‘Whole-Life Orders’: Life means life

... except that it doesn’t quite

by Sundeep Athwal

The Court of Appeal has recently confirmed that judges in England and Wales are not prohibited by human rights legislation from imposing ‘whole-life orders’ when sentencing people found guilty of committing ‘exceptionally serious’ criminal acts. However, the predominant reaction to the decision, celebrating the possibility of offenders spending the rest of their lives in prison, fails to grasp the reasoning behind the decision and largely ignores the need to justify the imposition of whole-life orders.

The Criminal Justice Act 2003 (**CJA 2003**) gave judges in England and Wales the ability to impose whole-life orders on those people convicted of the most serious crimes (usually murder

with certain aggravating factors). Unlike an offender serving an indefinite prison sentence with a minimum term of imprisonment, an offender subject to a whole-life order is not eligible to be considered for parole. Prior to CJA 2003 being enacted, the power to impose the equivalent of a whole-life order rested with the Home Secretary. Under the old regime, the Home Secretary had the power to review such a sentence after 25 years. In pursuit of the desire to remove sentencing decisions from the hands of politicians, the ability to impose whole-life orders was transferred by CJA 2003 to the judiciary. However, no provision was made for routinely reviewing the imposition of a whole-life order on an offender.

In July 2013, the Grand Chamber of the European Court of Human Rights (**ECtHR**) upheld an appeal by three murderers, all convicted under the laws of England and Wales, that the imposition of whole-life orders constituted a breach of their human rights. The ECtHR accepted that a state may keep a person imprisoned for the purposes of punishment, deterrence, public protection, and rehabilitation. Nor did the ECtHR reject the ability of a state to keep a person imprisoned for life. However, the ECtHR did find that depriving an imprisoned person of the opportunity to argue that they had been rehabilitated breached that person's rights under Article 3 of the European Convention on Human Rights (
ECHR
), which prohibits 'inhuman or degrading treatment or punishment'.

The reaction of the UK government to the decision could only be described as one of displeasure. The Justice Secretary, Chris Grayling, declared, in embarrassingly outlandish fashion, that the ECHR's authors would be 'turning in their graves' as a result of the decision. However, the Attorney General, Dominic Grieve, did not think that the ECtHR ruling contained anything to prevent judges in England and Wales from continuing to impose whole-life orders. The issued was raised when he referred the case of *R v McLoughlin* (heard alongside *R v Newell*)
to the Court of Appeal. The Court of Appeal recently delivered its judgment in both cases and, in short, agreed with the Attorney General.

The overwhelming media reaction to the Court of Appeal ruling appears to have been quite celebratory. The continued ability to imprison offenders for life, the willingness of British judges to ignore the 'ridiculous' ECtHR, and the confirmation of the sovereignty of Parliament have all been hailed. Such responses, however, appear to ignore the reasoning which led the Court of Appeal to reach its eventual decision.

The ECtHR had decided that in order for a life sentence to be compatible with Article 3, ECHR, there had to be both 'a prospect of release and a possibility of review'. It was also held that a mechanism for review has to be in place at the time that a sentence is imposed. The ECtHR felt that whole-life orders did not satisfy these requirements. When the time came for the Court of Appeal to consider the implications of the ECtHR decision, it was found that the ECtHR had erred in its understanding of the law of England and Wales.

The Court of Appeal clarified the scope of section 30 of the Crime (Sentences) Act 1997, which allows a secretary of state to release a life prisoner on licence if the secretary of state is satisfied that there are exceptional circumstances which would justify the release on compassionate grounds. The ECtHR had been concerned that this provision could only be used restrictively, such as when an offender is terminally ill. It had therefore been suggested that a separate mechanism of review should be implemented.

The Court of Appeal, however, stated that the secretary of state must take into consideration all exceptional circumstances that may be relevant to an offender's release on compassionate grounds. Additionally, it was stated that a decision taken under the section would need to comply with the provisions of the ECHR and could be subjected to judicial review. Thus, it was held that a mechanism for the review of whole-life orders does, in fact, exist and offenders serving such sentences do enjoy the prospect of release.

Thus, the Court of Appeal did not disagree with the ECtHR on the issue of whether all life sentences, regardless of the seriousness of the corresponding offence, need to allow offenders the opportunity to argue that they have been rehabilitated. Whether the mechanism upheld by the Court of Appeal will prove to be sufficient to avoid the need for changes to the legislation governing whole-life orders remains to be seen. It may be the case that the compatibility of whole-life orders with human rights legislation will be called into question once again when an offender subject to such an order actually attempts to rely on section 30 of the 1997 Act.

