 28 of the 1997 Act which applies to discretionary lifers, automatic lifers and those sentenced to detention during Her Majesty's pleasure. The result would be a clear and uniform procedure applied to all cases of life imprisonment, in which the judiciary would set the tariff, i.e. the relevant part of the sentence which the

prisoner would have to serve before being considered for release on licence by a Lifer Panel of the Parole Board, presided over by a senior judge. It would avoid the criticism levelled at Secretaries of State that they would be more susceptible than judges to be influenced by public clamour and pressure from the media when deciding on matter of punishment, and would also properly leave all decisions relating to punishment to the judiciary. 

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Commercial Law

Confidentiality letters – protecting disclosed business secrets



Nigel Thorne

It was reported in the business press, that when Barclays Bank plc put their investment banking arm up for sale, a number of potential purchasers were concerned about the severity of the restrictions in the confidentiality agreement they were presented with. The sale process will have involved Barclays providing confidential information about their investment banking arm to the potential purchasers. Barclays will have been concerned that potential purchasers may have been tempted to use the confidential information for their own commercial purposes, rather than simply for the purpose of evaluating the acquisition, or that they may simply have

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been careless as to whom they gave access to the confidential information.

When a business is up for sale and confidential information is given out, there may be a concern that companies who have expressed an interest in acquiring the business are on a fact-finding exercise, with no intention of undertaking an acquisition. This suspicion will be particularly strong where the potential acquirer is a competitor. Even if a competitor has a genuine interest in the acquisition they may not turn out to be the successful acquirer. A vendor who fails to sell their business or the actual acquirer of the business will be concerned as to who has obtained confidential information during the sales process and, if they are a competitor, what they could do with it.

As a result it is normal for a potential purchaser to be asked to enter into a confidentiality agreement before they are provided with sensitive information. However, placing legal obligations on a potential purchaser is not necessarily the whole answer in practical terms. A vendor may not know that confidential information is being used or distributed for purposes unconnected with the sale. Even if they suspect that it is being used for commercial advantage it may be

difficult to prove. Therefore a vendor should consider holding back the most confidential information about their business, such as customer lists, until the sales contract is about to be signed.

DUTIES OF CONFIDENTIALITY

Depending on the circumstances there may be common law duties of confidentiality. The type of information involved and the relationship between the parties at the time of disclosure will be the key factors. There would seem to be little doubt that business information concerning corporate strategy, customer lists and pricing will, if not in the public domain, give rise to a duty of confidence if handed to a third party as part of a sales process. However, common law duties will rarely be relied on, essentially for three reasons:

- a document setting out the type of information that is confidential and the duty of confidence in relation to that information will serve to emphasise the existence of the duty and the importance that the vendor places on it;
- if the duty of confidence is thought to have been breached, a provider will have greater confidence approaching a court for an injunction or other relief or remedy, if they are armed with an agreement between the parties which