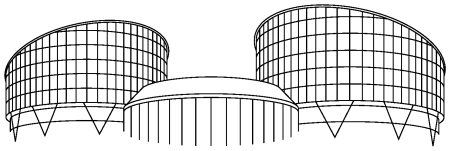

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF HUTCHINSON v. THE UNITED KINGDOM

(Application no. 57592/08)

JUDGMENT

STRASBOURG

17 January 2017

This judgment is final but it may be subject to editorial revision.

In the case of Hutchinson v. the United Kingdom,

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

András Sajó, *President,*
Işıl Karakaş,
Josep Casadevall,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Angelika Nußberger,
Päivi Hirvelä,
Ganna Yudkivska,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos,
Erik Møse,
Helena Jäderblom,
Paul Mahoney,
Faris Vehabović,
Ksenija Turković,
Branko Lubarda,
Yonko Grozev, *judges,*
and Johan Callewaert, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 21 October 2015 and 10 October 2016,

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

PROCEDURE

1. The case originated in an application (no. 57592/08) 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 ("the Convention") by a British national, Mr Arthur Hutchinson ("the applicant"), on 10 November 2008.

2. The applicant, who had been granted legal aid, was represented by Kyles Legal Practice, North Shields. The United Kingdom Government ("the Government") were represented by their Agent, Mr P. McKell of the Foreign and Commonwealth Office.

3. The applicant alleged in particular that his whole life sentence gave rise to a violation of Article 3 of the Convention.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 10 July 2013 the complaint concerning Article 3 was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court. In its judgment of 3 February 2015, a Chamber of

the Fourth Section composed of Judges Raimondi, Nicolaou, Bianku, Tsotsoria, Kalaydjieva, Mahoney and Wojtyczek, and also of F. Aracı, Deputy Section Registrar, declared by a majority the applicant's Article 3 complaint admissible. The Chamber also held, by six votes to one, that there had been no violation of Article 3. A dissenting opinion of Judge Kalaydjieva was appended to the judgment.

5. On 1 June 2015, pursuant to a request by the applicant dated 5 March 2015, the Panel of the Grand Chamber decided to refer the case to the Grand Chamber in accordance with Article 43 of the Convention.

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court.

7. The applicant and the Government each filed written observations (Rule 59 § 1 of the Rules of Court) on the merits. In addition, third-party comments were received from the European Prison Litigation Network (the "EPLN"), which had been granted leave to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court). The Government replied to these comments in the course of their oral submissions at the hearing (Rule 44 § 6 of the Rules of Court).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 21 October 2015 (Rule 59 § 3 of the Rules of Court).

There appeared before the Court:

(a) *for the Government*

Mr P. McKELL, *Agent*,
Mr J. WRIGHT QC, *Attorney-General*,
Mr J. EADIE QC, *Counsel*,
Ms A. FOULDS,
Ms C. GASKELL,
Mr J. GERARD,
Ms J. EARL, *Advisers*;

(b) *for the applicant*

Mr J. BENNATHAN QC,
Ms K. THORNE, *Counsel*,
Mr J. TURNER, *Adviser*.

The Court heard addresses by Mr Wright and Mr Bennathan, and their answers to questions put by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1941 and is detained in Her Majesty's Prison Durham.

10. In October 1983, the applicant broke into a family home, where he stabbed to death a man, his wife and their adult son. He then repeatedly raped their 18 year-old daughter, having first dragged her past her father's body. He was arrested several weeks later and charged with these offences. At trial he pleaded not guilty, denying the killings and claiming that the sexual intercourse had been consensual. On 14 September 1984, he was convicted of three counts of murder, rape, and aggravated burglary.

11. The trial judge sentenced the applicant to a term of life imprisonment and, in accordance with the rules on sentencing then in force, recommended a minimum period (tariff) of 18 years to the Secretary of State for the Home Office. When asked to give his opinion again on 12 January 1988, the judge wrote that "for the requirements of retribution and general deterrence this is genuinely a life case". On 15 January 1988 the Lord Chief Justice recommended that the period should be set at a whole life term stating that "I do not think that this man should ever be released, quite apart from the risk which would be involved". On 16 December 1994, the Secretary of State informed the applicant that he had decided to impose a whole life term.

12. Following the entry into force of the Criminal Justice Act 2003, the applicant applied to the High Court for a review of his sentence, arguing that he should receive the 18-year tariff mentioned at his trial. On 16 May 2008, the High Court gave its judgment. It found that there was no reason to depart from the Secretary of State's decision. The seriousness of the offences alone was such that the starting point was a whole life order. A number of very serious aggravating factors were present, and no mitigating factors. On 6 October 2008, the Court of Appeal dismissed the applicant's appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

13. The domestic law and practice relating to the procedure for setting a whole life order under the Criminal Justice Act 2003 is set out in paragraphs 12-13 and 35-41 of the Court's judgment in *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, ECHR 2013 (extracts). At the hearing in the present case, the Government indicated that there were on that date 56 prisoners serving whole life sentences. No prisoner in this category has been released since the date of the *Vinter* judgment.

A. The Human Rights Act 1998

14. The Human Rights Act provides, as relevant:

"Section 2 - Interpretation of Convention rights.

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

...

Section 3 - Interpretation of legislation.

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

...

Section 6 - Acts of public authorities.

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

...

Section 7 - Proceedings.

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

...

Section 8 - Judicial remedies.

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

...”

B. The Crime (Sentences) Act 1997

15. Section 30 of the Act provides, as relevant:

“(1) The Secretary of State may at any time release a life prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner’s release on compassionate grounds.”

C. Prison Service Order 4700

16. The policy of the Secretary of State for Justice on the exercise of the power of release on compassionate grounds is set out in chapter 12 of the Indeterminate Sentence Manual (“the Lifer Manual”), issued as Prison Service Order 4700. The criteria, as formulated in April 2010, provide as follows:

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

and

the risk of re-offending (particularly of a sexual or violent nature) is minimal;

and

further imprisonment would reduce the prisoner’s life expectancy;

and

there are adequate arrangements for the prisoner’s care and treatment outside prison;

and

early release will bring some significant benefit to the prisoner or his/her family”.

D. Court of Appeal decision in *R v. Newell*; *R v. McLoughlin*

17. A special composition of the Court of Appeal was constituted to hear these appeals, including the Lord Chief Justice of England and Wales, the President of the Queen’s Bench Division, the Vice-President of the Court of Appeal Criminal Division, one other Lord Justice of Appeal and a senior High Court judge. It gave its decision (“*McLoughlin*”) on 18 February 2014, in light of the judgment of this Court in the *Vinter* case.

18. The appellant Newell challenged as contrary to Article 3 of the Convention the whole life order imposed on him for a murder committed while he was already serving a life sentence for a previous murder. The *McLoughlin* case took the form of a reference by the Attorney General under section 36 of the Criminal Justice Act 1986, who contended that the trial judge had been mistaken in his view that the judgment in *Vinter* precluded the imposition of a whole life order. The trial judge had instead imposed a life sentence with a tariff of forty years for a murder committed by a man with previous convictions for murder and manslaughter.

19. In its decision, the Court of Appeal traced the development of the whole life sentence and the review of such sentences. It stated at paragraph 7 (citations omitted):

> "i) On 7 December 1994 the then Home Secretary announced a policy in relation to prisoners serving a whole life tariff (...).
>
> "In addition, I have decided that for those life sentence prisoners for whom it is decided that the requirements of retribution and deterrence can be satisfied only by their remaining in prison for the whole of their life, there will in future be an additional ministerial review when the prisoner has been in custody for 25 years. The purpose of this review will be solely to consider whether the whole life tariff should be converted to a tariff of a determinate period. The review will be confined to the considerations of retribution and deterrence. Where appropriate, further ministerial reviews will normally take place at five-yearly intervals thereafter. Existing prisoners who fall into this category and who have already served 25 years or more in custody will not be disadvantaged. Their cases will be reviewed by ministers as soon as is practicable and after any representations they may wish to make."
>
> ii) That policy was modified by a different Home Secretary on 10 November 1997 (Hansard HC Deb 10 November 1997, vol 300, cols. 419-420: written answer):
>
> "So far as the potential for a reduction in tariff is concerned, I shall be open to the possibility that, in exceptional circumstances, including for example exceptional progress by the prisoner whilst in custody, a review and reduction of the tariff may be appropriate. I shall have this possibility in mind when reviewing at the 25-year point the cases of prisoners given a whole life tariff and in that respect will consider issues beyond the sole criteria of retribution and deterrence described in the answer given on 7 December 1994."
>
> iii) In a challenge by Myra Hindley to the whole life tariff imposed on her, Lord Bingham CJ held in the Divisional Court in *R v Home Secretary ex p Hindley* [...] that whereas the narrow policy set out in 1994 was unlawful, this had been corrected by the 1997 policy which permitted the taking into account of exceptional progress whilst in prison. In the appeal to the House of Lords counsel for the Home Secretary made clear that the Home Secretary was prepared to review any whole life tariff, even in the absence of exceptional circumstances (...) Lord Steyn, when approving the legality of the Home Secretary's 1997 policy, recorded the way in which the policy had been clarified (...):
>
> "..... counsel for the Secretary of State submitted that the policy of imposing a whole life tariff merely involves the expression of the current view of the Secretary of State that the requirements of retribution and deterrence make it inappropriate ever to release such a prisoner. It does not rule out reconsideration. The Secretary of

State envisages the possibility of release in the event of exceptional progress in prison; and, even in absence of such progress, the Secretary of State is prepared to reconsider any whole life tariff decision from time to time."

The Court of Appeal then set out the relevant criteria of the Lifer Manual (see paragraph 16 above), commenting that these were "highly restrictive" (paragraph 11 of the *McLoughlin* decision). It raised the question whether the statutory scheme was compatible with Article 3. In answering the question, it stated:

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

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

20. However, the Grand Chamber considered that the justification for detention might shift during the course of a sentence; although just punishment at the outset, it might cease to be just after the passage of many years. It said at paragraphs 110 and 121 of its judgment that for a life sentence to be compatible with Article 3, there must therefore be both a prospect of release and a possibility of review. It added at paragraph 122:

"A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration."

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

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

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

23. Whilst we have accepted the submission on behalf of the Attorney General that the Strasbourg Court did not determine that the imposition of a whole life tariff itself violates Article 3, we return briefly to the arguments advanced contingently on the hypothesis that it did. In our judgment section 3 of the Human Rights Act could not be used to read down the legislation to preclude the imposition of whole life tariffs. That is because section 269(4) provides that if the court is of the opinion that no order for early release should be made because of the seriousness of the offence alone or in

combination with others, it must order that those provisions do not apply. That being so, section 6(2) of the Human Rights Act disapplies the obligation on the court as a public authority to act compatibly with the Convention.

