Neutral Citation Number: [2014] EWCA Crim 188

Case No: 2013/05646/A7 & 2013/05317/A5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LEAMINGTON SPA
AND IN THE MATTER OF A REFERENCE UNDER S.36 OF THE CJA 1988

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2014

Before:
THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
LORD JUSTICE TREACY
and
MR JUSTICE BURNETT

- -

ATTORNEY GENERAL'S REFERENCE No. 69 of 2013
UNDER SECTION 36 OF
THE CRIMINAL JUSTICE ACT 1988

Between:

Regina	**Respondent**
- and -	
Ian McLoughlin	**Appellant**

- -

AND IN AN APPEAL FROM THE CROWN COURT
Between:

Regina	**Respondent**
- and -	
Lee William Newell	**Appellant**

Joe Stone QC for the **Appellant**
James Eadie QC and Louis Mably for the **Respondent**
K McCartney in attendance on the reference at the invitation of the court
Joe Stone QC and Miss C Hawley for **Thomas**

Hearing date: 24 January 2014

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Approved Judgment

Lord Thomas of Cwmgiedd, CJ:

Introduction

1. The statutory scheme enacted by Parliament for sentencing an adult guilty of murder is set out in the Murder (Abolition of Death Penalty) Act 1965 (the 1965 Act), the Criminal Justice Act 2003 (the 2003 Act) and Crime (Sentences) Act 1997 (the 1997 Act):

   i) A trial judge must, under s.1 of the 1965 Act, impose a life sentence for murder. Under s.269 of the 2003 Act, the judge must decide whether to make a minimum term of a fixed number of years or a whole life order.

   ii) If a fixed minimum term order is made, the Parole Board has the power under the provisions of s.28 of the 1997 Act, commonly called the early release provisions, to direct release of the offender after the expiry of any minimum term for a fixed number of years set by the trial judge; it considers in essence the risk to the public if release is ordered. However, the Parole Board has no such power where a whole life order is made.

   iii) A power of release is given under s.30 of the 1997 Act to the Secretary of State, if there are exceptional circumstances which justify release on compassionate grounds.

2. In the cases before the court a challenge is made to this scheme. It is advanced under Article 3 of the Convention and founded on decisions of the Strasbourg Court:

   i) On 12 February 2008, the Grand Chamber of the Strasbourg Court decided in *Kafkaris v Cyprus (*Application no. 21906/04) that whilst a sentence of life imprisonment did not violate Article 3, there would be a violation if such a sentence was irreducible – that is to say a sentence for the duration of the life of the offender with no "possibility" or "hope" or "prospect" of release from the sentence.

   ii) In *R v Bieber* [2009] 1 WLR 223, this court held, in the light of the decision in *Kafkaris* that, as the Secretary of State had a power of release under s.30 of the 1997 Act, a sentence with a whole life order was not irreducible and thus not in violation of Article 3.

   iii) On 17 January 2012 the Fourth Chamber of the Strasbourg Court in *Vinter v UK* [2012] 55 EHHR 34 held that there was no violation of Article 3. On 9 July 2012, the Grand Chamber decided to hear the case.

iv) Prior to the hearing by the Grand Chamber, a special constitution of this court considered appeals where four of the appellants had received whole life orders and one a minimum term of 30 years. In its decision given in November 2012, *R v David Oakes and others* [2012] EWCA Crim 2435, [2013] 2 Cr App R (S) 22, this court concluded that whole life orders were not incompatible with Article 3 of the Convention.

v) 0n 9 July 2013, the Grand Chamber of the Strasbourg Court gave its decision in *Vinter v United Kingdom*. It held, for reasons we shall analyse, that there had been a violation of Article 3 in relation to the whole life orders imposed on the basis that they were not reducible.

3. This court was therefore specially constituted to consider, in the light of that decision, three appeals by defendants on whom a whole life order had been imposed and a reference by the Attorney General under s.36 of the CJA 1986 in a case where it was contended that the trial judge had been mistaken in his view that the decision in *Vinter* precluded the imposition of a whole life order.