It is unfortunate that the potential implications of the approach adopted by the Court of Appeal appear to have been somewhat overlooked by some sections of the media. Some of the outraged reactions to the original ECtHR decision, on the other hand, have been rather more perplexing. The responses of many politicians appear to be have been based on the assumption that locking up offenders convicted of the most serious crimes and then throwing away the key could in no way be objectionable. Chris Grayling and shadow Justice Secretary Sadiq Khan, for example, have both stated that it is correct for such offenders to be locked up for life without offering any further explanation as to why.

It is admittedly difficult to imagine any of the 50 or so criminals in England and Wales currently subject to whole-life orders ever being able to prove that they have been rehabilitated, such is the horrific nature of the offences that they have committed. Nonetheless, the proposition that individuals may be imprisoned without even the possibility of parole is a serious one. It rests on accepting the notion that it is possible for a person to deviate so seriously from the standards of behaviour accepted by the wider society around them that that person can no longer be accepted as part of that society and that nothing in that person’s future behaviour can possibly allow re-admittance.

It may be the case that the above notion, in relation to notorious murderers such as Peter Sutcliffe, Ian Brady and Rosemary West, is widely accepted. However, the reasons and justifications for its acceptance must be clearly articulated. It must be accepted that in the most extreme scenarios, the pursuit of select interests – retribution, deterrence and public safety – become the key drivers in determining how offenders are treated. It must be accepted that an ideal that would ordinarily influence how law breakers are treated – the desire to rehabilitate – will be abandoned in its entirety.

Even if this is recognised, it does not mean that the notion will be accepted by everybody. After all, England and Wales are very much in the minority amongst European states in refusing parole hearings for the very worst whole-life prisoners. Some of the solicitors representing the appellants in the ECtHR case have stated their belief that all prison sentences should have the potential to recognise the possibility of rehabilitation. Where such disagreement exists, it has to be expected that the status quo may be challenged. That a particular state of affairs is supported by a majority does not make it a self-evident truth.

The decision of the ECtHR presented an opportunity to examine and assess the assumptions and justifications that underpin how we deal with those who we believe have fallen short of widely accepted collective standards in the worst ways imaginable. Instead, our political decision-makers displayed disdain for engaging with those who may hold different views; happy instead to endorse the dangerous supposition that the majority view within a society automatically equates with that which is true.

Further reading and sources

R v McLoughlin and *R v Newell* [2014] EWCA Crim 188 http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/r-v-mcloughlin-and-r-v-newell.pdf

Vinter and Others v The United Kingdom (2013) http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122664

BBC News, 'Ministers angry at European whole-life tariffs ruling' (9 July 2013) http://www.bbc.co.uk/news/uk-23245254

BBC News, 'Court of Appeal upholds principle of whole-life prison terms' (18 February 2014) http://www.bbc.co.uk/news/uk-26236225

Casciani D, 'Whole-life tariffs ruling could spark another huge row' *BBC News* (9 July 2013) http://www.bbc.co.uk/news/uk-23246052

Podmore J, 'Chris Grayling is bullying his way to a worse criminal justice system' *The Guardian* (19 February 2014) http://www.theguardian.com/commentisfree/2014/feb/19/chris-grayling-criminal-justice-system-justice-prisons-probation

Rozenberg J, 'English law gets upper hand with 'whole-life' sentences upheld' *The Guardian* (18 February 2014) http://www.theguardian.com/commentisfree/2014/feb/18/english-law-whole-life-sentences-lord-thomas-strasbourg

Slack J and Robinson M, 'I deserve to die behind bars, admits triple killer whose 40-year sentence was deemed too lenient by UK judges as they defy Europe to say 'life means life'' *The Daily Mail* (18 February 2014) http://www.dailymail.co.uk/news/article-2561876/UK-judges-defy-Europe-say-life-prison-sentences-mean-life.html

The Guardian, ‘Life sentences: an evolving synthesis’ (19 February 2014) http://www.theguardian.com/commentisfree/2014/feb/19/whole-life-sentences-appeal-court-ruling

The Telegraph, ‘Wholly correct on whole-life tariffs’ (18 February 2014) http://www.telegraph.co.uk/comment/telegraph-view/10646410/Wholly-correct-on-whole-life-tariffs.html