The distinctive feature of the sentence of life imprisonment is that it is indeterminate. Unlike a prisoner serving a fixed term the life sentence prisoner does not know when, if ever, he or she will be released. Moreover, where the sanction is mandatory, life imprisonment is an inflexible instrument that does not take account of the culpability of the particular offender and such sentences are difficult to reconcile with the principle of proportionality. It is not surprising that the compatibility of life sentences with human rights principles has become a matter of concern, as have the arrangements put in place to facilitate the release of life sentence prisoners.

The European Court of Human Rights (ECtHR) has delivered a series of rulings in which life sentences have been evaluated in the light of the European Convention on Human Rights (ECHR). The Court has not declared that the life sentence per se involves a breach of the ECHR but it has pronounced on the review mechanisms and procedures that are required by the Convention. In short, once the punitive element of a life sentence has been served the prisoner is entitled to frequent and speedy review of the lawfulness of his or her imprisonment by an independent and impartial tribunal. The stated purpose underlying this regime is to protect the prisoner against the arbitrary prolonging of his or her incarceration.

The current Irish position is that the question of release is exclusively an executive matter and the courts have demonstrated a marked reluctance to interfere with the exercise of that power. The power of release has been assigned by statute to the Minister for Justice, Equality and Law Reform. The Parole Board, a non-statutory body, advises the Minister but crucially he or she is not bound by that advice. In a series of decisions the superior courts in Ireland have invoked separation of powers considerations to reinforce this stance and they have demonstrated a marked reluctance to interfere with the exercise of that executive power.

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This article considers current Irish law on the review of life sentences, as opposed to fixed-term sentences, in the light of the ECtHR jurisprudence. The principal conclusion is that Irish law is incompatible with the ECHR. The question of how Irish law might be brought into compliance with the Convention is briefly considered.

**ECHR AND LIFE SENTENCES**

Since the enactment of the European Convention on Human Rights Act 2003, the Convention enjoys an enhanced profile in Irish domestic law. The jurisprudence of the European Court of Human Rights has a greater purchase in domestic proceedings: Irish courts are now required to take judicial notice of declarations, decisions, advisory opinions and judgments of the European Court of Human Rights and to take 'due account' of the principles established by those instruments. The courts are enjoined, where possible, to interpret national law in a manner that is compatible with the ECHR and the superior courts are authorised to issue a declaration of incompatibility where a national law falls foul of the ECHR.

A declaration of incompatibility does not invalidate a national legal measure, but of course it would place direct pressure on the Oireachtas (Parliament) to remedy the position in order to ensure alignment between Irish law and ECHR demands. This position may be contrasted with that which pertains under the Constitution where the superior courts may declare legislation to be invalid. A measure that is so condemned by the superior courts is considered null and void. In the result, there are in effect two bodies of rights which operate in Irish law, namely national constitutional rights and the ECHR via the European Convention on Human Rights Act 2003. Although there might be significant overlaps between these two bodies the distinction between them must be borne in mind.

The European Court has been presented with a growing number of cases concerning the determination of life sentences in recent years. This has provided the Court with the opportunity to spell out in some detail the requirements of the ECHR on the matter. Accordingly it is incumbent on signatory states to align their procedures governing the conditional release on licence of life sentence prisoners with rulings of the Strasbourg Court.

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3 See remarks of Kearns J in *Dublin City Council v Fennell* [2005] 1 IR 604 at 608: 'The 2003 Act ... does not purport to incorporate the Convention directly into domestic law, but rather imposes an obligation that, when interpreting or applying any statutory provision or rule of law, a court shall, insofar as is possible, and subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions. The 2003 Act also provides that every organ of the State shall, subject to any statutory provision or rule of law, perform its functions in a manner compatible with the State's obligations under the Convention provisions. A party may also seek from the High or Supreme Court a declaration that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions, and where such a declaration is made certain consequences as detailed in the Act then follow'.


7 Constitution of Ireland, Art. 15.4.2.

In general, European human rights law accepts that the detention of a prisoner following his or her being sentenced by a court of competent jurisdiction is lawful. However, the ECtHR has acknowledged that in some circumstances a prisoner may invoke the provisions of Article 5 to review his or her sentence. In the context of the review of life sentences the Court has clearly established that the fact that a person has been convicted does not preclude future review of his or her continued incarceration: in this regard the prisoner may invoke the review provisions of Article 5(4).

Two key themes can be disinterred from the Court's jurisprudence. First, the underlying purpose of Article 5 is to protect individuals from being deprived of their liberty arbitrarily: in the context of life sentence prisoners a decision to continue their detention should not be taken arbitrarily. The required protection is achieved through the review mechanism prescribed by Article 5(4). Second, it may be inferred from the jurisprudence that prolonged detention can be justified on the limited grounds of risk and dangerousness. The second theme reflects the English tariff system under which a life sentence is in effect divided into punitive and preventive components. The thrust of the case law is to the effect that once the punitive element of the life sentence (as reflected in the tariff) has been served the continued detention of the prisoner can only be justified on the basis that he or she represents a continuing danger to the public, a matter that must be open to periodic review. Moreover, there must be a causal connection between the offence for which the prisoner has been convicted and the potential for re-offending. Although it has not been required to rule on the matter directly, it is significant that the Court has indicated that public acceptability is not a relevant criterion on which to base a decision relating to a prisoner’s release.

The principle that the lawfulness of a life sentence prisoner’s continued detention must be periodically reviewed once the punitive element of the sentence has been served, and the corresponding entitlement to challenge that detention in accordance with Article 5(4), was established in the late 1980s. In Weeks v United Kingdom, the applicant, who had been convicted of robbery, received discretionary life imprisonment on the grounds that he was a dangerous offender. He was subsequently released on licence but the licence was revoked when he committed a further offence. The Court accepted that the freedom of a prisoner released on licence was ‘more precarious’ than that of a normal citizen. However, the restrictions on the applicant as an ‘on licence’ prisoner did not mean that he was not at liberty within the meaning of Article 5. Accordingly, he was entitled to invoke that provision. Nevertheless, the Court concluded that the decision to re-detain the applicant in this case was neither arbitrary nor unreasonable since it was based on his unstable and aggressive behaviour and it followed that there was no violation of Article 5(1). However, the Court went on to hold that once he was returned to custody the applicant was entitled to the review specified in Article 5(4) and in the circumstances it concluded that the procedures in the instant case were deficient.

