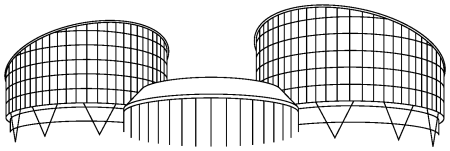

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Applications nos. 70495/10 and 74565/10
Paul LYNCH against Ireland
and Peter WHELAN against Ireland

The European Court of Human Rights (Fifth Section), sitting on 8 July 2014 as a Chamber composed of:

Mark Villiger, *President*,
Boštjan M. Zupančič,
Ann Power-Forde,
Ganna Yudkivska,
André Potocki,
Helena Jäderblom,
Aleš Pejchal, *judges*,
and Stephen Phillips, *Deputy Section Registrar*,

Having regard to the above applications lodged on 21 October 2010 and 17 November 2010 respectively,

Having regard to the decision of 18 June 2013,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The applicant in the first application, Mr Paul Lynch, is an Irish national, who was born in 1976. At the time he lodged his application he was a prisoner at Portlaoise Prison in Ireland. He was represented before the Court by Mr F. Taaffe, a lawyer practising in Co. Kildare.

2. The applicant in the second application, Mr Peter Whelan, is also an Irish national, who was born in 1982. He too is detained in Portlaoise Prison. He was represented before the Court by Mr J. Cuddigan, a lawyer practising in Co. Cork.

3. The Irish Government ("the Government") are represented by their Agent, Mr P. White of the Department of Foreign Affairs.

A. The circumstances of the case

4. Mr Lynch was convicted of murder on 10 February 1997 and was sentenced to life imprisonment pursuant to section 2 of the Criminal Justice Act, 1990. An appeal was unsuccessful. His situation was reviewed for the first time by the Parole Board in 2004. The Minister for Justice, Equality and Law Reform (now the Minister for Justice and Equality, hereafter "the Minister") decided that Mr Lynch should not be released at that time, and that his situation should not be considered again for a further three years. The Parole Board considered Mr Lynch's situation again in 2007, 2010 and in September 2012. In its last review of his case, the Parole Board recommended to the Minister that an escalating programme of temporary release be put in place for Mr Lynch. The Minister accepted the recommendation and the programme has since commenced. According to the Government, it entails attendance five days per week at a voluntary agency that works with offenders, and four overnight releases per month.

5. Mr Whelan was convicted on 2 December 2002 of the crimes of murder and attempted murder. He was sentenced to life imprisonment pursuant to section 2 of the Criminal Justice Act, 1990 and, on the same date he was also convicted of attempted murder and sentenced to a term of 15 years to be served consecutive to the life sentence. The order of sentence was subsequently reversed by the Court of Criminal Appeal. Mr Whelan completed his first sentence in July 2013, having benefitted from the standard remission of 25% of the total duration imposed at trial (fifteen years). He then commenced his consecutive life sentence. His situation was reviewed by the Parole Board in 2010 with a second consideration due to take place in 2014.

6. The two applicants later challenged their detention as contrary to the Constitution in a number of respects and also to the Convention. Their challenge was rejected by the High Court on 5 October 2007, and their appeal was rejected by the Supreme Court on 14 May 2010.

7. The Supreme Court did not accept that, by prescribing a mandatory life sentence for murder, the legislature had intruded into the domain of the judicial branch. It described murder as "the ultimate crime against society as a whole", "a crime which may have exceptional irrevocable consequences of a devastating nature for the family of the victim" and a crime that "by its very nature has always been considered at the highest level of gravity among all forms of homicide or other crimes against the person". It stated:

> "For the reasons already indicated that crime has always and legitimately been considered to be one of profound and exceptional gravity and, in the Court's view, one for which the State is entitled to impose generally a punishment of the highest

level which the law permits. Given that it is an offence which is committed when, and only when, a person is unlawfully killed and that the person so doing intended to kill or cause serious injury it is one which can therefore properly be differentiated from all other crimes including manslaughter.

The Court is of the view that the learned trial judge was correct when she concluded "...there can be nothing offensive in the Oireachtas promoting respect for life by concluding that any murder even at the lowest end of the scale, is so abhorrent an offensive to society that it merits a mandatory life sentence ..."."

8. The Supreme Court also rejected the argument that the mandatory life sentence was contrary to the principle of proportionality in sentencing. It stated:

" ...[T]he duty to impose the sentence which is proportionate or appropriate to the circumstances of the case only arises where a judge is exercising a judicial discretion as to the sentence to be imposed within the parameters laid down by law. It does not arise where a court is lawfully imposing a fixed penalty generally applicable to a particular offence ..."

