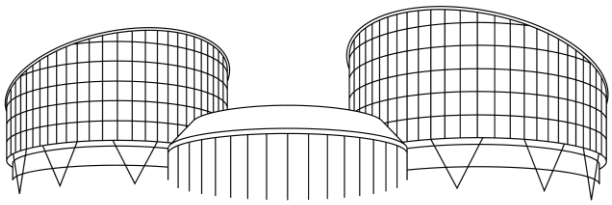

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASES OF VINTER AND OTHERS v. THE UNITED KINGDOM

(Applications nos. 66069/09 and 130/10 and 3896/10)

JUDGMENT

STRASBOURG

17 January 2012

Referral to the Grand Chamber

09/07/2012

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Vinter and Others v. the United Kingdom**,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Lech Garlicki, *President,*
David Thór Björgvinsson,
Nicolas Bratza,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Vincent A. De Gaetano, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 13 December 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in three applications (nos. 66069/09 and 130/10 and 3896/10) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

2. The first applicant, Mr Douglas Gary Vinter, is a British national who was born in 1969 and is currently detained at HMP Frankland. He is represented before the Court by Mr S. Creighton, a lawyer practising in London with Bhatt Murphy Solicitors, assisted by Mr P. Weatherby, counsel, and Professor D. van Zyl Smit.

3. The second applicant, Mr Jeremy Neville Bamber, is a British national who was born in 1961 and is currently detained at HMP Full Sutton. He is represented before the Court by Mr B. Woods, a lawyer practising in Leeds with Cousins Tyrer Solicitors, assisted by Mr R. Horwell QC and Mr L. Hindmarsh, counsel.

4. The third applicant, Mr Peter Howard Moore, is a British national who was born in 1946 and is currently detained at HMP Wakefield. He is represented before the Court by Chivers Solicitors, Bingley, assisted by Mr M. McKone, counsel.

5. The United Kingdom Government ("the Government") were represented by their Agent, Ms L. Dauban of the Foreign and Commonwealth Office.

6. The applicants alleged that the whole life orders which had been imposed on them violated Articles 3, 5 § 4, 6 and 7 of the Convention.

7. On 1 February 2011, the Court decided to give notice of the applications to the Government. It also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASES

A. Introduction

8. Since the abolition of the death penalty in England and Wales, the sentence for murder has been a mandatory sentence of life imprisonment. When such a sentence is imposed, it is the current practice, in the majority of cases, for the trial judge to set a minimum term of imprisonment which must be served before the prisoner is eligible for release on licence. Exceptionally, however, "a whole life order" may be imposed by the trial judge instead of a minimum term. This has the effect that the prisoner cannot be released other than at the discretion of the Secretary of State. (The power of the Secretary of State to release a prisoner is provided for in section 30(1) of the Crime (Sentences) Act 1997.) The Secretary of State will only exercise his discretion on compassionate grounds when the prisoner is terminally ill or seriously incapacitated (see Prison Service Order 4700 set out at paragraph 36 below).

9. Prior to the entry into force of the 2003 Act, it was the practice for the mandatory life sentence to be passed by the trial judge but for the Secretary of State, after receiving recommendations from the trial judge and the Lord Chief Justice, to decide the minimum term of imprisonment which the prisoner would have to serve before he would be eligible for early release on licence. This was also referred to as the "tariff" part of the sentence and was taken to represent the minimum period which the prisoner was required to serve to satisfy the requirements of retribution and deterrence.

It was open to the Secretary of State to impose a whole life tariff on a prisoner. In such a case, it was the practice of the Secretary of State to review a whole life tariff after twenty-five years' imprisonment to determine whether it was still justified, particularly with reference to cases where the prisoner had made exceptional progress in prison (see *Hindley* at paragraph 39 below).

With the entry into force of the 2003 Act (and, in particular, section 276 and schedule 22 to the Act), all prisoners whose tariffs were set by the Secretary of State have been able to apply to the High Court for review of that tariff. Upon such an application the High Court may set a minimum term of imprisonment or make a whole life order.

10. This case concerns three applicants who, having been convicted of murder in separate criminal proceedings in England and Wales, are currently serving mandatory sentences of life imprisonment. All three applicants have been given whole life orders: in the first applicant's case this order was made by the trial judge under the current practice; in the case

of the second and third applicants, who were convicted and sentenced prior to the entry into force of the 2003 Act, the orders were made by the High Court. All three applicants maintain that these whole life orders, as they apply to their cases, are incompatible *inter alia* with Articles 3 and 5 § 4 of the Convention. The facts of the applications, as submitted by the parties, may be summarised as follows.

B. Mr Vinter

11. On 20 May 1996, the first applicant was sentenced to life imprisonment for the murder of a work colleague, with a minimum term of 10 years. He was released on licence on 4 August 2005.

12. He began living with a woman who was to become the victim of his second murder offence. The couple married on 27 June 2006. On 31 December 2006 the first applicant was involved in a fight in a public house and charged with affray (using or threatening unlawful violence). His licence was revoked and he was recalled to prison. In July 2007, having pleaded guilty to the charge of affray, he was sentenced to 6 months' imprisonment. He was released on licence again in December 2007 and returned to live with his wife and her four children. The couple became estranged and the first applicant left the marital home.

13. On 5 February 2008, the first applicant followed his wife to a public house. He had been drinking and had taken cocaine. The couple argued and the wife's daughter, who was present, telephoned the police to alert them to the dispute. The first applicant ordered his wife to get into a car. When the daughter tried to get into the car to protect her mother, the first applicant forcibly removed her. He then drove off with his wife. When the police telephoned her to ascertain if she was safe, the first applicant forced his wife to tell them that she was fine. The first applicant also telephoned the police to tell them that his wife was safe and well. Some hours later he gave himself up to the police, telling them that he had killed her. A post-mortem examination revealed that the deceased had a broken nose, deep and extensive bruising to her neck (which was consistent with attempted strangulation), and four stab wounds to the chest. Two knives were found at the scene, one of which had a broken blade.

14. The first applicant pleaded guilty to murder and instructed his counsel not to make any submissions in mitigation lest it add to the grief of the victim's family. The trial judge considered that the first applicant fell into that small category of people who should be deprived permanently of their liberty. He passed the mandatory life sentence and made a whole life order.

15. The Court of Appeal dismissed his appeal on 25 June 2009. It considered the general principles for determining the minimum term of a mandatory life sentence (as set out in schedule 21 to the 2003 Act: see

relevant domestic law and practice below). It found that, given the circumstances of the offence, there was no reason whatever to depart from the normal principle enshrined in schedule 21 to the 2003 Act that, where murder was committed by someone who was already a convicted murderer, a whole life order was appropriate for punishment and deterrence.

C. Mr Bamber

16. On 7 August 1985, the second applicant's parents, his adoptive sister and her two young children were shot and killed. The second applicant was subsequently charged and, on 28 October 1986, convicted of the murders. The prosecution's case was that the murders were premeditated and planned and had been committed for financial gain. It was also alleged that the second applicant had arranged the crime scene so as to mislead the police by making it appear as if his adoptive sister had killed the family and then herself.

17. The trial judge recommended to the Secretary of State that the second applicant serve twenty-five years' imprisonment "as a minimum" (his underlining). On the trial judge's letter to the Secretary of State, the Lord Chief Justice added the comment "for my part I would never release him". In 1988, the Secretary of State imposed a whole life tariff. The practice at the time was not to inform the prisoner of this decision. By letter dated 15 December 1994, the applicant was informed that the Secretary of State had concluded that the requirements of retribution and deterrence could only be satisfied by the second applicant remaining in prison for the whole of his life.

18. In 2008, following the entry into force of section 276 and schedule 22 to the 2003 Act, the second applicant applied to the High Court for review of the whole life tariff. Having regard to schedule 21 to the Act, the High Court concluded that, given the number of murders involved and the presence of premeditation by the second applicant, the offence plainly fell within that category of cases where the appropriate starting point was a whole life order. Having further regard to statements submitted by the victims' next-of-kin and submissions by the second applicant, including reports as to the behaviour and progress he had made in prison, the High Court found that there was no reason to depart from the views of the Lord Chief Justice and the Secretary of State. It therefore imposed a whole life order.

19. The second applicant appealed to the Court of Appeal, which dismissed the appeal on 14 May 2009. The court found that, when the Secretary of State had set a whole life tariff in 1988, he had been provided with two different judicial recommendations: one from the trial judge recommending a minimum term of twenty-five years and one from the Lord Chief Justice recommending that the second applicant should never be

released. The Secretary of State had been entitled to choose between those recommendations or to adopt neither of them. The Court of Appeal also found that the whole life order imposed by the High Court was not only correct but, for the purposes of punishment and retribution, fully justified.

20. Relying on its previous judgment in *R v. Bieber* (see paragraph 40 below), it found that no issue arose under Article 3 of the Convention as the whole life order was not an irreducible life sentence as that term had been used in *Kafkaris v. Cyprus* [GC], no. 21906/04, ECHR 2008-... Finally, following its ruling in *R v. Pitchfork* (see paragraph 41 below) it found that the review procedure created by the 2003 Act was compatible with Article 7 of the Convention as, properly construed, the relevant statutory provisions meant a prisoner could not be disadvantaged by the outcome of the review: the term to be served could be reduced, or maintained, but it could not be increased or extended.

21. The second applicant applied to the Court of Appeal to certify that its judgment concerned a point of law of general public importance which ought to be considered by the House of Lords. That application was refused on 23 June 2009.

D. Mr Moore

22. On 29 November 1996 the third applicant was convicted after trial in the Crown Court at Chester of four counts of murder. The victims were homosexual men and the applicant, himself a homosexual, was alleged to have committed the murders for his own sexual gratification. Each victim was stabbed many times with a large combat knife which the third applicant had bought for that purpose. The first victim was attacked in his home on 23 September 1995. Soon after, on the weekend of 7 October 1995, the third applicant met his second victim in a bar and arranged to take him home for sex; he instead took him to a forest, stabbed him to death and left the body there. The third victim was stabbed in the caravan where he lived on 30 November 1995. Finally, shortly before Christmas 1995, the third applicant went to a beach which was well-known for homosexual trysts. He met the fourth victim on the beach and stabbed him there.

