

AS TO THE ADMISSIBILITY OF

Application No. 22761/93
by R. M.
against the United Kingdom

The European Commission of Human Rights sitting in private
on
14 April 1994 the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
A. WEITZEL
F. ERMACORA
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL CONFORTI
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY

Mr. H.C KRUGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the
Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 8 October
1993 by R. M. against the United Kingdom and registered on 13
October 1993 under file No. 22761/93;

Having regard to :

- the reports provided for in Rule 47 of the Rules of
Procedure of the Commission;
- the Commission's decision of 21 October 1993 to communicate
the application;
- the observations submitted by the respondent Government on
19 November 1993 and the observations in reply submitted by
the applicant on 3 February 1994;

Having deliberated;

Decides as follows:

THE FACTS

1. The particular circumstances of the case

The applicant is a British citizen born in 1951 and currently serving a sentence of imprisonment in HM Prison Brixton. He is represented before the Commission by Mr. Ben Rose, a solicitor practising in London, and Mr. Ben Emerson, counsel practising in London.

The facts as submitted by the parties may be summarised as follows.

The applicant has been a heroin addict since 1976. From 1982, he was a registered addict under the care of St. Thomas' Hospital undergoing methadone treatment.

In October-November 1991, the applicant was diagnosed as infected with HIV (human immunodeficiency viruses).

The applicant is married with 2 children. His wife suffers from mental illness and the applicant has been acknowledged by the Social Services as being the primary carer for the children.

On 2 August 1992, the applicant was found under the influence of drugs by the police who, discovering him to be in possession of 84 grams of heroin and £1939, arrested him.

On 30 November 1992, the applicant pleaded guilty to possession of heroin with intent to supply. Sentence was adjourned pending the preparation of reports.

On 8 January 1993, the applicant was sentenced by the trial judge to 5 years' imprisonment. It had been submitted to the court in mitigation of sentence that the applicant had the symptoms of the onset of AIDS (acquired immune deficiency syndrome) and that he had between 12 and 24 months to live.

It was also submitted to the court that account should be taken of the effect of a custodial sentence on the members of his family, in particular in the context of the counselling which would be required to enable the children to come to terms with the loss of their father and in which the applicant should participate.

The judge in passing sentence declined to make any allowance for the applicant's illness, referring to recent decisions regarding sentencing policy in AIDS cases:

"I do not think it is for me to deal with the matter of your life expectancy and so on. These are medical matters which I think have to be dealt with within the province of the Home Office..."

The applicant was granted leave to appeal against sentence to the Court of Appeal, inter alia, on the grounds that insufficient regard was given to his reduced life expectancy and the hardship which would result for his family.

A report dated 12 May 1993 from the specialist treating the applicant stated, inter alia:

"...his life expectancy is severely limited and is in

the order of no more than one to two years. However the course of HIV disease is very unpredictable and because he has a severely damaged immune system he is at risk of developing a sudden rapidly terminal complication. The quality of the remainder of his life will undoubtedly deteriorate and he is likely to require long periods of hospital care..."

The applicant's appeal was heard on 18 May 1993. The Court of Appeal reduced sentence to three and a half years on the basis that insufficient weight had been given to the guilty plea and the judge had erred in his valuation of the drugs at issue. The Court refused to take into account the exceptional circumstances arising from the applicant's life expectancy. It held inter alia:

"<Counsel> submits that there was a lack of sufficient weight given by the learned judge to the exceptional circumstances arising from the <applicant's> life expectancy...The learned judge in that regard no doubt had in mind the decision of this court in Stark (1992) 13 Cr.App.R.(S) 548. In terms of life expectancy that was a very similar case indeed to the present case. In giving the court's judgment, Jowitt J. at page 550 said this:

`In the view of this court, the sentence of four years' imprisonment was a proper one. It is not for this court to manipulate the sentence so as to achieve a desirable social end. Desirable though that is, that seems to us to be a matter for the exercise of the Royal Prerogative of Mercy and not for us. The appeal is therefore dismissed. We direct that the medical reports which are before us be furnished to the prison authorities.'

That decision had been preceded by another decision of this court in the case of Moore (1990) 12 Cr.App.R.(S) 384.

<Counsel> invited this court to take the view that no hard and fast rule was laid down by this court in Stark and that the <applicant's> life expectancy should be weighed in the balance as part of the sentencing process. In support of that submission she referred the court to Leatherbarrow (1992) 13 Cr.App.r. (S) 632. It is to be noted that neither Moore nor Stark appears to have been cited to the court in Leatherbarrow. On the other hand, this point was specifically considered by the court in Stark. Stark was a case involving a prisoner suffering from AIDS and having a greatly reduced life expectancy in consequence. It seems to us that the inescapable conclusion is that this court is bound by the approach of the court in Stark to hold that it is not for the court to alter an otherwise proper sentence in order to achieve a desirable end. That is a matter for the Royal Prerogative of Mercy. The sentencing judge was right so to conclude. But, as in the case of Stark, we shall direct that all the medical and other reports before this court are placed before the prison authorities."