9. The Supreme Court then considered the argument that, in substance, a life sentence was not a determinate sanction because the actual duration of imprisonment was decided systematically by the Minister, and that in so doing he was guided by considerations of a preventive nature. It noted, firstly, that it had been affirmed many times in case law that preventative justice or detention forms no part of Irish law. A convicted person may not be sentenced by a court or detained by an executive order for a preventative or non-punitive purpose. It was a "misconception that the punitive element of the life sentence terminates on temporary release"; "even where the release is open-ended ... the released prisoner remains liable to arrest and return to imprisonment to continue serving the life sentence should he be in breach of the conditions". Temporary release was a privilege or a concession accorded at the discretion of the executive, not a right of a prisoner. The Supreme Court stated:

"In the Court's view a life sentence imposed pursuant to s. 2 of the Act of 1990 is a sentence of a wholly punitive nature and does not incorporate any element of preventative detention.

It is a sentence which subsists for the entire life of the person convicted of murder. That person may, by virtue of a discretionary power vested in the executive, be temporarily released under the provisions of the relevant legislation on humanitarian or other grounds but he or she always remains liable to imprisonment on foot of the life sentence should the period of temporary release be terminated for good and sufficient reason.

It may be appropriate at this point to note that in the event of a prisoner's privilege of temporary release being withdrawn by virtue of a breach of the conditions of that release the Minister, or any person acting on his behalf, is bound to observe fair procedures before withdrawing the privilege of temporary release ... Should the Minister fail to observe such procedures or otherwise act in an unlawful, arbitrary or capricious manner in terminating the release for a breach of his conditions or

otherwise, the prisoner may seek to have that decision set aside by way of judicial review before the courts.

In all these circumstances the Court does not consider that there is anything in the system of temporary release which affects the punitive nature or character of a life sentence imposed pursuant to s. 2. In particular a decision to grant discretionary temporary release does not constitute a termination let alone a determination of the sentence judicially imposed. Any release of a prisoner pursuant to the temporary release rules is, both in substance and form, the grant of a privilege in the exercise of an autonomous discretionary power vested in the executive exclusively in accordance with the constitutional doctrine of the separation of powers ..."

10. The Supreme Court went on to reject the argument that because the Minister was required to have regard to, *inter alia*, the gravity of the offence and the risk posed by the prisoner to public safety, it made the process of temporary release akin to a sentencing exercise. Consideration of such matters did not mean that the Minister was exercising a judicial function and, in particular, it did not mean that a decision not to release because of a risk to safety converts the punitive sentence for murder into a preventative one. It stated:

"It is a necessary incident to the exercise of a purely executive discretion that the decision-maker would be bound to have, before directing a person's release on any of the possible grounds, have regard to a whole range of matters of which some twelve are specified in s. 2 subs. 2 of the Act of 1960. Inevitably two of those considerations which ought to be taken into account in the making of any such decision are the gravity of the offence and the risk which the temporary release would pose to the public. A decision to grant temporary release even for a short period such as to permit a prisoner to attend a family funeral would necessarily involve a consideration of any potential risk that that would have for the safety of members of the public. Such a consideration is incidental to the discretionary power and its purpose. ... Refusing temporary release is a decision not to grant a privilege to which the prisoner has no right."

11. The Supreme Court next considered the applicants' arguments, based on Article 5 §§ 1 and 4 of the Convention and on certain judgments of this Court, that under Irish law a life sentence was in reality an indeterminate one, which in practice was determined by the Minister in the form of a grant of temporary release. This, it was argued, constituted executive interference in the judicial function of sentencing and was prone to arbitrariness. The court stated:

"The power of the executive, in this case the Minister, to release a prisoner ... is a distinct executive function and does not constitute a determination of what punishment a person should undergo as a consequence of his crime. It is in the form of an exercise of clemency or commutation and (*sic*) although it may bring to an end the period of incarceration, subject to conditions in the case of temporary release. As already pointed out the life sentence imposed by the Court continues to exist notwithstanding any conditional release and he may be required to continue serving it if there are found to be good and sufficient reasons in accordance with law to withdraw the privilege of temporary release, or the period of release simply expires."