European human rights law governing the determination of life sentences has evolved since the mid-1990s. At first the European Court drew a distinction between discretionary life sentences and mandatory life sentences, which coincided with the

10 van Droogenbroeck v Belgium (1982) 4 EHRR 443.
12 (1988) 10 EHRR 293.
theory then underpinning English law that the latter were exclusively punitive whereas the former incorporated a preventative element. Hence in *Wynne v United Kingdom*, the court held that a periodic review of a mandatory life sentence was not required: in these circumstances the review requirements of Article 5(4) were sufficiently complied with by both the trial court and appellate courts. The facts of this case merit consideration. The applicant, who had been convicted of murder and sentenced to a mandatory life sentence, was released on licence. Some time later he killed a woman. Ultimately, he pleaded guilty to manslaughter on the grounds of diminished responsibility and received a discretionary life sentence. His licence was also revoked so he continued to serve the life sentence for murder. Arguing that he was in reality serving the discretionary life sentence, the applicant contended that he was entitled to have that sentence reviewed. The court dismissed that claim concluding that his conviction for manslaughter did not alter the validity of either his original sentence for murder or the revocation of his licence. He continued to serve the mandatory life sentence and the discretionary life sentence for manslaughter merely added a supplemental basis for his detention. The Court reasoned that a review of the manslaughter sentence would be ‘devoid of purpose’ since the applicant would continue to be held under the mandatory life sentence.

In *Thynne, Wilson and Gunnell v United Kingdom*, the applicants, convicted sex offenders, were serving discretionary life sentences but their continued post-tariff detention had not been periodically reviewed. They claimed that this state of affairs violated Article 5(4) ECHR due to the absence of a review procedure to determine the lawfulness of the continued detention of the prisoners after the tariff period of the sentence had been served. This was not a challenge to the lawfulness of the imposition of the original sentence but rather against their continued indeterminate post-tariff detention. The ECtHR held that since the circumstances that gave rise to the applicants’ initial detention may have changed in the intervening time they were entitled to periodic reviews of their continued indeterminate detention after the punitive element of their respective life sentences had been served. The ECtHR explained that:

> [...] the factors of mental instability and dangerousness are susceptible to change over the passage of time and new issues of lawfulness may thus arise in the course of detention. It follows that at that phase in the execution of their sentences, the applicants were entitled under Article 5(4) to take proceedings to have the lawfulness of their continued detention decided by a court at reasonable intervals and to have the lawfulness of any re-detention determined by a court.

The Court eventually came to realise that the distinction between mandatory and discretionary life sentences lacked substance. The initial change in tack occurred in several cases dealing with juvenile offenders who had been convicted of murder. The mandatory sentence for such offenders was detention during Her Majesty’s Pleasure—in effect, they were sentenced to indefinite detention with their release being determined by the Home Secretary. In *Hussain v United Kingdom*, the applicant prisoner had been detained during Her Majesty’s Pleasure for a murder he committed

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16 (1991) 13 EHRR 666, at para 76.
when he was a juvenile. The European Court held that under Article 5(4) ECHR such prisoners were entitled to have the lawfulness of their continued indeterminate detention considered by a court or quasi-judicial body. Subsequently, in *V and T v United Kingdom*, the ECtHR in effect removed the Home Secretary’s power to decide on the release date and, therefore, to set the tariff period of those detained at Her Majesty’s pleasure. The ECtHR held that an ‘independent and impartial tribunal’, not the Home Secretary (an emanation of the executive), should set the tariff for juveniles convicted of murder. The setting of the tariff by the Home Secretary was held to be an infringement of the right to a fair trial under Article 6(1) ECHR.

Eventually, in *Stafford v United Kingdom*, a uniform regime was adopted for mandatory and discretionary life sentences and for juvenile murderers. The applicant was a convicted murderer whose tariff period had been set by the Home Secretary in accordance with English domestic practice at the time. He had been released on licence but that was revoked on his later conviction for fraud. On completion of his fraud sentence the Parole Board recommended that the applicant be released but the Home Secretary rejected that advice on the grounds that there was a risk that the applicant would engage in further fraud offences. The ECtHR ruled that the applicant’s rights under the provisions of Article 5(1) and 5(4) ECHR had been violated in that the setting of the tariff was a sentencing exercise for judges, not members of the executive. The ECtHR also held that the Home Secretary’s power of veto over a recommendation by the Parole Board to release a post-tariff life prisoner contravened Articles 5(1) and 5(4) ECHR.

In *Stafford*, the ECtHR was particularly influenced by the fact that at this stage it had become widely accepted that the view that a mandatory life sentence amounts to punishment for life no longer corresponded with practical reality. The UK government had sought to maintain the distinction between mandatory and discretionary life sentences by arguing that, unlike the latter, the former was not based on individual characteristics of dangerousness: accordingly, the argument ran, there was no issue of changing circumstances that might undermine the basis for continued detention. The Court rejected that argument, concluding that mandatory life sentences contain a punitive element that is reflected in the tariff. Once that period had been served, the Court reasoned, the grounds for continued incarceration, ‘as in discretionary life and juvenile murder cases must be considerations of risk and dangerousness’. Since those elements are liable to change over time, as in the case of other life sentence prisoners, the continued lawfulness of a prisoner’s detention cannot be assumed. Departing from its judgment in *Wynne v United Kingdom* the ECtHR concluded that ‘it can no longer be maintained that the original trial and appeal proceedings satisfied, once and for all, issues of compatibility of subsequent detention of mandatory life prisoners with the provisions of Article 5(1) of the Convention’.