4. Prior to the hearing the first of the appellants, Mark Bridger, abandoned his appeal against the whole life order imposed on him for the sadistic murder of a child. In respect of the second appellant, Matthew Thomas, it was clear that the appellant had not received a whole life order. The hearing therefore proceeded as an appeal by Newell, the third appellant, on whom a whole life order had been imposed, and a reference by the Attorney General in the case of McLoughlin where the judge, after concluding the decision in *Vinter* precluded the imposition of a whole life order, had imposed a minimum term of 40 years. The reference was made on the grounds that the judge had made an error of law as to his powers and that the consequent failure to make a whole life order had resulted in an unduly lenient sentence.

The development of the legislative scheme

(a) The fixing of the tariff and its reconsideration in exceptional circumstances

5. Although an account of the development of the life sentence for murder and its practical operation has been set out on many occasions, such as the judgment of Lord Mustill in *R v Secretary of State ex p Doody* [1994] AC 531 and the judgment of Lord Judge CJ in *R v Oakes,* it is important to summarise one aspect of that development as it assists in understanding the submissions presented to us.

6. On 30 November 1983 the then Home Secretary introduced a scheme that formalised the practice that had developed in the years after the introduction of the mandatory life sentence for murder (see Hansard HC Deb 30 November 1983, vol 49, cols 505-507). Under that scheme a formal distinction was drawn between the penal element of a sentence (punishment, retribution and deterrence) and the element that protected the public from risk. It initially operated on the basis that the trial judge would make

a recommendation to the Home Secretary on the term required to reflect the penal element. The Home Secretary was not bound by that recommendation; he made his own determination of that period which was commonly known as the tariff period. Although the overwhelming majority of tariffs were for a determinate period, some whole life tariffs were imposed. At the conclusion of a determinate tariff period, the Parole Board was asked to review whether the offender should be released, having regard to the risk that he posed to the public. The decision on release was then made by the Home Secretary.

7. The position in relation to whole life tariffs was more complex.

i) On 7 December 1994 the then Home Secretary announced a policy in relation to prisoners serving a whole life tariff (Hansard HC Deb 7 December 1994, vol 251, cols. 234-235: written answer).

> "In addition, I have decided that for those life sentence prisoners for whom it is decided that the requirements of retribution and deterrence can be satisfied only by their remaining in prison for the whole of their life, there will in future be an additional ministerial review when the prisoner has been in custody for 25 years. The purpose of this review will be solely to consider whether the whole life tariff should be converted to a tariff of a determinate period. The review will be confined to the considerations of retribution and deterrence. Where appropriate, further ministerial reviews will normally take place at five-yearly intervals thereafter. Existing prisoners who fall into this category and who have already served 25 years or more in custody will not be disadvantaged. Their cases will be reviewed by ministers as soon as is practicable and after any representations they may wish to make."

ii) That policy was modified by a different Home Secretary on 10 November 1997 (Hansard HC Deb 10 November 1997, vol 300, cols. 419-420: written answer):

> “So far as the potential for a reduction in tariff is concerned, I shall be open to the possibility that, in exceptional circumstances, including for example exceptional progress by the prisoner whilst in custody, a review and reduction of the tariff may be appropriate. I shall have this possibility in mind when reviewing at the 25-year point the cases of prisoners given a whole life tariff and in that respect will consider issues beyond the sole criteria of retribution and deterrence described in the answer given on 7 December 1994.”

iii) In a challenge by Myra Hindley to the whole life tariff imposed on her, Lord Bingham CJ held in the Divisional Court in *R v Home Secretary ex p Hindley* [1998] QB 751 at page 770 that whereas the narrow policy set out in 1994 was unlawful, this had been corrected by the 1997 policy which permitted the taking into account of exceptional progress whilst in prison. In the appeal to the House of Lords counsel for the Home Secretary made clear that the Home Secretary was prepared to review any whole life tariff, even in the absence of exceptional circumstances (see page 417C of [2001] 1 AC 410). Lord Steyn, when approving the legality of the Home Secretary's 1997 policy, recorded the way in which the policy had been clarified (at 417D):

> "…. counsel for the Secretary of State submitted that the policy of imposing a whole life tariff merely involves the expression of the current view of the Secretary of State that the requirements of retribution and deterrence make it inappropriate ever to release such a prisoner. It does not rule out reconsideration. The Secretary of State envisages the possibility of release in the event of exceptional progress in prison; and, even in absence of such progress, the Secretary of State is prepared to reconsider any whole life tariff decision from time to time."