24. The only remedy available in the domestic courts on this hypothesis would be a declaration of incompatibility, the discretionary remedy available under section 4 of the Human Rights Act when primary legislation is found to be incompatible with the Convention. Such a remedy is not available in the Crown Court and would not, in any event, affect the continuing operation of the statutory scheme.

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

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

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

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

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

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

> "The fact remains that, despite the Court of Appeal's judgment in *Bieber*, the Secretary of State has not altered the terms of his explicitly stated and restrictive policy on when he will exercise his section 30 power. Notwithstanding the reading given to section 30 by the Court of Appeal, the Prison Service Order remains in force and provides that release will only be ordered in certain exhaustively listed, and not merely illustrative, circumstances, ...
>
> These are highly restrictive conditions. Even assuming that they could be met by a prisoner serving a whole life order, the Court considers that the Chamber was correct to doubt whether compassionate release for the terminally ill or physically incapacitated could really be considered release at all, if all it meant was that a prisoner died at home or in a hospice rather than behind prison walls. Indeed, in the Court's view, compassionate release of this kind was not what was meant by a "prospect of release" in *Kafkaris*, cited above. As such, the terms of the Order in themselves would be inconsistent with *Kafkaris* and would not therefore be sufficient for the purposes of Article 3."

28. The Grand Chamber therefore concluded that section 30 did not, because of the lack of certainty, provide an appropriate and adequate avenue of redress in the event

an offender sought to show that his continued imprisonment was not justified. It concluded at paragraph 129:

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

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

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

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

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

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

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

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

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

Conclusion

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

III. RELEVANT INTERNATIONAL MATERIALS

20. The Court makes reference to the materials referred to in the *Vinter* judgment (at §§ 59-81). It refers in particular to one of the Council of Europe texts mentioned there, Recommendation Rec(2003)22 of the Committee of Ministers to member states on conditional release (parole). This provides, as relevant:

"*Discretionary release system*

16. The minimum period that prisoners have to serve to become eligible for conditional release should be fixed in accordance with the law.

17. The relevant authorities should initiate the necessary procedure to enable a decision on conditional release to be taken as soon as the prisoner has served the minimum period.

18. The criteria that prisoners have to fulfil in order to be conditionally released should be clear and explicit. They should also be realistic in the sense that they should take into account the prisoners' personalities and social and economic circumstances as well as the availability of resettlement programmes.

...

20. The criteria for granting conditional release should be applied so as to grant conditional release to all prisoners who are considered as meeting the minimum level of safeguards for becoming law-abiding citizens. It should be incumbent on the authorities to show that a prisoner has not fulfilled the criteria.

21. If the decision-making authority decides not to grant conditional release it should set a date for reconsidering the question. In any case, prisoners should be able to reapply to the decision-making authority as soon as their situation has changed to their advantage in a substantial manner.

…

VIII. Procedural safeguards

32. Decisions on granting, postponing or revoking conditional release, as well as on imposing or modifying conditions and measures attached to it, should be taken by authorities established by law in accordance with procedures covered by the following safeguards:

a. convicted persons should have the right to be heard in person and to be assisted according to the law;

b. the decision-making authority should give careful consideration to any elements, including statements, presented by convicted persons in support of their case;

c. convicted persons should have adequate access to their file;

d. decisions should state the underlying reasons and be notified in writing.

33. Convicted persons should be able to make a complaint to a higher independent and impartial decision-making authority established by law against the substance of the decision as well as against non-respect of the procedural guarantees."

21. The Court also refers to the 2006 European Prison Rules, in particular Rule 30.3 which provides:

"Prisoners shall be informed about any legal proceedings in which they are involved and, if they are sentenced, the time to be served and the possibilities of early release."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

22. The applicant complained that his whole life order 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 Chamber judgment

23. The Chamber noted that the Government initially considered themselves not to be in a position to submit observations on the merits of the case, as they recognised that the principles set out in the *Vinter* case were applicable. The Government changed their stance following the *McLoughlin* decision, arguing that a whole life sentence was now to be regarded as reducible. The Chamber examined the *McLoughlin* decision and recalled that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic law. It further observed that it was a well-entrenched and necessary part of the legal tradition of the United Kingdom to develop the law through judicial interpretation. As the

Court of Appeal had specifically addressed the doubts raised in *Vinter* regarding the clarity of the applicable domestic law, and set out an unequivocal statement of the legal position, that interpretation had to be accepted by the European Court. It concluded that the power of release under section 30 of the 1997 Act, exercised in the manner delineated in *McLoughlin*, was sufficient to comply with the requirements of Article 3.

B. The parties' submissions

1. The Government

24. The Government agreed with the Chamber judgment. They maintained that the Court of Appeal had set out, authoritatively and conclusively, the operation of domestic law in clear and unequivocal terms. By virtue of sections 3 and 6 of the Human Rights Act, section 30 of the 1997 Act had to be interpreted and applied broadly enough so as to comply with Article 3 in every case. The Lifer Manual did not and could not restrict or in any way fetter this obligation. Therefore, as the Court of Appeal had stated, the fact that the text of the Manual had not been revised was of no legal consequence. The Manual remained valid inasmuch as it laid out the approach to be taken where release was sought on grounds of advanced terminal illness or severe incapacity. The *McLoughlin* decision had further clarified that the Secretary of State was obliged under domestic law to consider all relevant circumstances of each case in a manner compatible with Article 3 – there was no remaining unclarity as to the law in this regard. Section 30 operated in precisely the way that the *Vinter* judgment had held would be sufficient to satisfy with the requirements of Article 3.

25. As for the basis for the Secretary of State's review of sentence, it was clear that the term used in section 30, "exceptional circumstances", encompassed exceptional progress towards rehabilitation. The relevant yardstick in the Secretary of State's review would be that stated in *Vinter*, i.e. whether there had been any changes in the life of the prisoner and such progress towards rehabilitation that continued detention could no longer be justified on legitimate penological grounds. A whole life prisoner therefore knew what he must do to have a prospect of release, and what criteria would apply to the review. No greater specificity was required; it was neither necessary nor practicable to seek to lay down in greater detail what a prisoner must be able to demonstrate to be considered for release or reduction of sentence. The European Court itself had not identified specific criteria in its Article 3 case law, but expressed itself in more general terms. In every individual case, therefore, all the relevant circumstances of the prisoner would be taken into account. This permitted the necessary flexibility in the review, adapting it to each set of individual circumstances.

26. The domestic law was both accessible and foreseeable for prisoners. It was enough that they sought legal advice, which was available to them, or asked the prison administration, and they would receive an explanation of the applicable legal provisions. To every request the Secretary of State was required to give a reasoned response, which would be subject to judicial review. That review would not merely react to the decisions of the Secretary of State, but would bear on the merits of the case. The procedure had the capacity to develop the practical working out of the relevant considerations in this context, such as what amounted to a legitimate penological ground. Nor would successful judicial review merely mean the Secretary of State taking the decision again. It was within the power of the courts to directly order the release of a prisoner, if this was warranted.

27. Regarding the timing of the review, the Government recalled that *Vinter* had regarded this matter as being within the margin of appreciation of the domestic authorities, which should not now be narrowed. That judgment did not prescribe a review after twenty-five years, but simply observed that the comparative and international materials reflected clear support for this particular arrangement. In any event, identifying such a timeframe was more relevant to a system which did not provide for a review for a very long period, which was not the case in the domestic system. Legal certainty did not require a specific time constraint on sentence review, when that review was premised on the ability of the prisoner to make a case that their detention was no longer justified. This they could do at any time; they were not obliged to wait an indeterminate number of years. That could be regarded as more advantageous to the prisoner than being required to serve a long, minimum term of years before being permitted to apply for review. Regarding the circumstances of the applicant, they noted that he had not suggested at any stage that there was no legitimate penological ground for his continued detention. There was nothing to stop him applying to the Secretary of State at any time in the future for a review of sentence.

2. The applicant

28. The applicant disagreed with the Chamber judgment, which he criticised as being inconsistent with *Vinter*, as well as with other cases decided by this Court since that judgment. He considered that the situation in domestic law remained contrary to Article 3, the *McLoughlin* decision having failed to remedy the deficiencies identified in *Vinter*. The Court of Appeal had proceeded on the incorrect assumption that the European Court was mistaken in its analysis of domestic law. Consequently, *McLoughlin* had merely sought to correct that perceived error, without developing the *de jure* situation. The review of whole life sentences was still based on a vague discretion vested in a Government minister. He considered that the Court should now rule that such a function must be entrusted to judges not politicians, this proposition finding clear support in the relevant

international and comparative materials referred to in *Vinter*, and being implicit in the *Vinter* reasoning itself. He drew an analogy in this respect with the evolution that took place both in domestic case-law and Convention case-law requiring the removal of any role for the executive in the determination of sentences. Even if executive review could still be accepted in principle, the domestic system was deficient since the review was conducted by a partisan political figure, as illustrated by public remarks made by the then-Secretary of State following the *McLoughlin* decision. The procedure therefore did not offer any prospect of fairness, balance and certainty.

29. The *McLoughlin* decision had indicated that the statutory terminology was to be given a broad meaning, but this should not be regarded as sufficient to meet the requirements of Article 3, as laid down in *Vinter* and subsequent judgments of this Court. The meaning of the terms "exceptional circumstances" and "compassionate grounds" had not been elucidated. Greater specificity was required for the sake of legal certainty; without it, a prisoner's motivation to attempt rehabilitation would be completely undermined. The only detailed point of reference for whole life prisoners remained the Lifer Manual, the restrictive wording of which had been criticised in *Vinter*.

30. Concerning the timing of the review, this issue was still affected by legal uncertainty. It was not stipulated in any legal provision, and had not been addressed in the *McLoughlin* decision. Whole life prisoners had no clarity as to when their sentences would be reviewed. The applicant recalled that prior to 2003, such sentences were systematically reviewed after twenty-five years, and that the proposal had been made in Parliament (a proposal put forward by the Joint Committee on Human Rights in 2013 and debated in the House of Lords in 2014) to reintroduce this practice via legislation. The Court's post-*Vinter* cases confirmed that a specific timeframe must be provided for in domestic law. Were the Court to now find no violation of Article 3, this would cause chaos in the relevant Convention case-law.

31. Nor had the situation improved *de facto* since the *Vinter* judgment. The applicant criticised the Government's refusal to revise the Lifer Manual despite the criticism expressed by this Court and subsequently by the Court of Appeal. As a matter of fact, no whole life prisoner had ever been released in the way envisaged in *Vinter*. It could only discourage such prisoners from making the huge effort required to achieve rehabilitation to know that ultimately their fate would be decided by political decision, rather than an independent and impartial judge.

32. The applicant further submitted that the system of sentence review should not be treated as falling within the margin of appreciation of the respondent State. This was, first, because of the absolute nature of Article 3. Further, to find a violation in the present case would not impose any

particular solution on the United Kingdom. The domestic system had included a twenty-five year review in the past, which could easily be re-introduced and entrusted to the Parole Board. This was not in any way complicated, as the legislative proposal made in Parliament showed. A violation would not mean that the whole life order as such was contrary to the Convention – the requirement was that it be reducible. Nor would it mean that the applicant should be released; this was a quite separate issue to be assessed elsewhere at another time.