12. The Supreme Court considered that the distinction between these two functions was recognized by this Court in its judgment in *Kafkaris v. Cyprus* [GC], no. 21906/04, ECHR 2008. Having cited several passages from the judgment, it stated:

> "In its analysis the Court of Human Rights made a clear distinction between the imposition of a mandatory and punitive life sentence by a court and the exercise of an executive discretion to commute, remit or grant conditional release which gives the prisoner a de facto and de jure prospect of release at some point. It clearly did not consider that the existence of an executive discretion to grant conditional release or commutation to constitute the determination or imposition of a sentence by the executive.
>
> ...
>
> Provided a causal connection remains between the detention and the punishment imposed by the court of trial, the sentence cannot be considered arbitrary or in breach of Article 5(1). The discretionary power of the executive to grant conditional release on humanitarian or other grounds does not affect the lawfulness of the continued detention of a person as long as that detention is punitive by reason of its nexus with the sentence imposed following conviction."

The Supreme Court held that on any objective analysis of the sentences currently being served by the two applicants, their detention remained, *de jure* and *de facto*, in accordance with the punishment provided by law and ordered by the court of trial.

13. The Supreme Court then distinguished the legal situation in Ireland from that which prevailed in the United Kingdom, the latter having been found in a number of judgments of this Court to be contrary to Article 5 of the Convention. The Supreme Court noted that the sentencing regime in the United Kingdom which was under scrutiny in the judgments relied upon by the applicants was 'radically different' to the sentencing regime in Ireland. The sentencing regime which was found to be incompatible with the Convention featured a dual element—a punitive element identified as the 'the tariff' period and the subsequent preventative element. Once the prisoner had served the punitive element of the sentence, the nexus between the crime and its punishment was terminated. In *Stafford* the Supreme Court noted that the prisoner had been recalled after release even though he must have been regarded as having served the punitive element for his offence of murder. That being so, his detention after recall could not be justified as 'punishment for the original murder' which led the Strasbourg Court to conclude that his detention on foot of the original mandatory life sentence violated Article 5 § 1 of the Convention. That was, said the Supreme Court, in stark contrast to the longstanding position in Irish law.

B. Relevant domestic law and practice

1. Sentence for murder

14. Section 2 of the Criminal Justice Act 1990 provides:

> "A person convicted of treason or murder shall be sentenced to imprisonment for life."

2. Temporary release

15. The power of temporary release is regulated by Section 2 of the Criminal Justice Act 1960, as amended by the Criminal Justice (Temporary Release of Prisoners) Act 2003, which provides:

> "2.(1) The Minister may direct that such person as is specified in the direction (being a person who is serving a sentence of imprisonment) shall be released from prison for such temporary period, and subject to such conditions, as may be specified in the direction or rules under this section applying to that person—
>
> (a) for the purpose of—
>
> (i) assessing the person's ability to reintegrate into society upon such release,
>
> (ii) preparing him for release upon the expiration of his sentence of imprisonment, or upon his being discharged from prison before such expiration, or
>
> (iii) assisting the Garda Síochána in the prevention, detection or investigation of offences, or the apprehension of a person guilty of an offence or suspected of having committed an offence,
>
> (b) where there exist circumstances that, in the opinion of the Minister, justify his temporary release on—
>
> (i) grounds of health, or
>
> (ii) other humanitarian grounds,
>
> (c) where, in the opinion of the Minister, it is necessary or expedient in order to—
>
> (i) ensure the good government of the prison concerned, or
>
> (ii) maintain good order in, and humane and just management of, the prison concerned, or
>
> (d) where the Minister is of the opinion that the person has been rehabilitated and would, upon being released, be capable of reintegrating into society.
>
> (2) The Minister shall, before giving a direction under this section, have regard to—
>
> (a) the nature and gravity of the offence to which the sentence of imprisonment being served by the person relates.
>
> (b) the sentence of imprisonment concerned and any recommendations of the court that imposed that sentence in relation thereto,
>
> (c) the period of the sentence of imprisonment served by the person,
>
> (d) the potential threat to the safety and security of members of the public (including the victim of the offence to which the sentence of imprisonment being served by the person relates) should the person be released from prison,

(e) any offence of which the person was convicted before being convicted of the offence to which the sentence of imprisonment being served by him relates,

(f) the risk of the person failing to return to prison upon the expiration of any period of temporary release,

(g) the conduct of the person while in custody, while previously the subject of a direction under this section, or during a period of temporary release to which rules under this section, made before the coming into operation of the Criminal Justice (Temporary Release of Prisoners) Act 2003, applied,

(h) any report of, or recommendation made by—

(i) the governor of, or person for the time being performing the functions of governor in relation to, the prison concerned,

(ii) the Garda Síochána,

(iii) a probation and welfare officer, or

(iv) any other person whom the Minister considers would be of assistance in enabling him to make a decision as to whether to give a direction under subsection (1) that relates to the person concerned.