iv) The Secretary of State's policy of being willing to review existing tariffs in exceptional circumstances was noted in *R(Cole & others) v Secretary of State for the Home Department* [2003] EWHC 1789 (Admin) at paragraph 11. The then Vice President of the Court of Appeal Criminal Division (Rose LJ) observed (in relation to then planned review by judges in the High Court of existing tariffs as subsequently enacted in the CJA 2003) that it seemed:

> "inconceivable, in human terms, that … in relation to prisoners serving a notified tariff, exceptional progress in prison will not be taken into account." (See paragraph 88)

8. Following successive decisions of the Strasbourg Court and of the House of Lords and an acceptance that decisions on the liberty of an individual are properly decisions for the judicial branch of the state as opposed to the executive, policy and legislative changes were made. These gradually brought both the fixing of the tariff period to reflect the penal element and the decision on the prisoner's safety for release under judicial control within the scheme we have summarised at paragraph 1.

(b) The duty of the judge under the CJA 2003

9. Under that scheme the trial judge approaches the task of setting the penal element of the sentence of mandatory life imprisonment by determining the seriousness of the offence in accordance with the principles set out in Schedule 21 and any applicable guidelines of the Sentencing Council. The judge is not concerned with risk to the

public on release. Paragraph 4 of that schedule provides that the appropriate starting point where the seriousness of the offence or offences is exceptionally high should be a whole life order. The types of case that would normally fall within this category are:

> "(a) the murder of two or more persons, where each murder involves any of the following—
>
> (i) a substantial degree of premeditation or planning,
>
> (ii) the abduction of the victim, or
>
> (iii) sexual or sadistic conduct,
>
> (b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation,
>
> (c) a murder done for the purpose of advancing a political, religious, racial or ideological cause, or
>
> (d) a murder by an offender previously convicted of murder."

(c) The power of release under s.30 of the 1997 Act

10. Although, as we have explained, the Parole Board has no power to consider early release if a whole life order is made, the power of the Secretary of State to release the prisoner is set out in s.30 of the 1997 Act:

> "(1) The Secretary of State may at any time release a life prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds.
>
> (2) Before releasing a life prisoner under subsection (1) above, the Secretary of State shall consult the Parole Board, unless the circumstances are such as to render such consultation impracticable."

11. The Secretary of State for Justice has set out in chapter 12 of the Indeterminate Sentence Manual (the Lifer Manual), issued as Prison Service Order 4700, guidance on his policy as to the criteria for release on compassionate grounds. The criteria in the current chapter date from April 2010.

> "the prisoner is suffering from a terminal illness and death is likely to occur very shortly (although there are no set time limits, 3 months may be considered to be an appropriate period for an application to be made to Public Protection Casework Section [PPCS]), or the ISP is bedridden or similarly

> incapacitated, for example, those paralysed or suffering from a severe stoke;
> and
> the risk of re-offending (particularly of a sexual or violent nature) is minimal;
> and
> further imprisonment would reduce the prisoner's life expectancy;
> and
> there are adequate arrangements for the prisoner's care and treatment outside prison;
> and
> early release will bring some significant benefit to the prisoner or his/her family".

These are highly restrictive criteria.

The contentions of the parties

12. The submissions of Mr Eadie QC on behalf of the Attorney General and the Crown can be summarised:

i) The Grand Chamber's decision did not hold that the statutory regime relating to the imposition of a whole life order under s.269 of the CJA 2003 was incompatible with Article 3. The Grand Chamber had drawn a clear distinction between the regime which governed the imposition of the sentence and the regime for the reducibility of that sentence through review and release. The imposition of a whole life order was just punishment and was compatible with the Convention.

ii) The Grand Chamber were mistaken in concluding that the statutory regime for the reducibility of the sentence by review and release was insufficiently certain; and that uncertainty gave rise to a breach of Article 3. As a matter of analysis of the law of England and Wales, the Human Rights Act required the Secretary of State to act compatibly with Convention Rights. When the Secretary of State considered review and release, the Secretary of State had to exercise his powers under s.30 of the 1997 Act compatibly with Convention Rights. The policy set out in the Lifer Manual (to which we referred at paragraph 11) did not represent the whole of the circumstances in which the power of release might be exercised.