3. The third party intervener

33. The EPLN underlined the need for the law relating to the consideration of the release of whole life prisoners to be clear, foreseeable and accessible to those affected by it. Imposing an irreducible life sentence could no longer be regarded as a matter within the margin of appreciation of States, since Article 3 required reducibility. It was only regarding certain details of the requisite review that the State could claim a margin of appreciation, although it was ultimately for the Court to determine whether the review included the necessary procedural safeguards, having regard to the international consensus in this area and the great importance of what is at stake for the prisoner. Any margin available should be narrow.

34. Referring to the relevant international instruments cited in the *Vinter* judgment, the EPLN argued that purely punitive or retributory sentencing is not compatible with human rights principles. Rehabilitation must be at the heart of sentencing, implying some prospect of release for life prisoners. For this to be a realistic prospect, there must be sentence planning, the opportunity to progress through the prison system, and structured reviews. The relevant international instruments identified certain basic procedural standards, demanding clarity and foreseeability as regards the timing of the review and the criteria governing it. These points had been endorsed in the *Vinter* judgment. In subsequent cases they had been reiterated and further developed. It was not just a question of rehabilitating the prisoner, but a matter of personal safety as well. A prisoner with no real prospect of ever being released risked the destruction of his personality, posing real danger to himself and to those in contact with him in the prison environment. To illustrate this point, a statement from a serving life prisoner was also submitted.

35. The EPLN submitted that the *Vinter* judgment was not based on any misunderstanding of the domestic system, but had correctly revealed its shortcomings, i.e. the lack of a fixed timeframe and clear, published criteria. No steps had been taken domestically to develop the review into something more than mere compassionate release, already held to be insufficient. This stood in contrast to German constitutional law, cited in *Vinter*, which held that the preconditions for release and the procedures must be stipulated in

law. The Court of Appeal had failed to identify and embed the essential procedural requirements of Article 3 in domestic law.

36. The statutory duty on the Secretary of State to act compatibly with Article 3 was not sufficient, as it only concerned the point in time when the review took place. It had no bearing on the processes and procedures that must be in place prospectively. There were still no clear published criteria at the domestic level, nor any specific timeframe, contrary to foreseeability and legal certainty, and to the emerging international consensus. Nor were any procedural safeguards provided for, such as disclosure, the right to make oral representations at a review hearing, or the right to be given the reasons for a negative decision. It had not been shown that, notwithstanding these flaws, the system in fact operated in a Convention-compliant way.

C. The Court's assessment

37. The parties' submissions were confined to the issue whether, in light of the *McLoughlin* ruling, the applicant's situation in relation to his whole life sentence is in keeping with the requirements of Article 3 as these were laid down in the *Vinter* judgment (*Vinter and Others*, cited above §§ 123-131). In this connection, the Court will examine, first, whether the unclarity in the domestic law has now been dispelled, and, if so, whether the relevant requirements are now met in the applicant's case. No separate examination will be made as to a possible violation of Article 3 in the period of the applicant's imprisonment prior to the *McLoughlin* ruling.

1. Whether the domestic law has been clarified

38. In *Vinter*, the Court considered that section 30 of the 1997 Act could, by virtue of section 6 of the Human Rights Act (see paragraphs 14 and 15 above), be read as imposing a duty on the Secretary of State to release a whole life prisoner where it could be shown that continued detention was no longer compatible with Article 3, for example where it could no longer be justified on legitimate penological grounds. It noted that this was the reading given to section 30 by the Court of Appeal in the *Bieber* and *Oakes* cases, which would be consistent with the requirements of Article 3 as these were set down in *Kafkaris v. Cyprus* [GC], no. 21906/04, ECHR 2008. However, in addition to the relevant judicial dicta the Court also had regard to the published official policy and to the application of the law in practice to whole life prisoners. It found that the policy set out by the Secretary of State in the Lifer Manual (see paragraph 16 above) was too restrictive to comply with the *Kafkaris* principles. It further pointed out that the Lifer Manual gave whole life prisoners only a partial picture of the conditions in which the power of release might be exercised. It concluded that the contrast between section 30, interpreted by the domestic courts in a Convention-compliant manner, and the narrow terms of the Lifer Manual

meant such a lack of clarity in the law that the whole life sentence could not be regarded as reducible for the purposes of Article 3.

39. In the *McLoughlin* decision the Court of Appeal responded explicitly to the *Vinter* critique. It affirmed the statutory duty of the Secretary of State to exercise the power of release compatibly with Article 3 of the Convention. As for the published policy, which it too regarded as highly restrictive (at paragraphs 11 and 32 of *McLoughlin*, see paragraph 19 above), the Court of Appeal clarified that the Lifer Manual cannot restrict the duty of the Secretary of State to consider all circumstances relevant to release under section 30. Nor can the published policy fetter the Secretary of State's discretion by taking account only of the matters stipulated in the Lifer Manual. The failure to revise official policy so as to align it with the relevant statutory provisions and case law is, the Court of Appeal explained, of no consequence as a matter of domestic law.

40. The Court considers that the Court of Appeal has brought clarity as to the content of the relevant domestic law, resolving the discrepancy identified in the *Vinter* judgment. Although *Vinter* contemplated that the policy might be replaced or quashed in the course of judicial review proceedings (*Vinter and Others*, cited above, § 129), the Court notes the Government's submission that the Lifer Manual retains its validity in relation to release on compassionate (in the narrow sense of humanitarian) grounds. What is important is that, as confirmed in *McLoughlin*, this is just one of the circumstances in which the release of a prisoner may, or indeed must, be ordered (see paragraphs 32-33 of *McLoughlin* at paragraph 19 above).

41. Having satisfied itself that the applicable domestic law has been clarified, the Court will now pursue its analysis of it.

2. Whether the domestic law meets the requirements of Article 3

a. General principles established in the Court's case law on life sentences

42. The relevant principles, and the conclusions to be drawn from them, are set out at length in the *Vinter* judgment (cited above, §§ 103-122; recently summarised in *Murray v. the Netherlands* [GC], no. 10511/10, §§ 99-100, ECHR 2016). The Convention does not prohibit the imposition of a life sentence on those convicted of especially serious crimes, such as murder. Yet to be compatible with Article 3 such a sentence must be reducible *de jure* and *de facto*, meaning that there must be both a prospect of release for the prisoner and a possibility of review. The basis of such review must extend to assessing whether there are legitimate penological grounds for the continuing incarceration of the prisoner. These grounds include punishment, deterrence, public protection and rehabilitation. The balance between them is not necessarily static and may shift in the course of a sentence, so that the primary justification for detention at the outset may

not be so after a lengthy period of service of sentence. The importance of the ground of rehabilitation is underlined, since it is here that the emphasis of European penal policy now lies, as reflected in the practice of the Contracting States, in the relevant standards adopted by the Council of Europe, and in the relevant international materials (*Vinter and Others*, cited above, §§ 59-81).

43. As recently stated by the Court, in the context of Article 8 of the Convention, "emphasis on rehabilitation and reintegration has become a mandatory factor that the member States need to take into account in designing their penal policies" (*Khoroshenko v. Russia* [GC], no. 41418/04, § 121, ECHR 2015; see also the cases referred to in *Murray*, cited above, § 102). Similar considerations apply under Article 3, given that respect for human dignity requires prison authorities to strive towards a life sentenced prisoner's rehabilitation (see *Murray*, cited above, §§ 103-104). It follows that the requisite review must take account of the progress that the prisoner has made towards rehabilitation, assessing whether such progress has been so significant that continued detention can no longer be justified on legitimate penological grounds (*Vinter and Others*, cited above, §§ 113-116). A review limited to compassionate grounds is therefore insufficient (*ibid.*, § 127).

44. The criteria and conditions laid down in domestic law that pertain to the review must have a sufficient degree of clarity and certainty, and also reflect the relevant case-law of the Court. Certainty in this area is not only a general requirement of the rule of law but also underpins the process of rehabilitation which risks being impeded if the procedure of sentence review and the prospects of release are unclear or uncertain. Therefore prisoners who receive a whole life sentence are entitled to know from the outset what they must do in order to be considered for release and under what conditions. This includes when a review of sentence will take place or may be sought (*Vinter and Others*, cited above, § 122). In this respect the Court has noted clear support in the relevant comparative and international materials for a review taking place no later than twenty-five years after the imposition of sentence, with periodic reviews thereafter (*ibid.*, §§ 68, 118, 119 and 120). It has however also indicated that this is an issue coming within the margin of appreciation that must be accorded to Contracting States in the matters of criminal justice and sentencing (*ibid.*, §§ 104, 105 and 120).

45. As for the nature of the review, the Court has emphasised that it is not its task to prescribe whether it should be judicial or executive, having regard to the margin of appreciation that must be accorded to Contracting States (*Vinter and Others*, cited above, § 120). It is therefore for each State to determine whether the review of sentence is conducted by the executive or the judiciary.

b. Application of these principles

i. Nature of review

46. In England and Wales the review of sentence is entrusted to the Secretary of State. The applicant submitted that this was wrong in principle, arguing that the review ought to be judicial in nature. He further argued that systems of presidential clemency should be distinguished from the domestic system on the ground that State Presidents can be regarded, by the nature of their office, as non-partisan figures who are above the political fray and thus less susceptible to the pressures of public opinion. Entrusting sentence review to a Government minister left little hope for fair, thorough and consistent assessment of the grounds for releasing a whole life prisoner.

47. The Court observes that a judicial procedure brings with it a series of important guarantees: the independence and impartiality of the decider, procedural safeguards and protection against arbitrariness. In two cases, the Court found that due to the existence of a judicial procedure of sentence review the domestic law was in keeping with Article 3 of the Convention (see *Čačko v. Slovakia*, no. 49905/08, 22 July 2014, and *Bodein v. France*, no. 40014/10, 13 November 2014).

48. In the *Bodein* case, the Court discounted the power of presidential clemency (cited above, at § 59). Similar systems in Hungary and Bulgaria were likewise found not to meet the requisite standard: *László Magyar v. Hungary*, no. 73593/10, 20 May 2014, and *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, ECHR 2014 (extracts) (referring to the system of presidential clemency in the period up to January 2012). However, it was because of various shortcomings in the procedures and not the executive nature of the review as such that the States in question were found to be in violation of Article 3. Moreover, in the *László Magyar* case the Court made some suggestions regarding the measures to be taken to execute the judgment but without suggesting that a judicial mechanism was required (at § 71 of that judgment; see in the same sense *Öcalan v. Turkey (no. 2)*, nos. 24069/03, 197/04, 6201/06 and 10464/07, § 207, 18 March 2014).