(i) the risk of the person committing an offence during any period of temporary release,

(j) the risk of the person failing to comply with any conditions attaching to his temporary release, and

(k) the likelihood that any period of temporary release might accelerate the person's reintegration into society or improve his prospects of obtaining employment."

3. Parole Board

16. In their submissions, the Government provided information about the Parole Board. It was established on an administrative basis in April 2001. It is chaired by an independent Chairperson and includes a representative from the medical/psychiatric profession, the Probation Service, the Department of Justice and Equality, the Prison Service, a retired Prison Governor, and representatives of the wider community.

17. The Parole Board's principal function is to advise the Minister in relation to the administration of long term prisoners. The Board reviews the cases of prisoners serving life sentences or determinate sentences of eight years or more. The Board, by way of recommendation to the Minister, advises of the prisoner's progress to date, the degree to which the prisoner has engaged with the various therapeutic services and how best to proceed with the future administration of the sentence.

18. In the case of mandatory life sentences the Parole Board considers the initial application after the prisoner has served seven years. Subsequent reviews are conducted at intervals of no more than three years. The final decision regarding the recommendations of the Parole Board remains with the Minister who may accept them in their entirety (as occurs in the majority of cases) or accept them in part, or reject them.

4. Statistics on temporary release

19. In reply to a question from the Court the Government indicated that as of 31 July 2013 there were 297 persons serving a mandatory life sentence for murder, with another 18 persons serving discretionary life sentences for other very serious offences. On the same date there were 78 persons with a life sentence who were on supervised release in the community. In the period 2005 to 31 July 2013 a total of 29 persons sentenced to life imprisonment were granted temporary release. The average duration of their imprisonment was 18 years.

COMPLAINTS

20. The applicants complained under Article 5 of the Convention that their continuing detention was not lawful within the meaning of that provision and that there was no possibility to raise this matter before an Irish court so as to seek release. Under Article 6 they complained that the effective power to determine the duration of sentence lay with the executive.

THE LAW

A. Application no. 74565/10

21. The Court notes that in his application form the applicant stated that the final decision on his case was taken by the Supreme Court on 27 July 2010. On that date, however, the Supreme Court simply made an order for costs. That order itself records that the decision on the applicant's appeal was given on 14 May 2010, in the presence of the applicant's counsel. Parties are, as a matter of practice, furnished with copies of any written judgments handed down in Court. The Court recalls its practice of taking as the date of the final decision in the domestic proceedings the date on which it was rendered orally in public, the six-month time-limit beginning to run from that point (see *Loveridge v. the United Kingdom* (dec.), no. 39641/98, 23 October 2001). The applicant lodged his case with the Court on 17 November 2010, that is, more than six months after the final decision at the domestic level. It follows that the application is out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

B. Application no. 70495/10

1. The Government's request to strike the application out

22. The Government requested the Court to strike the application out in view of developments in Mr Lynch's situation. They noted that he was currently placed on an escalating programme of temporary release at the recommendation of the Parole Board. They argued that this development in his circumstances made his application moot; he has no longer any need to seek review by the Parole Board since his release from detention is imminent. This development has occurred having served 15 years of his life sentence.

23. The Court need not consider the request to strike the case out as it finds in any event that it is inadmissible for the reasons set out below.

2. Article 5 of the Convention

24. In his application form, Mr Lynch (hereafter "the applicant") invoked Articles 3, 6 and 13 of the Convention but not Article 5 §§ 1 and 4, as did Mr Whelan. That does not prevent the Court from considering his case in light of the latter provisions, it being master of the characterisation to be given in law to the facts of the case. As established in the case-law, a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (*Şerife Yiğit v. Turkey* [GC], no. 3976/05, § 52, 2 November 2010). Furthermore, in the domestic proceedings the applicant explicitly relied on Article 5. The relevant provisions of this Article are as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his 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;
>
> ...
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

(a) The applicant's arguments

25. Mr Lynch and Mr Whelan maintained separate legal representation in these proceedings and each applicant made their submissions to the Court. In their response, the Government addressed the situation of each applicant and replied to the arguments advanced by them. Mr Whelan's application, however, has subsequently been found to be out of time and thus cannot be considered by the Court. In order to examine the compatibility of the facts in respect of which Mr Lynch complains with Article 5 of the Convention, the Court considers it useful to recall the

arguments made on behalf of Mr Whelan particularly since similar arguments were made before and considered by the domestic courts in Mr Lynch's case - his case and Mr Whelan's case having been examined together at national level.