20 In both Scotland and Northern Ireland the law had been altered to assign the function of setting the tariff to the trial judge: Convention Rights (Compliance) (Scotland) Act 2001; the Life Sentences (Northern Ireland) Order 2001, S.I. 2001/2564.  
22 (2002) 35 EHR 32, at para 87. The decision in *Stafford* had an impact on domestic law. In *R (Anderson) v Secretary of State for the Home Department* [2003] AC 1 the House of Lords bowed to the weight of ECtHR jurisprudence and concluded that the fixing of the tariff was legally indistinguishable from imposing a sentence. It followed that Article 6 ECHR applied and that the tariff should be set by a court (‘an independent and impartial tribunal’) rather than by the Home Secretary. Accordingly, the House
Following the decision in *Stafford* it is settled that, irrespective of the form of the life sentence takes, once the punitive element of the sentence has expired a prisoner is entitled under Article 5(4) ECHR to have lawfulness of his continued indeterminate detention reviewed by a ‘court’.\(^{23}\) The concept of lawfulness embraces both domestic and Convention law: it requires the detention to conform with domestic substantive and procedural rules and to be ‘in keeping with the purposes of Article 5, namely to protect the individual from arbitrariness’.\(^{24}\) In the context of life sentences continued detention after the expiry of the punitive element has been served is justifiable only on grounds of risk and dangerousness. Factors that the Court has indicated that are relevant in assessing whether the continued detention is lawful include mental instability,\(^{25}\) unstable, disturbed and aggressive behaviour,\(^{26}\) youth and level of maturity\(^{27}\) and personality factors such as anger, alcoholism and the ability to maintain relationships.\(^{28}\) Given that these factors are liable to change over time a life sentence prisoner is entitled to frequent review of his or her sentence.\(^{29}\)

It is also clear that the notion of lawful imprisonment insists that there is a sufficient connection between the prisoner’s continued detention and the offence for which he or she was convicted. Thus, in *Stafford v United Kingdom*,\(^{30}\) the Court condemned the imprisonment of a convicted murderer where his continued detention was based on a fear that he would commit fraud offences in the future. On the other hand, the circumstances of the original offence might be relevant to the issue of connection: in *Waite v United Kingdom*,\(^{31}\) the Court held that there was a sufficient connection where the accused, who killed his grandmother while he was addicted to glue-sniffing, had his licence revoked following his arrest for possession of drugs.

Article 5(4) requires a speedy decision but it allows a measure of procedural flexibility. The ECtHR has acknowledged that the review period may vary according to the individual circumstances of the prisoner. In *Oldham v United Kingdom*,\(^{32}\) the ECtHR held that an interval of two years between assessments did not fulfil the requirements of Article 5(4). The applicant attended a number of prescribed courses that were designed to deal with his anger and alcoholism problems and his difficulty in managing relationships. He completed these courses within eight months of his earlier review and a further 16 months passed before the next review. The UK government contended that the delay was necessary to monitor the applicant’s progress but did not explain the nature or duration of that process. The Court concluded that:

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23 What amounts to a ‘court’ is considered below in text accompanying fn 38–42.
29 Discussed further in text accompanying fn 32–37 below.
in the circumstances of this case that the two year delay between reviews was not reasonable and that the question of whether his continued detention was lawful was not decided 'speedily' within the meaning of Article 5(4) of the Convention. There has, accordingly, been a violation of this provision.\[33\]

The ECtHR also considered the issue of frequency in *Blackstock v United Kingdom*,\[34\] which involved a gap of 22 months between reviews. The applicant received a discretionary life sentence for wounding a police officer. On the expiry of his minimum term (ie tariff) his detention was reviewed by the Parole Board who in June 1998 recommended that he be transferred to an open prison or, if that recommendation was not accepted by the Home Secretary, a further review in 12 months.\[35\] The Home Secretary rejected the recommendation and in September 1998 ruled that the applicant be transferred to a Category C prison. The appropriate transfer instructions were issued the following month but the applicant objected to the proposed prison to which he was to be sent, indicating his preference to be sent to one of several other named prisons. In December 1998 it was decided to transfer him to one of those prisons but that did not happen until April 1999 when a place became available. His next review took place in April 2000 with the Parole Board again recommending his transfer to open conditions. The Home Secretary accepted the latter recommendation.

In ruling in favour of the applicant, the Court's starting point was that the frequency of reviews required by Article 5(4) ECHR must be determined in the light of the circumstances of each case and it refused to lay down a firm rule stipulating a maximum period between reviews. Instead, the Court recognised that a flexible approach is to be preferred since the personal circumstances of prisoners will differ markedly. Thus the Court had ruled in some earlier cases that gaps of between 15 months and two years were unreasonable\[36\] while accepting a two-year lapse in another case.\[37\] In the instant case the UK government had sought to justify the delay on a combination of the delay (almost six months) in finding a place in the prison nominated by the applicant and a desire that he should spend 12 months in that facility before being considered for transfer to open conditions. The Court was not persuaded by that argument: no formal courses had been prescribed for the applicant when he was transferred and there was no evidence that, in the light of the administrative delays, consideration had been given to whether it was necessary to insist on the usual 12 months in Category C before reviewing his case.