iii) Even if the statutory scheme for imposing the sentence and the legal regime for review and release had to considered as a single regime, and there had to be a regime which provided for reducibility compatible with Article 3 at the time the whole life order was imposed, and the current regime was not compatible, then the court could not read the terms of s.269 down in accordance with s.3 of the Human Rights Act. That is because s.269(4) says that the court 'must' impose a whole life order and the effect of any attempt to read down the section would require it to

be read as 'must not'. Furthermore, whilst the court is a public body enjoined by s.6(1) to act compatibly with the Convention, s.6(2) has the effect of disapplying that provision where a public body acts in accordance with primary legislation which cannot be read down. S.6 is one of the mechanisms in the Human Rights Act which carefully preserves the supremacy of Parliament in the domestic legal order.

13. The only short submission made in response was that by Mr Joe Stone QC for the appellant Newell. The offender McLoughlin had expressly instructed his counsel and solicitors not to oppose the Attorney General's reference in the terms we set out at paragraph 46 below. Mr McCartney (who had represented McLoughlin before the judge) was present at the appeal at the direction of the court to assist us to the extent that he could, consistent with McLoughlin's instructions to make no submissions. The submission made by Mr Stone QC was that the Grand Chamber had made it clear that there must be a regime for review of the sentence at the time the sentence was passed; that regime must provide for the realistic possibility of reducibility to be compatible with Article 3; the current regime did not. The whole life order was therefore incompatible with Article 3.

Is the statutory regime established by Parliament compatible with Article 3?

(a) The power to impose a whole life order as just punishment

14. In *Vinter* the Grand Chamber set out its view that it was axiomatic that a person could not be detained unless there were "legitimate penological grounds" for detention; those grounds were stated by the court to include punishment, deterrence, public protection and rehabilitation.

15. Although there may be debate in a democratic society as to whether a judge should have the power to make a whole life order, in our view, it is evident, as reflected in Schedule 21, that there are some crimes that are so heinous that Parliament was entitled to proscribe, compatibly with the Convention, that the requirements of just punishment encompass passing a sentence which includes a whole life order.

16. In *R v Oakes,* Lord Judge CJ summarised (at paragraphs 9 and 10) the views expressed on the whole life tariff by Lord Bingham CJ and Lord Steyn in *Hindley* as illustrations of a view held by eminent judges in the judiciary of England and Wales. Lord Bingham had said, at a time the whole life tariff was fixed by the Home Secretary:

> "I can see no reason, *in principle*, why a crime or crimes, if sufficiently heinous, should not be regarded as deserving life-long incarceration for purposes of pure punishment….. Successive Lord Chief Justices have regarded such a tariff as lawful, and I share their view." (769).

Lord Steyn, giving the leading judgment in the House of Lords had specifically agreed with this observation (at page 416) and went onto say at page 417:

> "There is nothing logically inconsistent with the concept of a tariff by saying that there are cases where the crimes are so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution and deterrence."

Lord Judge CJ concluded in *R v Oakes*:

> "At the time when this case [Hindley] was making its way through the courts, the whole-life tariff was not based on an express statutory provision. Nevertheless Lord Bingham and Lord Steyn were expressing views which affirmed support for the principle that there had been and no doubt would continue to be cases in which a whole life order represented just punishment."

17. We do not read the judgment of the Grand Chamber in *Vinter* as in any way casting doubt on the fact that there are crimes that are so heinous that just punishment may require imprisonment for life. There may be legitimate dispute as to what such crimes are - at one end genocide or mass murder of the kind committed in Europe in living memory or, at the other, murder by a person who has committed other murders, but that there are such crimes cannot be doubted. In *Vinter* the Grand Chamber accepted that, because what constitutes a just and proportionate punishment is the subject of debate and disagreement, States have a margin of appreciation. Under our constitution it is for Parliament to decide whether there are such crimes and to set the framework under which the judge decides in an individual case whether a whole life order is the just punishment.

18. We therefore conclude that no specific passage in the judgment nor the judgment read as a whole in any way seek to impugn the provisions of the CJA 2003 (as enacted by Parliament) which entitle a judge to make at the time of sentence a whole life order as a sentence reflecting just punishment.

(b) Does the regime which provides for reducibility have to be in place at the time the whole life order is imposed?

19. The Grand Chamber made clear, as is self evident, that there is no violation of Article 3 if a prisoner in fact spends the whole of his life in prison. One example is an offender who continues to be a risk for the whole of his or her life.