49. That an executive review can satisfy the requirements of Article 3 is shown by the Court's assessment of the systems in Cyprus and Bulgaria. Regarding the former, the power of the President of Cyprus, in light of the practice followed, was found to be sufficient (*Kafkaris*, cited above, §§ 102-103). Regarding the latter, the power vested in the President of Bulgaria was likewise found to be in compliance with Article 3, following reform in 2012 (*Harakchiev and Tolumov*, cited above, §§ 257-261). The Court notes here that the relevant European standard does not exclude executive review but refers to decisions on conditional release being taken by the "authorities established by law" (paragraph 32 of Recommendation Rec(2003)22, see paragraph 20 above).

50. It is therefore clear from the case-law that the executive nature of a review is not in itself contrary to the requirements of Article 3. The Court sees no reason to depart from this.

51. As for the applicant's criticisms of the domestic system, the Court considers that these are countered by the effect of the Human Rights Act. As recalled in *McLoughlin* (see paragraph 29 of that decision, set out at paragraph 19 above), the Secretary of State is bound by section 6 of that Act to exercise the power of release in a manner compatible with Convention rights. He or she is required to have regard to the relevant case-law of this Court and to provide reasons for each decision. The power or, depending on the circumstances, the duty of the Secretary of State to release a prisoner on compassionate grounds cannot therefore be regarded as akin to the broad discretion conferred on the Head of State in certain other jurisdictions and found to be insufficient for the purposes of Article 3 in the cases referred to above.

52. Furthermore, the Secretary of State's decisions on possible release are subject to review by the domestic courts, themselves bound by the same duty to act compatibly with Convention rights. The Court notes here the Government's statement that judicial review of a refusal by the Secretary of State to release a prisoner would not be confined to formal or procedural grounds, but would also involve an examination of the merits. Thus the High Court would have the power to directly order the release of the prisoner, if it considered this to be necessary in order to comply with Article 3 (see paragraph 26 above).

53. Although the Court has not been provided with any examples of judicial review of a refusal by the Secretary of State to release a life prisoner, it is nonetheless satisfied that a significant judicial safeguard is now in place (see *E. v. Norway*, 29 August 1990, § 60, Series A no. 181-A). The absence of any practice to date, which is unsurprising given the relatively brief period since the *McLoughlin* decision, does not necessarily count against the domestic system, just as it did not count against the Slovak and French systems, both found to be in conformity with Article 3 without reference to any judicial practice (see in particular § 60 of *Bodein*).

ii. Scope of review

54. In the *McLoughlin* decision, the Court of Appeal took the view, as did this Court in *Vinter*, that the policy set down in the Lifer Manual was a highly restrictive one. It reiterated the position stated in *Bieber* that the Secretary of State must exercise his power of release in a manner compatible with principles of domestic administrative law and with Article 3 of the Convention (see, respectively, paragraphs 32 and 29 of *McLoughlin*, set out at paragraph 19 above).

55. In addition, and crucially, it specified, having regard to the Court's judgment in *Vinter*, that the "exceptional circumstances" referred to in

section 30 cannot legally be limited to end-of-life situations as announced in the Lifer Manual (see paragraph 16 above), but must include all exceptional circumstances that are relevant to release on compassionate grounds. Although the Court of Appeal refrained from specifying further the meaning of the words "exceptional circumstances" in this context, or to elaborate criteria, it recalled earlier domestic case-law to the effect that exceptional progress by the prisoner whilst in prison is to be taken into account (*per* Lord Bingham CJ in the 1998 judgment *R v Home Secretary ex parte Hindley*, and also Lord Steyn when that same case was decided by the House of Lords in 2001 – see paragraph 19 above). The Court further notes that in *Bieber*, when explaining the time at which an Article 3 challenge could be brought by a whole life prisoner, the Court of Appeal referred to "all the material circumstances, including the time that he has served and the progress made in prison" (reproduced in *Vinter and Others*, cited above, at § 49). Having regard to all of these dicta, it is evidently part of the established law of England and Wales that exceptional progress towards rehabilitation comes within the meaning of the statutory language and is thus a ground for review.

56. As for the other term used in section 30, "compassionate grounds", here too the narrow emphasis put upon it in the Lifer Manual has been corrected by the judgment of the Court of Appeal, which affirmed that the term is not limited to humanitarian grounds but has a wide meaning, so as to be compatible with Article 3 of the Convention (see paragraph 33 of *McLoughlin*, set out at paragraph 19 above). In this respect too, the role of the Human Rights Act is of importance, section 3 of the Act requiring that legislation be interpreted and applied by all public bodies in a Convention-compliant way.

57. These clarifications are sufficient to satisfy the Court as to the existence of a review that not only can but also must consider whether, in light of significant change in a whole life prisoner and progress towards rehabilitation, continued detention can still be justified on legitimate penological grounds (*Vinter and Others*, cited above, § 125).

iii. Criteria and conditions for review

58. The Court must next examine the criteria and conditions for review of whole life sentences. *McLoughlin* did not elaborate further on the meaning of "exceptional circumstances", the Court of Appeal deeming it sufficiently certain in itself. The applicant was critical of this, arguing that it left him in a state of uncertainty. The Government considered that matters were sufficiently clear, no greater degree of specificity being possible or feasible. As the Court has already noted above, the term "exceptional circumstances" encompasses the progress by the prisoner during the service of sentence (see paragraph 55 above). The relevant question is whether those serving life sentences in the domestic system can know what they

must do to be considered for release, and under what conditions the review takes place (*Vinter and Others*, cited above, § 122; see also paragraph 18 of Recommendation Rec(2003)22 and Rule 30.3 of the European Prison Rules, at paragraphs 20 and 21 above).

59. Both parties referred to cases decided by Chambers of this Court after the *Vinter* ruling. These judgments are indeed relevant here, in that they illustrate the application by the Court of the *Vinter* case-law. In the *László Magyar* case, it was the lack of specific guidance as to the criteria and conditions for gathering the prisoner's "personal particulars" and for assessing them that was criticised. As there was no duty on the executive to give reasons for a decision, it meant that prisoners did not know what was required of them in order to be considered for release (*László Magyar*, cited above, §§ 57-58). Under Article 46, the Chamber called for a reform that would ensure the relevant review, and that life prisoners would know "with some degree of precision" what they must do (at § 71). In the *Harakchiev and Tolumov* case, the Court faulted the system as it was pre-2012 for its opacity, for the lack of publicly-available policy statements, for the absence of reasons on individual requests for clemency, and also for the complete lack of formal and informal safeguards (*Harakchiev and Tolumov*, cited above, § 262). In another case, *Trabelsi v. Belgium*, no. 140/10, ECHR 2014 (extracts), the Chamber based its finding of a violation of Article 3 on the absence of a sentence review mechanism operating on the basis of "objective, pre-established criteria of which the prisoner had precise cognisance at the time of imposition of the life sentence" (§ 137). The applicant relied on this statement in particular. The Court observes that while there is some variation in the formulations employed in these judgments, the essential point is the same in each of them, namely that there needs to be a degree of specificity or precision as to the criteria and conditions attaching to sentence review, in keeping with the general requirement of legal certainty.

60. Consideration must equally be given to the post-*Vinter* cases in which the Court concluded that the domestic system was in conformity with the requirements of Article 3 as regards the reducibility of life sentences. There are three such judgments, and they demonstrate that a high degree of precision is not required in order to satisfy the Convention.

61. The first is the *Harakchiev and Tolumov* case, in which the Court considered that as from 2012 there was adequate clarity surrounding the presidential power of clemency. Although, by its nature, the procedure was not subject to statutory criteria, the Constitutional Court derived guiding principles from constitutional values, namely "equity, humanity, compassion, mercy, and the health and family situation of the convicted offender, and any positive changes in his or her personality" (*Harakchiev and Tolumov*, cited above, see § 258). It is only the last of these that concerns progress by the prisoner. Although the procedure did not provide

for the giving of reasons in individual cases, transparency was nonetheless ensured by other means. The Clemency Commission, created to advise on requests for clemency, functioned in accordance with published Rules of Procedure. These required it to take account of the relevant case-law of international courts on the interpretation and application of the relevant international human rights instruments. The rules also required the Clemency Commission to publish activity reports, which it did monthly and yearly, detailing its examination of requests for clemency, its advice to the Vice-President and the latter's decision on such requests (*ibid.*, §§ 90-107). The Court found that these measures increased the transparency of the clemency procedure and constituted an additional guarantee of the consistent and transparent exercise of the presidential power (*ibid*., § 259).

62. In the *Čačko* case, the Court noted that the criteria for early release were that the prisoner "has demonstrated improvement by fulfilling his or her obligations and by good behaviour" and that "it can be expected that the person concerned will behave in an appropriate manner in the future" (*Čačko*, cited above, § 43). In the *Bodein* case, the Chamber noted that the review in French law was based on the dangerousness of the prisoner as well as any changes in his personality during the service of sentence (*Bodein*, cited above, § 60).

63. The Court does not regard the domestic system as deficient in this particular respect for two closely-related reasons. First, the exercise of the section 30 power will, as is clear from *McLoughlin* and by virtue of the Human Rights Act, be guided by all of the relevant case-law of this Court as it stands at present and as it may be further developed or clarified in future. By setting out its relevant case-law in the preceding paragraphs, the Court's purpose is to aid the Secretary of State and the domestic courts to fulfil their statutory duty to act compatibly with the Convention in this area.

64. The second reason is that, as the Court of Appeal stated and the Chamber accepted, it can be expected that the concrete meaning of the terms used in section 30 will continue to be further fleshed out in practice. The duty on the Secretary of State to give the reasons for each such decision, subject to judicial review, is of significance here, being a guarantee of the consistent and transparent exercise of the power of release.

65. The Court sees fit to add, however, that a revision of the Lifer Manual (and other official sources of information) so as to reflect the law as it has been clarified by the Court of Appeal, and to reflect also the relevant Article 3 case-law, would be desirable so that the applicable law is readily accessible. The Court refers once again to the relevant standard defined by the Council of Europe (see paragraph 18 of Recommendation Rec(2003)22, at paragraph 20 above).

iv. Timeframe for review

66. One particular aspect of legal certainty is the timeframe for sentence review, the Court having stated in *Vinter* that a prisoner should not be obliged to wait and serve an indeterminate number of years before being permitted to mount an Article 3 challenge (see paragraph 44 above).

67. In general, providing for an automatic review of sentence after a specified minimum term represents an important safeguard for the prisoner against the risk of detention in violation of Article 3. The Court refers in this respect to the *Öcalan (no. 2)* case. It found there that domestic law clearly prohibited the applicant from applying at any point in his sentence of aggravated life imprisonment for release on legitimate penological grounds. The Turkish authorities were therefore required to establish a procedure to review whether the applicant's incarceration remained justified after a minimum term of detention (*Öcalan (no. 2)*, cited above, § 204 and § 207). The domestic system in this case differs in that the process of review can be initiated by the prisoner at any time. The Court recalls that it took note of a similar arrangement in Cyprus, where life prisoners could benefit from the relevant provisions at any time without having to serve a minimum period of imprisonment (*Kafkaris*, cited above, § 103). It is possible to regard this as being in the interest of prisoners, since they are not required to wait for a set number of years for a first or subsequent review. In light of the very serious nature of the crimes committed by persons in this category though, it has to be expected that their period of detention will be lengthy.

