Whole Life Sentences and Article 3 of the European Convention on Human Rights: Time for Certainty and a Common Approach?

Foster, S.H.

Author post-print (accepted) deposited by Coventry University's Repository

Original citation & hyperlink:
Foster, S.H. (2015) Whole Life Sentences and Article 3 of the European Convention on Human Rights: Time for Certainty and a Common Approach?. Liverpool Law Review, volume 36 (2): 147-169
http://dx.doi.org/10.1007/s10991-015-9166-7

DOI 10.1007/s10991-015-9166-7
ISSN 0144-932X
ESSN 1572-8625

Publisher: Springer

The final publication is available at Springer via http://dx.doi.org/10.1007/s10991-015-9166-7

Copyright © and Moral Rights are retained by the author(s) and/ or other copyright owners. A copy can be downloaded for personal non-commercial research or study, without prior permission or charge. This item cannot be reproduced or quoted extensively from without first obtaining permission in writing from the copyright holder(s). The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the copyright holders.

This document is the author's post-print version, incorporating any revisions agreed during the peer-review process. Some differences between the published version and this version may remain and you are advised to consult the published version if you wish to cite from it.

Whole life sentences and article 3 of the European Convention on Human Rights: time for certainty and a common approach?

Abstract Whether the law should reserve the power to impose a whole life sentence on an individual found guilty of murder in the most serious cases raises issues surrounding just punishment, public protection and a humane criminal justice system. The prospect of a prisoner being incarcerated for their whole life – as opposed to receiving a life sentence where they will be considered for release on license for life after a determined, or flexible term, begs the question whether such sentences are inconsistent with the liberty and dignity of the prisoner. In addition, there are two related questions: whether each individual state (within the Council of Europe) should be at liberty to promulgate and apply its own domestic rules in this area, or whether a supra national court – the European Court of Human Rights – should lay down common standards for all states, such rules being based on fundamental principles reflecting international human rights standards; and the extent to which any relevant domestic laws have to provide the prisoner and the domestic authorities with sufficient guidance on what factors will be taken into account when any such review takes place. These issues have been raised in a number of recent decisions – in both and the European Court of Human Rights and the UK domestic courts - and this article examines these cases and attempts to assess the extent to which the Convention, and the jurisprudence of the European Court, requires the regulation of domestic law with respect to the passing and review of such sentences.

KEY WORDS: whole life sentences; review and release, inhuman and degrading punishment

INTRODUCTION

In July 2013 the Grand Chamber of the European Court of Human Rights – in *Vinter, Moore and Bamber v United Kingdom*[1] - held that the imposition of whole life sentences without review and the realistic possibility of release violates Article 3 of the European Convention on Human Rights, which prohibits torture and inhuman and degrading treatment and punishment. It also held that UK law was in violation of that article as it did not provide a sufficiently clear power to the national authorities to review such sentences and order the release of the prisoner.[2] The Grand Chamber's decision clarified both the position of whole life sentences within Article 3 and the various cases that had considered the challenge to the legality of such sentences. Prior to *Vinter*, the European Court had on a number of occasions considered whether the imposition of a whole life sentence would be contrary to Article 3: either because the sentence was excessive and arbitrary, or because there may be no safeguard of review. In *Leger v France*[3] the Court held that very long sentences were not contrary to Article 3 provided they are supported

[1] Application Nos. 66609/09; 130/10 and 3896; *The Times*, 11 July 2013.

[2] See Foster, S 'Whole life sentences and the European Court of Human Rights: now life might not mean life' (2013) 177 (30) *Criminal Law and Justice Weekly* 505. For a detailed analysis of the decision in Vinter, see Dirk van Zyl Smit, Pete Weatherby and Simon Creighton 'Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What is to be done?' (2014) 14(1) *Human Rights Law Review* 59; and Szydlo, M 'Free Life after Life Imprisonment as a Human Right under the European Convention' (2013) 9(3) *European Constitutional Law Review* 501.

[3] Decision of the European Court of Human Rights 11 April 2006

on strong punitive grounds. In that case the Court accepted that a sentence of this nature necessarily entailed anxiety and uncertainty relating to prison life and life after release, but on the facts it found that there were no aggravating circumstances to conclude that the applicant had undergone an exceptional ordeal capable of constituting treatment contrary to article 3.[4]

The specific issue of the review of such sentences was addressed by the European Court in *Panayi (aka Kafkaris) v Cyprus*,[5] where it was held that the imposition of an indeterminate life sentence did not necessarily violate Article 3 (or Article 5 – guaranteeing protection against arbitrary deprivation of liberty). The Court stated that although the imposition of an irreducible life sentence could be inconsistent with Article 3, this would only be the case *where there was no hope, prospect or possibility of release*.[6] In that case, it found that although a whole life sentence was possible, there were provisions in domestic law for suspension and remission of the sentence. Thus, although such a sentence entailed a level of anxiety, given the possibilities of release it was not one which gave rise to a violation of Article 3.[7] European Court jurisprudence thus appeared to outlaw the imposition of whole life sentences where there was no clear possibility of release, even where the initial whole life term was justified as proportionate

[4] For a discussion on very long and disproportionate sentences and their compatibility with article 3, see Rogan, M 'The European Court of Human Rights, gross disproportionality and long prison sentences after Vinter v United Kingdom' [2015] PL 22

[5] (2009) 49 EHRR 35

[6] Ibid, at paras 98-100

[7] Ibid, at paras 106-107

to the crime. However, the UK domestic courts were of the view that even an irreducible term could comply with the Convention and the Human Rights Act 1998. Thus, in *R (Wellington)* v *Secretary of State for the Home Department*, [8] the House of Lords held that the threat of an imposition (by an American court) of a whole life sentence in lieu of the death penalty did not automatically violate Article 3, because although the prisoner was to be subjected to a blanket rule, in this case the punishment was by no means out of proportion to the gravity of the offence. In any case, their Lordships insisted that a life sentence under domestic law was not irreducible, following the decision in *R v Bieber*,[9] where it was held that a whole life term should not be construed as irreducible, and that any claim that such a sentence violated Article 3 should be made not at the time of the sentence's imposition, but at a time when it is claimed that any further detention would be in breach of that article. Indeed the domestic courts had gone so far as to suggest that irreducible whole life sentences were not in violation of the Convention. Although the *Wellington* case, above was an extradition case, in *R v Bamber*,[10] the Court of Appeal held that a whole life sentence for conviction of the murder of 5 people was justified as there was nothing in the Convention precluding the making of a whole life order where it represented appropriate punishment for extreme criminality. Further, In *R v Oakes*[11] the Court of Appeal held that whole life sentences passed under domestic law were not in violation of Article 3 provided the sentencing court had reflected on mitigation properly

---

[8] [2009] 1AC 335

[9] [2009] 1 WLR 223

[10] [2009] EWCA Crim 962

[11] [2012] EWCA Civ 2345

available to the defendant. In such a case, in the court's view whole life orders imposed as a matter of judicial discretion as to the appropriate level of punishments and deterrence for a crime of utmost seriousness would not constitute inhuman or degrading treatment. Such an order was not prescriptive and was one of last resort, reserved for the few exceptionally serious offences for which after reflecting on all aggravation and mitigation, the judge was satisfied that just punishment required the imposition of a whole life sentence.[12]

Following the decision of the Grand Chamber in *Vinter*, the UK Court of Appeal – in *Re Attorney-General's Reference (No 69 of 2013); R v McLoughlin and R v Newel* [13] - found that UK law did in fact provide such a power to review and release and accordingly held that domestic law was in compliance with both Article 3 and the Grand Chamber's judgment in *Vinter*. Although a subsequent decision of the European Court involving a Hungarian prisoner has re-iterated the need for clarity with respect to such

[12] On the other hand, the Privy Council have followed European jurisprudence, and in *Boucherville v Mauritius* ([2008] UKPC 37) it held that a mandatory sentence of imprisonment for life was akin to a death sentence and thus breached the constitution, drawing the distinction between this case and *Kafkaris*, above, and finding that the lack of release possibilities made the sentence arbitrary and disproportionate as well as inhuman and degrading.