23. Blood from the first and third victims was found on the third applicant's jacket and on the knife. Property from the first, second and fourth victims was found in his possession. He made extensive admissions about all four murders to the police. The police had been unaware of the second victim until the third applicant mentioned him to them. The body was recovered from the forest with his assistance. At trial, the applicant's defence was that the murders had been committed by someone else, though he admitted to having been present at all the murders save for that of the second victim.

24. After the third applicant was convicted, the trial judge passed the mandatory sentence of life imprisonment and recommended to the Secretary of State for the Home Department that, in his view, the applicant should never be released. Upon review, the Lord Chief Justice reported that he thought the minimum period before eligibility for release should be set at thirty years. On 27 September 2002, the Secretary of State decided to set a whole life tariff.

25. In 2008, pursuant to section 276 and schedule 22 to the Criminal Justice Act 2003, the third applicant applied to the High Court for review of the whole life tariff set by the Secretary of State. In its judgment of 12 June 2008 the High Court rejected the third applicant's submission that it should accept the Lord Chief Justice's recommendation of a minimum term of thirty years. It found that, while weight should be accorded to that recommendation, the Lord Chief Justice did not have regard to the principles set out in schedule 21 as the High Court was required to do. It also rejected the submission that an issue arose under Article 6 given that a whole life tariff had been set by the Secretary of State. The High Court found that the procedure for applying to the High Court under section 276 and schedule 22 of the Act provided the necessary independent review as to whether a prisoner should be released. The court also found that a whole life order would be compatible with Articles 3 and 5 of the Convention. Having regard to the general principles for determining the minimum term of a mandatory life sentence (as set out in schedule 21 to the Act), no issue of arbitrariness arose and whether such a sentence was disproportionate depended on the facts of each case.

26. The High Court found that, since the case involved the murder of two or more persons, sexual or sadistic conduct and a substantial degree of premeditation, under schedule 21 the starting point was a whole life order. There were no mitigating features and even the Lord Chief Justice, in recommending a minimum term of thirty years, had shared the trial judge's view that it might never be safe to release the third applicant. There were no reasons, therefore, to mitigate the starting point of a whole life order. The High Court added that, even if the starting point were a minimum term of thirty years, the aggravating features of the murders were such as to make a whole life order appropriate.

27. On 26 February 2009, the Court of Appeal dismissed the third applicant's appeal, finding that the High Court was not only entitled, but clearly right, to conclude that a whole life order was appropriate.

28. It appears that the third applicant, in order to allow him to appeal to the House of Lords, then applied to the Court of Appeal to certify that its judgment concerned a point of law of general public importance which ought to be considered by the House of Lords. On 14 August 2009, he was informed by the Court of Appeal's Criminal Appeal Office that, because the Court of Appeal had refused his application for permission to appeal against

sentence (as opposed to granting permission to appeal against sentence and then dismissing the appeal), an application to certify a point of law for the House of Lords could not be made.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Statutory provisions on mandatory life sentences

29. In England and Wales, the mandatory life sentence for murder is contained in section 1(1) of the Murder (Abolition of the Death Penalty) Act 1965.

30. The power of the Secretary of State to set tariff periods for mandatory life sentence prisoners, as contained in section 29 of the Crime Sentences Act 1997, was found by the House of Lords to be incompatible with Article 6 of the Convention in *R (Anderson) v. the Secretary of State for the Home Department* [2003] 1 AC 837. This led to the enactment of Chapter 7 of the Criminal Justice Act 2003 and schedules 21 and 22 to that Act.

31. Section 269 of the 2003 Act directs a trial judge, in passing a mandatory life sentence, to determine the minimum term which the prisoner must serve before he or she is eligible for early release on licence. By section 269(3), this minimum term must take into account the seriousness of the offence. Section 269(4) allows the trial judge to decide that, because of the seriousness of the offence, the prisoner should not be eligible for early release (in effect, to make a "whole life order"). Section 269(4) only applies to an offender who is 21 years of age or over when he committed the offence. Section 269(5) directs the trial judge, in considering the seriousness of the offence, to have regard *inter alia* to the principles set out in schedule 21 to the Act.

1. Schedule 21 to the 2003 Act

32. Schedule 21 provides for three different "starting points" which may be increased or decreased depending on the presence of aggravating or mitigating features in the offence: a whole life order, a minimum term of thirty years' imprisonment and a minimum term of fifteen years' imprisonment.

33. By paragraph 4(1) of the schedule, if the seriousness of the offence is "exceptionally high" the appropriate starting point is a whole life order. Paragraph 4(2) provides that the following cases would normally fall within this category:

> (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 or ideological cause, or

(d) a murder by an offender previously convicted of murder.

By paragraph 5(1), if the seriousness of the offence does not fall within paragraph 4(1) but is "particularly high", the appropriate starting point in determining the minimum term is thirty years' imprisonment. Paragraph 5(2) provides that the following cases would normally fall within this category:

(a) the murder of a police officer or prison officer in the course of his duty,

(b) a murder involving the use of a firearm or explosive,

(c) a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death),

(d) a murder intended to obstruct or interfere with the course of justice,

(e) a murder involving sexual or sadistic conduct,

(f) the murder of two or more persons,

(g) a murder that is racially or religiously aggravated or aggravated by sexual orientation, or

(h) a murder falling within paragraph 4(2) committed by an offender who was aged under 21 when he committed the offence."

Paragraphs 6 and 7 provide that, in all other cases, the appropriate starting point in determining the minimum term is fifteen years' imprisonment (twelve years for those less than eighteen years of age).

Paragraphs 8 and 9 provide that, having chosen a starting point, the trial judge should take into account any aggravating or mitigating factors which may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order.

Paragraph 10 provides that aggravating factors include:

"(a) a significant degree of planning or premeditation,

(b) the fact that the victim was particularly vulnerable because of age or disability,

(c) mental or physical suffering inflicted on the victim before death,

(d) the abuse of a position of trust,

(e) the use of duress or threats against another person to facilitate the commission of the offence,

(f) the fact that the victim was providing a public service or performing a public duty, and

(g) concealment, destruction or dismemberment of the body."

Paragraph 11 provides that mitigating factors include:

(a) an intention to cause serious bodily harm rather than to kill,

(b) lack of premeditation,

(c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957 (c. 11)), lowered his degree of culpability,

(d) the fact that the offender was provoked (for example, by prolonged stress) in a way not amounting to a defence of provocation,

(e) the fact that the offender acted to any extent in self-defence,

(f) a belief by the offender that the murder was an act of mercy, and

(g) the age of the offender."

2. Schedule 22 to the 2003 Act

34. Schedule 22 enacts a series of transitional measures for those prisoners who were given mandatory life sentences prior to the entry into force of section 269 of the Act and whose minimum terms of imprisonment were set by the Secretary of State. It also applies to those prisoners whom the Secretary of State directed should never be eligible for early release on licence (that is, those prisoners for whom a whole life tariff had been set). Paragraph 3 of the schedule allows both categories of prisoners to apply to the High Court. Upon such an application the High Court must, in the case of a prisoner who is subject to a minimum term of imprisonment set by the Secretary of State, make an order specifying the minimum term that prisoner must serve before he or she is eligible for early release. Under paragraph 3(1)(b), where the Secretary of State notified the prisoner that a whole life tariff had been set, the High Court may make an order that the prisoner should not be eligible for release ("a whole life order").

The minimum term set by the High Court must not be greater than that previously set by the Secretary of State (paragraph 3(1)(a)).

Similar provisions apply to sentences passed after the commencement of the Act in respect of murders committed before commencement. Paragraph 10 provides that the court may not make an order which, in its opinion, is greater than that which the Secretary of State would have been likely to have made under the previous practice.

35. In determining an application under paragraph 3, the High Court must have regard *inter alia* to the seriousness of the offence and, in so doing, must also have regard to the general principles set out in schedule 21 and any recommendations to the Secretary of State by the trial judge or the Lord Chief Justice as to the minimum term to be served by the offender before release on licence (paragraphs 4 and 5 of schedule 22). The offender may also make representations to the High Court, including representations

as to his or her behaviour and progress in prison since the offence, before the High Court determines the application. Representations can also be made by the victim or victims' families. The High Court may also hold an oral hearing in rare cases.

B. The Secretary of State's discretion to release

36. Section 30(1) of the Crime (Sentences) Act 1997 provides that 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.

The criteria for the exercise of that discretion are set out in Prison Service Order 4700 chapter 12, which, where relevant, provides:

> "• 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 (Indeterminate Sentenced Prisoner) is bedridden or similarly incapacitated, for example, those paralysed or suffering from a severe stoke;
>
> and
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> • the risk of re-offending (particularly of a sexual or violent nature) is minimal;
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> and
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> • 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."

37. According to the Government, as of 28 April 2011, 4,900 prisoners were serving mandatory life sentences for murder in England and Wales. Forty-one prisoners were subject to whole life orders (including those held in secure hospitals). Since 1 January 2000, thirty-seven whole life orders had been imposed, eight of which were subsequently reduced by the Court of Appeal. Since 2000, no prisoner serving a whole life term had been released on compassionate grounds. In response to a freedom of information request by the first applicant, the Ministry of Justice indicated that, as of 30 November 2009, thirteen life-sentence prisoners who had not been given whole life terms had been released on compassionate grounds.

C. Relevant domestic case-law on mandatory life sentences and the Convention

1. Case-law on the pre-2003 Act system

38. In *R. v. Lichniak* and *R. v. Pyrah* [2003] 1 AC 903, the House of Lords considered that, in its operation at that time, a mandatory life sentence was not incompatible with either Articles 3 or 5 of the Convention.