Since other prisoners refuse to share a cell with him, the applicant has been confined alone. He spends up to 23 hours alone in his cell each day.

The applicant petitioned the Home Office for early release. By letter dated 28 April 1993, the Home Office stated that:

"<the applicant's> case for compassionate release under the terms of CI 36/1992 has now been considered and it has been decided that he does not meet the criteria for early release at this time."

The applicant's request was reconsidered by the Home Office in June 1993. In a letter dated 28 June 1993, the applicant's solicitors were informed that it was considered that the applicant's medical condition was not such as would justify the exceptional course of early release. An assurance was added that the applicant's condition would continue to be closely monitored and, if there was significant change, his case would be reconsidered.

Following the communication of this application to the respondent Government, a further review of the applicant's case was conducted. Since however a report from the consultant who had visited the applicant in prison suggested that the applicant had a life expectancy of up to two years and his condition was not so acute as to suggest that death was imminent, the Home Office maintained its decision not to grant the applicant early release.

The letter dated 4 November 1993 from the consultant to the Home Office stated:

"This patient ... is very immunosuppressed, had had a number of medical problems including pneumonia, viral meningitis and has a CD4 count persistently in the 0.1 x 10⁹/l range (normal range >0.4). This gentleman has advanced HIV disease and thus has a poor prognosis. I think it entirely reasonable that he should be considered for parole on medical grounds as obviously his life expectancy is very limited." [The consultant further explained by telephone to the Home Office that the applicant was likely to live at least for months and possibly up to two years.]

Pursuant to the provisions for release for persons serving sentences less than 4 years and taking into account 24 additional days awarded against him as disciplinary punishment, the applicant is due to be released on licence on 26 May 1994.

2. Relevant domestic law and practice

a. Sentencing policy in the Court of Appeal

Section 9 of the Criminal Appeals Act 1968 provides a right of appeal against sentence, after conviction on indictment, to the Court of Appeal. The Court of Appeal recognises that judges must be allowed a measure of discretion: it will only interfere where the sentence imposed is wrong in law, wrong in principle, where the judge took a wrong approach to sentencing or followed the wrong procedure or where the sentence is "manifestly excessive". If it finds any one of these grounds to have been satisfied, the Court of Appeal may quash any sentence or impose any sentence which was available to the Crown Court, save that it may not deal with the appellant, taking the sentence as a whole more severely than he/she was originally dealt with.

The cases before the Court of Appeal indicate that a number of health related matters may be taken into account as mitigating factors.

In R v. Herasymenko (12.12.75, (1975) CSP C5-2B01), the offender had suffered a severe heart attack and a medical report referred to the likelihood of another attack which if not treated promptly might lead to death. The Court of Appeal reduced the 18 month sentence to allow his immediate release "in view of this man's extremely ill condition".

In R v. Saunders (unreported 16.5.91), the Court of Appeal accepted that the appellant was suffering from pre-senile dementia. While the gravity of the case was such that the Court of Appeal was not able to allow Saunders' immediate release, in light of the medical evidence the sentence was reduced from 5 years to two and a half to render him immediately eligible for parole.

In R v. Green (1992 13 Cr. App.R(S) 613), the offender had been diagnosed as suffering from sickle cell anaemia from the age of 16 months and suffered a very serious form of the disease requiring blood transfusions on many occasions. Management of the condition was severely hampered by his imprisonment and there was a risk of deterioration leading to sudden death. The Court of Appeal adjusted a sentence of 5 years, which it considered otherwise appropriate for the offence, to secure his immediate release:

"It must be obvious to any person of ordinary sensibility that subjection to so painful and life-threatening a disease is one of the most powerful mitigating factors which can be put forward by a defendant. Here in addition there is some material to suggest that if the appellant remains in prison he may possibly be in enhanced danger."

In the case of R v. Leatherbarrow (1992 Cr.App.R(S) 632) the offender had chronic emphysema and was subject to severe and sometimes critical breathing difficulties. The Court of Appeal varied the 15 month sentence of imprisonment to effect his immediate release:

"The Court has in the past taken an exceptionally merciful course by reason of the medical condition of an appellant who, but for his illness, would have merited severe punishment."

There have been a number of cases dealing with HIV/AIDS sufferers.