68. In two of the post-*Vinter* cases decided by this Court, the domestic system included a review of sentence after a set period – 25 years in *Čačko* and 30 years in *Bodein* (effectively 26 years in that applicant's case). In the *Harakchiev and Tolumov* case though, the domestic system subsequent to the 2012 reforms did not include a fixed timeframe for review of sentence. Furthermore, the Court found a violation of Article 3 in the *László Magyar* case and gave indications under Article 46 as to the necessary measures without referring to the question of the timing of the review in either context.

69. Turning to the facts of the present case, the Court does not consider that the concern expressed in *Vinter* regarding indeterminacy, and the repercussions of this for a whole life prisoner (*Vinter and Others*, cited above, § 122) can be said to arise for the applicant at present. As is stated in section 30 of the 1997 Act, the Secretary of State may order release "at any time". It follows, as the Government have confirmed, that it is open to the applicant to trigger, at any time, a review of his detention by the Secretary of State. It is not for the Court to speculate as to how efficiently such a system, which has minimum regulation, might generally operate in practice. It is the individual situation of the applicant that is the focus of these proceedings, and he has not suggested that he is prevented or deterred from applying to the Secretary of State at any time to be considered for release.

Before concluding, though, the Court refers once again as it did in the *Vinter* case to the relevant comparative and international materials that show "clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter" (*Vinter and Others*, cited above, § 120; see more recently and in the same sense *Murray*, cited above, § 99).

v. Conclusion

70. The Court considers that the *McLoughlin* decision has dispelled the lack of clarity identified in *Vinter* arising out of the discrepancy within the domestic system between the applicable law and the published official policy. In addition, the Court of Appeal has brought clarification as regards the scope and grounds of the review by the Secretary of State, the manner in which it should be conducted, as well as the duty of the Secretary of State to release a whole life prisoner where continued detention can no longer be justified on legitimate penological grounds. In this way, the domestic system, based on statute (the 1997 Act and the Human Rights Act), case-law (of the domestic courts and this Court) and published official policy (the Lifer Manual) no longer displays the contrast that the Court identified in *Vinter* (cited above, § 130). Further specification of the circumstances in which a whole life prisoner may seek release, with reference to the legitimate penological grounds for detention, may come through domestic practice. The statutory obligation on national courts to take into account the Article 3 case-law as it may develop in future provides an additional important safeguard.

71. As the Court has often stated, the primary responsibility for protecting the rights set out in the Convention lies with the domestic authorities (see for example *O.H. v. Germany*, no. 4646/08, § 118, 24 November 2011). It considers that the Court of Appeal drew the necessary conclusions from the *Vinter* judgment and, by clarifying domestic law, addressed the cause of the Convention violation (see also *Kronfeldner v. Germany*, no. 21906/09, § 59, 19 January 2012).

72. The Court concludes that the whole life sentence can now be regarded as reducible, in keeping with Article 3 of the Convention.

73. As indicated at the outset (see paragraph 37 above), given that the parties' submissions were confined to the current state of the domestic law, the Court has not found it necessary to examine separately whether the requirements of Article 3 in relation to whole life sentences, as laid down in the *Vinter* judgment, were complied with in the applicant's case prior to the *McLoughlin* decision. It would nevertheless observe, as the Government themselves in effect recognised before the Court of Appeal delivered its judgment in *McLoughlin*, that at that time the material circumstances regarding the applicant's whole life sentence were indistinguishable from those of the applicants in the *Vinter* case (see paragraph 23 above).

FOR THESE REASONS, THE COURT

Holds, by fourteen votes to three, that there has been no violation of Article 3 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 17 January 2017.

Johan Callewaert	András Sajó
Deputy to the 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) Dissenting opinion of Judge López Guerra;
(b) Dissenting opinion of Judge Pinto de Albuquerque;
(c) Separate opinion of Judge Sajó.

A.S.
J.C.

DISSENTING OPINION OF JUDGE LÓPEZ GUERRA

My dissent derives from the final statement in the Grand Chamber judgment (see paragraph 73), that is, its refusal to examine the applicant's situation as it stood prior to the domestic *R. v. McLoughlin* decision. As I see it, that situation (which began, in contrast to the Grand Chamber's assessment, with the applicant's sentencing in 1984, thus encompassing a span of thirty years) represents a violation of Article 3 of the Convention, as the applicant was denied any hope of one day (however far in the future) being released from prison. On the contrary, the certainty that he would remain imprisoned for the rest of his life was borne down upon him.

The applicant was sentenced in 1984 to a term of life imprisonment. As shown in the facts in the Grand Chamber judgment, his was defined as a "life case" by the trial judge in 1988, and the Lord Chief Justice recommended that the applicant should never be released. In 1994 the Secretary of State informed the applicant that he had decided to impose a whole life term. In 2008 the High Court found there was no reason to depart from the Secretary of State's decision. That finding was upheld by the Court of Appeal. It was in that same year that the application was submitted to this Court. Five years later, in 2013, while the present application was still pending, the Court issued its ruling in *Vinter and Others v. the United Kingdom* ([GC], nos. 66069/09, 130/10 and 3896/10, ECHR 2013 (extracts)), which addressed the compatibility of the conditions of life imprisonment in the United Kingdom with Article 3 of the Convention. In that judgment, the Court, interpreting Article 3, established that the Convention does not prohibit the imposition of a life sentence; nonetheless, in order to be compatible with Article 3 such a sentence must be reducible *de jure et de facto*, meaning that there must be both a prospect of release for the prisoner and a possibility of review (see *Vinter and Others*, cited above, § 42). Such an interpretation was reiterated very recently in *Murray v. the Netherlands* ([GC], no. 10511/10, ECHR 2016). Such is therefore the consolidated (for the time being) interpretation by this Court of Article 3 of the Convention, an interpretation which is not disputed by the applicant. This interpretation is not, therefore, the object of the case, nor of the applicant's claim.

The basis for the present application, introduced, as noted above, in 2008, was that the whole life order was in breach of Article 3. Before the Grand Chamber, the applicant maintains that even since the *McLoughlin* judgment, the United Kingdom's legal order with regard to life imprisonment continues to be contrary to that article, and does not meet the requisites established by this Court in *Vinter*.

The present Grand Chamber judgment considers that the current situation in this respect derives from the lines established in the case-law of the United Kingdom courts, notably by the Court of Appeal in the *McLoughlin*

case. It accepts that the principles established in that judgment in 2014 have dispelled the deficiencies identified in *Vinter* with regard to the United Kingdom's legal system in respect of life imprisonment and its compatibility with Article 3, namely concerning the possibility of a review of the terms of a life sentence, the scope of such a review, the criteria and conditions to be applied and the timeframe for the review. Therefore, it concludes that, at the present time and as a consequence of *McLoughlin*, the whole life sentence imposed on the applicant can now be regarded as reducible, in keeping with Article 3 of the Convention. There is now, according to the Grand Chamber, no violation of that article. Notwithstanding the applicant's submissions, I see no reason to differ from the detailed reasoning of the Grand Chamber on this point.

But of course, this conclusion (and the use of the term "now" in paragraph 72 of the judgment is revealing) refers to the situation existing at the present moment, and more precisely to the situation existing now (in 2016) as a consequence of the *McLoughlin* judgment in 2014.

Even admitting that, in the opinion of the Grand Chamber, there is not at present a violation of Article 3 with respect to the applicant as a result of the above ruling, an issue remains concerning his situation between the point that he was sentenced to a whole life term and the date on which the *McLoughlin* judgment was delivered, thus translating into the United Kingdom's legal system the principles set out by this Court in *Vinter*.

In the latter judgment, the Court found that the situation in the United Kingdom concerning life imprisonment was in contradiction with the standards of Article 3. As it transpires from the Grand Chamber's considerations in the present case, such a situation persisted until 2014, the date of the *McLoughlin* judgment. Therefore, the applicant was subject from his sentencing to a whole life term until that date (that is, for thirty years) to a situation which in itself represented a violation of Article 3.

I find it somewhat puzzling that the Grand Chamber considers that the applicant's claim was confined "to the present state of the domestic law" (see paragraph 73), given that he submitted his application in 2008 and then only after having unsuccessfully attempted for many years to obtain a remedy, on many occasions, before the United Kingdom authorities. During this time, the applicant, sentenced to a whole life term, was deprived of any prospect of review, or of mitigation of that penalty. He was therefore subjected to what was defined by the Court in *Vinter* as inhuman treatment, and I consider that the Grand Chamber in its present judgment should have recognised that fact and found a violation of Article 3 of the Convention.

DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

Table of Contents

I. Introduction (§ 1)

1. I beg to disagree with this judgment. I find that the *McLoughlin* decision[1] should not be regarded as complying with the requirements of Article 3 of the European Convention on Human Rights ("the Convention") as exposed in the *Vinter and Others* judgment[2]. The majority's ingenious effort to reconcile the letter and spirit of *Vinter and Others* with *McLoughlin* raises not only questions of linguistic precision, logical coherence and legal certainty that were left unanswered in the present judgment, but also the fundamental issue of the compatibility of section 2 of the Human Rights Act ("the Act"), as applied in the present case by the Court of Appeal of England and Wales ("the Court of Appeal"),

1. R v. McLoughlin, R v. Newell, Court of Appeal, Criminal Division, 18 February 2014 [2014] EWCA Crim 188.
2. Vinter and Others v. the United Kingdom [GC], nos. 66069/09, 130/10 and 3896/10, ECHR 2013 (extracts).

with the Convention. The purpose of this dissent is to reply to these questions.

First Part (§§ 2-25)

II. The Convention law on parole (§§ 2-10)

A. The acknowledgment of the right to parole in *Vinter* (§§ 2-6)

2. On 9 July 2013 the European Court of Human Rights ("the Court") held, in *Vinter and Others*, that whole life orders violate Article 3 of Convention. The Court's critique concerned two interconnected issues: the lack of clarity as to the law at the relevant time concerning the prospect of release for life prisoners given the discrepancy between various sources[3], as well as the absence of any dedicated parole mechanism for whole life orders[4]. In view of both of these deficiencies in the domestic law, the Court found that the applicants' life sentences could not be regarded as reducible for the purposes of Article 3 of the Convention.

3. For the Court, the discrepancy between domestic case-law as stated in *Bieber*[5] and the official policy set out in the Indeterminate Sentence Manual (the "Lifer Manual")[6] made it unclear "at the present time" whether "the Secretary of State would apply his existing, restrictive policy, as set out in the Prison Service Order, or would go beyond the apparently exhaustive terms of that Order by applying the Article 3 test set out in *Bieber*"[7]. The Court did not find the possibility of judicial review of any ministerial refusal to release a life prisoner, in the course of which the legal framework would come to be clarified, sufficient to remedy the lack of clarity existing at the relevant ("present") time as to the state of applicable domestic law[8].