26. The applicant argued that the routine release in Ireland of life sentenced prisoners subject to conditions does not render a mandatory life sentence a "wholly punitive" one. While there is no formal mechanism providing for release on licence, such prisoners are routinely granted renewable temporary release by the Minister which may be revoked in the event of a breach of conditions. It is, therefore, comparable to the parole regimes that exist in other jurisdictions permitting the release of life prisoners on license. In substance, therefore, the system should be compared to that of the United Kingdom, even if the punitive and preventative components of a life sentence are not formally or expressly acknowledged. Irish courts recognise that a person who receives a mandatory life sentence for murder may one day be released from prison. This is in stark contrast to the Cypriot situation as reviewed by this Court in the *Kafkaris* case, since the release of a life prisoner in Cyprus was a rare occurrence. In Cyprus, therefore, the legal meaning of a life sentence coincided with the reality. In view of the practical reality in Ireland, the applicant's life sentence was tainted by indeterminacy and arbitrariness and could not be regarded as meeting the quality of law criterion inherent in the rule of law. It was indeterminate at the moment of sentencing since neither the trial judge nor the applicant could know for how long he would actually be incarcerated, this being a matter for the Minister to decide at some future date. Any person in that situation therefore faced absolute uncertainty, with no clear path towards rehabilitation or release. In *The People (DPP) v. McC. and D.* (2007) the Supreme Court had expressed dissatisfaction at this and had used the phrase "tariff period". The Minister was granted broad discretion by legislation, and by the courts, as regards the basis for his decision and the timescale. There was therefore scope for considerations of a non-legal nature, which made for opacity. According to official sources, the average number of years served by life prisoners in Ireland had risen steadily from 7.5 years in the period 1975-1984 to 18 years presently.

27. Despite the *dicta* of the Irish courts on the non-existence of preventative detention in domestic law, the applicant maintained that it was inherent in Irish sentencing policy. The Minister was required by statute to have regard to such considerations when deciding whether to grant temporary release. In its practice, the Parole Board based its recommendations on essentially identical considerations. The applicant referred to a 2005 decision of the Irish Court of Criminal Appeal – *The People* (*DPP) v. D.G.* – which, he said, demonstrated that the element of prevention had in fact been recognised by Irish courts in the matter of sentencing.

28. Given that reality, the Convention required the State to put in place a review procedure to ascertain the ongoing legality of and justification for life sentences once the prisoner had served what was, effectively though implicitly, the punitive element of the sentence. The earlier case-law of this Court, cited by the Supreme Court, must now be read in the light of the case *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, ECHR 2013 (extracts), entitling the applicant to an assessment at the time of sentence to its actual duration.

(b) The Government's arguments

29. The Government contended that this complaint was manifestly ill-founded, having regard to the relevant case-law of the Court. As a matter of Irish law, the mandatory sentence of life imprisonment denoted incarceration for the remainder of the prisoner's life. The Supreme Court had made it clear when considering this case at the domestic level that there was no similarity between the laws of Ireland and the United Kingdom in this respect. It had further affirmed that point in a more recent decision of 2012, *Caffrey v. Governor of Portlaoise Prison*, involving the repatriation from the United Kingdom of a life prisoner and the inapplicability in Ireland of the tariff that the English court had set when passing sentence, such inapplicability having worked to the prisoner's benefit. The Government stressed that preventative detention formed no part of Irish criminal law. They refuted the applicant's reliance on the *D.G.* case, which had to be distinguished for several reasons. First, that case concerned a discretionary life sentence and not a mandatory one. Second, the trial judge had in no sense set a sort of punitive tariff, but had set a ten-year review date when the case would return to the courts. Third, the fact that the perpetrator in that case was a minor was a crucial consideration. Overall, that decision could not be taken as going against the consistent case-law of the superior courts as reiterated in the domestic proceedings in the present case. The *McC. and D.* decision had concerned quite different circumstances and legal considerations; in particular it involved discretionary life sentences.

30. As to the legal nature of temporary release, the Supreme Court had explained in the domestic proceedings that the Minister did not determine a person's sentence. In Ireland the executive had never had the power to determine what sentence should be applied to any person convicted of an offence. Rather, temporary release was an exercise in clemency or commutation of sentence that may bring to an end the period of incarceration but which did not terminate the sentence imposed at trial. Indeed, it was a *temporary* release – the person could well be recalled to prison to resume service of sentence. It was a distinct and quintessentially executive function involving a privilege and not a right and is applicable to all custodial sentences.