Such a sentence was partly punitive, partly preventative. The punitive element was represented by the tariff term, imposed as punishment for the serious crime which the convicted murderer had committed. The preventative element was represented by the power to continue to detain the convicted murderer in prison unless and until the Parole Board, an independent body, considered it safe to release him, and also by the power to recall to prison a convicted murderer who had been released if it was judged necessary to recall him for the protection of the public (Lord Bingham of Cornhill at paragraph 8 of the judgment).

The House of Lords therefore held firstly, that the appellant's complaints were not of sufficient gravity to engage Article 3 of the Convention and secondly, that the life sentence was not arbitrary or otherwise contrary to Article 5 § 1 of the Convention. Lord Bingham added:

> "If the House had concluded that on imposition of a mandatory life sentence for murder the convicted murderer forfeited his liberty to the state for the rest of his days, to remain in custody until (if ever) the Home Secretary concluded that the public interest would be better served by his release than by his continued detention, I would have little doubt that such a sentence would be found to violate articles 3 and 5 of the European Convention on Human Rights ... as being arbitrary and disproportionate."

39. In *R. v. Secretary of State for the Home Department, ex parte Hindley* [2001] 1 AC 410, HL and *R. v. Anderson* [2003] 1 AC 837, HL, the House of Lords found that, under the tariff system then in operation, there was "no reason, in principle, why a crime or crimes, if sufficiently heinous should not be regarded as deserving lifelong incarceration for purposes of pure punishment" (per Lord Steyn at pp. 416H). Lord Steyn also observed: "there is nothing logically inconsistent with the concept of a tariff by saying that there are cases were 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" (p. 417H). The House of Lords also found that the Secretary of State had not unlawfully fettered his discretion in reviewing the cases of prisoners where a whole life tariff was in place after the prisoner had served twenty-five years' imprisonment and reducing the tariff in appropriate cases.). The judgment records the Secretary of State's policy statement of 10 November 1997, in which the Secretary of State indicated that he was: "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." The

Secretary of State indicated that he would 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 would consider issues beyond the sole criteria of retribution and deterrence (p. 417A-C).

2. Case-law on the 2003 Act system

40. In *R v. Bieber* [2009] 1 WLR 223 the Court of Appeal considered the compatibility of the 2003 Act with Article 3 of the Convention in the light of *Kafkaris v. Cyprus* [GC], no. 21906/04, ECHR 2008-...

It found that a whole life order did not contravene Article 3 of the Convention because of the possibility of compassionate release by the Secretary of State. It also found that the imposition of an irreducible life sentence would not itself constitute a violation of Article 3 but rather that a potential violation would only occur once the offender had been detained beyond the period that could be justified on the ground of punishment and deterrence. The court observed:

> "45. While under English law the offence of murder attracts a mandatory life sentence, this is not normally an irreducible sentence. The judge specifies the minimum term to be served by way of punishment and deterrence before the offender's release on licence can be considered. Where a whole life term is specified this is because the judge considers that the offence is so serious that, for purposes of punishment and deterrence, the offender must remain in prison for the rest of his days. For the reasons that we have given, we do not consider that the Strasbourg court has ruled that an irreducible life sentence, deliberately imposed by a judge in such circumstances, will result in detention that violates article 3. Nor do we consider that it will do so.
>
> 46. It may be that the approach of the Strasbourg court will change. There seems to be a tide in Europe that is setting against the imposition of very lengthy terms of imprisonment that are irreducible. Thus it may become necessary to consider whether whole life terms imposed in this jurisdiction are, in fact irreducible.
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> ...
>
> Under the regime that predated the 2003 Act it was the practice of the Secretary of State to review the position of prisoners serving a whole life tariff after they had served 25 years with a view to reducing the tariff in exceptional circumstances, such as where the prisoner had made exceptional progress whilst in custody. No suggestion was then made that the imposition of a whole life tariff infringed article 3.
>
> ...
>
> Under the current regime the Secretary of State has a limited power to release a life prisoner under section 30 of the Crime (Sentences) Act 1997.
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> ...
>
> 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.

49. For these reasons, applying the approach of the Strasbourg court in *Kafkaris v Cyprus* 12 February 2008, we do not consider that a whole life term should be considered as a sentence that is irreducible. Any article 3 challenge where a whole life term has been imposed should therefore be made, not at the time of the imposition of the sentence, but at the stage when the prisoner contends that, having regard to all the material circumstances, including the time that he has served and the progress made in prison, any further detention will constitute degrading or inhuman treatment.

50. For these reasons we reject the challenge made to the defendant's sentence that is founded on article 3.

51 We would add, for the avoidance of doubt, that we have not been asked to consider, nor have we, whether the decision under section 30 of the 1997 Act is one that should properly be taken by a judge rather than by a minister."

41. The transitional measures set out in schedule 22 were found by the Court of Appeal to be compatible with Articles 6 and 7 of the Convention in *R v. Pitchfork* [2009] EWCA Crim 963. The schedule expressly provided that the outcome of the High Court review could not be an increase in the minimum period set by the Secretary of State. It was not in breach of Article 7 to direct the High Court to consider the general principles set out in schedule 21: neither those principles nor the original recommendations by the trial judge and the Lord Chief Justice were to enjoy primacy over the other. Instead, the High Court was conducting a fresh review, taking account of both the judicial recommendations and schedule 21.

42. In *R v. Neil Jones and Others* [2006] 2 Cr. App. R. (S.) 19 the Court of Appeal held that protection of the public was not a relevant factor in fixing the minimum term, since it was the task of the Parole Board to ensure that the offender was not released after serving the minimum term unless this presented no danger to the public. The court also held:

"A whole life order should be imposed where the seriousness of the offending is so exceptionally high that just punishment requires the offender to be kept in prison for the rest of his or her life. Often, perhaps usually, where such an order is called for the case will not be on the borderline. The facts of the case, considered as a whole, will leave the judge in no doubt that the offender must be kept in prison for the rest of his or her life. Indeed if the judge is in doubt this may well be an indication that a finite minimum term which leaves open the possibility that the offender may be released for the final years of his or her life is the appropriate disposal. To be imprisoned for a finite period of 30 years or more is a very severe penalty. If the case includes one or more of the factors set out in para.4(2) it is likely to be a case that calls for a whole life order, but the judge must consider all the material facts before concluding that a very lengthy finite term will not be a sufficiently severe penalty."

43. In *Attorney-General's Reference No 38 of 2008* (also known as *R v. Wilson*) [2008] EWCA Crim 2122, the offender had been convicted of murder in 1991, and was notified of the decision of the Secretary of State to set a whole life tariff in 1994. Upon an application to the High Court, the whole life tariff was substituted by a minimum term of eighteen years'

imprisonment. That decision was reviewed by the Court of Appeal, which increased the minimum term to thirty years' imprisonment. The Court of Appeal also observed that it remained open to the High Court to consider the recommendation of the trial judge and Lord Chief Justice in their contemporaneous context but, as in any case, the findings and views of the trial judge represented a critical element in any sentencing decision. The recommendations were not subsidiary to the provisions in schedule 21 and paragraph 4(2) of schedule 22 made it clear that proper weight should be given to these recommendations in the review process. The Court of Appeal accepted that the recommendations in the case before it, and in many cases like it, would be "likely to have been made in a sentencing environment in which the term to be served would be likely to be shorter than it is now".

44. In *R v. Leigers* [2005] 2 Cr. App. R. (S.) 104 the Court of Appeal stated that schedule 21 provided an even more rigorous approach to the determination of the minimum term than had applied previously and, when followed, would in some cases lead to longer minimum terms. However, in that case, which concerned a sentence passed after the commencement of the 2003 Act in respect of a murder committed before its commencement, the court went on to state that the scheme was compatible with Articles 5 and 7 of the Convention, given the transitional measures contained in paragraph 10 of schedule 22.

3. R (Wellington) v. Secretary of State for the Home Department [2008] UKHL 72

45. The United States requested the extradition of Ralston Wellington from the United Kingdom to stand trial in Missouri on two counts of murder in the first degree. In his appeal against extradition, Mr Wellington argued that his surrender would violate Article 3 of the Convention, on the basis that there was a real risk that he would be subjected to inhuman and degrading treatment in the form of a sentence of life imprisonment without parole.

46. In giving judgment in the High Court ([2007] EWHC 1109 (Admin)), Lord Justice Laws found that there were "powerful arguments of penal philosophy" which suggested that risk of a whole-life sentence without parole intrinsically violated Article 3 of the Convention. He observed:

> "The abolition of the death penalty has been lauded, and justified, in many ways; but it must have been founded at least on the premise that the life of every person, however depraved, has an inalienable value. The destruction of a life may be accepted in some special circumstances, such as self-defence or just war; but retributive punishment is never enough to justify it. Yet a prisoner's incarceration without hope of release is in many respects in like case to a sentence of death. He can never atone for his offence. However he may use his incarceration as time for amendment of life, his punishment is only exhausted by his last breath. Like the death sentence the whole-life tariff is *lex talionis*. But its notional or actual symmetry with the crime for

> which it is visited on the prisoner (the only virtue of the *lex talionis*) is a poor guarantee of proportionate punishment, for the whole-life tariff is arbitrary: it may be measured in days or decades according to how long the prisoner has to live. It is therefore liable to be disproportionate – the very vice which is condemned on Article 3 grounds – unless, of course, the death penalty's logic applies: the crime is so heinous it can never be atoned for. But in that case the supposed inalienable value of the prisoner's life is reduced, merely, to his survival: to nothing more than his drawing breath and being kept, no doubt, confined in decent circumstances. That is to pay lip-service to the value of life; not to vouchsafe it."

However, and "not without misgivings", he considered that the relevant authorities, including those of this Court, suggested an irreducible life sentence would not always raise an Article 3 issue.