[13] [2014] EWCA Crim 188; [2014] HRLR 7. See Ashworth, A 'Case Comment' [2014) Crim Law 471; Foster, S 'Whole life sentences: resolving the conflict (2014) 178 (10) *Criminal Law and Justice Weekly* 138

legal provisions and their compatibility with Article 3,[14] thus casting doubt on the Court of Appeal's decision that UK law was consistent with the Convention and its case law, the Court of Appeal' decision has been accepted by a more recent decision of the European Court of Human Rights.[15] This article will analyse those cases to examine the extent to which international human rights law insists on minimum rules relating to the review and possible release of such prisoners, and how such rules can be reconciled with each member state's prerogative to promulgate its own laws in this controversial and sensitive area. In particular, in the light of the most recent decision of the European Court, the article will assess whether UK law, and indeed the most decision, are consistent with the principles of legality and certainty that were stressed by the Grand chamber in *Vinter*. Such an analysis is especially pertinent given the concerns of many member states regarding the power of the European Court to interfere with domestic law in areas which impact on Convention rights and general principles of international human rights law.[16] The article concludes that whilst the European Court is prepared to give each member state a wide margin of appreciation with respect to the passing of such sentences, and the manner and regularity in which they are reviewed, it is, correctly, not prepared to allow member states to depart from fundamental principles of legality, certainty and

[14] *László Magyar v Hungary*, Application No. 73593/10, decision of the European Court of Human Rights 20 May 2014.

[15] *Hutchinson v United Kingdom*, Application No. 57592/08, decision of the European Court of Human Rights 3 February 2015. See Foster 'All Right Now? (2015) ** Criminal Law and Justice Weekly **. The decision in *Hutchinson* has now been appealed to the Grand chamber of the European Court of Human Rights and the effect of that appeal is considered in the conclusion, below.

[16] See Elliot, M 'After Brighton; between a rock and a hard place' [2013] PL 619

proportionality when making provision for such sentences and their review. However, the article will also note that the most recent decision of the European Court has misinterpreted the wording and spirit of *Vinte*r, and will contribute to create uncertainty for the prisoner and the domestic judiciary with respect to the rules on review and release of life sentence prisoners.

THE DECISION OF THE GRAND CHAMBER IN VINTER MOORE AND BAMBER V UNITED KINGDOM

This decision is at the centre of the compatibility of whole life sentences with Article 3 of the European Convention – which provides that no one shall be subject to torture, or inhuman or degrading treatment or punishment. Thus, all domestic law must comply with the basic principles laid down in this judgment, although, as we shall see the Grand Chamber allow some level of discretion with respect to the domestic law and how it regulates such sentences and their review.[17]

In *Vinter* three prisoners had been given whole life terms for murder, imposed by the trial judge under s.269 of the Criminal Justice Act 2003. Before this Act was passed, the Home Secretary could expressly review such sentences after 25 years, but the 2003 Act removed the executive role with respect to these sentences so as to comply with the

[17] For a comprehensive coverage of the case, see van Zyl Smit, D, Weatherby, P and Creighton, S 'Whole life sentences and the tide of European human rights jurisprudence: what is to be done?' (2014) 14(1) *Human Rights Law Review* 59

European Court's decision in *Stafford v United Kingdom*,[18] which held that such executive involvement in the sentencing and review process was contrary to Article 5 of the Convention; but the 2003 Act did not provide expressly for any judicial or other review.

The prisoners in *Vinter* claimed that such sentences were in breach of Article 3, as they imposed a whole life sentence on each prisoner without the possibility of review or release and thus constituted inhuman treatment and punishment. In January 2012 the European Court of Human Rights rejected their claims,[19] believing that the sentences served a sound penological purpose and were proportionate and just in the circumstances, and that the prisoners had failed to show that their *present* detention was inhuman as they had only recently had their sentences imposed and appealed.

The prisoners appealed to the Grand Chamber of the European Court, which held that even though there was no argument that the sentences imposed on the applicants in this case were disproportionate, for a life sentence to be compatible with Article 3 that sentence had to offer both a possibility of release and a possibility of review.[20] Considering the compatibility of UK law with that principle, it noted that the large majority of Member States in the Council of Europe either did not impose life sentences at all, or, if they did, provided some form of mechanism guaranteeing a review of that

[18] (2002) 35 EHRR 32

[19] (2012) 55 EHRR 34

[20] ibid, at para 119

sentence after a set period, usually after 25 years of imprisonment.[21] Further, the Grand Chamber noted that the Rome Statute of the International Criminal Court provides for a review of such sentences after 25 years and periodic reviews thereafter. Thus, although it was for each Member State to decide when such a review took place, comparative and international data showed clear support for a mechanism guaranteeing review no later than 25 years after the sentence.[22]

The Grand Chamber reached its conclusion regarding Article 3 on several grounds. First, that after a period of time the causal link between detention and sound penal reasons for imprisonment eroded or was capable of change; although sentences are imposed partly for punishment, retribution and deterrence, they should also reflect the principle of rehabilitation, as many state's criminal justice systems did these days.[23] Secondly, the whole life term offered no possibility of atonement on behalf of the prisoner and thus did not guarantee just punishment.[24] Thirdly, such a sentence was contrary to the human dignity of the individual, leaving the prisoner in a constant state of anxiety in that they have to live with no possibility of release.[25] Explaining that decision in the light of Article 3, Syzdlo comments that 'the continued detention of a life prisoner, who has possibly spent many years or decades in prison, and whose future detention is no

[21] ibid, at para 117

[22] ibid, at para 118

[23] ibid, at para 111

[24] ibid at para 112

[25] ibid at para 113

longer justified by an y penological grounds, is clearly the manifestation of an inhuman punishment…because the prisoner is then treated purely instrumentally.'[26]

With respect to the claims in the present case, the Grand Chamber rejected the government's argument that a review was no longer possible as the European Court had forbidden executive involvement in such processes; in its view the 2003 Act could quite easily have included a judicial review to replace the previous executive one.[27] It also noted that the 2003 Act was incompatible with Article 3, despite the government's pleas that with a human rights-friendly interpretation the provision allowing release in exceptional circumstances on compassionate grounds - s.30 Crime (Sentences) Act 1997 - was capable of being extended to other reasons for release, including rehabilitation. The Grand Chamber rejected that interpretation because the relevant Prison Service Order - PSO 4700 Chapter 12 - made it clear that that release was confined to illness, where the prisoner was effectively released to die.[28] Accordingly, the Grand Chamber found a violation of Article 3, although it stressed that such a finding did not give any of the applicants the prospect of immediate release: whether they should be released would depend on whether there were still sound penological reasons for their continued detention and whether they should continue to be detained be detained on grounds of dangerousness.[29]

---

[26] Szydlo, M 'Free Life after Life Imprisonment as a Human Right under the European Convention' (2013) 9 *European Constitutional Law Review* 501, at 508