31. The Government submitted that Irish law was comparable to Cypriot law in this regard, so that this Court's decision on the Article 5 § 1 complaint in the *Kafkaris* case should be followed here. The causal link between the applicant's current detention and the sentence imposed at his trial remained intact, and was not disturbed by the possibility of his being granted temporary release. It followed from this that Article 5 § 4 did not confer upon the applicant the right to a procedure allowing him to challenge the lawfulness of his current detention. As the applicant's sentence was wholly punitive in nature, the requisite supervision was incorporated in the original trial.

(c) The Court's assessment

(i) Article 5 § 1(a)

32. In the case *Kafkaris v. Cyprus* [GC], no. 21906/04, ECHR 2008, the Court summarised the relevant principles pertaining to Article 5 § 1(a) of the Convention as follows:

> "116. The Court reiterates that where the "lawfulness" of detention is in issue, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. This primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention (...). In this respect, the Court's case-law indicates that it may be necessary to look beyond the appearances and the language used and concentrate on the realities of the situation (...). In addition, any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness (...).
>
> 117. The "lawfulness" required by the Convention presupposes not only conformity with domestic law but also, as confirmed by Article 18, conformity with the purposes of the deprivation of liberty permitted by sub-paragraph (a) of Article 5 § 1 (...). Furthermore, the word "after" in sub-paragraph (a) does not simply mean that the detention must follow the "conviction" in point of time: in addition, the "detention" must result from, "follow and depend upon" or occur "by virtue of" the "conviction". In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty in issue (...)."

33. The Court would first observe that there has been no challenge in this case to the conformity of the applicant's trial and sentence with the substantive and procedural rules of national law. For the purposes of Article 5, the penalty for murder is clearly laid out in domestic law and was imposed upon the applicant by the trial court following his conviction in respect of that offence.

34. The applicant urged the Court to look beyond the legal situation and to have regard to the realities of the situation. The Court notes that that is, precisely, what the Supreme Court did in its examination of the case when it confirmed that it should not look simply at the formal provisions of the law but at the substance and effect of the law in practice concerning the sentence

imposed on a convicted person. In doing so, it had regard to the *Kafkaris* jurisprudence as well as other relevant precedents of this Court. As set out above (paragraph 12), the Supreme Court concluded that "on any objective analysis" the applicant was "*de jure* and *de facto*" detained in accordance with statute and the sentence imposed on him. The Court cannot disregard the repeated and very clear *dicta* of the domestic courts concerning the wholly punitive character of the mandatory life sentence and the right of any convicted person on whom a sentence comprising a preventative element was imposed to successfully appeal his sentence on that ground to the Court of Criminal Appeal. It does not consider that the two domestic decisions referred to by the applicant reveal any inconsistency or evolution in this respect, the Government having clearly distinguished them.

35. The applicant sought to refute the characterisation of his sentence as wholly punitive on the basis that in most cases such prisoners are in practice granted temporary release. The Court does not consider that this fact belies what the Supreme Court also termed the "exclusively punitive" nature of the applicant's sentence. As affirmed by the Supreme Court decision in this case, and also in the other domestic case-law referred to by the Government, in Ireland a mandatory life sentence for the crime of murder has as its sole purpose the punishment of the offender. There is no 'tariff period' which a prisoner must serve. Temporary release, towards which the applicant is headed, does not as a matter of domestic law terminate the sentence imposed upon him following conviction, the Supreme Court stated. Although the applicant has sought to rely on the Court's reasoning under Article 3 in the *Vinter* judgment, the issue in that case – irreducibility of a whole life sentence – does not arise on the facts of the present case.

36. Contrary to the applicant's contention, there are clear grounds for distinguishing this case from that of *Stafford v. the United Kingdom* [GC], no. 46295/99, ECHR 2002-IV. Factually, the cases are very different. The applicant in the *Stafford* case, sentenced to life imprisonment for murder in 1967 and released on licence twelve years later, complained before the Court that thirty years after conviction, and because of more recent, lesser offences, he had been recalled and remained in prison by decision of the executive to maintain the revocation of his licence. The present applicant has served only fifteen years of a mandatory life sentence for murder and, as indicated by the Government, is currently in a programme to prepare for temporary release. Unlike the case of *Stafford* in which the applicant was a re-called prisoner serving a term of imprisonment by virtue of an administrative decision, there has, in the instant case, been no interruption in the applicant's incarceration that could be viewed as rupturing the link between his original conviction and his present detention. Unlike the applicant in Stafford, his current detention is not based on any administrative withdrawal of the privilege of temporary release. In short, the applicant's position does not compare to that of Mr Stafford. Legally, the