47. On Wellington's appeal to the House of Lords, a majority of their Lordships found that Article 3, insofar as it applied to inhuman and degrading treatment and not to torture, was applicable only in attenuated form to extradition cases. In any event, all five Law Lords found that the sentence likely to be imposed on the appellant would not be irreducible; having regard to the powers of clemency and commutation of the Governor of Missouri, it would be just as reducible as the sentence at issue in *Kafkaris*.

48. All five Law Lords also noted that, in *Kafkaris*, the Court had only said that the imposition of an irreducible life sentence may raise an issue under Article 3. They found that the imposition of a whole life sentence would not constitute inhuman and degrading treatment in violation of Article 3 *per se*, unless it were grossly or clearly disproportionate. Lord Brown in particular noted:

> "Having puzzled long over this question, I have finally concluded that the majority of the Grand Chamber [in *Kafkaris*] would not regard even an irreducible life sentence—by which, as explained, I understand the majority to mean a mandatory life sentence to be served in full without there ever being proper consideration of the individual circumstances of the defendant's case—as violating article 3 unless and until the time comes when further imprisonment would no longer be justified on any ground—whether for reasons of punishment, deterrence or public protection. It is for that reason that the majority say only that article 3 may be engaged."

49. Moreover, Lord Hoffmann, Lord Scott, Baroness Hale and Lord Brown all doubted Lord Justice Laws' view (endorsed by the Privy Council in *de Boucherville* – see section 3 below) that life imprisonment without parole was *lex talionis*. Lord Hoffmann, Baroness Hale and Lord Brown did not accept his premise that the abolition of the death penalty had been founded on the idea that the life of every person had an inalienable value; there were other, more pragmatic reasons for abolition such as its irreversibility and lack of deterrent effect. Lord Scott rejected the view that an irreducible life sentence was inhuman and degrading because it denied a prisoner the possibility of atonement; once it was accepted that a whole life sentence could be a just punishment, atonement was achieved by the prisoner serving his sentence.

50. Wellington's application to this Court was struck out on 5 October 2010, the applicant having indicated his wish to withdraw it; *Wellington v. the United Kingdom* (dec.), no. 60682/08.

III. RELEVANT INTERNATIONAL AND COMPARATIVE LAW ON LIFE SENTENCES AND "GROSSLY DISPROPORTIONATE" SENTENCES

51. The relevant texts of the Council of Europe, the European Union and other international legal texts on the imposition and review of sentences of life imprisonment, including the obligations of Council of Europe member States when extraditing individuals to States where they may face such sentences, are set out in *Kafkaris*, cited above, at §§ 68-76. Additional materials before the Court in the present cases (and those materials in *Kafkaris* that are expressly relied on by the parties) may be summarised as follows.

A. Council of Europe texts

52. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") prepared a report on "Actual/Real Life Sentences" dated 27 June 2007 (CPT (2007) 55). The report reviewed various Council of Europe texts on life sentences, including recommendations (2003) 22 and 23, and stated in terms that: (a) the principle of making conditional release available is relevant to all prisoners, "even to life prisoners"; and (b) that all Council of Europe member States had provision for compassionate release but that this "special form of release" was distinct from conditional release.

It noted the view that discretionary release from imprisonment, as with its imposition, was a matter for the courts and not the executive, a view which had led to proposed changes in the procedures for reviewing life imprisonment in Denmark, Finland and Sweden. The report also quoted with approval the CPT's report on its 2007 visit to Hungary in which it stated:

> "[A]s regards "actual lifers", the CPT has serious reservations about the very concept according to which such prisoners, once they are sentenced, are considered once and for all as a permanent threat to the community and are deprived of any hope to be granted conditional release".

The report's conclusion included recommendations that: no category of prisoners should be "stamped" as likely to spend their natural life in prison; no denial of release should ever be final; and not even recalled prisoners should be deprived of hope of release.

B. The International Criminal Court

53. Article 77 of the Rome Statute of the International Criminal Court allows for the imposition of a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. Such a sentence must be reviewed after twenty-five years to determine whether it should be reduced (Article 110).

C. The European Union

54. Article 5(2) of Council Framework Decision of 13 June 2002 on the European arrest warrant provides:

> "if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure..."

D. Life sentences in the Contracting States

55. According to a comparative study provided by the applicants (D. Van Zyl Smit, "Outlawing Irreducible Life Sentences: Europe on the Brink?", 23: 1 *Federal Sentencing Reporter* Vol 23, No 1 (October 2010)) the majority of European countries do not have irreducible life sentences, and some, including Portugal, Norway and Spain, do not have life sentences at all. In Austria, Belgium, Czech Republic, Estonia, Germany, Lithuania, Luxembourg, Poland, Romania, Russia, Slovakia, Slovenia, Switzerland and Turkey, prisoners sentenced to life imprisonment have fixed periods after which release is considered. In France three such prisoners have no minimum period but it appears they can be considered for release after 30 years. In Switzerland there are provisions for indeterminate sentences for dangerous offenders where release can only follow new scientific evidence that the prisoner was not dangerous, although the provisions have not been used. The study concludes that only the Netherlands and England and Wales have irreducible life sentences.

E. Germany

56. Article 1 of the Basic Law of the Federal Republic of Germany provides that human dignity shall be inviolable. Article 2(2) provides:

> "Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law."

The compatibility of a mandatory sentence of life imprisonment for murder with these provisions was considered by the Federal Constitutional Court in the *Life Imprisonment* case of 21 June 1977, 45 BVerfGE 187 (an English translation of extracts of the judgment, with commentary, can be found in D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd ed.), Duke University Press, Durham and London, 1997 at pp. 306-313).

The court found that the State could not turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth. Respect for human dignity and the rule of law meant the humane enforcement of life imprisonment was possible only when the prisoner was given "a concrete and realistically attainable chance" to regain his freedom at some later point in time.

The court underlined that prisons also had a duty to strive towards the re-socialisation of prisoners, to preserve their ability to cope with life and to counteract the negative effects of incarceration and the destructive changes in personality that accompanied imprisonment. It recognised, however, that, for a criminal who remained a threat to society, the goal of rehabilitation might never be fulfilled; in that case, it was the particular personal circumstances of the criminal which might rule out successful rehabilitation rather than the sentence of life imprisonment itself. The court also found that, subject to these conclusions, life imprisonment for murder was not a senseless or disproportionate punishment.

57. In the later *War Criminal* case 72 BVerfGE 105 (1986), where the petitioner was eighty-six years of age and had served twenty years of a life sentence imposed for sending fifty people to the gas chambers, the court considered that the gravity of a person's crime could weigh upon whether he or she could be required to serve his or her life sentence. However, a judicial balancing of these factors should not place too heavy an emphasis on the gravity of the crime as opposed to the personality, state of mind, and age of the person. In that case, any subsequent review of the petitioner's request for release would be required to weigh more heavily than before the petitioner's personality, age and prison record.

58. In its decision of 16 January 2010, BVerfG, 2 BvR 2299/09, the Federal Constitutional Court considered an extradition case where the offender faced "aggravated life imprisonment until death" (*erschwerte lebenslängliche Freiheitsstrafe bis zum Tod*) in Turkey. The German government had sought assurances that he would be considered for release and had received the reply that the President of Turkey had the power to remit sentences on grounds of chronic illness, disability, or old age. The court refused to allow extradition, finding that this power of release offered

only a vague hope of release and was thus insufficient. Notwithstanding the need to respect foreign legal orders, if someone had no practical prospect of release such a sentence would be cruel and degrading (*grausam und erniedrigend*) and would infringe the requirements of human dignity provided for in Article 1.

F. Canada

59. Section 1 of the Canadian Charter of Rights provides that the Charter guarantees the rights and freedoms set out in it "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Section 7 provides:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Section 12 provides:

> "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

60. In *United States v. Burns* [2001] S.C.R. 283, Burns and another (the respondents) were to be extradited from Canada to the State of Washington to stand trial for murders allegedly committed when they were both eighteen. Before making the extradition order the Canadian Minister of Justice had not sought assurances that the death penalty would not be imposed. The Supreme Court of Canada found that the remoteness between the extradition and the potential imposition of capital punishment meant the case was not appropriately considered under section 12 but under section 7. However, the values underlying section 12 could form part of the balancing process engaged under section 7. The extradition of the respondents would, if implemented, deprive them of their rights of liberty and security of person as guaranteed by section 7. The issue was whether such a deprivation was in accordance with the principles of fundamental justice. While extradition could only be refused if it "shocked the conscience" an extradition that violated the principles of fundamental justice would always do so. The court balanced the factors that favoured extradition against those that favoured seeking assurances that the death penalty would not be sought. The latter included the fact that a degree of leniency for youth was an accepted value in the administration of justice, even for young offenders over the age of eighteen. The court concluded that the objectives sought to be advanced by extradition without assurances would be as well served by extradition with assurances. The court held therefore that assurances were constitutionally required by section 7 in all but exceptional cases.

61. In *United States of America v. Ferras; United States of America v. Latty*, [2006] 2 SCR 77, the appellants were to be extradited to the United States to face charges of fraud (the *Ferras* case) or trafficking of cocaine

(the *Latty* case). The appellants in the *Latty* case had argued that, if extradited and convicted they could receive sentences of ten years to life without parole and this would "shock the conscience". In dismissing the appeals, the Supreme Court affirmed the balancing approach laid down in *Burns* to determining whether potential sentences in a requesting state would "shock the conscience". The harsher sentences the appellants might receive if convicted in the United States were among the factors militating against their surrender but they had offered no evidence or case-law to back up their assertions that the possible sentences would shock the conscience of Canadians. The factors favouring extradition far outweighed those that did not.

