Cambridge Law Journal, **74(1)**, March 2015, pp. 1–48

THE
CAMBRIDGE LAW JOURNAL

VOLUME 74, PART 1 MARCH 2015

CASE AND COMMENT

THE WHOLE-LIFE SENTENCE IN ENGLAND AND WALES

THERE can be little doubt that there is disagreement between the Court of Appeal and the European Court of Human Rights (ECtHR) over the whole-life sentence in England and Wales. Despite evolving jurisprudence on the issue of life-long detention emanating from Strasbourg, the Court of Appeal has readily upheld the English whole-life sentence in recent years. It has been doing so by adopting a very wide interpretation of the Secretary of State's power to order the compassionate release of a life sentence prisoner.

The latest instalment of this saga was played out in the Court of Appeal in *Attorney General's Reference (No. 69 of 2013)* [2014] EWCA Crim 188; [2014] 1 W.L.R. 3964, in which the court considered two separate appeals. In October 2013, Ian McLoughlin had pleaded guilty to murder and to robbery – offences committed whilst on day release from an open prison where he was already serving a life sentence for an earlier murder. When determining a minimum term for murder, sentencing judges must have regard to the statutory framework set out in s. 269 of, and Sch. 21 to, the Criminal Justice Act 2003 (the "2003 Act"). Under this scheme, a murder committed by an offender previously convicted of murder would "normally" fall within the ambit of the whole-life starting point (and in the case of McLoughlin, who also had an earlier conviction for manslaughter, in addition to his previous conviction for murder, a whole-life sentence would be anticipated). Passing sentence at the Central Criminal Court, Sweeney J. instead imposed a minimum term of 40 years; this sentence was challenged as unduly lenient by the Attorney General, under s. 36 of the Criminal Justice Act 1988. The other appellant was Lee Newell, who was convicted of murder and theft for an offence committed in prison, where he was already serving a life sentence for murder. Newell was sentenced to a whole-life order for this murder; he appealed, arguing that instead a (lengthy) determinate minimum term should have been imposed.

The background to this judgment was the decision of the Grand Chamber of the ECtHR in *Vinter and others v United Kingdom* (2013) 34 B.H.R.C. 605, handed down in July 2013. The Grand Chamber's earlier decision in *Kafkaris v Cyprus* (2009) 49 E.H.R.R. 35 that, for a whole-life sentence to be compliant with Article 3 of the European Convention on Human Rights (ECHR), it had to be *de jure* and *de facto* reducible (i.e. that there must be some possibility of eventual release) had invited scrutiny of the whole-life sentence in England and Wales. Since the 2003 Act, any offender sentenced to a whole-life order has had only one possible avenue for release – through the Secretary of State's power to release life-sentence prisoners on compassionate grounds under s. 30 of the Crime (Sentences) Act 1997 (the "1997 Act"). Three English whole-lifers (Douglas Vinter, Jeremy Bamber, and Peter Moore) contended that the absence of a formal review breached their Article 3 rights as the uncertain and narrow application of s. 30 alone did not offer them a realistic possibility of release. They appealed to the Grand Chamber following the decision of the Fourth Section of the ECtHR, by four votes to three, that the English whole-life sentence was compliant with Article 3.

The Grand Chamber concluded in *Vinter*, by 16–1, that the English whole-life sentence was *de jure* and *de facto* irreducible and therefore infringed the applicants' Article 3 rights. (Even the dissenting judgment was only partially so: Judge Villiger concluded that a breach would occur only at a later date when a lifer remained in prison without justification; the majority decided that the breach would occur at the moment of the sentence's imposition.) This brings us back to *Attorney General's Reference (No. 69 of 2013)*. When McLoughlin came to be sentenced three months after the Grand Chamber's decision in *Vinter*, Sweeney J. concluded that he could not impose a whole-life sentence as this would not be compliant with the ECHR.

In *Attorney General's Reference (No. 69 of 2013)*, the Court of Appeal considered three questions: whether a whole-life order can be imposed as just punishment; whether the regime for reducibility of the sentence has to be in place at the time of imposing a whole-life order; and whether the regime under s. 30 for reducibility satisfies Article 3. In relation to the first question, the court concluded that the ECtHR had not held in *Vinter* that the imposition of whole-life sentences, in appropriate cases, violated Article 3. The second question was answered in the affirmative: it was clear from the *Vinter* judgment that a legal regime for a review during the sentence must be in place at the time the sentence is imposed. And so the final question became the important one – and the issue over which there is disagreement.