[27] ibid, at para 124

[28] ibid, at paras 126-128

As noted above, the Grand Chamber's decision clarified both the position of whole life sentences *vis a vis* Article 3 and the various cases that had considered the challenge to the legality of such sentences. Aside from the clear inconsistency between European and domestic jurisprudence in this area, the Grand Chamber's decision expanded the European Court's case law by allowing the Court to judge the compatibility of such sentences at their inception, rather than waiting until refusal of release at a later stage of incarceration. Thus, in the Court's first judgment in *Vinter, Moore and Bamber v United Kingdom*, it was held that the imposition of whole a life sentence on three prisoners was not in breach of Article 3 because the sentences were proportionate in the circumstances and the compatibility of a whole life sentence (without parole) was not to be judged at the time of the sentence but at a later date if and when the prisoners were being detained without justification. This rationale was subsequently approved in *Babar Ahmed and others v United Kingdom*,[30] where the European Court held that the extradition of a number of individuals to the USA to serve whole life sentences in high security prisons would not violate Article 3. Although the Court accepted that whole life sentences without review could be disproportionate and inhuman, and needed particularly robust review if part of a mandatory sentence, the sentences were proportionately handed down, and the appropriate time to assess them in the context of article 3 would be when

[29] ibid, at paras 130-131

[30] (2013) 56 EHRR 1

the prisoners were no longer a risk, and not at the time of the imposition of the sentence, or at the time of extradition.[31]

The Grand Chamber's decision in *Vinter*, whilst not prescribing particular forms of review necessary to comply with Article 3, clearly states that the *imposition* of a whole life sentence without the safeguard of sufficiently clear rules on future review and release will constitute inhuman punishment and thus be in breach of Article 3:

> '…a whole life prisoner should not be obliged to wait and serve an indeterminate number of years of his sentence before he can raise the complaint that the legal conditions attaching to his sentence fail to comply with the requirements of Article 3 in this regard. This would be contrary to both legal certainty and to the general principles on victim status within Article 34…Furthermore, in cases where the sentence on imposition, is irreducible under domestic law, it would be capricious to expect the prisoner wo work towards his own rehabilitation without knowing whether, at an unspecified, future date, a mechanism might be introduced which would allow him, on the basis of that rehabilitation, to be

[31] Ibid at para 243. In *Trabesli v Belgium*, Application No. 140/10, decision of the European Court of Human Rights 4 September 2014, the European Court rejected the government's plea that the risk of any violation of Article 3, and the principles in *Vinter*, had to be assessed at least after the applicant had been extradited and convicted. In the Court's view, the risk had to be assessed before a person suffered a penalty of a level of severity that was proscribed by Article 3, in other words before the applicant's possible conviction in the United States of terrorist charges.

> considered for release. A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought.'[32]

Thus, it is no longer necessary to for a court to wait until the time that the prisoner can realistically show that they are no longer a risk to the public and show sufficient atonement for their actions; hope should be given at the outset of the sentence and the current judgment takes into account the human dignity of the prisoner and not just possibility of the arbitrary nature of their continued detention.

The decision of the Grand Chamber in *Vinter* has been approved in a number of cases, including *László Magyar v Hungary*,[33] detailed below. In addition, in *Ocalan v Turkey*,[34] the European Court not only makes it clear that the rules on release must be clearly formulated and foreseeable at the outset, but that there is a clear distinction between the prospect of release, as required by *Vinter*, and release on compassionate grounds. In this case, Öcalan had initially been sentenced to death for particularly serious crimes, but following the abolition by Turkey of the death penalty in peacetime his sentence was then commuted to an "aggravated" life sentence. Under the new Turkish

[32] *Vinter v United Kingdom* at para. 122

[33] Application No. 73593/10, decision of the European Court of Human Rights 20 May 2014

[34] Application Nos. 24069/03; 197/04; 6201/06; 10464/07, decision of the European Court 18 March 2014; the judgment is only available in French.

Criminal Code, that sentence meant that the convicted person would remain in prison for the rest of his life, regardless of any consideration as to the person's dangerousness or any possibility of conditional release, even after a certain term of imprisonment. Thus, the European Court noted that whilst it was true that under Turkish law the President of the Republic was entitled to order the release of a person imprisoned for life who was elderly or ill, that was release on compassionate grounds, which different from the notion of "prospect of release."

THE RESPONSE OF THE UK COURTS: THE DECISION IN RE ATTORNEY-GENERAL'S REFERENCE (NO 69 OF 2013); R V McLOUGHLIN AND R V NEWELL

Following the decision of the Grand Chamber in *Vinter*, the domestic courts had to consider the compatibility of such sentences with Article 3 and the Human Rights Act 1998, hopefully clarifying both the relevant domestic law and its relationship with the case law of the European Court of Human Rights.[35] The Court of Appeal case was brought in response to concerns about the legality of whole life sentences and in August 2013, triple murderer Arthur Hutchinson appealed to the European Court of Human Rights against a whole life tariff following the ruling in *Vinter*.[36]

[35] *Attorney-General's Reference (No 69 of 2013); R v McLoughlin and Newell* [2014] HRLR 7

[36] See 'Triple murderer Arthur Hutchinson mounts first whole-life tariff appeal', *The Times*, August 22, 2013, Law. As we shall see, the European Court rejected Hutchinson's claim that his sentence was incompatible with Article 3 and *Vinter*: *Hutchinson v United Kingdom* Application No. 57592/08, decision of the European Court of Human Rights 3 February 2015.

In the first of conjoined appeals the Attorney-General referred to the court as unduly lenient a minimum term of 40 years which had been passed on M following a plea of guilty for murder; the judge being reluctant to impose a whole life sentence because of the ruling in *Vinter*, above. In the second case, N appealed against his whole life sentence on the grounds that such sentences were now incompatible with Article 3 and the ruling in *Vinter*. The power to impose such sentences is contained in s.269 of the Criminal Justice Act 2013 and under s.30 of the Crime (Sentences) Act 1997 the Secretary of State has the power, in exceptional circumstances, to order the release of such a prisoner on compassionate grounds. The Court of Appeal was thus asked to determine whether that legislative scheme was compatible with Article 3 and the relevant case law of the European Court of human rights, which, under s.2 of the Human Rights Act 1998 the domestic courts must take into account in domestic proceedings involving the determination of Convention rights.

The Court of Appeal held firstly that there were some crimes that were so heinous that Parliament was entitled to feel that a whole life order should be imposed; such a sentence was not incompatible with Article 3 and the Grand Chamber's judgment in *Vinter* did not dispute that. According to the Court of Appeal, although there may be a dispute about which crimes warranted such an order, the state would be allowed a certain margin of appreciation in making that decision.[37] Thus, *Vinter* did not question the validity of whole life orders in appropriate cases; rather it insisted that such a sentence without the prospect of review and release would be contrary to Article 3 as it would

[37] ibid, at para 17

involve the prisoner in being subjected to inhuman and degrading treatment. Further, it is essential that a system of review exists at the time that the sentence is passed.[38]

The Court of Appeal then stated that even if the Grand Chamber had outlawed whole life sentences, the domestic courts could not use s.3 of the Human Rights Act 1998 – allowing domestic courts to interpret legislation, wherever possible, to achieve compatibility with Convention rights – to read down the clear words of s.269 of the Criminal Justice Act 2003. The question, therefore, was whether a declaration of incompatibility should be issued by the present court, and whether the release procedures under s.30 of the 1997 Act –'exceptional circumstances justifying release on compassionate grounds' - were sufficiently clear to provide an adequate remedy to those who should be released in the circumstances envisaged by the Grand Chamber.[39]