62. The Supreme Court has also found that a grossly disproportionate sentence will amount to cruel and unusual treatment or punishment within the meaning of section 12 of the Charter (see, *inter alia*, *R v. Smith (Edward Dewey)* [1987] 1 SCR 1045). In *R v. Luxton* [1990] 2 S.C.R. 711, the court considered that, for first degree murder, a mandatory minimum sentence of life imprisonment without eligibility for parole for twenty-five years was not grossly disproportionate. Similarly, in *R v. Latimer* 2001 1 SCR 3, for second degree murder, a mandatory minimum sentence of life imprisonment without eligibility for parole for ten years was not grossly disproportionate. The court observed that gross disproportionality would only be found on "rare and unique occasions" and that test for determining this issue was "very properly stringent and demanding".

G. South Africa

63. In *Dodo v. the State* (CCT 1/01) [2001] ZACC 16, the South African Constitutional Court considered whether a statutory provision which required a life sentence for certain offences including murder, was compatible with the constitutional principle of the separation of powers, the accused's constitutional right to a public trial and the constitutional prohibition on cruel, inhuman or degrading treatment or punishment. The court found none of these constitutionals provisions was infringed, since the statute allowed a court to pass a lesser sentence if there were substantial and compelling circumstances. The court did, however, observe that the concept of proportionality went to the heart of the inquiry as to whether punishment was cruel, inhuman or degrading.

64. In *Niemand v. The State* (CCT 28/00) [2001] ZACC 11, the court found an indeterminate sentence imposed pursuant to a declaration that the defendant was a "habitual criminal" to be grossly disproportionate because it could amount to life imprisonment for a non-violent offender. The court "read in" a maximum sentence of fifteen years to the relevant statute.

H. The United States of America

65. The Eighth Amendment to the United States Constitution provides, *inter alia*, that cruel and unusual punishments shall not be inflicted. It has been interpreted by the Supreme Court of the United States as prohibiting extreme sentences that are grossly disproportionate to the crime (*Graham v. Florida* 130 S. Ct. 2011, 2021 (2010)). There are two categories of cases addressing proportionality of sentences.

The first category is a case-by-case approach, where the court considers all the circumstances of the case to determine whether the sentence is excessive. This begins with a "threshold comparison" of the gravity of the offence and the harshness of the penalty. If this leads to an inference of gross disproportionality, the court compares the sentence in question with sentences for the same crime in the same jurisdiction and other jurisdictions. If that analysis confirms the initial inference of gross disproportionality, a violation of the Eighth Amendment is established.

In the second category of cases, the Supreme Court has invoked proportionality to adopt "categorical rules" prohibiting a particular punishment from being applied to certain crimes or certain classes of offenders.

66. Under the first category, the Supreme Court has struck down as grossly disproportionate a sentence of life imprisonment without parole imposed on a defendant with previous convictions for passing a worthless cheque (*Solem v. Helm* 463 US 277 (1983)). It has upheld the following sentences: life with the possibility of parole for obtaining money by false pretences (*Rummel v. Estelle* 445 US 263 (1980)); life imprisonment without parole for possessing a large quantity of cocaine (*Harmelin v. Michigan* 501 US 957 (1991)); twenty-five years to life for theft under a "three strikes" recidivist sentencing law (*Ewing v. California* 538 US 11 (2003)); forty years' imprisonment for distributing marijuana (*Hutto v. Davis* 454 US 370 (1982)).

67. Examples of cases considered under the second category include *Coker v. Georgia* 433 US 584 (1977) (prohibiting capital punishment for rape) and *Roper v. Simmons* 543 US 551 (2005) (prohibiting capital punishment for juveniles under eighteen). In *Graham*, cited above, the court held that the Eighth Amendment also prohibited the imposition of life imprisonment without parole on a juvenile offender who did not commit homicide. The court found that life imprisonment without parole was an especially harsh punishment for a juvenile and that the remote possibility of pardon or other executive clemency did not mitigate the harshness of the sentence. Although a State was not required to guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime, it had to provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. The court also held that a sentence lacking in

legitimate penological justification (such as retribution, deterrence, incapacitation and rehabilitation) was, by its nature, disproportionate. Such purposes could justify life without parole in other contexts, but not life without parole for juvenile non-homicide offenders.

I. Other jurisdictions

68. In *Reyes v. the Queen* [2002] UKPC 11 the Judicial Committee of the Privy Council considered that a mandatory death penalty for murder by shooting was incompatible with section 7 of the Constitution of Belize, which prohibits torture and ill-treatment in identical terms to Article 3 of the Convention. Lord Bingham observed that to deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate was to treat him as no human being should be treated. The relevant law was not saved by the powers of pardon and commutation vested by the Constitution in the Governor-General, assisted by an Advisory Council; in Lord Bingham's words "a non-judicial body cannot decide what is the appropriate measure of punishment to be visited on a defendant for the crime he has committed".

69. In *de Boucherville v. the State of Mauritius* [2008] UKPC 70 the appellant had been sentenced to death. With the abolition of the death penalty in Mauritius, his sentence was commuted to a mandatory life sentence. The Privy Council considered the Court's judgment in *Kafkaris*, cited above, and found that the safeguards available in Cyprus to prevent Kafkaris from being without hope of release were not available in Mauritius. The Mauritian Supreme Court had interpreted such a sentence as condemning de Boucherville to penal servitude for the rest of his life and the provisions of the relevant legislation on parole and remission did not apply. This meant the sentence was manifestly disproportionate and arbitrary and so contrary to section 10 of the Mauritian Constitution (provisions to secure protection of law, including the right to a fair trial). It had also been argued by the appellant that the mandatory nature of the sentence violated section 7 of the Constitution (the prohibition of torture, inhuman or degrading punishment or other such treatment). In light of its conclusion on section 10, the Committee considered it unnecessary to decide that question or to consider the relevance of the possibility of release under section 75 (the presidential prerogative of mercy). It did, however, find that the safeguards available in Cyprus (in the form of the Attorney-General's powers to recommend release and the President's powers to commute sentences or decree release) were not available in Mauritius. It also acknowledged the appellant's argument that, as with the mandatory sentence of death it had considered in *Reyes*, a mandatory sentence of life imprisonment did not allow for consideration of the facts of the case. The

Privy Council also considered any differences between mandatory sentences of death and life imprisonment could be exaggerated and, to this end, quoted with approval the dicta of Lord Bingham in *Lichniak* and Lord Justice Laws in *Wellington* (at paragraphs 46 and 38 above).

70. In *State v. Philibert* [2007] SCJ 274, the Supreme Court of Mauritius held that a mandatory sentence of 45 years' imprisonment for murder amounted to inhuman or degrading treatment in violation of section 7 on the grounds that it was disproportionate.

71. In *State v. Tcoeib* [1997] 1 LRC 90 the Namibian Supreme Court considered the imposition of a discretionary life sentence to be compatible with section 8 of the country's constitution (subsection (c) of which is identical to Article 3 of the Convention). Chief Justice Mahomed, for the unanimous court, found the relevant statutory release scheme to be sufficient but observed that if release depended on the "capricious exercise" of the discretion of the prison or executive authorities, the hope of release would be "too faint and much too unpredictable" for the prisoner to retain the dignity required by section 8. It was also observed that life imprisonment could amount to cruel, inhuman or degrading treatment if it was grossly disproportionate to the severity of the offence. The High Court of Namibia found mandatory minimum sentences for robbery and possession of firearms to be grossly disproportionate in *State v. Vries* 1997 4 LRC 1 and *State v Likuwa* [2000] 1 LRC 600.

72. In *Lau Cheong v. Hong Kong Special Administrative Region* [2002] HKCFA 18, the Hong Kong Court of Final Appeal rejected a challenge to the mandatory life sentence for murder. It found that the possibility of regular review of the sentence by an independent board meant it was neither arbitrary nor grossly disproportionate and thus it did not amount to cruel, inhuman or degrading punishment.

73. Section 9 of the New Zealand Bill of Rights Act 1990 also protects against disproportionately severe treatment or punishment.

THE LAW

I. JOINDER OF THE APPLICATIONS

74 Given their similar factual and legal background, the Court decides that the three applications should be joined pursuant to Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

75. The applicants complained that their whole life orders violated Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

1. The applicants

76. The applicants submitted that, from the international materials set out in *Kafkaris*, it was clear that the Court considered that an irreducible life sentence did not merely raise an issue under Article 3, but would in fact violate Article 3. The further materials summarised at paragraphs 51–73 above supported that position. The comparative materials also indicated that irreducible life sentences were confined to only two legal systems: the Netherlands and England and Wales (see Professor Zyl Smit's study at paragraph 55 above).

77. They considered that the Court of Appeal had erred in *Bieber*, cited above, in distinguishing between irreducible mandatory life sentences and irreducible discretionary life sentences. There was no proper basis in *Kafkaris* for the Court of Appeal's conclusion that only an irreducible mandatory life sentence would raise an issue under Article 3. If this were the case, prisoners convicted of identical offences in different Contracting States might both receive irreducible life sentences but with different Convention consequences: there would be a violation if the sentence in the first State were mandatory but there would be no violation if the sentence in the second State were discretionary. Yet, in either case the effect was the same: imprisonment without hope of release.

78. They accepted that life sentences were not, of themselves, objectionable and that a prisoner sentenced to life imprisonment may serve the rest of his or her life in prison based on their personal characteristics and risk. However, the Court of Appeal in *Bieber* had also erred in finding that a violation of Article 3 could not arise at the moment of imposition of a sentence. Instead, they submitted that a violation arose because of the imposition of hopelessness that came with such a sentence.

79. The Secretary of State's power of compassionate release was not such as to make a life sentence reducible. It was not a general power of release and involved no consideration of progress, rehabilitation, remorse or redemption. Compassionate release was, moreover, construed narrowly as applying only when the prognosis was death within three months and there was no risk to the public. This contrasted unfavourably with the approach taken by the President of Cyprus, who also considered factors such as the

nature of the offence, time served, genuine remorse and whether continued detention was necessary for retribution and deterrence (*Kafkaris* at §§ 86 and 87). The Secretary of State's power had never been exercised and could not be interpreted as allowing conditional release (i.e. release other than on compassionate grounds), which was what Article 3 required. The need for conditional release, and not just compassionate release, was plain from *Kafkaris*, from the CPT's report of 2007, and from the Federal Constitutional Court's decisions in the *Life Imprisonment* case and the case concerning extradition to Turkey (see paragraphs 52, 56 and 58 above). Requiring the possibility of conditional release was not overly prescriptive; indeed, conditional release had clearly been contemplated by the previous twenty-five year review policy of the Secretary of State.