The ECtHR has reflected on what constitutes a 'court' for the purposes of Article 5(4). In *Thynne, Wilson and Gunnell v United Kingdom*,\[38\] the ECtHR ruled that a 'court-like' body should determine the release date of life sentence prisoners. For these

\[34\] [2005] ECHR 59512/00.
\[35\] At the time the Crimes (Sentences) Act 1997 [UK], s 28 invested the Parole Board with the power to order the release of discretionary life sentence prisoners once the tariff period had expired; where the Board chose not to order release it could make recommendations to the Home Secretary concerning the prisoner's future progress.
\[37\] Citing Dancy v United Kingdom No 55768/00, 21 March 2002, where the applicant having benefited from previous 12-month reviews, failed to make progress and considerable offence-related work had been identified as being necessary.
\[38\] (1990) 13 EHRR 666.
purposes a ‘court’ does not have to be a permanent court in the legal system of a signatory state. In *Weeks v United Kingdom*, the ECtHR explained that:

The ‘court’ referred to in Article 5(4) does not necessarily have to be a court of law of the classic kind integrated within the standard judicial machinery of the country. ... The term ‘court’ serves to denote ‘bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case ... but also the guarantees’—‘appropriate to the kind of deprivation of liberty in question’—‘of a judicial procedure’, the forms of which may vary from one domain to another. ... In addition, as the text of Article 5(4) makes clear, the body in question must not have merely advisory functions but must have the competence to ‘decide’ the ‘lawfulness’ of the detention and to order release if the detention is unlawful. There is thus nothing to preclude a specialised body such as the Parole Board being considered as a ‘court’ within the meaning of Article 5(4), provided it fulfils the foregoing conditions. ... 

Thus, a quasi-judicial body, such as a parole board, is a ‘court’ within the meaning of Article 5(4) ECHR provided that its deliberations are determinative rather than advisory. It is also clear that the body charged with deciding on whether the life prisoner should be released must be independent of the executive and of the parties involved. In *Neumeister v Austria*, the ECtHR addressed the issue of independence of the Court from the procedures adopted in the following terms:

Nor is it possible to justify application of the principle of ‘equality of arms’ to proceedings against detention on remand by invoking Article 5(4) which, while requiring that such proceedings shall be allowed, stipulates that they should be taken before a ‘court’. This term implies only that the authority called upon to decide thereon must possess a judicial character, that is to say, be independent both of the executive and of the parties to the case; it in no way relates to the procedure to be followed.

The central principle set out in *Neumeister* was amplified in *de Wilde and others v Belgium*, where the ECtHR insisted that the procedures adopted must be judicial in nature and must provide ‘the individual concerned [with] guarantees appropriate to the kind of deprivation of liberty in question’.

It is essential that the body reviewing a prisoner’s detention adopts procedures that are judicial in nature. In *E v Norway*, the ECtHR outlined the general position under this provision in the following terms:

Article 5(4) does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the ‘lawful’ detention of a person according to Article 5(1).

Nevertheless, the ECtHR has held that domestic judicial review proceedings do not satisfy Article 5(4) ECHR on the ground that that procedure is not sufficiently wide to determine whether the prisoner’s continued imprisonment was justified by the

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41 (1979) 1 EHRR 373.
42 (1979) 1 EHRR 373, at para 76.
objectives of the indeterminate sentence. The Court has also taken the opportunity to provide some procedural detail. It has held that the review proceedings must be adversarial with the prisoner being afforded an opportunity to attend an oral hearing that respects the rights to be legally represented and to call and question witnesses. The Court has also ruled that a failure to disclose adverse material that the review body had in its possession did not satisfy the requirements of Article 5(4) ECHR.

The cardinal principles of ECHR law relating to the determination of life sentences can be summarised thus: (i) a life sentence is not per se a breach of Convention rights; (ii) once the punitive element of the sentence has been served a life sentence prisoner is entitled to a speedy and frequent review of the lawfulness of his continued detention by a court or quasi-judicial body; (iii) whether a review is sufficiently speedy or frequent is to be determined in the light of the circumstances of the particular case; (iv) the concept of ‘lawfulness’ embraces both domestic law and ECHR considerations and the permitted grounds for continued detention are risk and dangerousness; (v) the review must be sufficiently broad to allow a determination as to whether the grounds for continued detention still operate; and (vi) the body reviewing the detention must be invested with the power to determine the lawfulness of the prisoner’s detention rather than acting in a merely advisory capacity and that body must be independent of the executive and of the parties and must adopt appropriate procedures in its hearings.

LIFE SENTENCES IN IRELAND

As is the case in many other jurisdictions, life sentences in Ireland fall into two categories. For some offences, most notably treason and murder, a mandatory life sentence is prescribed by law. It was noted above that this form of sentence is a blunt instrument in that it cannot reflect the culpability of the particular offender. Thus, the mandatory life sentence is imposed for all murders ranging from the most heinous (eg serial killings) to those that some might feel merit less condemnation (‘mercy’ killing of a loved one is often cited in this regard). On the other hand, it may be contended that the mandatory life sentence amounts to a legislative assessment of the culpability associated with all murders and a corresponding judgement that it is not appropriate to draw a distinction between different types of murder. It might further be suggested that a mandatory life sentence is purely punitive (and perhaps deterrent) and eschews other sentencing goals such as rehabilitation and incapacitation. In a word, the mandatory life sentence may be taken to reflect the sentiment that ‘murder is murder is murder’ and deserves the severest punishment without mitigation. However these considerations are not borne out in practice. Most life sentence prisoners are

eventually released and this, coupled with official or quasi-official pronouncements, creates an expectation that they will qualify for release. 48

The second category consists of discretionary life sentences where a maximum sentence of life imprisonment is provided for by law. Discretionary life sentences are prescribed for a number of serious offences including manslaughter, rape, aggravated sexual assault, committing a sexual act on a child less than 15 years of age, causing serious harm, syringe attacks, false imprisonment, robbery, aggravated burglary and serious drugs offences. Discretionary life sentences are more easily reconciled with the principle of proportionality since the particular sentence imposed can be calibrated to match the culpability of the offender and the circumstances of the offence. 49 In such cases the sentencing judge enjoys the wide measure of discretion that is allowed in sentencing generally.