In R v. Rees (unreported 10.8.88), the Court of Appeal reduced a seven year sentence to four in respect of an appellant who had been seropositive for some time, had recently contracted AIDS and had a life expectancy of 2-3 years. It stated:

"This court has never shrunk in appropriate cases from exercising mercy...it seems to us right that this court should continue in the case of AIDS sufferers to exercise mercy when the circumstances appear to demand it."

In R v. Archibald Moore (1990 12 Cr.App.R.(S) 384), the offender was infected with HIV and there was a likelihood that he would develop AIDS within 2 years. The Court of Appeal declined to take his reduced life expectancy into account as a mitigating factor:

"...We do not know what the future may hold with regard to

this particular Appellant. If the time should come when it is no longer possible to hold this Appellant in hospital because of his physical condition, then it is the job of the Home Office, who have at least two methods by which they can take action in circumstances of this sort as this Court has reason to know..."

In R v. Stark (1992 13 Cr.App.R.(S) 548), the appellant suffering from AIDS had a life expectancy of 1-2 years. The Court of Appeal held, in declining to interfere with the sentence, that to afford a reduction in sentence based upon AIDS was "not within the province of this Court":

"In the view of this court, the sentence of four years' imprisonment was a proper one. It is not for this court to manipulate the sentence so as to achieve a desirable social end. Desirable though that is, that seems to us to be a matter for the exercise of the Royal Prerogative of Mercy and not for us."

In his commentary on the cases of Leatherbarrow and Green (see above) in the Criminal Law Review, Dr. Thomas (author of the authoritative textbook "Principles of Sentencing") stated :

"The interest of these cases is that they appear to contrast with the attitude displayed in Archibald Moore, where the appellant was HIV positive , and Stark, where the appellant was suffering from AIDS. In those cases the Court indicated that the condition of the appellant was not a matter which could lead to mitigation of sentence."(1992 Criminal Law Review 520-1)

b. Provisions governing early release on compassionate grounds

Section 36 of the Criminal Justice Act 1991 provides:

"1. The Secretary of State may at any time release a prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds."

Circular Instruction 36/1992 concerns the policy applied in respect of early release of prisoners on compassionate grounds under the Criminal Justice Act 1991. It recommends early release where a prisoner is suffering from a terminal illness and death is likely to occur soon (within three months is given as an appropriate period). The criteria to be satisfied are:

"- the prisoner is suffering from a terminal illness and death is likely to occur soon; or the prisoner is bedridden or similarly incapacitated, and

- the risk of further crime is past, and

- there are adequate facilities for the prisoner's care and treatment outside prison, and

- early release will bring some significant benefit to the prisoner or his/her family."

COMPLAINTS

The applicant complains that he has been discriminated against in respect of sentencing policy and treatment in prison as a result of being an AIDS sufferer. He submits that factors of illness and life expectancy are mitigating factors in sentencing generally, and were so in the cases of AIDS sufferers until the case of STARK, which has established a policy of treating AIDS sufferers differently.

Because he is suffering from AIDS, the applicant is kept in a single cell, and is not permitted to undertake any form of work or partake in recreational facilities. He spends 23 hours in his cell. He is classified as Category C which would normally allow sentence to be passed in an open prison. Since however only Category B prisons have hospitals, he is confined in a more restrictive regime than his classification warrants.

The applicant invokes Article 14 in conjunction with Article 5 of the Convention in the above respect.

The applicant also invokes Article 5 para. 5 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 8 October 1993 and registered on 13 October 1993.

On 21 October 1993, the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the application. The Commission decided to give the case priority pursuant to Rule 33 of its Rules of Procedure.

The Government's observations were submitted on 19 November 1993 and the applicant's observations in reply were submitted on 3 February 1994 after one extension in the time-limit.

On 9 March 1994, the Commission examined the application.

THE LAW

1. The applicant complains that he has been the subject of discrimination in sentencing policy as a result of suffering from AIDS.

He invokes Article 14 in conjunction with Article 5 (Art. 14+5) of the Convention. These provide as relevant:

Article 14 (Art. 14) of the Convention

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 5 (Art. 5) of the Convention

"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..."

According to the case-law of the Convention organs, Article 14 (Art. 14) of the Convention in effect has no independent existence but plays an important role in supplementing the other provisions of the Convention and its Protocols. Article 14 (Art. 14) safeguards individuals, placed in similar situations, from discrimination in the enjoyment of the rights and freedoms set out in those other provisions. A measure which as such might be in conformity with the normative provision in issue may nevertheless violate that provision taken in conjunction with Article 14 (Art. 14), if it is applied in a discriminatory manner. It is as though Article 14 (Art. 14) formed an integral part of each of the provisions laying down the specific rights and freedoms (see eg. Eur. Court H.R. Belgian Linguistic judgment of 23 July 1968, Series A no. 6 p. 33-4, paras. 8-9).