It was at this point that the Court of Appeal disagreed with the Grand Chamber. The Grand Chamber had found that s.30 was not capable of being extended to reasons other than illness, including rehabilitation; because relevant Prison Service Order (PSO 4700 Chapter 12) made it clear that that release was confined to illness, where the prisoner was effectively released to die. In the Court of Appeal's view, the secretary was bound to use his release powers in a manner that was compatible with Article 3, and in particular interpret the words 'compassionate grounds' in such a manner.[40] It was not

---

[38] ibid, at para 20

[39] ibid at paras 23-25

[40] Ibid, at paras 29-35

necessary to specify what those circumstances are, and as Article 3 had to be interpreted in accordance with s.3 of the 1998 Act it was entirely consistent with the rule of law that applications were to be considered on an individual basis against the criteria that circumstances had changed to such an extent that the punishment was no longer justifiable.[41]

With respect to the consistency of UK law with the Convention, The Court of Appeal noted that although a violation of Article 3 was established in *Vinter*, the Grand Chamber stressed that such a finding did not give any of the applicants the prospect of immediate release, and that whether they should be released would depend on whether there were still sound penological reasons for their continued detention and whether they should continue to be detained be detained on grounds of dangerousness. In that respect, therefore, the Court of Appeal's decision appears to be in line with the Grand Chamber's judgment, despite there being a lack of formal process to check on the imposition of potentially arbitrary whole life sentences.

---

[41] Ibid, at para 36 Accordingly, the Court of Appeal held that the judge in M had clearly erred in not making a whole life order because he felt such an order was not consistent with article 3 or *Vinter*. In that case, and taking into account that it was M's second murder and committed on conditional release from prison; see also 'Killer who struck again on day release avoids life sentence,' The *Times*, 22 October 2013), the case was so serious that the punishment required a whole life sentence. The Court of Appeal also held that the trial judge had been entitled to impose a whole life sentence in N's case – his second murder, committed whilst he was in prison serving a life sentence, and there being no mitigation.

As noted above, the Grand Chamber rejected the government's pleas that with a human rights-friendly interpretation the provision allowing release on medical grounds (s. 30 Crime (Sentences) Act 1997) was capable of being extended to other reasons for release, including rehabilitation. In the Court of Appeal's view such a provision *was* capable of extending to other circumstances of covering cases where the prisoner has rehabilitated to such an extent that further detention would not be compatible with Article 3 or just sentences. Thus, compatibility may have been achieved indirectly: although the Grand Chamber indicated that a formal system of release should be evident at the time of sentence – with a provision that allows a review within 25 years – the liberal interpretation and use of s.30 could satisfy the Grand Chamber; provided subsequent Ministers are prepared to apply it in an equally liberal fashion.

The Court of Appeal thus managed to avoid a conflict between the decisions of the European Court and the domestic courts by its, not very convincing, interpretation of s.30 of the 1997 Act. Thus, although it was not possible to interpret the whole life powers of the secretary under the 2003 Act by using s.3 of the Human Rights Act, it was possible to extend the apparent scope of s.30 to comply with the tenor of the Grand Chamber's judgment. It is submitted that this is, in many ways, an unsatisfactory solution to the problem. It is quite clear that Parliament and the executive did not intend s.30 to apply much beyond the exceptional case where a prisoner is released to die because of serious and life-threatening illness. What the prisoner is now being asked to believe is that *at the appropriate time* they will be considered for release on other grounds relating to

rehabilitation and the injustice of detention that no longer serves a legitimate or humane purpose. It is submitted that a more logical and legitimate step would have been for the Court of Appeal to declare the current scheme unclear and incompatible with Article 3 and for Parliament to put into place a process that would comply with the tenor of the Grand Chamber's judgment. By not taking this step it was felt that the Court of Appeal was storing up trouble, awaiting inevitable applications under the European Convention by prisoners who will still be unclear when and if they are ever to be released. Indeed, in its recent report on the legislative scrutiny of the Criminal Justice and Courts Bill 2014, the Joint Committee on Human Rights, in commenting on the proposal to increase sentences for terrorist related offences, noted that although the Court of Appeal in *McLoughlin* brought welcome clarification of the legal position concerning "whole life orders", it believed that, in view of the legal uncertainty that remains about the availability of a review mechanism for such orders, more specific details need to be provided about this mechanism, including the timetable on which such a review can be sought, the grounds on which it can be sought, who should conduct such a review, and the periodic availability of further such reviews after the first review. The Committee then added that the current Bill provided an opportunity for Parliament to remove any legal uncertainty by specifying the details of the review mechanism, and that an amendment be added to the Bill to give Parliament the opportunity to debate the desirability of amending the statutory framework to put beyond legal doubt the availability of this mechanism, in accordance with the principle of subsidiarity.[42] Despite

[42] House of Lords, House of Commons Joint Committee on Human Rights Legislative Scrutiny (1) Criminal Justice and Courts Bill; (2) Deregulation Bill, fourteenth report of session 2013-2014, at

the recent affirmation of the Court Of Appeal's decision in Hutchinson, below, the Committee's concerns are also be borne out by decision in *Mayar v Hungary*, below, which gives further guidance on the requirements of certainty with respect to the prospect of the review of such sentences and any release of the prisoners and which will now be examined.

THE DECISION OF THE EUROPEAN COURT IN LASSZLO MAGAY V HUNGARY AND RELATED CASES

The applicant was detained at Steged Prison in Hungary having been sentenced to life imprisonment without parole for murder, burglary and other offences; the offences in question were connected with a series of burglaries and assaults against a number of elderly victims. A life sentence was awarded because the applicant was considered a multiple recidivist. The applicant claimed that his sentence constituted inhuman and degrading punishment under Article 3; he also asserted that there had been a breach of Article 6 because of the excessive length of the criminal proceedings against him.

In deciding whether there was a violation of Article 3 the European Court acknowledged that under the Convention those convicted of a serious crime could be sentenced to indeterminate detention where such a sentence was necessary for the

---

paragraph 1.26

protection of the public, provided the sentence is in some way irreducible.[43] Further, it held that a life sentence does not become irreducible by the mere fact that *in practice* it may be served in full; thus no issue arises under Article 3 if a life sentence is *de iure* and *de facto* reducible,[44] and no such issue could arise if, for example, a life prisoner had the right under domestic law to be considered for release but this was refused on the ground that he or she continued to pose a danger to society. This was because States have a duty under the Convention to take measures for the protection of the public from violent crime and the Convention does not prohibit them from subjecting a person convicted of a serious crime to an indeterminate sentence, allowing for the offender's continued detention where necessary for the protection of the public.[45] This was particularly so for those convicted of murder or other serious offences against the person, and the mere fact that such prisoners may already have served a long period of imprisonment did not weaken the State's positive obligation in that respect; they may fulfil that obligation by continuing to detain such life sentenced prisoners for as long as they remain dangerous.[46]

However, the Court then stressed that Article 3 had to be interpreted as requiring reducibility of that sentence, where national authorities should be allowed to review life sentences in order to assess whether the prisoner had made such significant progress

[43] *László Magyar v Hungary*, Application No. 73593/10, decision of the European Court of Human Rights 20 May 2014, at paras 46-47