As far as discretionary life sentences are concerned, Irish courts have indicated that they are governed by the principle of proportionality and it has been ruled impermissible to include a preventive element in such a sentence. In theory, at least, a discretionary life sentence in Ireland is predominantly punitive in nature, designed exclusively to reflect the offender’s culpability and the gravity of the offence. The dominance of the proportionality principle in the Irish sentencing process would appear to preclude the imposition of preventative sentences along the lines practised in the United Kingdom. Indeed, the Court of Criminal Appeal has handed down several decisions to the effect that a sentencing judge may not include an element of incapacitation, designed to protect the public from a potentially dangerous offender, in a sentence. 50 In DPP v Jackson, the Central Criminal Court had imposed a discretionary life sentence on the defendant, a serious sex offender, but the Court of Criminal Appeal subsequently overturned that sentence on the basis that it constituted one of preventative detention. The Court clearly rejected the notion that preventative detention is a feature of Irish sentencing law, stating that: ‘The Court is satisfied that preventative detention is not known to our judicial system and that there is no form of imprisonment for preventative detention’. 52 The decision in Jackson was applied in The People (DPP) v Bambrick, where the Central Criminal Court refused to impose a sentence of preventative detention. The trial judge explained that he was:

48 See the remarks of the Minister for Justice, Equality and Law Reform, 24 March 2006 (http://www.justice.ie/80256EO1003A02CF/vWeb/pctUSQ6N7FGB-en: accessed on 15 Feb 2007): ‘. . . nobody [convicted of murder] should expect even in the absence of aggravating factors and where guilt has been admitted, remorse shown, good behaviour demonstrated during imprisonment and a capacity for rehabilitation proven that there is a likelihood that he or she will be set at liberty on licence at least before the expiry of 12 to 14 years . . . I can tell you that, of those prisoners serving life sentences who have been released over the past ten years, the average sentence served in prison is approximately thirteen and a half years’. See also Chairman’s Foreword, The Parole Board, Annual Report 2005 (Dublin, 2006) p 3: ‘The days of prisoners who have served 10 or 12 years expecting to be released from custody are now over. The sentence they must serve must be a long and salutary one. The Board must do everything it can to promote public confidence and to ensure that its attitude to the dreadful crime of murder will remain constant. The position of human life in society must be restored’.


51 Unreported, Court of Criminal Appeal, 26 April 1993.

52 Unreported, Court of Criminal Appeal, 26 April 1993, per Hederman J.

In view of this general policy, the sentencing process should not be concerned with the potential for future re-offending. \(^{55}\) Probably as a result of this stance very few prisoners are sentenced to discretionary life sentences: the vast bulk of life sentence prisoners in the Irish prison system are serving mandatory sentences. Prisoners convicted of treason and certain forms of murder are required to serve a minimum of 40 years before becoming eligible for release.\(^{56}\) In the case of other life sentence prisoners Ireland, unlike the United Kingdom, has not adopted a formal practice of setting tariffs or minimum terms to be served. Significantly, sentencing judges do not express an opinion on the length of time that should be served by life sentence prisoners although on occasion some judges have obliquely indicated their views on the matter without specifying a particular number of years. On the other hand, both the Minister for Justice, Equality and Law Reform and the Parole Board have proclaimed that a life sentence prisoner will not be considered for release until he or she has served at least 14 years.\(^{57}\) By their very nature these pronouncements are political, stemming from a concern to be seen not to be overly lenient towards murderers, and do not bind the Minister. With the exceptions noted above, there is no legal impediment to releasing a life sentence prisoner early nor is there an entitlement to be considered for release after a certain period.

REVIEW OF SENTENCES IN IRISH LAW

A range of constitutional and statutory provisions governs the review of sentences in Ireland. In particular, the law accommodates the commutation and remission of punishment on the one hand, and the temporary release of prisoners on the other. Each is governed by separate legal provisions.\(^{58}\) Article 13.6 of the Irish Constitution provides for the pardoning of offenders and the commutation and remission of punishment:

The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may also be conferred by law on other authorities.

The Criminal Procedure Act 1993 prescribes the procedure to be followed by a person who seeks a presidential pardon. The power of pardon cannot be delegated but it is clear that the powers of commutation or remission are delegable. Section 23(1) of the Criminal Justice Act 1951 duly conferred the 'power to commute or remit punishment' on the executive.\(^{59}\) Section 23A of the 1951 Act, inserted by section 17 of


\(^{55}\) However, preventative considerations may feature in the decision to allow a prisoner temporary release; see further in text accompanying fn 71.

\(^{56}\) Criminal Justice Act 1990, s 4.

\(^{57}\) See remarks quoted in fn 48.


\(^{59}\) Section 23(1) of the 1951 Act inter alia reads: '[t]he Government may commute or remit, in whole or in part, any punishment imposed by a court exercising criminal jurisdiction, subject to such conditions as they may think proper'.

the Criminal Justice (Miscellaneous Provisions) Act 1997, allows the government to delegate its powers of remission to the Minister for Justice, Equality and Law Reform.

The courts have considered the nature of the power of remission. In *The State (O) v O’Brien*, Ó Dálaigh CJ drew a distinction between an act of sentencing and one that merely effects a remission. Walsh J, drawing the same distinction, spoke of the judicial character of the power of remission:

The power of commutation and remission . . . is a power which, although a power of a judicial character, is nonetheless expressly conferred by the provisions of the Constitution upon the President and, in certain instances, upon the Executive or members thereof. It was, of course, quite open to the People when enacting the Constitution to confer powers of a judicial character upon the Executive or to provide by the Constitution means whereby it could be done by Act of the Oireachtas; but that does not alter the nature of the power.

In a dissenting judgment, McLoughlin J expressed a different view. He saw the power of commutation and remission as corresponding to the royal prerogative of mercy and, therefore, as being executive in nature. In *Brennan v Minister for Justice*, Geoghegan J also preferred the view that the power of remission is executive in nature. However, he went on to state that that power should be exercised sparingly and, given the special nature of the power, the evidence supporting a decision to remit and the reasons for it should be recorded. Moreover, he ventured the opinion that the exercise of the power of remission is open to judicial review.

The constitutionally located powers of commutation and remission are complemented by the statutory power to order the temporary release of prisoners: in practice, it is the latter power that is employed to bring about the release of life sentence prisoners. A comprehensive statutory regime governing the temporary release was adopted in 2003 when section 2 of the Criminal Justice Act 1960 was amended by section 1 of the Criminal Justice (Temporary Release of Prisoners) Act 2003:

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 [...].