The applicant submits that the United Kingdom has a discernible sentencing policy which applies only to offenders with HIV/AIDS in violation of Article 14 in conjunction with Article 5 (Art. 14+5) of the Convention. He contends that the previous and continuing practice of the courts indicates that if an offender is suffering from an illness which will definitely shorten his life it will usually be accepted as a substantial mitigating factor. Since however two cases in the Court of Appeal, *Moore and Stark*, a departure has been made from this established practice restricted to offenders who are diagnosed as HIV positive or suffering from AIDS which excludes consideration of their medical condition as presenting any mitigating factor.

The Government, while not arguing that Article 14 taken in conjunction with Article 5 (Art. 14+5) of the Convention is not applicable to the applicant's complaints, submit that the case-law of the Court of Appeal concerning mitigating circumstances does not involve treating those with HIV any differently from any other offender. Whatever the illness or condition involved, the Court of Appeal can only take into account those matters which are certain present realities and must ignore uncertain future contingencies.

The Commission in light of its finding below considers it unnecessary to reach a conclusion as to whether the applicant has been subject to a difference in treatment which falls within the scope of Article 14 in conjunction with Article 5 (Art. 14+5) of the Convention.

Even assuming that a distinction has been made in this case, the case-law of the Convention organs establishes that not every difference in treatment is discriminatory within the meaning of Article 14 (Art. 14). The Commission must determine whether the difference has an "objective and reasonable" justification. This is to be assessed in relation to the aims and effects of the measure under consideration; it must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see Eur. Court H.R. Belgian Linguistic judgment of 23 July 1968, loc. cit., p. 34, para. 10).

The Government argue that insofar as HIV sufferers are being treated differently from offenders suffering from other

illnesses, this has objective and reasonable justification since HIV infection is characteristic of being uncertain and unpredictable in its effects. In such cases, future developments are more appropriately dealt with in compassionate release applications.

As regards the alleged differences between HIV/AIDS and other illnesses, the applicant attacks the Government's analysis as medically unsound. He refers to a medical opinion of a Professor of Immunology which states that HIV/AIDS infections, in their poor prognosis and risk of recurrent infections and premature death, are no less predictable than many conditions which have an early fatal outcome such as cancer or severe emphysema. He points out that the Government, from their observations and reference to an annexed passage from Paul Sieghart, appear to confuse symptomless HIV which can last 8-10 years with the onset of AIDS or symptomatic HIV with low CD4 counts where death within 1-2 years (or much less) almost inevitably ensues.

The Commission recalls that the applicant was diagnosed as HIV positive in October-November 1991. By the time of his trial in January 1993 he had been diagnosed as suffering from symptoms of the onset of AIDS and had a life expectancy of 12-24 months. A report submitted in the applicant's appeal in May 1993 referred to his life expectancy as "severely limited" and in the order of 12-24 months. The most recent medical report (as elaborated by the consultant by telephone in November 1993) gave the opinion that the applicant was likely to live at least for months and possibly up to two years. The Commission notes that the applicant is due to be released in May 1994.

The gravity of the illness from which the applicant suffers cannot be in dispute. It appears however that in the applicant's case the prognosis has remained unchanged over the period of his trial and detention. There is no indication from the material submitted that he has suffered during that time any significant deterioration or that he is incapacitated in any way. There is no complaint that he is by reason of his continued detention failing to receive the necessary care or monitoring of his condition. In these circumstances, the Commission finds that the decision of the Court of Appeal not to take his condition into account as a mitigating factor in sentence was in the circumstances of this case not unreasonable or disproportionate. Further, it would have been apparent from the length of sentence substituted by the Court of Appeal that the applicant was not precluded from the hope of surviving the term of detention imposed and consequently it was legitimate to leave the question of the applicant's release in light of any future change in his condition to the discretion of the Secretary of State.

Consequently, having regard to the margin of appreciation accorded to the national authorities, the Commission finds that in the present case any difference in treatment was reasonably and objectively justified. It follows that this part of the application discloses no appearance of a violation of Article 14 of the Convention in conjunction with Article 5 (Art. 14+5) and must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant has also invoked Article 5 para. 5 (Art. 5-5) of the Convention which provides:

"5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

The right to compensation under this provision presupposes that a violation of one of the other paragraphs of Article 5 (Art. 5) has been established either by a domestic authority or by the Convention organs (see eg. No. 7950/77, Dec. 4.3.80, D.R. 19, p. 213). Even assuming that a complaint of discriminatory detention could found a right to compensation under this provision, the Commission has in any event found no appearance in this case of a violation of Article 14 in conjunction with Article 5 (Art. 14+5).

It follows that this complaint must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission

President of the Commission

(H.C. KRUGER)

(C.A. NØRGAARD)