substantive differences between the two systems have been clearly and cogently elucidated by the Irish courts. The legal situation in the United Kingdom was such that the executive had a clear role in fixing, at the outset, the tariff period to be served by a prisoner. The judiciary in the United Kingdom voiced reservations on the role of the Secretary of State in this regard and a clear evolution occurred over time to progressively limit that role (*Stafford*, cited above, §§ 69-79). The executive under Irish law has no sentencing function nor could it ever, as a matter of Irish Constitutional law, assume such a function, this being a matter reserved solely for the courts. The Irish courts, mindful of the situation in the neighbouring jurisdiction and the relevant Strasbourg case-law, made clear that such considerations as arose in that jurisdiction were of no application to the criminal law of Ireland. The Minister exercises discretion to grant temporary release having regard to certain statutory considerations. The exercise of such a discretion is subject to judicial review by the Irish courts. For the Court, therefore, the differences between the legal situation at issue in the present case and that examined in the line of British cases leading to the *Stafford* judgment are not ones of mere form, appearance or terminology, but of substance.

37. Any similarity that might be drawn in a *de facto* sense between the statutory parole regime in the United Kingdom and the discretionary system of temporary release in Ireland does not change the above analysis. The discretionary power of the executive to grant temporary release to a life prisoner is not inconsistent with the solely punitive character of a mandatory life sentence, as expounded by the domestic courts. Nor can it be said to give rise to any uncertainty as regards the applicant's legal status such as would raise an issue of quality of law or respect for the rule of law.

38. The Court regards the causal connection between the applicant's conviction of murder in 1997 and his imprisonment from that point to date as both clear and sufficient (*Kafkaris*, cited above,§ 120). His detention remains in conformity with the original life sentence imposed on him. Finding no sign of any arbitrariness, the Court is satisfied that the applicant's detention is justified under Article 5 §1.

39. This part of the application is therefore manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

(ii) Article 5 § 4

40. The Court refers to its decision in the second *Kafkaris* case (*Kafkaris v. Cyprus*, no. 9644/09, decision of 26 June 2011) in which it summarised the relevant case-law principles thus:

> "58. The Court firstly reiterates that no right to release on parole can be derived from Article 5 § 4 of the Convention. Secondly, it reiterates that where a person is deprived of his liberty pursuant to a conviction by a competent court, the supervision required by Article 5 § 4 is incorporated in the decision by the court at the close of

judicial proceedings (...). No further review is therefore required. As far as life sentences are concerned, the Court has found this to be so in the case of mandatory life sentences which were purely punitive in nature because of the gravity of the offence (...)."

41. Here too the applicant urged the Court to view the mandatory life sentence in Irish law as similar in reality to that in the United Kingdom. While the latter explicitly divided the overall sentence into its punitive and security components, that was the unspoken factual reality in Ireland as well. Although the Court, in the *Stafford* case, had attributed weight to developments in the domestic system, this was not the essential basis of the reasoning of that judgment. There did not have to be a formal identification of a "tariff" in order to trigger the requirement of a subsequent review of the continuing lawfulness of detention, as shown by *Wynne v. the United Kingdom (no. 2)*, no. 67385/01, 16 October 2003.

42. The Court refers to its finding that that the applicant's detention is justified under Article 5 §1, there being a clear and sufficient causal connection between the applicant's conviction of murder in 1997 and his current detention. In these circumstances, the Court considers that it is not necessary to examine the applicant's complaint under Article 5 § 4 of the Convention (*Kafkaris*, cited above, § 58). However, even assuming the applicability of Article 5 § 4 to the applicant's situation, the Court notes that the lawfulness of the executive's decision concerning the grant of temporary release to life prisoners in Ireland is subject to judicial review by the Irish courts.

43. Finally, insofar as the applicant relies on the case of *Wynne* the Court observes that this case differs significantly from the present one as that applicant had been released after serving about 15 years of a life sentence for murder. This allowed the Court to assume that such period represented the tariff. As far as that conviction was concerned (that applicant having subsequently been given a discretionary life sentence for murder), the continuing detention post recall was based on the risk he represented. Because that was a reason which could change over time, a periodic review of his detention was required by the Convention.

44. The Court has already accepted above that preventative considerations are not part of Irish criminal law generally, and *a fortiori* when it comes to the imposition of a mandatory life sentence. The existence of an executive power of temporary release, which takes account of factors of security and risk and which is routinely exercised, does not entitle the applicant to a judicial procedure to test the ongoing legality of his current imprisonment. While the issue does not arise in this case, the Court notes in any event that the power of the Minister is subject to legal safeguards as explained by the Supreme Court (see paragraph 9 above).The Convention does not require any further review of the lawfulness of the applicant's detention.