This provision establishes a clear legislative basis for the power of the Minister for Justice, Equality and Law Reform to grant temporary release of prisoners by setting down the principles that will apply to its exercise. The Act stipulates the purposes for which temporary release may be ordered: to assess the prisoner’s ability to be re-integrated into society, to prepare him or her for release on the expiry of his or her sentence or to assist the police in investigating crime; where release is warranted on health or humanitarian grounds; on the grounds of good prison management; and where the Minister is of the opinion that the prisoner has been rehabilitated and is ready for re-integration into society.

60 [1973] IR 50.
61 [1973] IR 50 at 60.
62 [1973] IR 50 at 70.
64 Criminal Justice (Temporary Release of Prisoners) Bill 2001, explanatory memorandum.
65 Criminal Justice Act 1960, s 2(1)(a).
66 Criminal Justice Act 1960, s 2(1)(b).
67 Criminal Justice Act 1960, s 2(1)(c).
68 Criminal Justice Act 1960, s 2(1)(d).
Section 2(2) of the Criminal Justice Act 1960 outlines the range of factors that the Minister is required to take into account in reaching a decision on temporary release:

(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 S.1 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.

The Minister is prevented from ordering temporary release if he or she is of the opinion that it would not be appropriate to do so for reasons connected with any of the foregoing factors or if the prisoner has been remanded in custody by a court. 69 Moreover, section 2(3)(b) stipulates that a prisoner may not be released if another statute prohibits such release, a provision that is relevant in the case of those serving sentences for treason, certain forms of murder and some drug dealing offences. 70

The power to order temporary release applies to life sentence prisoners and those serving a fixed term alike. It is noteworthy that both punitive and preventative considerations feature in the decision to allow temporary release. In particular, the factors listed in section 2(2)(a), (b) and (c) relate to the offender’s culpability while the provision in paragraph (d) is clearly preventative in nature. Therefore, despite the courts’ determination to avoid sentencing on a preventative basis71 the Minister for

69 Criminal Justice Act 1960, s 2(3)(a) and (c).
70 Criminal Justice Act 1990, s 4 (prescribing a 40 year minimum term for treason and certain murders); Misuse of Drugs 1977, s 15A (specifying minimum terms for possession for supply of drugs worth more than €13,000).
71 See text accompanying fnn 50–54.
Justice, Equality and Law Reform is statutorily obliged to take preventative considerations into account when deciding on the question of temporary release. As far as life sentence prisoners are concerned the net effect of this state of affairs is that the determination of their sentence is, in part, shaped by preventative concerns. To this extent, the fate of the life sentence prisoner in Ireland differs little from his or her English counterpart, despite the formal differences in sentence structure between the two jurisdictions.

The power to grant temporary release has been distinguished from the power to commute or remit punishment. In Kinahan v The Minister for Justice, Equality and Law Reform, the Supreme Court, per Hardiman J, stated:

"It does not appear ... that temporary release is a specific exercise of the general power of commutation or remission envisaged in the Constitution. Rather, it appears to be a statutory creation administered under the Prisoners (Temporary Release) Rules, 1960, which instrument was in turn made under the powers conferred by the Criminal Justice Act, 1960."

An administrative framework has been put in place to manage the temporary release of prisoners, including life sentences. The Parole Board, which was established in 2001 replacing the former Sentence Review Group, considers cases for release and advises the Minister for Justice, Equality and Law Reform. Significantly, the Parole Board was established on a temporary non-statutory basis and it lacks the power to determine cases: its role is merely advisory and the Minister is not obliged to act on their advice. Despite its non-statutory basis it is likely that the manner in which the Parole Board conducts hearings is open to judicial review: its predecessor, the Sentence Review Group has been successfully challenged in judicial review proceedings.

However, the susceptibility of the Parole Board to judicial review to ensure compliance with the principles of fair procedures is not matched by a similar judicial willingness to scrutinise the actual exercise of the power to allow temporary release.

The Irish courts have been consistent in their reluctance to engage in the review of sentences. Inspired by separation of powers considerations they have indicated that the question of early release is an executive matter and that the courts should exercise caution in encroaching on that territory. The executive enjoys a wide measure of discretion in the matter of release, which is seen as a privilege that is extended to prisoners rather than a right. Judicial review of a refusal to order temporary release will be successful only on the limited grounds that the refusal was arbitrary, capricious or unjust.

In The People (DPP) v Tiernan, it was held that a court should not take account of the possible release of an offender when determining the appropriate sentence to impose. Finlay CJ emphasised the discretionary nature of temporary release:

72 [2001] 4 IR 454 at 457.
74 See Ryan v Governor of Limerick Prison [1988] IR 198 at 200, per Murphy J: "... temporary release is a privilege or concession to which the person in custody has no right ..."; Dowling v Minister for Justice, Equality and Law Reform [2003] 2 IR 535 at 538, per Murray J: "... temporary release of a prisoner before the sentence imposed by the court has expired is a privilege accorded to him at the discretion of the executive".
75 This broadly corresponds with the grounds on which the courts will overturn an administrative decision: see The State (Keegan) v Stardust Victims Compensation Tribunal [1986] IR 642; O'Keeffe v An Bord Pleanala [1993] 1 IR 39; see further G Hogan and D G Morgan, Administrative Law in Ireland 3rd edn (Dublin, Round Hall Sweet & Maxwell, 1998) pp 641–649.
76 [1988] IR 250 at 256.
What is described in this ground as the conventional period a person who has been sentenced to life imprisonment might expect to serve is a matter of a policy pursued by the Executive at given times and subject to variation at the discretion of the Executive. It cannot, therefore, in my view, properly be taken into consideration by a court in imposing sentence.