[44] ibid, at para 49 Applying *Kafkaris v Cyprus*, note 7 above

[45] ibid, citing *T and V v United Kingdom* (2000) 30 EHRR 121

[46] ibid

towards rehabilitation that their continued detention could no longer be justified.[47] Further, the Court stated that the prisoner should be entitled to know, from the beginning of their sentence, what they had to do to be considered for release and under what conditions. Thus, with respect to the timing of a prisoner's challenge, it stated that although the requisite review is a prospective event necessarily subsequent to the passing of the sentence, a whole life prisoner should not be obliged to wait and serve an indeterminate number of years of his sentence before he can raise the complaint that the legal conditions attaching to his sentence fail to comply with Article 3. This, in the Court's view, would be contrary both to legal certainty and to the general principles on victim status within Article 34, which guarantees access to the Court.[48] Further, in cases where the sentence, on imposition, is irreducible under domestic law, it would be capricious to expect the prisoner to work towards his own rehabilitation without knowing whether, at an unspecified, future date, a mechanism might be introduced which would allow him, on the basis of that rehabilitation, to be considered for release. A whole life prisoner thus is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought.[49]

Thus, following *Vinter*, in determining whether a life sentence in a given case can be regarded as irreducible, the Court will seek to ascertain whether a life prisoner can be

---

[47] ibid, at para 50

[48] ibid, at para 53

[49] ibid

said to have any prospect of release, and where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, whether this is sufficient to satisfy Article 3. It followed, therefore, that where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3. Despite that principle, the Court reiterated that, having regard to the margin of appreciation which must be accorded to Contracting States in matters of criminal justice and sentencing, it was not its task to prescribe *the form* - whether executive or judicial - which that review should take; and for the same reason, it was not for the Court to determine *when* that review should take place.

The Court then turned its attention to whether, in all the circumstances, the applicant's whole life order met the requirements of Article 3. Under Hungarian law, those sentenced to life imprisonment without parole could submit, via the Ministry of Justice, a request for a pardon to the President of the Republic via s. 597(5) of the Code of Criminal Procedure. Although the Court did not appear to exclude the possible legality of presidential clemency, it ruled that the relevant domestic law did not comply with Article 3 or the principles established in *Kafkaris* and, more recently, in *Vinter*. It noted first, that the relevant regulations did not oblige the authorities or the President of the Republic to assess, whenever a prisoner requests a pardon, whether his or her continued imprisonment is justified on legitimate penological grounds. Although the Court noted that the authorities had a general duty to collect information about the prisoner and to enclose it with the pardon request, the law did not provide for any specific guidance as to

what kind of criteria or conditions was to be taken into account in the gathering and organisation of such personal particulars and in the assessment of the request. Further, neither the Minister of Justice nor the President of the Republic was bound to give reasons for the decisions concerning such requests. In coming to this conclusion, the Court took into consideration its previous decision in *Törköly v Hungary*,[50] where the relevant domestic law on parole was upheld by the Court. However, the Court noted that the present case was substantially different from *Törköly*, because in that case the applicant's eligibility for release on parole from his life sentence was not excluded. Thus, in *Törköly*, it was in great part that distant but real possibility for release which led the Court to consider that the applicant had not been deprived of all hope of being released from prison one day. Although in *Törköly* the Court took into account that the applicant might be granted presidential clemency, the present case, where the applicant's eligibility for release on parole was excluded, a stricter scrutiny of the regulation and practice of presidential clemency was required.[51]

Accordingly, the Court was not persuaded that the institution of presidential clemency, taken alone (without being complemented by the eligibility for release on parole) and as its regulation presently stands, would allow any prisoner to know what he or she must do to be considered for release and under what conditions. In the Court's view, the regulation did not guarantee a proper consideration of the changes and the progress towards rehabilitation made by the prisoner, however significant they might

[50] Application No 4413/06; decision of the European Court 5 April 2011

[51] *László Magyar v Hungary* , at para 56

be.[52] The Court thus found a violation of Article 3, although, as in the Grand Chamber's decision in *Vinter*, it stressed that, in the course of the present proceedings, the applicant had not argued that, in his individual case, there are no longer any legitimate penological grounds for his continued detention, and that a finding of a violation under Article 3 could not be understood as giving him the prospect of imminent release.[53]

This rationale has also been applied in the case of *Ocalan v Turkey,*[54] where the European Court found a violation of article 3 with regards to the applicant's sentence to life imprisonment with no possibility of release on parole. In this case the applicant had been sentenced to death in June 1999 after the Ankara State Security Court held that he was the founder and leader of the Kurdish separatist organisation known as the Kurdistan Workers' Party (PKK) and convicted him of leading a group of armed terrorists with the aim of bringing about the secession of part of Turkish territory. On the abolition of the death penalty in peacetime in 2002, this sentence was commuted to a whole life term with no possibility of release on parole - an "aggravated life sentence." Confirming that national law must provide the possibility of release on parole, or of a review to the end of commuting, suspending or ending the sentence, the Court noted that the prisoner in this case would remain in prison for the rest of his life, regardless of any fresh consideration of the threat that he posed and without any prospect of release on parole. Although the

[52] ibid, at paras 57-58

[53] ibid, at para 59

[54] Application No.24069/03) , decision of the European Court of Human Rights, March 18, 2014. Noted in (2014) EHRLR 414

Court conceded that the Turkish President had the power to release a prisoner on compassionate grounds in cases of illness or old age, release for such humanitarian reasons was not equivalent to the "prospect of release" required by *Vinter*. The Court acknowledged that the Turkish legislature had passed general or partial amnesties from time to time. However, it had not been demonstrated that there was any such proposal in relation to the applicant.[55]

The more recent decision in *Trabelsi v Belgium*[56] further re-iterates the requirement that the prospect of release must be a realistic one, so that the sentence is reducible both de jure and de facto. In this case, a Tunisian national who had been sentenced by a Belgian court to ten year's imprisonment for attempting to blow up a military base was the subject of an extradition request by the United States government to face charges with respect to offences relating to Al-Qaeda inspired acts of terrorism. The Belgian authorities sought assurances form the US authorities that that the death penalty would not be imposed on him, or that any life sentence should be accompanied by the possibility of commutation of that sentence. Such assurances were given and the extradition request was granted.

[55] Rejecting the government's argument that the applicant had been imprisoned for life because he was the author of particularly serious terrorist crimes, the Court recalled that the Convention did not permit derogation from art.3 in any circumstances. The Court emphasised that its finding should not be interpreted as providing the applicant with a prospect of imminent release. Rather, it obliged the Turkish government to amend the law to set in place a procedure which provided after a certain minimum period of time for a compulsory assessment of whether the applicant's detention could still be justified.

[56] Application No. 140/10, decision of the European Court of Human Rights 4 September 2014

In deciding that his extradition was incompatible with Article 3 and the judgment in *Vinter*, the European Court noted that even if the assurances from the US had been sufficiently precise,[57] none of the procedures provided by US law to consider and allow early release amounted to a review mechanism which required the national authorities to ascertain, *on the basis of objective, pre-established criteria of which the prisoner had precise cognisance at the time of the imposition of the life sentence* (italics added), whether, while serving his sentence, the prisoner had changed and progressed to such an extent that continued detention could no longer be justified on legitimate oenological grounds.[58]

THE DECISION OF THE EUROPEAN COURT IN HUTCHINSON V UNITED KINGDOM

Since the decision of the UK Court of Appeal in *McCloughlin* and *Newell*, the European Court of Human Rights has given its judgment in *Hutchinson v United Kingdom*.[59] In this case the European Court was satisfied that the UK Court of Appeal had clarified the

[57] The Court in fact found that such assurances were too general to pass that test; at paragraph 135.