80. The second applicant further relied on the fact that, in the 15 December 1994 letter (see paragraph 17 above) he had apparently also been promised 10, 25 and then five-yearly reviews of his whole life tariff only for the Secretary of State to renege on that system. He also relied on the fact that he was only twenty-five years of age when he had been convicted: an irreducible life sentence imposed on a young man was very different from one imposed on a much older man. This served to underline the inequity, cruelty and illogicality of irreducible life sentences.

2. The Government

81. The Government submitted that, generally, matters of sentencing fell outside the proper scope of the Convention (*Léger v. France*, no. 19324/02, § 72, ECHR 2006-...) but, nevertheless, a particular sentence could violate Article 3 if it were wholly unjustified or grossly disproportionate to the gravity of the crime (*Soering v. the United Kingdom*, 7 July 1989, § 104, Series A no. 161).

82. The Government further observed that the Court had only found in *Kafkaris* that an irreducible mandatory life sentence might give rise to an issue under Article 3 and the Court of Appeal in *Bieber* was correct to hold that no issue arose when an irreducible life sentence was imposed on a discretionary basis by a judge. Consequently, no Article 3 issue could arise at the moment when such a sentence was imposed. Instead, the Government submitted that a potential violation could only arise when further detention would constitute inhuman or degrading treatment and, indeed, that point may never be reached. However, in such a case it would be the detention itself and not the sentence which rendered the treatment of the prisoner inhuman or degrading.

83. In any event, a whole life order imposed in England and Wales was reducible both *de iure* and *de facto*. *De facto* reducibility did not require conditional release as this would be over-prescriptive given the different approaches taken by Contracting States to sentencing. Instead, compassionate release was sufficient. It was unsurprising that, since 2000,

no prisoner serving a whole life term has been released on compassionate grounds. First, there were only 41 prisoners serving such a term. Second, those prisoners had, by definition, committed the most heinous of crimes and there had been a judicial determination that a whole life term was necessary for punishment and deterrence. Therefore, the mere fact of having spent a considerable period of time in prison would not in itself provide a basis for compassionate release. Moreover, if release were required it would create a paradox that the more heinous the crime (and thus the more deserving a prisoner was of a whole life order), the greater the prospect of a violation of Article 3.

84. Contrary to the applicants' comparative study, there was also no consensus among the Contracting States on life sentences. This was illustrated by Article 5(2) of the Council Framework Decision on the European Arrest Warrant (see paragraph 54 above). This provided, in optional and not mandatory terms, for a State to refuse extradition unless the issuing State had provisions allowing for review of a sentence after twenty years or for the application of measures for clemency.

85. The Government therefore submitted that, in respect of each applicant, no issue arose because: (i) his whole life order had been imposed on a discretionary basis by a judge for the purposes of punishment and deterrence; (ii) the sentence was reducible; and (iii) continued detention did not amount to inhuman or degrading treatment.

B. Admissibility

86. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

C. Merits

87. The Court takes note of the parties' submissions as to whether the applicants' whole life orders are irreducible within the meaning of that term used in *Kafkaris*. However, given the views expressed by the Court of Appeal in *Bieber* and the House of Lords in *Wellington* in respect of *Kafkaris* (summarised at paragraphs 40 and 45–50 above), the Court considers it necessary to consider first whether a grossly disproportionate sentence imposed by a Contracting State would violate Article 3 and second, at what point in the course of a life or other very long sentence an Article 3 issue might arise.

88. For the first, the Court notes that all five Law Lords in *Wellington* found that, in a sufficiently exceptional case, an extradition would be in

violation of Article 3 if the applicant faced a grossly disproportionate sentence in the receiving State.

The Court further notes that, in their observations in the present cases, the Government, relying on the *Soering* judgment, accept that a particular sentence could violate Article 3 if it were wholly unjustified or grossly disproportionate to the gravity of the crime.

The Court notes that support for this proposition can also be found in the comparative materials before the Court. Those materials demonstrate that "gross disproportionality" is a widely accepted and applied test for determining when a sentence will amount to inhuman or degrading punishment, or equivalent constitutional norms (see the Eighth Amendment case-law summarised at paragraphs 65–67 above, the judgments of the Supreme Court of Canada at paragraph 62 above, and the further materials set out at paragraphs 68– 73 above).

89. Consequently, the Court is prepared to accept that while, in principle, matters of appropriate sentencing largely fall outside the scope of Convention (*Léger*, cited above, § 72), a grossly disproportionate sentence could amount to ill-treatment contrary to Article 3 at the moment of its imposition. However, the Court also considers that the comparative materials set out above demonstrate that "gross disproportionality" is a strict test and, as the Supreme Court of Canada observed in *Latimer* (see paragraph 62 above), it will only be on "rare and unique occasions" that the test will be met.

90. The Court now turns to the second issue raised by the Court of Appeal and House of Lords. It considers that, subject to the general requirement that a sentence should not be grossly disproportionate, for life sentences it is necessary to distinguish between three types of sentence: (i) a life sentence with eligibility for release after a minimum period has been served; (ii) a discretionary sentence of life imprisonment without the possibility of parole; and (iii) a mandatory sentence of life imprisonment without the possibility of parole.

91. The first sentence is clearly reducible and no issue can therefore arise under Article 3.

92. For the second, a discretionary sentence of life imprisonment without the possibility of parole, the Court observes that, normally, such sentences are imposed for offences of the utmost severity, such as murder or manslaughter. In any legal system, such offences, if they do not attract a life sentence, will normally attract a substantial sentence of imprisonment, perhaps of several decades. Therefore, any defendant who is convicted of such an offence must expect to serve a significant number of years in prison before he can realistically have any hope of release, irrespective of whether he is given a life sentence or a determinate sentence. It follows, therefore, that, if a discretionary life sentence is imposed by a court after due consideration of all relevant mitigating and aggravating factors, an Article 3

issue cannot arise at the moment when it is imposed. Instead, the Court agrees with the Court of Appeal in *Bieber* and the House of Lords in *Wellington* that an Article 3 issue will only arise when it can be shown: (i) that the applicant's continued imprisonment can no longer be justified on any legitimate penological grounds (such as punishment, deterrence, public protection or rehabilitation); and (ii) as the Grand Chamber stated in *Kafkaris*, cited above, the sentence is irreducible *de facto* and *de iure*.

93. For the third sentence, a mandatory sentence of life imprisonment without the possibility of parole, the Court considers that greater scrutiny is required. The vice of any mandatory sentence is that it deprives the defendant of any possibility to put any mitigating factors or special circumstances before the sentencing court (see, for instance, *Reyes* and *de Boucherville* at paragraphs 68 and 69 above). This is especially true in the case of a mandatory sentence of life imprisonment without the possibility of parole, a sentence which, in effect, condemns a defendant to spend the rest of his days in prison, irrespective of his level of culpability and irrespective of whether the sentencing court considers the sentence to be justified.

However, in the Court's view, these considerations do not mean that a mandatory sentence of life imprisonment without the possibility of parole is *per se* incompatible with the Convention, although the trend in Europe is clearly against such sentences (see, for example, the comparative study summarised at paragraph 55 above). Instead, these considerations mean that such a sentence is much more likely to be grossly disproportionate than any of the other types of life sentence, especially if it requires the sentencing court to disregard mitigating factors which are generally understood as indicating a significantly lower level of culpability on the part of the defendant, such as youth or severe mental health problems (see, for instance, *Hussain v. the United Kingdom* and *Prem Singh v. the United Kingdom*, judgments of 21 February 1996, *Reports* 1996-I at paragraphs 53 and 61 respectively and the Canadian case of *Burns*, at paragraph 93, quoted at paragraph 60 above).

The Court concludes therefore that, in the absence of any such gross disproportionality, an Article 3 issue will arise for a mandatory sentence of life imprisonment without the possibility of parole in the same way as for a discretionary life sentence, that is when it can be shown: (i) that the applicant's continued imprisonment can no longer be justified on any legitimate penological grounds; and (ii) that the sentence is irreducible *de facto* and *de iure* (*Kafkaris*, cited above)..

2. The present cases

94. The Court observes that, of the three sentences outlined above, only the first two may be imposed in England and Wales.

The whole life orders imposed in the present cases are, in effect, discretionary sentences of life imprisonment without parole. Once imposed, such sentences are not subject to later review: release can only be obtained from the Secretary of State on compassionate grounds.

The Court would observe that the Secretary of State's policy on compassionate release appears to be much narrower than the Cypriot policy on release which was considered in *Kafkaris*.

First, as presently drafted, the policy could conceivably mean that a prisoner will remain in prison even if his continued imprisonment cannot be justified on any legitimate penological grounds, as long as he does not become terminally ill or physically incapacitated.

Second, it is of some relevance that the practice of a twenty-five year review, which existed under the old system (see paragraphs 9 and 39 above), was not included in the reforms introduced by the 2003 Act. No clear explanation has been provided for this omission, even though it would appear that a twenty-five year review, supplemented by regular reviews thereafter, would be one means by which the Secretary of State could satisfy himself that the prisoner's imprisonment continued to be justified on legitimate penological grounds. In this connection, it is also of some relevance that Articles 77 and 110 of the Rome Statute of the International Criminal Court, provide for an identical review period for life sentences imposed by that court (paragraph 53 above).

Third, the Court doubts whether compassionate release for the terminally ill or physically incapacitated could really be considered release at all, if all that it means is that a prisoner dies at home or in a hospice rather than behind prison walls (see, for example, the CPT's report of 27 June 2007 at paragraph 52 above).