20. However, the Grand Chamber considered that the justification for detention might shift during the course of a sentence; although just punishment at the outset, it might cease to be just after the passage of many years. It said at paragraphs 110 and 121 of

its judgment that for a life sentence to be compatible with Article 3, there must therefore be both a prospect of release and a possibility of review. It added at paragraph 122:

> "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. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration."

21. It made it clear that this requirement was quite different from the task of the judge in setting the sentence when saying at paragraph 124:

> "However, the need for independent judges to determine whether a whole life order may be imposed is quite separate from the need for such whole life orders to be reviewed at a later stage so as to ensure that they remain justified on legitimate penological grounds. Furthermore, given that the stated intention of the legislative amendment was to remove the executive entirely from the decision-making process concerning life sentences, it would have been more consistent to provide that, henceforth, the twenty-five year review, instead of being eliminated completely, would be conducted within a wholly judicial framework rather than, as before, by the executive subject to judicial control."

22. Thus whilst it is clear that the Grand Chamber accepted that a judge can impose a whole life order as just punishment, it concluded that a legal regime for a review during the sentence must be in place at the time the sentence is passed.

23. Whilst we have accepted the submission on behalf of the Attorney General that the Strasbourg Court did not determine that the imposition of a whole life tariff itself violates Article 3, we return briefly to the arguments advanced contingently on the hypothesis that it did. In our judgment s.3 of the Human Rights Act could not be used to read down the legislation to preclude the imposition of whole life tariffs. That is because s.269(4) provides that if the court is of the opinion that no order for early release should be made because of the seriousness of the offence alone or in combination with others, it *must* order that those provisions do not apply. That being so, s.6(2) of the Human Rights Act disapplies the obligation on the court as a public authority to act compatibly with the Convention.

24. The only remedy available in the domestic courts on this hypothesis would be a declaration of incompatibility, the discretionary remedy available under s.4 of the

Human Rights Act when primary legislation is found to incompatible with the Convention. Such a remedy is not available in the Crown Court and would not, in any event, affect the continuing operation of the statutory scheme.

(c) Is the regime under s.30 a regime for reducibility which is in fact compliant with Article 3?

25. The questions therefore arise as to whether the provisions of s.30 provide such a regime compatible with Article 3 as interpreted by the Grand Chamber and on the assumption that, discharging our duty under s.2 of the Human Rights Act to take into account the decision of the Strasbourg Court, we should adopt that interpretation.

26. Lord Phillips CJ in giving the judgment of this court in *R v Bieber* concluded that the regime was compatible and a whole life order was reducible, because of the power of the Secretary of State under s.30 of the 1997 Act. He said at paragraph 48:

> "At present it is the practice of the Secretary of State to use this power sparingly, in circumstances where, for instance, a prisoner is suffering from a terminal illness or is bedridden or similarly incapacitated. If, however, the position is reached where the continued imprisonment of a prisoner is held to amount to inhuman or degrading treatment, we can see no reason why, having particular regard to the requirement to comply with the Convention, the Secretary of State should not use his statutory power to release the prisoner."

In *R v Oakes*, this was reaffirmed in the judgment of this court – see paragraph 15.

27. The Grand Chamber whilst accepting that the interpretation of s.30 of the 1997 Act as set out in *R v Bieber* would in principle be consistent with the decision in *Kafkaris*, was concerned that the law might be insufficiently certain. It added at paragraphs 126-7:

> "The fact remains that, despite the Court of Appeal's judgment in *Bieber*, the Secretary of State has not altered the terms of his explicitly stated and restrictive policy on when he will exercise his s.30 power. Notwithstanding the reading given to s.30 by the Court of Appeal, the Prison Service Order remains in force and provides that release will only be ordered in certain exhaustively listed, and not merely illustrative, circumstances, …
>
> These are highly restrictive conditions. Even assuming that they could be met by a prisoner serving a whole life order, the Court considers that the Chamber was correct to doubt whether compassionate release for the terminally ill or physically incapacitated could really be considered release at all, if all it

> meant was that a prisoner died at home or in a hospice rather than behind prison walls. Indeed, in the Court's view, compassionate release of this kind was not what was meant by a "prospect of release" in *Kafkaris*, cited above. As such, the terms of the Order in themselves would be inconsistent with *Kafkaris* and would not therefore be sufficient for the purposes of Article 3."