[58] *Trabelsi v Belgium*, at paragraph 137. Subsequently, the UK High Court refused to stay the extradition of an individual who was to be extradited to the US to face terrorist charges on grounds that he would face a non-reducible life sentence*: R (Harkins*) *v Secretary of State for the Home Department* [2014] EWHC 309 (Admin). The High Court stated that the decision in *Trabelsi* did not advance the principles in *Vinter* apart from applying them to the context of extradition, and that it was not obliged to follow that decision.

[59] Application No. 57592/08, decision of the European Court of Human Rights 3 February 2015.

power of release in domestic legislation to a sufficient extent so as to comply with the Grand Chamber's judgment in *Vinter*.

In this case Hutchinson had been convicted of aggravated burglary, rape and three counts of murder in 1984 and was given a life sentence with a minimum tariff of 18 years set by the trial judge. The Secretary of State then informed him that he had decided to impose a whole life sentence and in 2008 the High Court, and then the Court of Appeal dismissed the prisoner's appeal against that sentence.[60] Hutchinson then made an application to the European Court of Human Rights, alleging that that the sentence amounted to inhuman and degrading treatment under Article 3 as the sentence offered no prospect of release. In particular, he argued that as the Grand Chamber in *Vinter* had found that domestic law did not clearly provide for review and possible release on grounds of rehabilitation, then his sentence was inconsistent with Article 3 and the Grand Chamber's judgment. The government, on the other hand, argued that following the Court of Appeal decision that it was now clear that such sentences were open to review and thus compatible with Article 3 and *Vinter*.

After summarizing the general principles established by the European Court with respect to the compatibility of whole life sentences with Article 3, the Court then considered whether the secretary of state's discretion under s. 30 of the 2003 Act was sufficient to make the whole life sentence imposed on the applicant legally and effectively reducible. Having noted that the Grand Chamber in *Vinter* had decided that the statutory power

[60] See *Hutchinson* [2008] EWHC 860 QB and *Hutchinson*

could not be interpreted to cover release on grounds of rehabilitation, and that the Lifer Manual that gave guidance on review had not been amended since *Vinter*, the European Court nevertheless noted that subsequently the UK Court of Appeal had established that the secretary was bound to use the power in a manner that was compatible with Article 3.[61] Thus, in the Court's view if an offender subject to a whole life order could establish that 'exceptional circumstances' had arisen subsequent to the sentence, the secretary of state had to consider whether such circumstances justified release on compassionate grounds. Regardless of the policy set out in the Lifer Manual, the secretary had to consider all the relevant circumstances, in a manner compatible with Article 3.[62] Further, any decision by the Secretary would have to be reasoned by reference to the circumstances of each case and would be subject to judicial review, which would serve to elucidate the meaning of the terms 'exceptional circumstances' and compassionate grounds, as was the usual practice under the common law.[63]

The European Court then recalled that it was primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation,[64] before deciding that where in the circumstances of the case, the national court had, following the Grand Chamber's judgment in *Vinter* addressed the doubts of the Grand Chamber and set out an unequivocal statement of the legal position, the European Court must accept the

[61] *Hutchinson v United Kingdom*, at paragraph 23.

[62] Ibid.

[63] Ibid.

[64] *Hutchinson v United Kingdom*, at paragraph 24.

national court's interpretation of domestic law.[65] Accordingly the Court found no breach of Article 3 in the present case.

With due respect, the Court's judgment in *Hutchinson* is flawed in its interpretation and understanding of both the *Vinter* judgment and the principles of legal certainty upon which the Grand Chamber based its judgment. As the dissenting judge – Judge Kalaydjieva - correctly notes, the question was not whether the European Court must accept the national court's interpretation of the domestic law as clarified in the process of progressive development of the law through judicial interpretation. Rather it was whether or not in 2008 the applicant was entitled to know - at the outset of his sentence - what he must do to be considered for release and under what conditions, including when a review of his sentences will take place or may be sought.[66]

Those requirements were the crux of the Grand Chamber's judgment in *Vinter*, and as the dissenting judge states such questions have not been addressed or answered by the Court of Appeal or the government. Further, to say that the secretary's executive power must be carried out in compliance with Article 3 and the principles established in *Vinter*, and that such discretion would be subject to judicial review which would elucidate the meaning of the relevant terms in the statute, does nothing to give the prisoner a clear idea, at the time of the sentence, of what criteria will be used and what he should be working towards in the forthcoming years of detention. At the very best, that will, or may become clear when the court reviews a number of cases and builds a clear

[65] *Hutchinson v United Kingdom*, at paragraph 25.

jurisprudence in this area. The European Court in *Hutchinson*, therefore, should have found that the failure to amend the statutory provision, or even the Lifer Manual, was fatal to the government's claim that it had complied with the judgment in *Vinter*. Finally, although the Grand Chamber did not regard a review after twenty five years as mandatory, leaving the state to decide that issue within its margin of appreciation, surely a the prisoner is entitled to know the earliest time that his release can be reviewed. That aspect of the statutory scheme, as with most of the process, remains a mystery.[67]

WHOLE LIFE SENTENCES AND THE PROPER ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The Grand Chamber's decision in *Vinter* is to be welcomed for its clarification on the issue of when a human rights challenge to the effects of a life sentence can be mounted. Thus, after *Vinter* it is quite clear that a prisoner is entitled to ask the courts – domestic or European - to make a decision on the compatibility of the review mechanisms of such sentences at any stage, including at the outset, and do not have to wait for the sentence to reach the point where it would be inhuman to continue with detention at that stage. The Grand Chamber and the European Court has stressed that the rule of law and the requirement of certainty should allow the prisoner to predict the circumstances under which he may be released in the future, and that such circumstances should be promulgated with sufficient certainty in domestic legislation.

[66] *Hutchinson v United Kingdom*, dissenting opinion of Judge Kalaydjieva.

Following the recent decision in *Magyar*, it is clear that although the review and release procedures can take various forms, and do not have to involve pure judicial input, any executive or other discretion surrounding review must be couched in sufficiently clear terms. More specifically, the criteria for review and the measures that the prisoner needs to satisfy for release, must be clear from the outset. In this respect, despite the recent affirmation of such provisions by the European Court in *Hutchinson*, it has to be doubted whether the current provisions in UK domestic law – felt by the Grand Chamber to be restricted to release on compassionate grounds relating to illness – are sufficiently clear to satisfy the European Court's jurisprudence, including the most recent decisions in *Magyar Ocalan* and *Trabelsi*. On inspection of those cases, and the provisions which were declared inadequate by the Court, it is predictable that the lack of reference to penological reasons for release in the UK regulations will result in Hutchinson appealing to the Grand Chamber and for that Court to rule in favour of challenges made by prisoners who are serving such sentences, and who wish to know their realistic prospects of release in the future.

Aside from the specific criminal justice issues raised by such sentences and their review, this recent case, together with the other judgments of the Court and Grand Chamber, provides an interesting case study of the power and role of the European Court of Human Rights, together with its diplomatic and legal restrictions. The role of the Court (under Article 19 of the Convention) is to ensure the observance of the European Convention by the member states. This it does, of course, only when determining an application made by the victim against a member state; the Court's role is judicial and it

[67] As noted in the conclusion, the case has been referred to the Grand Chamber of the European Court.

has no power to rule on an issue *in abstracto*.[68] Thus, it is not the role of the Court to attempt to promulgate legislative rules on what domestic law should contain in order to ensure that member states comply with its obligations under the Convention, including their obligation to comply with the decisions of the Court. On the other hand, the Courts' judgments are reasoned and will contain statements which indicate why the member state is in breach of the Convention and, inevitably, but to a limited extent, how the member state needs to proceed in the future if it is going to comply with the Convention and the Court's ruling.