In Murray v Ireland, the Supreme Court refused to direct the executive to grant temporary release to the plaintiffs, a married couple serving life sentences for murder. Finlay CJ explicitly invoked separation of powers considerations:

"... it was said that a court should direct the executive to grant temporary release for this purpose. ... The length of time which a person sentenced to imprisonment for life spends in custody and as a necessary consequence the extent to which, if any, prior to final discharge, such a person obtains temporary release is a matter which under the constitutional doctrine of the separation of powers rests entirely with the executive [ ... ]."

However, the Court did concede that there is scope for a limited form of judicial scrutiny of the executive role. Finlay CJ explained:

"The exercise of these powers of the executive is of course subject to supervision by the courts which will intervene only if it can be established that they are being exercised in a manner which is in breach of the constitutional obligation of the executive not to exercise them in a capricious, arbitrary or unjust way. It is not, however, in my view, permissible for the court to intervene merely on the grounds that it would [ ... ] have reached a different conclusion on the appropriateness [ ... ] of temporary release.

The Supreme Court has consistently reiterated these views. In McHugh v Minister for Justice, the Court stressed that temporary release and any form of release under escort are exclusively matters within the Minister’s discretion. In Kinahan v Minister for Justice and Law Reform, the Court took the view that the same legal position governs the release of life sentence prisoners and those serving determinate sentences. Referring to the decision in Murray, Hardiman J stated:

"In my view, this decision properly emphasises the important of the constitutional separation of powers in dealing with the implementation by the executive of a judicially imposed sentence of imprisonment. It also correctly identifies the sole circumstances in which the court would be justified in interfering with a decision in relation to temporary release."

As to the exercise of the executive discretion in the matter, the Court rejected the notion that there is a presumption that a prisoner is entitled to temporary release.

The Criminal Justice (Release of Prisoners) Act 1998 was enacted in the aftermath to the ‘Good Friday Agreement’ to provide a mechanism for the early release of prisoners. The Supreme Court, again emphasising the discretionary nature of the power to release, has held that the Act did not create a right to be released. In O’Neill v Governor of Castlerea Prison, Keane CJ spoke for the Court:

80 [1997] 1 IR 245.
81 [2001] 4 IR 454.
82 [2001] 4 IR 454 at 459.
83 The Court also dismissed the argument that the recommendations of the Council of Europe of the Committee of Ministers to Member States on European Prison Rules were binding.
84 [2004] 1 IR 298 at 314; see also Doherty v Governor of Portlaoise Prison [2002] 2 IR 252.
The power to release itself, whether exercised on what might be called conventional grounds of a compassionate or humanitarian nature or for purely political considerations, as in the case of releases effected for the purpose of giving effect to the Belfast Agreement, is a quintessentially executive function.

The broad nature of the discretion to grant temporary release was central to the decision of the High Court in *Breathnach v Minister for Justice, Equality and Law Reform*, 85 where the applicant was granted temporary release on condition that he remained handcuffed during his release. He challenged that condition as being unreasonable and argued that since the respondent had not presented material to the court to show why handcuffing was necessary the court should conclude that there was no basis to support that condition. Rejecting the claim, Ó Caoimh J concluded that it was within the respondent's discretion 'to release the applicant subject to any conditions which he chose to impose'. 86 The Court also took the view that in the circumstances it was not necessary to give reasons for the imposition of the condition.

The revocation of temporary release where a prisoner had been charged with, but not convicted of, another offence was condemned by the Supreme Court in *The State (Murphy) v Kieft*. 87 While the Court acknowledged that the executive enjoyed a wide measure of discretion in the matter it ruled that in the circumstances the applicant should have been afforded the opportunity to refute the allegation. Griffin J explained:

[... ] the fact that the [applicant] had been charged with an offence is an insufficient reason for the revocation of his temporary release. Charges are frequently dropped or not proceeded with and, if temporary release can be revoked merely or solely because the person released has been charged with an offence, what of the apparent injustice done to such a person who, in the period intervening between the charge and the dropping of the charges, has lost the liberty to which he would otherwise have been entitled [ ... ]. 88

It would appear that one response to the decision in *The State (Murphy) v Kieft* was to allow shorter periods of temporary release which could be renewed each time the previous period expired. The strategy was considered in *Dowling v Minister for Justice, Equality and Law Reform*. 89 The applicant in the latter case was a life sentence prisoner who had been granted temporary release on a monthly renewable basis: he was required to sign on at Mountjoy Prison on the 23rd day of each month. On 23 December 1999 the applicant was arrested and questioned in relation to a murder and, although he was released from police custody without charge, he was returned to prison the same day. The High Court refused to quash the revocation on the grounds that temporary release was a concession to which the prisoner had no right. The Supreme Court allowed the appeal and quashed the revocation. The Court again emphasised that temporary release is a privilege and that the executive enjoys a wide discretion in the matter. Moreover, Murray J, in language remarkably similar to that used by the ECtHR on the matter, 90 commented on the conditional nature of the

86 [2004] 3 IR 336 at 343.
89 [2003] 2 IR 535.
liberty of a prisoner on temporary release: it is not 'on a par'\textsuperscript{91} with that of the ordinary citizen.

The decision in \textit{Dowling} turned on an interpretation of the nature of the release granted to the applicant. Was it, as the respondent contended, a series of separate one-month releases with a new one-month period of release being allowed each time? If that was the position it was clear that the executive could not be compelled to grant a fresh period of temporary release on the expiry of any particular period of release. However, the Court reached the different conclusion that in reality the applicant had been granted indefinite temporary release, not a series of separate monthly releases, which was revoked when he was returned to Mountjoy Prison: hence the relevance to this case of the decision in \textit{The State (Murphy) v Kieft}.