28. The Grand Chamber therefore concluded that s.30 did not, because of the lack of certainty, provide an appropriate and adequate avenue of redress in the event an offender sought to show that his continued imprisonment was not justified. It concluded at paragraph 129:

> "At the present time, it is unclear whether, in considering such an application for release under s.30 by a whole life prisoner, the Secretary of State would apply his existing, restrictive policy, as set out in the Prison Service Order, or would go beyond the apparently exhaustive terms of that Order by applying the Article 3 test set out in *Bieber*. Of course, any ministerial refusal to release would be amenable to judicial review and it could well be that, in the course of such proceedings, the legal position would come to be clarified, for example by the withdrawal and replacement of the Prison Service Order by the Secretary of State or its quashing by the courts. However, such possibilities are not sufficient to remedy the lack of clarity that exists at present as to the state of the applicable domestic law governing possible exceptional release of whole life prisoners."

29. We disagree. In our view, the domestic law of England and Wales is clear as to "possible exceptional release of whole life prisoners". As is set out in *R v Bieber* the Secretary of State is bound to exercise his power under s.30 of the 1997 Act in a manner compatible with principles of domestic administrative law and with Article 3.

30. As we understand the Grand Chamber's view, it might have been thought that the fact that policy set out in the Lifer Manual has not been revised is of real consequence. However, as a matter of law, it is, in our view, of no consequence. It is important, therefore, that we make clear what the law of England and Wales is.

31. First, the power of review under the section arises if there are exceptional circumstances. The offender subject to the whole life order is therefore required to demonstrate to the Secretary of State that although the whole life order was just punishment at the time the order was made, exceptional circumstances have since arisen. It is not necessary to specify what such circumstances are or specify criteria; the term "exceptional circumstances" is of itself sufficiently certain.

32. Second, the Secretary of State must then consider whether such exceptional circumstances justify the release on compassionate grounds. The policy set out in the Lifer Manual is highly restrictive and purports to circumscribe the matters which will be considered by the Secretary of State. The Manual cannot restrict the duty of the Secretary of State to consider all circumstances relevant to release on compassionate grounds. He cannot fetter his discretion by taking into account only the matters set out in the Lifer Manual. In the passages in *Hindley* to which we have referred at paragraph 7 the duty of the Secretary of State was made clear; similarly the provisions of s.30 of the 1997 Act, require the Secretary of State to take in to account all exceptional circumstances relevant to the release of the prisoner on compassionate grounds.

33. Third, the term "compassionate grounds" must be read, as the court made clear in *R v Bieber*, in a manner compatible with Article 3. They are not restricted to what is set out in the Lifer Manual. It is a term with a wide meaning that can be elucidated, as is the way the common law develops, on a case by case basis.

34. Fourth, the decision of the Secretary of State must be reasoned by reference to the circumstances of each case and is subject to scrutiny by way of judicial review.

35. In our judgment the law of England and Wales therefore does provide to an offender "hope" or the "possibility" of release in exceptional circumstances which render the just punishment originally imposed no longer justifiable.

36. It is entirely consistent with the rule of law that such requests are considered on an individual basis against the criteria that circumstances have exceptionally changed so as to render the original punishment which was justifiable no longer justifiable. We find it difficult to specify in advance what such circumstances might be, given that the heinous nature of the original crime justly required punishment by imprisonment for life. But circumstances can and do change in exceptional cases. The interpretation of s.30 we have set out provides for that possibility and hence gives to each such prisoner the possibility of exceptional release.

Conclusion

37. Judges should therefore continue to apply the statutory scheme in the CJA 2003 and in exceptional cases, likely to be rare, impose whole life orders in accordance with Schedule 21. Although we were told by Mr Eadie QC that it might be many years before the applications might be made under s.30 and the three applicants in *Vinter* (Vinter, Bamber and Moore) did not seek to contend that there were no longer justifiable penological grounds for their continued detention, we would observe that we would not discount the possibility of such applications arising very much sooner. They will be determined in accordance with the legal principles we have set out.