4. The Court further added that, for a whole life order to be compatible with Article 3, a parole mechanism has to be in place at the time that a sentence is imposed. States must establish a mechanism to review the justification of continued imprisonment on the basis of the penological needs of the prisoner sentenced to a whole life order. The parole review

3. Ibid., §§ 124, 129 and 130.
4. Ibid., §§ 122, 129 and 130. For the sake of terminological clarity, I use the word "parole" in the same sense as the Council of Europe uses it, meaning conditional release or early release of sentenced prisoners under individualised post-release conditions; amnesties and pardons are not included in this definition, as Recommendation Rec(2003)22 of the Committee of Ministers has recognised.
5. R.v. Bieber (2009), 1 WLR 223, §§ 48 and 49.
6. The Lifer Manual was issued as Prison Service Order 4700, at Chapter 12. The official policy remained unaltered despite the judgment in Bieber.
7. Vinter and Others, cited above, § 129.
8. Ibid., § 129.

must take place within a pre-determined, reasonable timeframe, but this does not prevent it being sought at the prisoner's initiative at any point after sentencing[9].

5. The criteria and conditions, including timing, for assessing the appropriateness of parole must be established by law in a clear and foreseeable manner and be based primarily on rehabilitation (i.e. special prevention) considerations and secondarily on deterrence (i.e. general preventive) considerations. The criteria should not be limited to the prisoner's mental or physical infirmity or closeness to death. Such "compassionate grounds" are clearly too restrictive. According to the Court, that was the case with section 30 of the Crime (Sentences) Act 1997 and the Lifer Manual.

6. The logical conclusion from the above is that, if a parole mechanism must be available to those convicted of the most heinous crimes, *a fortiori* it must be available to other prisoners. It would fly in the face of justice if offenders convicted of less serious offences could not be paroled whenever they are apt to reintegrate society, while such an opportunity would be afforded to offenders convicted of more serious crimes. In other words, the Convention guarantees a right to parole, if and when the legal requisites of parole obtain. Furthermore, parole is not a release from the sentence, but a modification of the form of State interference with the sentenced person's liberty, by way of supervision of his or her life at large, and this supervision may take a very stringent form, with strict conditions attached, according to the needs of each paroled person.

B. The statement of the "relevant principles" on parole in *Murray* (§§ 7-10)

7. In *Murray*, the Court was even more explicit[10]. According to paragraphs 99 and 100 of that judgment, the parole mechanism must comply with the following five binding, "relevant principles":

(1) the principle of legality ("rules having a sufficient degree of clarity and certainty", "conditions laid down in domestic legislation");

(2) the principle of the assessment of penological grounds for continued incarceration, on the basis of "objective, pre-established criteria", which include resocialisation (special prevention), deterrence (general prevention) and retribution;

(3) the principle of assessment within a pre-established time frame and, in the case of life prisoners, "not later than 25 years after the imposition of the sentence and thereafter a periodic review";

9. Vinter and Others, cited above, § 122: "when the review of his sentence … may be sought".

10. Murray v. the Netherlands (GC), no. 10511/10, 26 April 2016.

(4) the principle of fair procedural guarantees, which include at least the obligation to give reasons for decisions not to release or to recall a prisoner;

(5) the principle of judicial review.

8. In *Murray*, the Court reaffirmed that, as a matter of principle, the criteria on which to assess the appropriateness of parole must be established by law in a clear and foreseeable manner. Beyond *Vinter and Others*, the authorities confirmed by the Grand Chamber were *Trabelsi*[11], *László Magyar*[12] and *Harakchiev and Tolumov*[13]. This position is also provided for by paragraph 10 of the Committee of Ministers Resolution (76) 2, paragraphs 3, 4 and 20 of the Committee of Ministers Recommendation Rec(2003)22, and paragraph 34 of the Committee of Ministers Recommendation Rec(2003)23, and, on the world stage, by Article 110 of the 1998 Statute of the International Criminal Court (Rome Statute) and Rule 223 (Criteria for review concerning reduction of sentence) of its Rules of Procedure and Evidence. Thus, according to the Grand Chamber, the parole assessment criteria are not left to the discretion of the member States. The parole review mechanism must be based on "objective, pre-established criteria", namely those "legitimate penological grounds" explicitly established in paragraph 100 of the *Murray* judgment. Most importantly of all, the Court restated that penological grounds do not equate to, and should not be confused with, "compassionate grounds for reasons of health related to ill-health, physical integrity and old age"[14].

9. According to *Murray*, the parole review must take place within a pre-determined, reasonable timeframe. The authority invoked by the Court was *Bodein v. France*[15]. This position is in line with paragraph 9 of the Committee of Ministers Resolution (76) 2 and paragraph 5 of the Committee of Ministers Recommendation Rec(2003)22 and also, at the global level, with Article 110 §§ 3 and 5 of the Rome Statute. In the event that parole is not determined at the time of the initial review, the prisoner's situation should be reviewed at reasonable, not too widely spaced intervals, as also indicated by paragraph 12 of Committee of Ministers Resolution (76) 2, and paragraph 21 of Committee of Ministers Recommendation Rec(2003)22.

10. Finally, still in the light of the *Murray* "relevant principles", the parole decision must be taken in a fair and adversarial procedure, reasoned and amenable to judicial review[16]. This is also provided by paragraph 32 of

11. Trabelsi v. Belgium, no. 140/10, § 137, ECHR 2014 (extracts).
12. Laszlo Magyar v. Hungary, no. 73593/10, § 57, 20 May 2014.
13. Harakchiev and Tolumov, nos. 15018/11 and 61199/12, §§ 255, 257 and 262, ECHR 2014 (extracts)).
14. Murray, cited above, § 100.
15. Bodein v. France, no. 40014/10, § 61, 13 November 2014.
16. It is odd that § 45 of the present judgment refers to § 120 of Vinter and Others, but ignores § 100 of Murray.

Committee of Ministers Recommendation Rec(2003)22, Article 110 § 2 of the Rome Statute and Rule 224 of its Rules of Procedure and Evidence[17].

To sum up, having established the above-mentioned "relevant principles", it could be expected that the Court had reached in *Murray* a point of no return in its standard-setting function for the protection of human rights of prisoners in Europe. Unfortunately this expectation proved to be wrong in the present case.

III. The UK legal framework on parole for whole life sentence (§§ 11-26)

A. The reaction of the Court of Appeal to *Vinter* (§§ 11-18)

11. In *McLoughlin*, the Court of Appeal was specifically constituted to consider the issue of compatibility of a whole life order with the Convention. It found that the *Vinter and Others* judgment did not prevent imposition of whole life orders for "heinous crimes", since the law of England and Wales did provide for reducibility as the conditions set out in the Lifer Manual, although "exceptional", were not too restrictive and indeed had a "wide meaning that can be elucidated, as is the way the common law develops, on a case-by-case basis". In other words, the Court of Appeal held that the Grand Chamber was wrong in its interpretation of section 30 of the Crime (Sentences) Act 1997 and the Lifer Manual[18].

12. The Court of Appeal addressed the critique of *Vinter and Others* in the following terms: "As we understand the Grand Chamber's view, it might have been thought that the fact that policy set out in the Lifer Manual has not been revised is of real consequence. However, as a matter of law, it is, in our view, of no consequence."[19] Hence, it is implicit in the Court of Appeal's formulaic reasoning that it would be unlawful for the Secretary of State to follow his own published policy, which the Court of Appeal also regarded as "highly restrictive"[20]. In the Court of Appeal's understanding, if an offender subject to a whole life order can establish that "exceptional circumstances" have arisen subsequent to the imposition of the sentence, the Secretary of State must consider all the relevant circumstances, in a manner compatible with Article 3. Any decision by the Secretary of State must be reasoned by reference to the circumstances of each case and is subject to judicial review, which would serve to elucidate the meaning of the terms

17. Murray, cited above, § 100.
18. McLoughlin, cited above, § 29.
19. Ibid., § 30.
20. Ibid., § 11.

"exceptional circumstances" and "compassionate grounds", as is the usual process under the common law[21].

13. The fact that the national court specifically addressed the first critique expressed by the Grand Chamber in *Vinter and Others* as to the clarity and certainty of the state of domestic law is not the end of the matter. The domestic court's interpretation of domestic law raises rather serious linguistic, logical and legal questions, as the applicant argued. In terms of linguistic precision, the thorny question to be put is the following: what does "compassion" have to do with "justifiable penological grounds"[22] for continued imprisonment? It is plain that the Court of Appeal's interpretation of the letter of section 30 of the Crime (Sentences) Act 1997 and the exhaustively listed, and not merely illustrative, circumstances of Prison Service Order 4700 chapter 12 simply does not square with the meaning of the concept of "compassion" in Western culture[23]. Is the "wide meaning" of compassionate grounds so wide that it has no connection with the dictionary meaning of the word "compassion"? In this respect, Lord Atkin's judgment in *Liversidge v Anderson* should not be forgotten:

> "I view with apprehension the attitude of judges who on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive-minded than the executive. Their function is to give words their natural meaning, not perhaps in war time leaning towards liberty, but following the dictum of Pollock C.B. in *Bowditch v. Balchin* (1850, 5 Ex. 378), cited with approval by my noble and learned friend Lord Wright in *Barnard v. Gorman* (1941, 3 All E.R., at p. 55), 'in a case in which the liberty of the subject is concerned, we "cannot go beyond the natural construction of the Statute."'"[24]

14. In terms of logical coherence, the unavoidable question is the following: How can it be logically sustained that a "highly restrictive"[25] provision like Prison Service Order 4700 chapter 12 can be interpreted with a "wide meaning"? How can a "highly restrictive" rule on "exceptional conditions"[26] capable of leading to the exercise of the Secretary of State's power under section 30 be interpreted extensively? The golden rule of interpretation is that restrictive rules, with exhaustive terms, must be interpreted narrowly[27]. And this for a basic reason, one that already

21. See paragraph 23 of the Chamber judgment in connection with paragraphs 25-36 in McLoughlin.
22. This is the expression used in McLoughlin, cited above, § 37.
23. See the Oxford dictionary's definition of compassion as "the sympathetic pity and concern for the sufferings or misfortunes of others", based on the Latin compassio, or suffer with.
24. Liversidge v Anderson [1941] UKHL 1.
25. Vinter and Others, cited above, § 126.
26. Vinter and Others, cited above, § 128.
27. Among many other authorities, Engel and Others v. the Netherlands, 8 June 1976, § 58, Series A no. 22; Amuur v. France, judgment of 25 June 1996, Reports 1996-III, p. 848, § 42; and Assanidze v. Georgia [GC], no. 71503/01, § 139, ECHR 2004‑II.

appeared in the Humpty-Dumpty story: "When I use a word, it means just what I intended it to mean, and neither more nor less". "But", said Alice, "the question is whether you can make a word mean different things." "Not so", said Humpty-Dumpty, "the question is which is to be the master. That's all." Figuratively, the master, that is, the Secretary of State, may know what "exceptional circumstances" are when he sees them, but prisoners, lawyers and even judges will find it difficult to anticipate his or her judgment.