95. However, the Court considers that the issue of *de facto* reducibility does not arise for examination in the present cases.

First, the Court notes that the applicants have not sought to argue that their whole life orders were grossly disproportionate in their case. Given the gravity of the murders for which they were convicted, the Court does not find that they were.

Second, the Court considers that none of the applicants has demonstrated that their continued incarceration serves no legitimate penological purpose.

The first applicant, Mr Vinter, has only been serving his sentence for three years. His crime was a particularly brutal and callous murder, all the more so for the fact that it was committed while he was on parole from a life sentence imposed for a previous murder. Despite the evidence he has produced as to the deterioration in his mental state in that time, the Court is satisfied that his incarceration serves the legitimate penological purposes of punishment and deterrence.

The second and third applicants, Mr Bamber and Mr Moore, have now served respectively twenty-six and sixteen years in prison. However, they

were effectively re-sentenced in 2009 when they applied to the High Court for review of their whole life tariffs. In each case, the High Court had before it all relevant information on the applicants and the offences for which they had been convicted. There is no indication in that re-sentencing process that the High Court considered that either applicant's continued incarceration served no legitimate penological purpose; on the contrary, in each case the High Court found that the requirements of punishment and deterrence could only be satisfied by a whole life order. These were sentences that the High Court was entitled to impose and, in each case, it gave relevant, sufficient and convincing reasons for its decision. In light of the High Court's decisions, the Court is similarly satisfied that the continued incarceration of the second and third applicants served the legitimate penological purposes of punishment and deterrence.

96. For these reasons, the Court considers that there has been no violation of Article 3 of the Convention in the case of any of the applicants.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

A. Alleged violations of Articles 5 § 4 and 6 of the Convention

97. The applicants also complained that the imposition of whole life orders without the possibility of regular review by the courts violated Article 5 § 4 or, alternatively, Article 6 of the Convention. Article 5 § 4 of the Convention reads as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

Article 6, where relevant, provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

1. The parties' submissions

98. The applicants relied on, among other materials, the dictum of Lord Bingham in *Lichniak* (see paragraph 38 above). They considered that, although the substantive issue of an irreducible life sentence fell to be considered under Article 3, procedurally the need to review such a sentence fell under Article 5 § 4. If Article 3 required review of fitness for conditional release, then, as with other powers to review the legality of indeterminate sentences, such a review required the procedural protections of Article 5 § 4, as in *Stafford v. the United Kingdom* [GC], no. 46295/99, ECHR 2002-IV. Even if the Government were correct and the Secretary of State's power of compassionate release were sufficient for the purposes of Article 3, there would still be a problem under Article 5 § 4 as the power

was only engaged when there was an Article 3 issue which was distinct from that of a whole life sentence itself. This was because it was only possible to use the power of compassionate release in situations where the continuing detention was likely to be disproportionate and thereby inhuman and degrading. The applicants submitted that the previous system of a twenty-five year review would be compatible with Article 3 but not Article 5 § 4 because, under that procedure, the final decision lay with the executive and not the courts.

99. The Government submitted that, once an appropriate sentence for the purpose of punishment and deterrence has been lawfully determined and imposed by a court and confirmed on appeal, it was unnecessary for the sentence to be subjected to continual review. In this respect, the present cases were different from *Kafkaris*, cited above, where there had been no judicial determination of the appropriate length of sentence for the purpose of punishment and deterrence. In any event, the Secretary of State's decisions on compassionate grounds could be challenged by way of judicial review and, in *Bieber* (see paragraph 40 above), the Court of Appeal had held that the Secretary of State was to have regard to Article 3 in exercising his power of compassionate release. In *Hindley* (see paragraph 39 above), the House of Lords had commented favourably on the Secretary of State's practice of reviewing whole life tariffs after twenty-five years to determine whether they were still justified. However, this had been in the context of the argument that, in imposing a whole life tariff, the Secretary of State was fettering his discretion. That was not the case in respect of a whole life order imposed on a discretionary basis by a judge to reflect the severity of a defendant's crimes.

2. The Court's assessment

100. The Court considers that the applicants' complaint falls to be considered under Article 5 § 4 alone and it will proceed accordingly.

101. The Court further considers that the issue raised by this complaint has been determined by its recent admissibility decision in *Kafkaris v. Cyprus (no. 2)* (dec.), no. 9644/09, 21 June 2011. That application was introduced by Mr Kafkaris following the Grand Chamber's judgment in his case. He complained *inter alia* that, under Article 5 § 4, he was entitled to a further review of his detention, arguing that his original conviction by the Limassol Assize Court was not sufficient for the purposes of that provision. He submitted that he had already served the punitive period of his sentence and, relying on *Stafford*, cited above, argued that new issues affecting the lawfulness of his detention had arisen. These included the Grand Chamber's finding of a violation of Article 7, the Attorney-General's subsequent refusal to recommend a presidential pardon and the fact that, in habeas corpus proceedings, the Supreme Court had failed to consider factors such as his degree of dangerousness and rehabilitation.

102. The Court rejected that complaint as manifestly ill-founded. The Court found that the Assize Court had made it quite plain that the applicant had been sentenced to life imprisonment for the remainder of his life. It was clear, therefore, that the determination of the need for the sentence imposed on the applicant did not depend on any elements that were likely to change in time (unlike in *Stafford*, cited above, § 87). The "new issues" relied upon by the applicant could not be regarded as elements which rendered the reasons initially warranting detention obsolete or as new factors capable of affecting the lawfulness of his detention. Nor could it be said that the applicant's sentence was divided into a punitive period and a security period as he claimed. Accordingly, the Court considered that the review of the lawfulness of the applicant's detention required under Article 5 § 4 had been incorporated in the conviction pronounced by the courts, no further review therefore being required.

103. The Court considers the complaints made in the present cases to be indistinguishable from the complaint made in *Kafkaris (no. 2)*. The Court has accepted that continued detention may violate Article 3 if it is no longer justified on legitimate penological grounds and the sentence is irreducible *de facto* and *de iure*. However, contrary to the applicant's submissions, it does not follow that their detention requires to be reviewed regularly in order for it to comply with the provisions of Article 5. Moreover, it is clear from the trial judge's remarks in respect of the first applicant and the High Court's remarks in respect of the second and third applicants that whole life orders have been imposed on them to meet the requirements of punishment and deterrence. This is supported by the Court of Appeal's statement in *R v. Neil Jones and others* that a whole life order should be imposed "where the seriousness of the offending is so exceptionally high that just punishment requires the offender to be kept in prison for the rest of his or her life" (see paragraph 42 above). The present applicants' sentences are therefore different from the life sentence considered in *Stafford*, which the Court found was divided into a tariff period (imposed for the purposes of punishment) and the remainder of the sentence, when continued detention was determined by considerations of risk and dangerousness (paragraphs 79 and 80 of the judgment). Consequently, as in *Kafkaris (no. 2)*, the Court is satisfied that the lawfulness of the applicants' detention required under Article 5 § 4 was incorporated in the whole life orders imposed by the domestic courts in their cases, and no further review would be required by Article 5 § 4. Accordingly, these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Alleged violations of Article 7 of the Convention

104. The second and third applicants further complained that the making of whole life orders in their case by the High Court was in violation of Article 7 of the Convention.

105. Article 7, where relevant, provides as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

1. The parties' submissions

106. The second applicant submitted that the trial judge in his case had recommended a minimum term of twenty-five years but had been overruled by the Secretary of State in 1988. This was incompatible with Article 6 and should have played no part in the sentencing process. The High Court review, therefore, imposed a more severe penalty than the sentence which had been passed at the time of the offence. It was also clear that, in the High Court review, schedule 21 had been relied upon, even though it was a harsher sentencing regime than that which was applicable in 1986, when the second applicant had been convicted (see *R. v Leigers* at paragraph 44 above). Instead, the High Court should have been directed to have had more than just "regard" for the trial judge's recommendation; in order to ensure that no heavier penalty was imposed, the recommendation should be the critical element in the sentencing process because it reflected the applicable penalty at the time of the offence (see *Attorney-General's Reference No 38 of 2008* at paragraph 43 above). It was immaterial that, as the Government submitted (see paragraph 108 below), schedule 22 prohibited the High Court from imposing a minimum term that was higher than the term notified by the Secretary of State. Instead, for the review to be compatible with Article 7, schedule 22 should have required that no minimum term could be imposed which was higher than the trial judge's recommendation.

107. The third applicant conceded that the whole life term was technically available in 1996 when his offences were committed. However, it was very exceptional indeed for whole life orders to be imposed at the time. The whole life order for the murder of two or more persons involving pre-meditation and/or sexual or sadistic conduct had effectively been introduced by schedule 21. The High Court had specifically rejected the trial judge's recommendation of thirty years because of schedule 21, as had the Court of Appeal. Therefore, he too had been sentenced under a harsher statutory framework than at the time of the offences.

108. In the Government's submission there was no violation of Article 7. At all times, the mandatory sentence for murder was imprisonment for life, and this had always included the power to order that the applicants

should serve a whole life term. Neither applicant had received a penalty which was heavier than at the time of his offences or than that which had been imposed prior to the High Court's review. There had, furthermore, been recommendations in each case that the applicant should serve a whole life term (in one case by the Lord Chief Justice, in the other by the trial judge). It was also significant that paragraph 3(1)(a) of schedule 22 prevented the High Court from imposing a minimum term which was greater than that notified by the Secretary of State.