38. We therefore turn to consider whether in these two cases, a whole life order ought to have been made.

The reference by the Attorney General in the case of McLoughlin

39. On 21 October 2013 McLoughlin pleaded guilty to murder and to robbery. He was sentenced by Sweeney J at the Central Criminal Court to life imprisonment for the offence of murder. A sentence of eight years imprisonment concurrent with that sentence was passed for the robbery. The judge fixed a minimum period of 40 years under s.269 (2) of the CJA 2003.

(a) The facts

40. McLoughlin who was born on 31 May 1958 and is 55 years old, had a previous history of serious offending, including previous convictions for manslaughter and murder.

i) Between May 1970 and October 1983 he was sentenced on 14 occasions for various offences including burglary and theft.

ii) On 19 September 1984 he was convicted of manslaughter and sentenced to eight years imprisonment. He confronted a man, lost his temper, picked up a hammer and hit him several times over the head. He tied a towel round the victim's neck in the hope it would reduce the flow of blood. It also reduced the noise of the hammer blows. He hid the body in a cupboard.

iii) On 2 July 1992 he was convicted of murder and sentenced to imprisonment for a minimum term of 14 years. He had been offered accommodation by his victim and formed the view that the victim had a sexual interest in young boys. This made him angry. He took a knife and marched the victim into his bedroom where he stabbed him several times, causing his death.

41. Whilst serving that sentence of life imprisonment at HMP Littlehay in December 2011, he befriended a fellow prisoner, Mr Cory-Wright. He learnt that Mr Cory-Wright was a wealthy man. In February 2013 Mr Cory-Wright was released and returned to his home in Little Gaddesden.

42. On 13 July 2013 McLoughlin was released for the day from HMP Spring Hill near Aylesbury, He went to the home of Mr Cory-Wright, then in his 80s, intending to get money and property from him by theft or robbery if necessary. When he arrived Mr Cory-Wright invited him into his home and gave him a drink. After some amicable conversation McLoughlin said he wanted to know where Mr Cory-Wright kept his gold and silver. When he was told it was in the bank he picked up a knife and forced

Mr Cory-Wright upstairs and tied him up. He then robbed him of valuables, his bank cards and PIN numbers. Mr Cory-Wright freed himself and shouted for help. A neighbour, Mr Buck, came to help, even though Mr Cory-Wright warned him not to do so. McLoughlin came out of the house, grabbed Mr Buck and slashed his throat with a knife. Mr Buck managed to escape to his own front garden but died before the emergency services could attend. Three days later McLoughlin was arrested in London, having spent the money he had stolen from Mr Cory-Wright. In interview he admitted killing Mr Buck and robbing Mr Cory-Wright.

43. There was only one mitigating feature, namely his plea of guilty. There were four aggravating features. First, the murder was committed in the course of a robbery. Second, he had the numerous previous convictions we have set out, including both the previous murder and the manslaughter to which we have referred. Third, the robbery was premeditated, involved the use of a knife and was committed against a vulnerable victim in his own home. Fourth, at the time, he was a prisoner serving the custodial part of the life sentence imposed on him for murder. The judge also found it difficult to accept that he had not formed the intention of killing Mr Buck.

44. The court has before it a very moving personal impact statement from the widow of the victim.

(b) The decision of the judge

45. In the course of his sentencing remarks the judge said he had to decide whether there should be a whole life order or whether there should be a determinate minimum term. In deciding whether to impose a whole life order the judge referred to the decision in *Vinter* and said:

> "Given that there is a duty upon the court imposed by the Human Rights Act to act in compliance with the Convention and to take into account at the least of it the decisions of the Court. And given that the 2003 Act does not require me to pass a whole life order, even though that is necessarily my starting point, I have reached the conclusion against the background that is incumbent upon me to pass a sentence which is compliant with the Convention if I can. But it is not appropriate to impose a whole life term. However, even for a man of 55 years of age the minimum term of years must be a very long one indeed."

(c) Our conclusion

46. In deciding that he did not want to be represented or make any submissions on the reference by the Attorney General, McLoughlin wrote in a letter to his lawyers placed before the court:

> "It is just that I believe I deserve the whole life tariff which the AG is seeking and that the family of Graham Buck deserves to know officially that I will never be released."

47. It is clear that the judge did not think he had the power to make a whole life order. He was, for the reasons we have given, in error. His reasoning as to whether he should impose a whole life order or a minimum term of a fixed number of years, had therefore proceeded on the assumption he had no such power.

