procedural fairness these technical and uncertain arguments over the reach of Article 6(1). And, moreover, one may wonder whether the European Court of Human Rights will be as generous in according curative powers to judicial review.

CHRISTOPHER FORSYTH

INDETERMINATE SENTENCES ... AGAIN

A NOTE on the legality of the mandatory life sentence in (2002) 61 C.L.J. 5 concluded that once the gap between the Government's rhetoric and the reality was recognised, the mandatory life sentence could no longer be justified. After a bit of kicking from the European Court of Human Rights (see *Stafford* v. *UK* (2002) 35 E.H.R.R. 32, (2002) 61 C.L.J. 508), the House of Lords has at last recognised that the Home Secretary's involvement in fixing the "tariff" can no longer be justified. Nearly six months after their Lordships issued a declaration that the existing legislative provisions were incompatible with the European Convention on Human Rights, it appears that the Home Office has still not decided what to do. We should expect late amendments to the already dense Criminal Justice Bill 2002, but at the time of writing (April 2003) the proposed amendments have not been published despite the fact that the Bill has reached its Report stage in the House of Commons.

On 25 November 2002 the House of Lords in *R. (Anderson)* v. *Secretary of State for the Home Department* [2002] UKHL 46, [2002] 3 W.L.R. 1800 declared section 29 of the Crime (Sentences) Act 1997 to be incompatible with Article 6 of the European Convention of Human Rights "in that the Secretary of State for the Home Department is acting so as to give effect to section 29 when he himself decides on the minimum period which must be served by a mandatory life sentence prisoner before he is considered for release on life licence". This curious wording was agreed between the parties. Section 29 provides:

(1) If recommended to do so by the Parole Board, the Secretary of State may, after consultation with the Lord Chief Justice together with the trial judge if available, release on licence a life prisoner who is not [a discretionary life prisoner].
(2) The Parole Board shall not make a recommendation under subsection (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.

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Perhaps the section may appear at first sight somewhat innocuous. It says nothing about the procedures which in practice follow the imposition of a mandatory life sentence. Lord Bingham describes it as a "not very perspicacious section" (para. [30]). What is clear is that the power to release a convicted murderer is conferred on the Home Secretary. He may not exercise that power unless recommended to do so by the Parole Board. But the Parole Board may not make such a recommendation unless the Home Secretary has referred the case to it. And the section imposes no duty on the Home Secretary either to refer a case to the Board or to release a prisoner if the Board recommends release. Thus it is left to the Home Secretary to decide whether or when to refer a case to the Board, and he is free to ignore its recommendation if he so wishes. This was clearly the intention of Parliament, and as Lord Bingham puts it, "to read section 29 as precluding participation by the Home Secretary, if it were possible to do so, would not be judicial interpretation but judicial vandalism: it would give the section an effect quite different from that which Parliament intended and would go well beyond any interpretative process sanctioned by section 3 of the [Human Rights Act] 1998" (para. [30]). Therefore the House declared the will of successive Parliaments up to and including that of 1997 to be incompatible with the will of Parliament in the Human Rights Act 1998.

So far so good. Anderson was convicted of two separate murders in 1988. The trial judge suggested a "tariff" of 15 years, the Home Secretary had increased this figure to 20 years. Whilst the House of Lords was unanimous that the Home Secretary should play no part in fixing the tariff of a convicted murderer, what will be the new solution? What will be the outcome for Mr. Anderson? The existing law and tariffs were, of course, not declared to be unlawful, simply incompatible with the European Convention, and therefore they remain until new legislation is in place: see the Home Secretary's written statement to the House of Commons of 25 November 2002. The power to fix the minimum length of time that the murderer should serve before his or her case is first considered by the Parole Board may be transferred to the trial judge, but this is only part of the story.