Some judges adopted the practice of incorporating a review element into the sentence. Thus, an offender might have been sentenced to seven years' imprisonment, to be reviewed after 36 months with a view to determining whether the remainder of the sentence could be suspended. One purpose served by such a sentencing structure is that it allows the court to take account of the offender's progress in prison and if it is satisfactory to give him or her the benefit of that progress. However, there is also a suspicion that a sentence of this type has the darker attraction of preventing the executive from releasing the prisoner prior to the review date and that it was a judicial attempt to counteract the 'revolving door' phenomenon. The superior courts have condemned this sentencing practice on the grounds, inter alia, that such sentences seek to 'freeze' the exercise of executive discretion.\textsuperscript{92}

The Supreme Court definitively resolved the matter in \textit{The People (DPP) v Finn},\textsuperscript{93} where it rejected the idea that the sentencing judge could include a review date for possible release on licence. Keane CJ explained that:

\begin{quote}
The making of such orders is not merely inconsistent with the provisions of s. 23 of the Act of 1951: it offends the separation of powers in this area mandated by Article 13.6 of the Constitution. That provision expressly vests the power of commutation or remission in the President but provides that the power may also be conferred by law on other authorities. Since under Article 15.2.1 of the Constitution the sole and exclusive power of making laws for the State is vested in the Oireachtas, it was for the legislative arm alone to determine which authorities other than the President should exercise that power. In enacting s. 23 of the Criminal Justice Act, 1951, the Oireachtas conferred the power of commutation or remission on the government or, where it delegated its power, the Minister for Justice. . . . It would seem to follow that the remission power, despite its essentially judicial character, once vested under the Constitution in an executive organ, cannot, without further legislative intervention, be exercised by the courts.\textsuperscript{94}
\end{quote}

Nevertheless, the Chief Justice offered the opinion that:

\begin{quote}
It is also, of course, open to the Oireachtas to provide by legislation, as has been done in other countries, for the regular review of sentences by a parole board and such an approach might
\end{quote}

\textsuperscript{91}[2003] 2 IR 535 at 538.


\textsuperscript{94}[2001] 2 IR 25 at 46.
well be consistent with modern penological principles. These again, however, are entirely matters for the legislature and not within the competence of the courts, having regard to Article 13.6, to determine. This passage provides the Oireachtas with the reassurance that it is constitutionally permissible to enact legislation establishing a system of sentence review by an independent statutory body. It may be inferred that the Court was fully aware of the demands of sentence management and the desirability of providing a mechanism for the determination of life sentences: hence the reference to 'modern penological principles'.

CONCLUSION

The European Court of Human Rights' jurisprudence concerning the determination of life sentences is particularly relevant since the enactment in Ireland of the European Convention on Human Rights Act 2003. Rulings by the Court on the temporary release or release on licence of life sentence prisoners strongly indicate that current Irish law is not compatible with the ECHR.

The most significant deficiency in Irish law is that release is treated as an executive matter, a position that is in marked contrast to the position in European human rights law. Article 5(4) ECHR, as interpreted by the E CtHR, demands that a court or 'court-like' body should be entrusted with the release of life sentence prisoners. The key features of such a body is that it is independent of the executive and of the parties, that it has the power to determine cases, that it conducts adversarial hearings and accords to the prisoner the procedural rights that follow from such a hearing. The current Parole Board fails to satisfy ECHR requirements. The difficulty is that the Parole Board lacks the power to determine cases, its role being merely advisory. Moreover, the limited form of judicial scrutiny that Irish law allows does not meet the demands of the Convention. The E CtHR decisions have firmly indicated that judicial review proceedings do not provide the form of review required: a mechanism that allows the review body to consider the factual basis for the continued detention of the life sentence prisoner is necessary.

The chasm between the Irish position and that required by the ECHR causes appreciable difficulties for Irish law given the Irish courts' reliance on the concept of separation of powers as underpinning their reluctance to engage in sentence review. There is a strange irony to the latter consideration given that the European Court and the House of Lords, in Stafford and Anderson respectively, have invoked the separation of powers in support of a very different conclusion: the view expressed in those cases is that the separation of powers demanded that sentencing and the setting of the tariff remain matters for the judiciary, not the executive. It is not beyond the bounds of possibility that the Irish courts will revise their position and bring Irish law into conformity with the ECHR. It is open to the courts to breathe life into the European Convention of Human Rights Act 2003 by interpreting it in a sufficiently expansive

95 (2001) 2 IR 25 at 46.
96 Weeks v United Kingdom (1988) 10 EHRR 293; see also Singh v United Kingdom [1996] ECHR 23389/94.
manner to ensure the reception of the relevant ECHR standards in domestic law: section 4 of the Act requires the courts to take ‘due account’ of the principles of European human rights law. To this end it is possible that the Irish courts, much like their English counterparts, will be driven to declaring the current legal position prescribed by section 2 of the Criminal Justice Act 1960⁹⁹ incompatible with the ECHR. This, of course, is a matter of speculation and it must be acknowledged that, to date, European human rights law has had a marginal impact on domestic Irish law and a decision along the lines of that in Anderson would represent a significant change in judicial attitude. However, it must also be observed that Irish case law on sentence review focused exclusively on questions of domestic law and that the ECHR issues were not raised in or considered by the courts. From a strictly doctrinal perspective the question whether Irish law can be interpreted in a manner that conforms to the ECHR, and the related question whether the courts would issue a declaration of incompatibility if the first question is answered in the negative, remain undecided.

It goes without saying that curing the defects in Irish law by judicial means requires an aggrieved litigant to initiate legal proceedings, an exhaustive process that leaves the law unchanged in the interim. Irish law might be aligned with the ECHR by a more direct legislative route. There is no constitutional impediment to transferring the power of release from the executive to a body that matches ECHR demands. As it happens the judgment in The People (DPP) v Finn,¹⁰⁰ quoted above, has opened the door to a development of the type required by ECtHR jurisprudence. The simple solution is to enact legislation that places the Parole Board on a statutory footing and assign to it the function of regularly reviewing sentences. In this way the Parole Board would acquire the vital qualities of a ‘court like’ body, namely that it is independent of the executive and acts impartially. It is clearly within the competence of the Oireachtas to enact such legislation. Whether it does so without prior judicial intervention remains to be seen.

⁹⁹ See text accompanying fnn 64-71.