15. The linguistic and logical fragility of the Court of Appeal's line of argument necessarily impacts on its legal force. In purely legal terms, the crucial question is this: What can be more unclear, uncertain and therefore unpredictable than a discretionary power to release in "exceptional circumstances" which is converted into an obligation to release with a "wide meaning" in accordance with the principles set out in the Court's case-law on Article 3 of the Convention? What can be more unclear, uncertain and therefor unpredictable than "exceptional circumstances" with a "wide meaning"? How can judges and lawyers, even experienced ones, apply such an unpredictable system and how can prisoners rely on it? No answer to these questions is to be found in the majority's judgment in the present case.

16. On the face of it, it is evident that the review mechanism provided for by section 30 of the Crime (Sentences) Act 1997 and the Lifer Manual, even when read in the light of the Court of Appeal's interpretation, does not provide for "a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds"[28]. As already indicated, the violation in *Vinter* rests on two grounds, the first one being the lack of certainty and the second one being the absence of a dedicated review mechanism. They remain untouched[29].

17. First, the lack of clarity and certainty of the legal framework was not dispelled by *McLoughlin*. The Court of Appeal did not clearly state what are the "exceptional circumstances" that are capable of triggering the review mechanism, or what are the grounds on which this review can be sought. On the contrary, it stated that "the term 'exceptional circumstances' is of itself sufficiently certain"[30]. In spite of the fact that the relevant provision of the Lifer Manual is still headed "Compassionate release on medical grounds", which plainly shows what section 30 was intended for, the Court of Appeal contended that the "wide meaning" of "compassionate grounds"

28. Vinter and Others, cited above, § 119.

29. In practice, nothing changed after Vinter. This is confirmed on the ground (see van Zyl Smit and Appleton, "The Paradox of Reform: Life Imprisonment in England and Wales", in van Zyl Smit and Appleton (eds.), Life Imprisonment and Human Rights, Oxford, 2016, p. 228).

30. McLoughlin, cited above, § 31.

encompasses "legitimate penological reasons". The contention is not new. It had already been made by the Government and explicitly rejected by the Grand Chamber in paragraph 129 of the *Vinter* judgment[31]. This way, the dialogue between courts risks becoming two parallel monologues until one of them gives up.

18. Second, the Court of Appeal did not provide the slightest hint on the features of the dedicated parole process by which a prisoner may be or may not be eligible to apply for review of his or her whole life order, including the time when he or she can expect to be able to make such an application for review, who should conduct the review and the periodic availability of further reviews after the first one[32].

B. The duty to take into account the Convention (§§ 19-25)

19. The Court of Appeal argued that by virtue of sections 3 and 6 of the Human Rights Act, section 30 of the 1997 Act had to be interpreted and applied broadly enough so as to comply with Article 3 of the Convention in every case. The Lifer Manual did not and could not restrict or in any way fetter this obligation. Here lies the crux of the case. This argument raises a more general, and fundamental issue: that of the compatibility of section 2 of the Human Rights Act, as applied in the present case by the Court of Appeal, with the Convention obligations of the United Kingdom[33].

20. The Act lays a general duty on all public authorities to respect Convention rights (section 6), adding to their general duty to act in accordance with administrative law principles[34]. They are domestic rights and their formal source is the Act[35]. Being "public authorities", the duty applies to the domestic courts as much as to the Secretary of State. To fail to observe Convention rights and freedoms is to act unlawfully, giving rise to appropriate judicial relief (sections 6 and 8). The Act places the domestic courts under a duty to "take into account" the case-law of this Court (section 2). Section 3 of the Act is a crucial provision, laying down the obligation to read and give effect to legislation, primary and secondary, in a

31. The exhaustive conditions set out in the Prison Service Order itself would not be sufficient for the purposes of Article 3 (see Vinter and Others, cited above, §§ 126, 127, 129).

32. As was explicitly acknowledged in the proposal of the Joint Committee on Human Rights of the United Kingdom Parliament on the issue, points 1.21-1.26.

33. McLoughlin, cited above, §§ 23 to 25.

34. Ibid., § 29.

35. Lord Hoffmann in R v Lyons [2002] UKHL 44, § 27; Lord Nicholls and Lord Hoffmann in In re McKerr [2004] UKHL 12, paragraphs 25 and 62-65; Lord Bingham in R (Al-Skeini and others) v. Secretary of State of Defence (2007) UKHL 26, § 10; Lord Hoffman in Re G (Adoption: Unmarried Couple) (2008) UKHL 38, §§ 33-35; and Lord Neuberger in R (on the application of Nicklinson and another) v. Ministry of Justice (2014) UKSC 38, § 74.

way that is compatible with Convention rights, so far as it is possible to do so. Section 3 does not affect the validity of any incompatible primary legislation or of any secondary legislation if in the latter case primary legislation prevents the removal of incompatibility (save for the possibility of revocation). The purpose behind the Act is to delegate to the courts the bulk of the work of ensuring Convention-compliant application of domestic law. In short, declarations of incompatibility should be the last resort.

21. Hence, the Convention was given legal effect in domestic law by the Human Rights Act and a constitutional status in the legislation establishing the devolution of legislative power in Scotland, Northern Ireland and Wales[36]. It did not supersede the human-rights protection afforded by common law or statute, or create a discrete body of law based upon the judgments of the European court[37]. In spite of the critique that the Act would represent "A field day for crackpots, a pain in the neck for judges and a gold mine for lawyers"[38], domestic courts have sought, in their interpretation and application of the Convention, to take greater responsibility for the implementation of the Convention rights and freedoms. They did this in the belief that it could not have been Parliament's intention that Convention rights and freedoms enshrined in the Human Rights Act were to remain set in stone as they were when the Act was passed[39].

22. In *Ullah*, Lord Bingham enunciated the "mirror principle", stating that national courts must "keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less"[40]. In *McCaughey*, Lady Hale shared the same insight, stating that

> "If the evolutive interpretation of the Convention rights means that they now mean something different from what they meant when the 1998 Act was passed, then it is our duty to give effect to their current meaning, rather than to the one they had before"[41].

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36. It is admitted that the Human Rights Act did not change the constitutional balance between Parliament, the Executive and Judiciary (see Lord Dyson, "What is wrong with human rights?", Lecture at the Hertfordshire University, 3 November 2011, citing the 2006 review of the Department of Constitutional Affairs).

37. Lord Reed in R (Osborn) v. Parole Board (2013) UKSC 61, § 57; Lord Toulson in Kennedy v. Charity Commission (Secretary of State for Justice and Others Intervening) (2014) UKSC 20, § 133.

38. Lord McCluskey, Scotland on Sunday, 6 February 2000.

39. Lord Dyson, "Are judges too powerful?", Bentham Association Presidential Address 2014, 13 March 2014: "It is wholly unrealistic to suppose that Parliament believed that the Convention would remain immutable as at 1998."

40. R (Ullah) v Special Adjudicator (2004) UKHL 26, § 20.

41. McCaughey and Another [2011] UKSC 20, § 91. See also Lady Hale, "Beanstalk or Living Instrument? How tall can the European Convention on Human Rights grow?", Gray's Inn Reading 2011, 16 June 2011.

Furthermore, where no specific case-law exists regarding the respondent State, the domestic courts are supposed, under the Human Rights Act, to take into consideration the Court's decisions concerning similar legal problems and "seek to extract specific principles from those decisions, and then apply them to the facts of the cases before us"[42], or in other words, to respect the *res interpretata* effect of the Court's decisions for all Contracting parties.

23. It should be noted that the domestic courts have been prepared to go to great lengths, and to adopt more expansive interpretations of legislative language in order to comply with the statutory command to achieve compatibility with the Convention. In the leading House of Lords case *Ghaidan v. Godin-Mendoza*[43], the House held, reversing earlier case-law, that the phrase "a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant" must be read as including same-sex partners. Lord Nicholls wrote:

> "The mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation."[44]

Hence, the role of the courts in United Kingdom is not, as in traditional statutory interpretation, to find the true meaning of the provision, but to find, if possible, the meaning which best accords with Convention rights and freedoms. Accordingly, even when the words of an Act of Parliament are, approaching them literally, clear and unambiguous, they can still be departed from, added to or ignored under Section 3 of the Human Rights Act if it is necessary to do so in order to achieve compatibility with a Convention right[45].

24. Yet some cases have arisen were the domestic courts have preferred to say that the beams were in the eyes of others[46]. Pointing the finger to

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42. Lord Neuberger in P and Q v. Surrey County Council (2014) UKSC 19, § 62.
43. Ghaidan v. Godin-Mendoza [2004] UKHL 30.
44. Lord Nicholls in Ghaidan, cited above, § 32.
45. Lady Hale, "What's the point of human rights?", Warwick Law Lecture 2013, 28 November 2013: "But statements from Lord Nicholls, Lord Steyn and Lord Roger also gave a very broad meaning to what was 'possible' – as long as an interpretation was not contrary to the scheme or essential principles of interpretation, words could be read in or read out, or their meaning elaborated, so as both to be consistent with the Convention rights and go with the grain of the legislation, even though it was not what was meant at the time."
46. Lord Kerr, "The UK Supreme Court: The Modest Underworker of Strasbourg?", Clifford Chance Lecture 2012, 25 January 2012: "even if a case can be made that in the

some unclear and inconstant case-law on the part of the Court, Lord Slynn set the tone for the future as far back as in *R (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions*:

> "In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights."[47]

In *R v Horncastle*, Lord Philips went a step further:

> "There will, however, be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances, it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course".[48]

The following year, Lord Neuberger summarised in *Manchester City Council v Pinnock* this apparently settled view in the following terms:

> "This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law: see eg *R v Horncastle* [2010] 2 AC 373. Of course, we should usually follow a clear and constant line of decisions by the European court: *R (Ullah) v Special Adjudicator* [2004] 2 AC 323. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in *Doherty v Birmingham City Council* [2009] AC 367, para 126, section 2 of the 1998 Act requires our courts to 'take into account' European court decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line."[49]

25. There are limits to this process, as Lord Mance (with whom Lord Hope, Lord Hughes and Lord Kerr concurred) clearly admitted in *Chester*[50], "particularly where the matter has been already to a Grand Chamber once or, even more so, as in this case, twice", referring to the two Grand Chamber judgements of *Hirst*[51] and *Scoppola (no. 3)*[52]. His Lordship added:

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past we were excessively deferential to Strasbourg, there are recently clear and vigorous signals that we are no longer."

47. Lord Slynn in R (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions UKHL 23, § 26. The passage was reproduced by Lord Bingham in the famous paragraph 20 of Ulhah.