It should not be thought that the House was in radical mood in November: in *R.* v. *Lichniak; R.* v. *Pyrah* [2002] UKHL 46, [2002] 3 W.L.R. 1834, decided the same day as *Anderson*, the House confirmed the legality of the mandatory life sentence. It was asked to find that the sentence itself contravened both Articles 3 and 5 of the European Convention. Ironically, the appellants seem to have

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lost their case in part because it was accepted that these two people were "low risk" murderers. The trial judges at both (quite separate) trials had specifically stated that neither was likely to pose a risk to the public on release. This allowed their Lordships to conclude that the appellants' complaints were not of "sufficient gravity" to engage Articles 3 and 5. Lord Bingham explained (at para. [16]) that:

> If their sentences were properly administered, reports would be prepared in sufficient time before the expiry date to permit the Parole Board to consider their cases and permit release on the tariff expiry date if the Board so recommended.... I doubt whether there is in truth a burden on the prisoner to persuade the Parole Board that it is safe to recommend release, since this is an administrative process requiring the Board to consider all the available material and form a judgment.

Once again, the reality is ignored: even for the "non risky", the current release process is likely to be far from smooth. In 2001–2, the Parole Board recommended the release of only 89 of the 513 murderers whose cases they examined. (See, for detailed criticisms of the process, Padfield, *Beyond the Tariff: Human Rights and the Release of Life Sentence Prisoners* (Willan Publishing 2002)). It does seem as though the process may be speeding up—for example, the Annual Report of the Parole Board for 2001–2 reports that 99 per cent. of recommendations in mandatory lifer cases were issued within the Parole Board's own target date, compared with 68 per cent. in 1999–2000. This Report, published in November, unsurprisingly "anticipates root and branch changes in the administrative processes".

So what will these changes be? The mandatory life sentence for murder will remain in place, with improved procedures governing release. Murderers are not of course the only people subject to indeterminate sentences. As well as prisoners serving other forms of life sentence, there are non-criminal prisoners detained in English prisons indefinitely: see Part 4 of the Anti-Terrorism, Crime and Security Act 2001 and *A, X and Y and others* v. *Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2003] 1 All E.R. 816. And many more people will fall to be detained under Chapter 5 of the Criminal Justice Bill 2002, which introduces the new indeterminate sentence of imprisonment for public protection. This will be available even for first time offenders; for a defendant with a previous conviction for a relevant serious offence, the sentencing court is to assume that there is a significant risk of future serious harm unless it considers that it would be "unreasonable" to reach such a conclusion. Once that assumption is made, an indeterminate sentence must be imposed. How will these new provisions withstand

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challenges under the evolving jurisprudence of the Human Rights Act?

NICOLA PADFIELD

SPOUSES AS WITNESSES: BACK TO BRIGHTON ROCK?

GRAHAM Greene's *Brighton Rock* is the tragic story of a murderer who marries an innocent girl, with the sole aim of preventing her giving evidence against him. Fact can be as strange as fiction—as the decision in *R. (Crown Prosecution Service)* v. *Registrar General of Births, Deaths and Marriages* [2002] EWCA Civ 1661, [2003] 2 W.L.R. 504 dramatically shows.

Mr. J was the prime suspect for a brutal double murder. Miss B, his long-term cohabitee, made statements to the police which gave them crucial information. While J was in prison awaiting the trial in which Miss B was billed as the star prosecution witness, B first tried to retract her statement—and when this failed to persuade the Crown Prosecution Service (CPS) to remove her from the witness-list, J and B announced that they were getting married. As under section 80 of the Police and Criminal Evidence Act (PACE) 1984 a wife cannot normally be compelled to give evidence against her husband in criminal proceedings, it looked suspiciously as if the intended union was motivated by this provision. To marry, a prisoner needs a certificate from the Registrar General: a document which the relevant legislation apparently requires this official to issue, provided the prison director raises no objection, which in this case he did not.

Faced with this, the CPS brought judicial review proceedings against the Registrar General, with a view to preventing him issuing the certificate, and the prison director, to encourage him to object. The courts briefly held that the prison director could only object on grounds relating to the suitability of the prison—and the main argument centred on the position of the Registrar.

The CPS argued that although the Registrar's official duties are apparently absolute, this is subject to the implied condition that they should not be carried out so as to enable citizens to commit crimes. Thus although the Registrar has an apparently absolute statutory duty to tell adopted children who their natural parents are, it was held *R.* v. *Registrar General, ex p. Smith* [1991] 2 Q.B. 393 that he could lawfully refuse an application from a would-be parricide, currently a resident in Broadmoor (!). In the present case, the CPS argued that by marrying, J and B would commit the

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