The Court must, therefore, tread a fine line between upholding the rights in the Convention when finding a violation during its judicial decision-making role, and dictating to the member state on the content and scope of its domestic law in that area. Taking the example of whole life sentences, the Court has the power, and duty, to rule on the question of whether such sentences are compatible with Article 3 – in other words whether they are inhuman and degrading, either by their very nature or because of the manner in which they are passed or reviewed. Such a question is one of law and requires the interpretation of the relevant article by the European Court, who must use accepted principles of international human rights law in reaching its conclusions. Using that power, the Court and the Grand Chamber has ruled that such sentences are capable of being unjust and of causing the prisoner unacceptable distress and anxiety, and that this will constitute a violation of Article 3 unless domestic law contains a procedure whereby these sentences are capable of review, and, in appropriate cases, the prisoner released at a

[68] *Handyside v United Kingdom* (1976) 1 EHRR 737

stage where that they are no longer a risk to the public. Member states may, even at this stage, complain that the Court has abused its position and is dictating to individual states, who no doubt feel that such sentences, and the conditions under which they operate, should be decided by domestic law alone.

The question, therefore, is whether it is permissible for the European Court to effectively prohibit certain state practices by laying down minimum rules with respect to the domestic law on, for example, the review of whole life sentences? The answer lies in the role of the principle of subsidiarity within the Convention machinery, together with the scope and extent of the margin of appreciation which the Court should provide to each member state when the Court is making its determinations. The position of subsidiarity is at the heart of recent debates surrounding the possible reform of the European Court of Human Rights,[69] and Protocol No. 15 to the European Convention on Human Rights adds a reference to both this principle and the margin of appreciation to the Convention's preamble.[70] This is to highlight that the role of the European Convention and the Court, is secondary to the member state's primary responsibility, under Article 1 of the Convention, to safeguard Convention rights.[71] Hence, it is expected that the European Court will show due respect to the doctrine when adjudicating on cases

[69] Note 15, above

[70] Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg 24 V1 2013, Article 1

[71] *Handyside v United Kingdom* , note 68

brought against member states,[72] and that a dialogue should exist between both the European and domestic courts in the interpretation and application of such rights and the extent to which domestic judges have to follow Strasbourg jurisprudence.[73]

Both subsidiarity and the margin of appreciation ensure an appropriate balance between the Court's supervisory role in ensuring compliance by states with Convention rights, and the state's power, and duty, to ensure that it protects those rights within its own jurisdiction.[74] Although this doctrine applies formally to the determination of 'conditional' rights – such as freedom of expression under Article 10, which can be limited if the restriction is 'necessary in a democratic society' – one can see the doctrine in play in the interpretation and determination of 'absolute' rights such as Article 3, in particular in the area of whole life sentences. In interpreting and applying Article 3 to a specific set of circumstances the Court needs to address the question whether whole life sentences are consistent with the Convention and Article 3, and in doing so may ask whether such sentences are illegal *per se*, or whether it is for the individual state to agree

[72] See Lord Hoffman n, 'The Universality of Human Rights' (2009) 125 LQR 416; Mowbray, A 'Subsidiarity and the European Convention on Human Rights' (2015) 15(2) *Human Rights Law Review* 313; and Sprano, R 'Universality or Diversity of Human Rights (2014) 14 (3) *Human Rights Law Review* 487

[73] Bratza, N 'The relationship between UK courts and Strasbourg' [2011] EHRLR 505; and Mahoney, P 'The relationship between the Strasbourg Court and the national courts' (2014) LQR 568

whether they want to accommodate such sentences in their systems. Provided, the Court does not rule that such sentences are always in violation of Article 3, then a margin of appreciation is available to individual states as to whether they will employ them. Thus, the Court in *Vinter* made it clear that each state may decide whether to accommodate whole life sentences within their own criminal justice systems. Such sentences are not necessarily in breach of Article 3 because the Court accepts the state's power to regard some crimes as worthy of a whole life term. The UK is, therefore, at liberty to provide for such sentences, even though many other states only pass determinate sentences.

However, it is argued the right of each state to pass such sentences, and then monitor possible release, cannot be unrestricted if the Court is to ensure that the UK, or any other state, is to comply with fundamental principles of human rights law; any such law must comply with the basic tenets of the rule of law and of reasonableness (proportionality). Thus such sentences must at least be proportionate to the crime and reserved for the most serious offences; otherwise the sentence is in danger of being unjust, irrational and, of course, inhuman and degrading towards the prisoner. Each member state would prefer to be left *entirely* to its own devises as to when such sentences can be imposed, and indeed the Court has suggested that these matters will be determined by each individual state within its discretion, primarily because there will inevitably be initial differences of opinion as to which offences warrant a whole life term. Yet even at

[74] See Kavanagh, P 'Policing the Margins: Right Protection and the European Court of Human Rights' [2006] EHRLR 422. See further, Letsas, G *A theory of the Interpretation of the European Convention* (Oxford 2009), chapter 5 (Two Concepts of the Margin of Appreciation) 80

this stage that discretion will be subject to the supervision of the European Court, to ensure that a state does not pass wholly unjust and inhuman sentences,[75]

It is, of course, the issue of *the review* of such sentences that has caused the conflict between the European Court and the national authorities, with claims that the European Court is changing the very nature of whole life sentences together with the scope of domestic discretion by insisting on an element of review and clear and prospective rules as to that review power. But again, we can see that the Court has not rejected the idea of state discretion in this area; it has indeed accepted that the form of review (executive or judicial) may vary from state to state. Further, although it has noted that the common review period with member states is within 25 years of the sentence, it has not *insisted* that any review takes place within that time – again, that is left to the state's discretion.

With respect to the appropriate roles of the European Court and the national authorities in this area, it has been argued that the process of interpreting (and developing) the penological grounds for life incarceration, as well as well as the process of evaluation of their continued existence, should not be determined in the Court's jurisprudence but should be left entirely to national authorities, because the latter are responsible for pursuing national criminal policies and must protect their societies against

[75] See Rogan, M 'The European Court of Human Rights, gross disproportionality and long prison sentences after Vinter v United Kingdom' [2015] PL 22

dangerous offenders, ad that responsibility cannot be taken up by the European Court, not least because there are no efficient instruments.[76] It is therefore accepted that the relevant national authorities should enjoy a wide margin of appreciation in assessing whether an individual life prisoner meets the criteria for release.[77] On the other hand, other authors have called for domestic law to respond to the decision in *Vinter* by incorporating a right to rehabilitation in domestic law, and of developing a legal basis and judicial process for assessing prisoners' rehabilitation.[78]

What the European Court is insistent on, however, is that there must be *a* review, and that the rules regulating that review must be clear so as to allow the prisoner to determine their eligibility for review and possible release. The first requirement – the *existence* of a review process – is, admittedly a *substantive* restriction on the legitimacy of the domestic law, but is an inevitable consequence of the Court's legal task of interpreting Article 3 in the light of fundamental human rights norms. The second requirement – that the law is clear – is, on the other hand, purely procedural and simply requires domestic law to comply with the basic principles of the rule of law - that the law should be clear and accessible. Thus, it has been noted that the Grand Chamber's decision in *Vinter* has demonstrated that the need for a comprehensive and manifestly fair

[76] Szydlo, M 'Free Life after Life Imprisonment as a Human Right under the European Convention' (2013) 9 *European Constitutional Law Review* 501, at 511.