In concluding that s. 30 of the 1997 Act provides an offender "hope" or the "possibility" of release, the Court of Appeal suggested that the Grand Chamber had misunderstood UK law. The Grand Chamber's concern in relation to s. 30 was that the criteria set out in Prison Service Order 4700 (the

"Lifer Manual"), which offers guidance to the Secretary of State about the application of compassionate release in life sentence cases, suggest that such release is restricted to a narrow band of cases where the lifer is terminally ill with death likely to occur very shortly (usually within three months) or where they are bedridden or similarly incapacitated, for example, those paralysed or suffering from a severe stoke. However, the Court of Appeal concluded that the Grand Chamber had misunderstood (and overestimated) the importance of the policy set out in the Lifer Manual – release under s. 30 is not limited to the facts set out in this policy and the power to release a life-sentence prisoner under this section arises whenever there are "exceptional circumstances" (s. 30(1) of the 1997 Act). The policy contained in the manual cannot restrict the duty of the Secretary of State to consider all circumstances relevant to release on compassionate grounds and he cannot fetter his discretion by taking into account only the matters set out in the Lifer Manual. Furthermore, the term "compassionate grounds" must be read, as the Court of Appeal had earlier made clear in *R v Bieber* [2008] EWCA Crim 1601; [2009] 1 W.L.R. 223, in a manner compatible with Article 3 and any decision made by the Secretary of State in relation to s. 30 is subject to scrutiny by way of judicial review. The court therefore allowed the Attorney General's appeal and imposed a whole-life sentence on McLoughlin, whilst upholding the one imposed on Newell.

By endorsing the wide discretionary powers of the Secretary of State, the Court of Appeal appear content with an ill-defined release process which is shrouded in far greater uncertainty than the ECtHR might have envisaged. It remains uncertain under what circumstances a whole-life-sentence prisoner might be released under s. 30. Rather counter-intuitively, the court concluded that "[i]t is not necessary to specify what such circumstances are or specify criteria; the term 'exceptional circumstances' is of itself sufficiently certain" (at para. [31]). Despite interpreting s. 30 as having wider application than the Grand Chamber had appreciated – and thus rendering the whole-life sentence in England and Wales reducible and therefore Article 3 compliant – a whole-life-sentence prisoner may enjoy no practical benefit.

The difficulty arises from the Grand Chamber's decision in *Vinter* itself. If a whole-life sentence can be justified for an offence on the grounds of retribution and deterrence at the point of sentencing, it is not obvious at what stage it becomes arguable that these grounds cease to justify continuing detention. The Grand Chamber's focus, in this respect, on a whole-life sentence potentially reaching the stage where continuing detention can no longer be justified on "legitimate penological grounds" (*Vinter*, at para. [129]) is perhaps not therefore helpful: the whole-life-sentence prisoner still in custody after, say, 40 years, remains in prison because they have committed an offence for which it has been decided that, for the purposes of retribution and deterrence, only life-long imprisonment will suffice. It

would be more helpful to articulate that the issue is not one of a sentence ceasing to serve *any* legitimate penological purpose but rather that sentencing necessarily entails multiple competing legitimate penological purposes and that one (rehabilitation) can eventually over-ride the others (retribution, deterrence and incapacitation). If a Secretary of State can decline to release a reformed whole-life-sentence prisoner on the grounds that their continuing detention serves the legitimate penological purposes of retribution and deterrence, it would appear that successfully challenging this decision by way of judicial review may be rather difficult. And anyone anticipating the first release of a whole-life-sentence prisoner by the Secretary of State under s. 30 without recourse to judicial review is likely to be in for a long wait.

JONATHAN BILD*

*Address for correspondence: Faculty of Law, University of Cambridge, 10 West Road, Cambridge CB3 9DZ. Email: jdb71@cam.ac.uk.

GOOD FAITH PERFORMANCE IN CANADIAN CONTRACT LAW

IN *Mellish v Motteux* (1792) 170 E.R. 113, 157, Lord Kenyon observed that "in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith". This passage echoes a similar statement by Lord Mansfield 25 years earlier in *Carter v Boehm* (1766) 97 E.R. 1162, 1910. Despite these early statements of principle, the modern common law has been notoriously hostile to the notion that contracting parties are under a general duty of good faith in the performance of their obligations (see W.P. Yee, "Protecting Parties' Reasonable Expectations: A General Principle of Good Faith" (2001) 1 Oxford U. Commonwealth L.J. 195), and there is certainly "no firm line of modern cases to support such an obligation" in English law (see L.E. Trakman and K. Sharma, "The Binding Force of Agreements to Negotiate in Good Faith" [2014] C.L.J. 598). Nevertheless, some recent decisions in Australia, Canada, and England have begun to imply obligations to perform certain types of promises, in certain classes of contracts, in an honest manner, crafting, in the words of Lord Bingham, "piecemeal solutions in response to piecemeal problems" (*Interfoto Picture Library v Stiletto Visual Programmes Ltd*. [1989] 1 QB 433, 439 (CA)). A recent English example is *Yam Seng Pte Ltd. v International Trade Corporation Ltd.* [2013] EWHC 111 (QB) in which Leggatt J. found there to be an implied duty of "honesty" and "fidelity to the bargain" in the context of a long-term distribution contract. Importantly, His Lordship emphasised that whether such obligations can be implied is a matter of construction, which involves ascertaining the parties' objective intentions through conventional