48. We must consider the matter afresh. The judge proceeded on the basis of a misunderstanding of the law. It is our duty to exercise our judgment free from that misunderstanding. This was McLaughlin's second conviction for murder. The serious aggravating features were correctly identified by the judge. The only mitigation was his admission and plea.

49. The approach to Schedule 21 has been made clear in numerous decisions of this court, as is summarised in *R v Oakes* at paragraph 21. A court must only impose a whole life order if the seriousness is exceptionally high and the requirements of just punishment and retribution make such an order the just penalty. As a second murder, it was a case for which the starting point is normally a whole life order. In addition it had the aggravating features to which we have referred. The only mitigation was his plea.

50. In our judgment this was a case where the seriousness was exceptionally high and just punishment required a whole life order. A fixed minimum term of 40 years was for that reason unduly lenient. We therefore quash the minimum term of 40 years and make a whole life order.

The appeal by Newell

51. On 19 September 2013 Jeremy Baker J, sitting at the Crown Court at Leamington Spa, sentenced Newell, who had been convicted of murder and theft, to imprisonment for life with a whole life order under s.269(4) of the CJA 2003.

(a) The facts

52. Newell was born on 5 October 1968. In 1986 and 1987 he had convictions for theft. On 17 January 1989 he was convicted at the Crown Court at Norwich of murder; he was sentenced to youth custody for life and his tariff period was subsequently fixed at 15 years. The brief facts of the murder were that he obtained entry to a house by deception, told the victim he wanted money and then strangled her to death. Jeremy Baker J accepted, when passing the sentence in the case from which this appeal arises, that the murder may not have been planned.

53. Newell was still serving that life sentence when in February 2013, with another prisoner, Gary Smith, also serving a life sentence for murder he murdered a prisoner Subhan Anwar, aged 24, in HMP Long Lartin. The deceased had been convicted of killing a young child and was considered by Newell and his fellow prisoners worthy of particular condemnation.

54. On the evening of 14 February 2013 Newell and Smith followed the deceased into his cell and engaged the privacy lock. Each had taken with them, as improvised weapons, a sharpened toothbrush and a pen. They told the deceased that they intended to hold him hostage to bargain with the prison authorities. The judge was satisfied this was merely a pretence in order to ensure that the deceased did not resist while they tied him up with sellotape.

55. Once the deceased had been tied up, Newell used the deceased's tracksuit bottoms as a ligature round his neck and strangled him to death. The strangulation took significantly in excess of half a minute to achieve. Newell used the cell intercom to inform the prison authorities that the deceased was dead. When Newell and Smith were asked why they had done it, they said it was because they were bored and it was something to do. When they were taken from the cell both Smith and Newell were completely calm. Each was wearing a piece of the deceased's property which they had stolen from him - Newell was wearing a watch and Smith an earring. The judge concluded that they regarded these as trophies of their exploits. Both were silent during police interviews and at trial.

56. The judge stated he was satisfied there was nothing spontaneous about the murder, the killing was premeditated and Newell was heard to laugh about what occurred. There was no mitigation in either case. The judge considered a whole life order was required as this had been a cold blooded second murder, deliberately lulling the deceased into a false sense of security and killing him in a manner where he had taken a significant time to die. They had shown no concern for anyone but themselves.

(b) Our conclusion

57. Newell is now 45 years of age. It was pointed out by Mr Stone QC that if the court were to fix a minimum term of 35 to 40 years as the appropriate fixed minimum term, he will be 80 to 85 before he is considered for release. He had been in prison since 1989. In the circumstances, it was submitted that the court should not deprive him of all hope of atonement.

58. Because this was a second murder, the starting point would normally be a whole life order. The murder was premeditated and involved the use of an improvised weapon. It occurred in prison whilst Newell continued to serve a life sentence. The deceased took a significant time to die. There was no mitigation. This was a murder where the seriousness of the offence was exceptionally high. The judge was right in making a whole life order. This appeal is accordingly dismissed.

Conclusion

59. These two cases are exceptional and rare cases of second murders committed by persons serving the custodial part of a life sentence. The making of a whole life order requires detailed consideration of the individual circumstances of each case. It is likely to be rare that the circumstances will be such that a whole life order is required. Our decision on each case turns on its specific facts and cannot be seen as a guide to any similar case.