45. This leads the Court to conclude that the applicant's complaint under Article 5 § 4 is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

3. Article 6 of the Convention

46. The applicant also complained that, in view of the executive power of temporary release, the criminal proceedings against him had not been conducted in accordance with Article 6 §1, which provides, as relevant:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

(a) The applicant's arguments

47. The applicant contended that, contrary to the principle of the separation of powers, Irish law conferred on the Minister the power to decide on the actual length of his sentence. Although a mandatory life sentence was imposed by the court of trial, it was not definitively fixed at that point. Rather, it was the Minister who systematically determined the duration of imprisonment. That was a judicial function, and a fact that could not be obscured by legal formalism. He further argued that the Parole Board failed to meet the criteria stipulated by Article 6 in terms of independence and procedural fairness and safeguards. The discretion afforded to States over the structure of their criminal justice systems had to yield to the exigencies of the Convention.

(b) The Government's arguments

48. The Government stated that no member of the executive had any role in sentencing, and that the notion of fixing a tariff did not exist in Irish law. The existence of a regime of temporary release did not in any way affect the nature or purpose of a mandatory life sentence. It did not divide or imply a division of the sentence into a punitive component, with another based on risk. Life prisoners could apply to the Parole Board after serving seven years in prison; this did not mean that seven years represented the punitive element of the sentence. The punishment encompassed the remainder of the applicant's life. The Supreme Court had rejected the idea that the Minister's power was judicial in nature – it was a purely executive discretion. It had also dismissed the argument that a refusal to release on security grounds converted the sentence into a preventative one. The system of tariff-fixing by the executive at the commencement of a sentence, at issue in the case *V. v. the United Kingdom*, would be unconstitutional in Ireland. The Court had confirmed in the *Vinter* case that States enjoyed a margin of appreciation in matters of criminal justice and sentencing, and that a State's

choice of a specific justice system was in principle outside the scope of the Court's supervision.

(c) The Court's assessment

49. It is well established in the Court's case law that a State's choice of a specific criminal justice system, including sentence review and release arrangements, is in principle outside the scope of the supervision the Court carries out at the European level, provided that the system does not contravene the principles set forth in the Convention (*Vinter and others v. United Kingdom* §104*).* Further, it is not this Court's task to prescribe the form (executive or judicial) which review of a life prisoner's sentence should take (*Vinter* §120). It is also the settled case-law of the Court that Article 6 § 1 covers criminal proceedings in their entirety, including appeal proceedings and the determination of sentence (see, among many authorities, *V. v. the United Kingdom,* [GC], no. 24888/94, § 109, ECHR 1999-IX).

50. The Court considers, contrary to the applicant's assertions, that the criminal charge against him was finally determined the day his appeal against conviction was dismissed in 1998. It cannot therefore accept his argument that the Minister had a role in this process. As already held above, Irish law does not recognise the concept of a tariff such as exists in the United Kingdom. Indeed, the notion is expressly refuted by the Irish courts. As was made clear by the Supreme Court, executive involvement in sentencing would be contrary to Irish constitutional principles under which the administration of justice is the exclusive domain of the courts. The applicant cannot derive any support from the *V.* judgment, therefore. In that case, there was a manifest violation of Article 6 § 1 in view of the formal, indeed pivotal, involvement of a member of the executive at the commencement of the sentencing process. The Secretary of State had the power to make his own decision on the requirements of retribution and deterrence in such cases, and did so shortly after the trial. It was a sentencing exercise. There is no approximation between that practice and the temporary release procedure in Ireland. In the Irish system, the Minister's role comes into play many years after the trial. It is artificial to suggest that a mandatory life sentence remains "unfixed" until the prisoner is eventually released by ministerial decision.

51. As for his criticism of the Parole Board, procedures of this sort are not within the scope of Article 6 since they do not concern the determination of a criminal charge or, as is clear from the Supreme Court's judgment, a civil right (see also *Boulois v. Luxembourg* [GC], no. 37575/04, ECHR 2012). While there is no cause in the present case for the Court to examine the Parole Board in the light of Convention principles, it takes note nevertheless of the Irish authorities' intention to place the Parole Board on

an independent statutory basis (see the report of the Law Reform Commission on Mandatory Sentences, 2013, paragraphs 3.85-3.86).

52. The Court concludes that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the applications inadmissible.

Stephen Phillips	Mark Villiger
Deputy Registrar	President