[77] Ibid

[78] Zyl Smit, D, Weatherby, P and Creighton, S 'Whole life sentences and the tide of European human rights jurisprudence: what is to be done?' (2014) 14(1) *Human Rights Law Review* 59, at 82

procedure to evaluate progress towards release is most urgent for the persons who are most likely to remain in prison for the longest on grounds of punishment and deterrence.[79]

This principle has in fact been applied in a recent UK High Court decision, in assessing whether the extradition of a person to Ghana for murder would be in violation of the UK's obligations under the European Convention. In *Ghana v Gambrah*,[80] it was held that there had been a violation of Article 3, and the principles established in *Vinter*, where the receiving state had agreed that the individual would not be executed in accordance with the law, and would be pardoned by the President, but where there was no legal framework for such pardon; it being simply common ground that the President would pardon such an individual. Thus the court found that there was no legal basis for allowing the prisoner to serve a sentence other than the one that was imposed for murder – a death sentence – and thus no material to suggest that the President would consider his release on the basis of the facts of the case or his personal circumstances.[81]

Both aspects of the European Court's judgments in cases such as *Vinter* are it is submitted entirely legitimate and consistent with its supervisory role. To ensure the

---

[79] Ibid, at 83

[80] [2014] EWHC 1569 (Admin)

[81] Ibid, at para * It was not possible, therefore, for the court to equate the individual's *ad hoc* incarceration to a mandatory life sentence which was reducible and passed by a sentencing court in accordance with the law.

maintenance of the rule of law a judicial body must have the power to interpret legal provisions and determine their general substantive and procedural limitations. So too it must be able to rule on the clarity of such laws; those aspects cannot be left to parliamentary or executive decision. Yet, in this area those judgments are objected to by states who wish to have *absolute* discretion in deciding on the prospect of release, including the power not to consider release in certain cases if the executive feel that such release would be contrary to the public interest.

The recent decision of the European Court in *Hutchinson* does not disturb the Grand Chamber's insistence that whole life sentence must be reviewable and that eligibility for such review is promulgated and available at the time of the sentence. That decision, however, severely dilutes the requirement that the rules regulating review, and possible release, allow the prisoner to foresee the eligibility and possibility of such review. Although the majority of the Court in *Hutchinson* is correct in stating that the Court of Appeal have expressly stated that the statutory scheme of compassionate release can, on a human rights interpretation, cover review on grounds of rehabilitation and release, such a declaration does nothing to clarify the factors that an authority would or should take into account if and when they used that process to consider a prisoner's release. Although, the Court correctly states that the interpretation of domestic law is the primary responsibility of the domestic authorities, such law has to possess the basic requirements of certainty. State law can, of course, become clearer through time and the process of interpretation and application, but to uphold a provision which was clearly not intended to cover review on grounds of rehabilitation, does little justice to the prisoner

who is entitled to know – at the time of the sentence - what factors will be taken into account in that decision, or at the very least, at what stage of the sentence the review may take place.

CONCLUSIONS

The case law of the European Court of Human Rights with respect to whole life sentences raises a number of important issues with respect to the protection of prisoners' rights, the principles of legality and proportionality, and the desirability of the European Court's power to impose Convention standards on individual member states.

Clear rules on review and release of whole life prisoners would raise legitimate expectations on behalf of the prisoner as to the period of incarceration and provide the domestic authorities with clear and reviewable powers of any review process. Thus, although the European Court is not willing to dictate the precise rules relating to review and release, it has stressed that Article 3 requires national authorities to be allowed to review whole life sentences in order to assess whether their continued detention is no longer be justified. Further, the prisoner is entitled to know, from the beginning of their sentence, what they have to do to be considered for release and under what conditions. The alternative is to have open ended and unclear powers of review, leaving the authorities with an unfettered power to consider release and leaving the prisoner in a state of uncertainty as to whether and on what grounds they will ever be considered for review and release. Unfortunately, the decision of the Court of Appeal, as affirmed by

the decision in *Hutchinson*, perpetuates that uncertainty; although technically complying with the Grand Chamber's judgment in *Vinter*, it in effect allows the executive to decide whether to use a statutory power which was clearly not designed to be used to make rational and proportionate decisions on whether a prisoner given a whole life term should nevertheless be released on penological and humane grounds. This objection is borne out by the recent decision in *Ghana v Gambrah*,[82] above, where it was held that the fact that it was common ground that the President would pardon an individual, whose death sentence had been unofficially commuted, was not sufficient to satisfy the requirements of certainty laid down in *Vinter*. Although the UK regulations on compassionate release have some foundation in law, it is submitted that unless they are clearly applicable to release on grounds of rehabilitation and just punishment, they fail to meet the requirements of certainty laid down by the Grand Chamber and the European Court in this area before the unsatisfactory and pragmatic decision in *Hutchinson*.

The objection to the European Court's interference in this area is it is submitted theoretically unsound and disingenuous. The European Court is clearly prepared to enter into a dialogue with member states on what offences can attract whole life terms, and the rules on which any reviews operate. The Court is not, however, prepared to surrender its power to interpret the terms of the Convention or to lay down fundamental and minimum standards that must be applied in such cases. If the UK authorities, including the judiciary, fail to compromise with the European Court, then that failure will frustrate the

[82] [2014] EWHC 1569 (Admin)

purpose of the European Convention, the fundamental role of the European Court and the maintenance of the rule of law.

The recent judgment of the European Court in *Hutchinson*, however, represents a retrograde step in achieving justice and certainty in this area. Whatever steps the domestic authorities take in facilitating the review of whole life sentences, such provisions have to be sufficiently clear to enable the criminal justice authorities and the prisoner to foresee the circumstances which would trigger such a review, and for the judiciary to review the exercise or non-exercise of those powers. To allow a provision which was clearly not intended to cover the possible release of a whole life sentence prisoner on grounds of rehabilitation and review of their risk to the public does little service to the true intention of the Grand Chamber's judgment in *Vinter*, or to the principles of certainty and legitimacy upon which convention rights are founded.

At the time of writing the Grand Chamber of the European Court has accepted Hutchinson's request for a referral of his case to the Grand Chamber.[83] This will provide the Grand Chamber with an opportunity to see whether the Chamber's decision followed the tenor and spirit of the Grand Chamber's ruling in *Vinter*. The decision will be eagerly awaited by whole lifers, but equally by the government who will want to know whether the Grand Chamber of the European Court is prepared to interfere with UK domestic law

[83] Press Release, European Court of Human Rights (ECHR 179 (2015) 3 June 2015

on this, and other sensitive issues involving the balance of human rights in the criminal justice system. [84]

A rejection of the case on its merits will appease the government; but if the appeal were to succeed the government may be prepared to resume its face off with the Court and the Council of Europe on the issue of subsidiarity with renewed vigour. In particular this would mean resurrecting and strengthening its plans to repeal the Human Rights Act 1998 and replace it with a British Bill of Rights, which would instruct the courts to have less reliance on the principles and case law of the Convention.[85] For the reasons highlighted in this article, however, it is submitted, however, that whatever the political and diplomatic fall out of the Grand Chamber's decision a reversal of the Court's judgment in *Hutchinson* is imperative for prisoners' rights and legal certainty.

[84] See Foster, S 'Review and Whole Life Sentences' (2015) 179 (24) *Criminal Law and Justice Weekly* *

[85] Conservative Party Manifesto: *Protecting Human Rights in the UK: the Conservatives' proposals for changing Britain's human rights laws (*2015), at para 60, where it is proposed that the UK Supreme Court will become the ultimate arbiter on human rights issues.