2. The Court's assessment

109. The Court observes that it does not appear to be in doubt that the setting of a minimum term in the context of a sentence of life imprisonment is a sentencing exercise and thus attracts the protection of Article 7. However, the Court is unable to accept that the process by which the second and third applicants' current whole life orders were imposed infringed Article 7. First, paragraph 3(1)(a) of schedule 22 expressly protects against the imposition of a longer minimum term than was initially imposed. Second, there is no evidence that, in practice, this statutory protection has been circumvented by the need to consider the principles set out in schedule 21. Schedule 21 may well reflect a stricter sentencing regime than was previously applied for the crime of murder and, if it were determinative of the minimum term to be imposed for offences committed prior to its enactment, might well have fallen foul of Article 7. However, as the Court of Appeal's ruling in *Pitchfork* demonstrates (see paragraph 41 above), this is not the case. In conducting its review under schedule 22, the High Court is to have regard to both schedule 21 and the previous recommendations made in respect of a life sentenced prisoner by the trial judge and the Lord Chief Justice. There is nothing objectionable in directing the High Court this way. Schedule 21 provides a comprehensive and carefully constructed framework for assessing the seriousness of a particular murder or murders and thus determining what minimum term is justified for the purposes of punishment and deterrence. All of the factors set out in it are commonly accepted factors for assessing the seriousness of murder. Indeed, given the limited reasons which were given in support of the recommendations made in respect of the second and third applicants, the Court considers that it was quite proper for the High Court to have had regard to the fuller provisions of schedule 21 when reviewing their minimum terms. Accordingly, the Court considers that the second and third applicants' complaints under Article 7 are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Joins* the applications unanimously;

2. *Declares*, unanimously, the applicants' complaints concerning Article 3 admissible and the remainder of the applications inadmissible;

3. *Holds*, by four votes to three, that there has been no violation of Article 3 of the Convention in respect of Mr Vinter;

4. *Holds*, by four votes to three, that there has been no violation of Article 3 of the Convention in respect of Mr Bamber;

5. *Holds*, by four votes to three, that there has been no violation of Article 3 of the Convention in respect of Mr Moore.

Done in English, and notified in writing on 17 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early	Lech Garlicki
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge De Gaetano;

(b) joint partly dissenting opinion of Judges Garlicki, David Thór Björgvinsson and Nicolaou.

L.G.
T.L.E.

CONCURRING OPINION OF JUDGE DE GAETANO

I have voted in this case with the majority for a finding of no violation of Article 3. What I find slightly puzzling is why the respondent Government did not rely more on the Royal Prerogative of Mercy (there seems to be, if at all, only a vague reference to it in § 64 of the Government's written observations of 28 April 2011). *If* my reading of English law is correct (I refer in particular to *Shields v. Secretary of State for Justice* [2008] EWHC 3102 (Admin); and *The Governance of Britain – Review of the Executive Royal Prerogative Powers: Final Report* (Ministry of Justice, October 2009)) the residual prerogative power of mercy – much wider and more flexible than the Presidential power under Article 53(4) of the Constitution of Cyprus – is applicable to cases similar to the applicants'. That being so, and quite apart from statutory powers and the powers of the Secretary of State under section 30 of the Crime (Sentences) Act 2007, one cannot speak of an irreducible life sentence or a life sentence without any prospect of release as understood in *Kafkaris*. The fact that this Royal Prerogative is used so sparingly appears to be the result of the introduction of statutory powers which have made it unnecessary, to a great extent, to resort to such prerogative. As stated in § 65 of the *Final Report* referred to above: "Use of the prerogative powers to grant free, conditional and remission pardons have been largely, but not entirely, superseded by statutory provisions. Residual prerogative powers may still be relied on, however, in exceptional circumstances." In this respect and for the purpose of Article 3, I see very little, if any, difference between the present applicants' case and the case of *Kafkaris*.

JOINT PARTLY DISSENTING OPINION OF JUDGES GARLICKI, DAVID THÓR BJÖRGVINSSON AND NICOLAOU

We fully share the majority view that there has been no violation of Articles 5 § 4, 6 and 7 of the Convention. However, on the Article 3 issue of inhuman or degrading treatment we conclude that there was a procedural infringement by reason of the absence of some mechanism that would remove the hopelessness inherent in a sentence of life imprisonment from which, independently of the circumstances, there is no possibility whatsoever of release while the prisoner is still well enough to have any sort of life outside prison.

Like the majority we see no problem in so far as the substantive aspect of Article 3 is concerned. A wholly unjustified or grossly disproportionate sentence could, at the time it is imposed, fall foul of Article 3. But the test is a strict one. It was described in the Canadian case of *R v. Latimer* [2001] 1 SCR 3 as "stringent and demanding"; and in *United States v. Burns* [2001] SCR 283 it was added, in an extradition context, that it must lead to the conclusion that the sentence would "shock the conscience" or violate principles of fundamental justice. As the Court pointed out in *Kafkaris v. Cyprus* [GC], no. 21906/04, § 97, ECHR 2008-..., a sentence of life imprisonment "is not in itself prohibited by or incompatible with Article 3". It made no difference that it was a mandatory rather than a discretionary sentence. Both may, at the time they are imposed, reflect the need for punishment and deterrence for the crimes committed and there would be no Article 3 issue on that score. The Court would, quite obviously, accord a large measure of deference to a judicial determination of sentence but both mandatory and discretionary life sentences are subject to the same overriding principle that they should not be wholly unjustified or grossly disproportionate. It should be noted, however, that in the present case nothing turns on this, for the applicants have not shown that the whole life orders imposed on them did not accord with principle.

It was made clear in *Kafkaris* that even in the case of a mandatory sentence of life imprisonment the whole of that sentence may be served without infringing Article 3. At the same time *Kafkaris* underlined that in a particular case circumstances may eventually arise that make it appropriate for domestic authorities to consider, in some way, whether continued detention would amount to inhuman or degrading treatment. The present United Kingdom provisions for compassionate leave which, subject to various conditions apply to prisoners who are terminally ill and about to die as also to prisoners who, being very severely incapacitated, are paralysed or bedridden with not much life to live outside prison walls, do not meet the procedural requirement referred to in *Kafkaris*. In the light of what the Court said in *Kafkaris*, the House of Lords accepted in *R (Wellington)*

v. Secretary of State for the Home Department [2008] UKHL 72 that a time may come when even a discretionary whole life order may have to be looked at again to see whether the prisoner's circumstances have so changed as to render further detention inhuman and degrading.

The real point at issue in the present case lies in whether the need for a possibility of revisiting a whole life order requires that there should already be in place a suitable mechanism in the domestic system, so as to lend credence to the existence of such possibility, and thus afford a measure of hope to the convicted person; or whether, as stated in paragraphs 92-94 of the judgment, once it is accepted that the sentence was appropriate at the time it was passed, nothing remains to be said unless and until such time, if ever, as the prisoner is in a position to show that continued detention would be in breach of Article 3, whereupon the existence of such procedural mechanism may, for the first time, become relevant. Our preference is for the first alternative and it is, essentially, on this that we differ from the majority.

The majority view echoes what Lord Phillips CJ had said in *R v Bieber* [2008] EWCA Crim 1601, and cited with approval in *R(Wellington).* The following passage is from the opinion of Lord Brown (at § 82):

> "Article 3 is violated only when the prisoner's further imprisonment can no longer be justified. In this I agree entirely with the view expressed by Lord Phillips in *Bieber* at para 43:
>
> > 'Can the imposition of an irreducible life sentence itself constitute a violation of article 3, or will the potential violation only occur once the offender has been detained beyond the period that can be justified on the ground of punishment and deterrence? In other words, is it the sentence or the consequent detention that is capable of violating article 3? We believe it is the latter. We think that this is implicit from the passage of the judgment [in *Kafkaris* at para 107, cited at para 70 above]. As we have recorded it was the detention itself that the applicant in *Kafkaris* contended amounted to a violation of article 3.'
>
> In my judgment it cannot be contended that the mere passing of a mandatory life sentence, even in circumstances where no satisfactory laws or procedures exist for thereafter reviewing the case on an individual basis to determine the actual period to be served, violates article 3."

This approach seems to us to be due, at least in part, to the guarded language used by the Court, particularly in the Grand Chamber case of *Kafkaris* (§ 97), when speaking about the impact of Article 3 on irreducible

life sentences. It repeated that, as it had held, an irreducible life sentence "may" raise an Article 3 issue. It did not say in terms that such an issue will inevitably arise and this has been taken to mean that the Court has accepted the possibility that an irreducible sentence will pose no problem under Article 3, either substantive or procedural: see, indicatively, the opinion of Baroness Hale (at § 49) and that of Lord Brown (at § 71) in *R (Wellington).* The Court explained the difference between a reducible and an irreducible sentence by saying that where there was a possibility of review, by which *de jure* and *de facto* the prisoner was not deprived of any prospect or hope of release, the sentence could not be regarded as irreducible; and it did not become so merely by the fact that it may be served in full. By using the word "may" in connection with irreducible sentences and by classifying sentences as reducible where there is a *de jure* and *de facto* mechanism for revisiting them, the Court left a question mark in respect of the former. Was it contemplating a real possibility that a truly irreducible sentence could be compatible with Article 3? In what circumstances might that be conceivable when it emphasised so strongly the importance of a revisiting mechanism? In fact the Court has never held that an irreducible life sentence did not breach Article 3.

It seems to us that the Court used the word "may" in order to avoid a categorical general statement which went beyond the needs of the case when previous cases, to which it referred, had gone no further than that. We are, respectfully, unable to accept the view expressed in *R v Bieber* and *R (Wellington)*, and shared here by the majority, that an irreducible life sentence can be upheld as compatible with Article 3. We are therefore also unable to accept the corollary of that view, namely that the absence of an Article 3 problem justifies the present lack of a suitable release mechanism. In our opinion it is necessary to have a suitable review mechanism in place right from the beginning. The Article 3 problem does not consist merely in keeping the prisoner in detention longer than would be justified, as suggested in the domestic judgments that we have cited. *Kafkaris* shows that it consists, equally importantly, of depriving him of any hope for the future, however tenuous that hope may be.

For the reasons we have set out we would find, in respect of all the applicants, inhuman and degrading treatment in breach of Article 3.