48. Lord Philips in R v Horncastle and others (Appellants) (on appeal from the Court of Appeal Criminal Division) [2009] UKSC 14, § 11.

49. Lord Neuberger in Manchester City Council v Pinnock [2010] UKSC 45, § 48.

50. R (on the Application of Chester) v. Secretary of State for Justice (2013) UKSC 63, § 27.

51. Hirst v. the United Kingdom (GC), no. 74025/01, 6 October 2005.

> "It would have then to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for the Court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level."

Lord Sumption made much the same point when he wrote:

> "In the ordinary use of language, to "take into account" a decision of the European Court of Human Rights means no more than to consider it, which is consistent with rejecting it as wrong. However, this is not an approach that a United Kingdom court can adopt, save in altogether exceptional cases... A decision of the European Court of Human Rights is more than an opinion about the meaning of the Convention. It is an adjudication by the tribunal which the United Kingdom has by treaty agreed should give definitive rulings on the subject. The courts are therefore bound to treat them as authoritative expositions of the Convention which the Convention intends them to be, unless it is apparent that it misunderstood or overlooked some significant feature of English law or practice which may, when properly explained, lead to the decision being revised by the Strasbourg Court."[53]

In other words, the domestic authorities' ultimate test for acceptance of the Court's judgments guidance seems to be determined by an apparently strict logic of norm/exception, according to which only in "rare cases" or "exceptional cases" when particularly important aspects of the domestic legal order are ignored or misunderstood the authorities will venture to say that the Court's judgments should not be followed[54]. This was precisely the understanding underlying the Court of Appeal's judgment[55].

Second Part (§§ 26-47)

IV. The State obligation in the present case (§§ 26-34)

A. The position of the respondent Government (§§ 26-29)

26. The Government argue that the applicant's point about the dictionary meaning of the word "compassion" is beside the point. In its statutory context the term "compassionate grounds" should now be understood in light of the requirements of Article 3 in this regard. Even assuming, for the sake of the discussion, that this should be the case under the Human Rights Act, the question still remains that the Court of Appeal declined to give more precise or concrete meaning to the term "exceptional circumstances", finding it to be sufficiently certain of itself. Where *Vinter and Others*

52. Scoppola v. Italy (no. 3) (GC), no. 126/05, 22 May 2012.
53. R (on the Application of Chester) v. Secretary of State for Justice (2013) UKSC 63, § 121.
54. Also referring to "exceptional circumstances" for refusal to follow the Court's clear jurisprudence, see Lord Dyson, Lecture at the Hertfordshire University, cited above.
55. McLoughlin, cited above, § 30, pointing to the Court's alleged misunderstanding of an important feature of national law.

invoked the principle of legal certainty, the Court of Appeal found it "entirely consistent with the rule of law" to consider requests on an individual basis against the criterion of an exceptional change in circumstances. It should be recalled that in *Bieber*, which remains good law, the Court of Appeal referred to "all the material circumstances, including the time ... served and the progress made in prison". No more specific indication appears to exist in domestic case-law regarding the criteria to be taken into account in reviewing a whole life sentence. Instead of specificity, as required by the principle of legality, there is breadth.

27. The Court's standard on the definition of the relevant parole grounds is much more demanding. In *Harakchiev and Tolumov*, the Court emphasized the importance of official policy statements and the general criteria guiding the authorities in the exercise of the power of clemency. It emphasized the importance of the transparency of the procedure[56]. In the *László Magyar* case which followed *Vinter*, the Chamber faulted the lack of specific guidance as to the governing criteria and applicable conditions for the exercise of presidential clemency (the gathering and organisation of personal particulars and the assessment of the request). The suggested remedy, in the Article 46 part of that judgment, was to introduce legislation enabling prisoners "to foresee, with some degree of precision, what they must do to be considered for release and under what conditions". The point was put even more exactingly in *Trabelsi*, where the Chamber referred to "objective, pre-established criteria of which the prisoner had precise cognisance at the time of imposition of the life sentence, whether, while serving his sentence, the prisoner has changed and progressed to such an extent that continued detention can no longer be justified on legitimate penological grounds"[57].

28. The Government disagree with the statement in *Trabelsi* that there need to be "pre-established criteria" for the review of sentence[58]. They consider it neither necessary nor practicable to describe what a whole life prisoner must do, such as in terms of progress towards rehabilitation. In the view of the Government rather, all relevant circumstances must be taken into consideration. The Government's position does not sit comfortably with Recommendation Rec (2003) 22, in which it is emphasised that the criteria which prisoners have to fulfil in order to be conditionally released should be clear and explicit and Rule 30.3 of the European Prison Rules[59], which provides that prisoners who are sentenced shall be informed about the time to be served and the possibilities of early release. Likewise, Article 110

56. Harakchiev and Tolumov, cited above, §§ 258 and 259.
57. Trabelsi, cited above, § 137.
58. The Government refer to a recent decision of the High Court which declined to follow Trabelsi – R (Harkins) v. Secretary of State for the Home Department [2015] 1 WLR 2975.
59. Recommendation Rec(2006)2 of the Committee of Ministers to member States on the European Prison Rules.

(4) of the Rome Statute provides that the Court may reduce the sentence if it finds that there are factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence[60]. These factors are further elaborated in Rules 223 and 224 of the Rules of Procedure and Evidence where the following examples are given: the conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime; the prospect of the resocialisation and successful resettlement of the sentenced person; whether the early release of the sentenced person would give rise to significant social instability; any significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release; individual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age.

29. Already at paragraph 128 of *Vinter and Others*, the Court observed that those directly affected are only given a partial picture of the exceptional conditions which might lead to the exercise of the Secretary of State's power under section 30. As stated by the applicant, the Lifer Manual is still the only text that is accessible to whole-life prisoners on the subject of the possibility of release. There are still no published criteria. Yet the Court's case-law gives examples of the factors that are relevant to determining whether a whole-life sentence ought to be reviewed. In *Harakchiev and Tolumov*, the judgment noted that in the Bulgarian system the circumstances taken into consideration include equity, humanity, compassion, mercy, the health and family situation of the convicted offender, and any positive changes in his or her personality[61]. In *Čačko*, the basis in domestic law for review is where the prisoner "has demonstrated improvement by fulfilling his or her obligations and by good behaviour, and where it can be expected that the person concerned will behave in an appropriate manner in the future"[62]. In *Bodein*[63], the judgment considered that the prisoner's application for reduction or variation of sentence will be assessed in the light of the degree of danger he or she poses, his or her behaviour and the evolution in his or her personality. These factors have been regarded by the Court as sufficient to fulfil the requirements of Article 3 of the Convention.

B. The position of the Grand Chamber (§§ 30-34)

30. It is true that in the present judgment the Grand Chamber confirms the overarching role of the principle of legality in prison law and

60. It is particularly important to bear in mind the Rome Statute, because the United Kingdom is a Contracting Party to it, and therefore accepted its standards.
61. Harakchiev and Tolumov, cited above, § 258.
62. Čačko v. Slovakia, no. 49905/08, § 43, 22 July 2014.
63. Bodein, cited above, § 60.

specifically in the domain of parole[64], as well as the prison authorities' obligation to strive towards a life-sentenced prisoner's rehabilitation[65]. It is also true that the Grand Chamber adds that the Secretary of State is required to take reasoned decisions on whether to release or not to release in a manner compatible with the Convention, that these decisions are to be judicially appealable, and that this judicial review must involve an "examination of the merits" of the prisoners' penological needs[66]. Finally, it is true that the Grand Chamber restates that there should be an automatic parole review after a specific minimum term, in principle 25 years after the imposition of the life sentence, without prejudice to a parole review requested by the prisoner at any time[67]. It is good news that the majority is not prepared to leave the details of such questions to the domestic authorities. But this is only half the picture.

31. The other, less positive half is that the Grand Chamber is satisfied with the Court of Appeal's vague reference to "exceptional circumstances" without any further substantive specification or clarification of these circumstances[68]. The Court of Appeal provided no guidance as to the criteria, respective weight and procedure for assessing the penological needs of further detention of the whole-life prisoner. The Court of Appeal stated that the section 30 power should and would be read in compliance with the Convention and the Court's case-law. Yet the Court of Appeal did not say what exactly that reading would be. In fact, the Court of Appeal gave a *chèque en blanc* to the Secretary of State, and the Court has nothing to say on this matter in the present judgment. Like Lord Atkin in his dissent in *Liversidge v Anderson*, I protest against strained construction put by the Court of Appeal and the majority upon words, with the practical effect of giving a Minister boundless power over the liberty of women and men.

32. This condescendence is further evidenced by the lack of any domestic application of the Court of Appeal's interpretation to date. The Government could not provide one single example since the entry into force of section 30 of the Crime (Sentences) Act 1997, or at least since *Bieber*, of release of a whole-life sentenced individual on the basis of penological grounds. Nor could the Government point to any practice showing that, notwithstanding these flaws, the system does in fact operate in a Convention-compliant way, in terms of basic procedural safeguards, such as disclosure, the right to make oral representations at the review hearing and the right to be given reasons for a negative decision. The absence of any case where the mentioned interpretation was applied only shows that it was, and still is, purely virtual. As a matter of fact, the Court of Appeal's

64. See paragraph 44 of the judgment.
65. See paragraph 43 of the judgment.
66. See paragraphs 51 and 52 of the judgment.
67. See paragraphs 67 and 69 of the judgment.
68. See paragraph 55 of the judgment.

interpretation even contradicts the Government's policy as stated black on white, *urbi et orbi*, on the web pages of the United Kingdom Government ("the person's never considered for release")[69] and the Sentencing Council, which is a public body of the Ministry of Justice ("they will never be released from prison")[70]. Indeed, the practice of the courts remains faithful to the strict punitive policy of the Government and its Sentencing Council and has paid no heed to the Court of Appeal's interpretation, as it is shown in the Sentencing Remarks of Sir John Griffiths Williams, in *R v Christopher Halliwell*, Bristol Crown Court, 23 September 2016:

> "I am satisfied your offending is exceptionally high and satisfies the criteria for a whole life term and that the Transitional Provisions do not require me to impose a minimum term. Were I to impose a minimum term it would be of such length that you would in all probability never be released. I sentence you to Life Imprisonment and direct there will be a whole life order";

the Sentencing Remarks of Mr Justice Wilkie, in *R v Thomas Mair*, Central Criminal Court, 23 November 2016:

> "I have considered this anxiously but have concluded that this offence, as I have described it, is of such a high level of exceptional seriousness that it can only properly be marked by a whole life sentence. That is the sentence which I pass. You will, therefore, only be released, if ever, by the Secretary of State exercising executive clemency on humanitarian grounds to permit you to die at home. Whether or not that occurs will be a matter for the holder of that office at the time";

and the Sentencing Remarks of Mr Justice Openshaw, *in R v Stephen Port*, Central Criminal Court, 25 November 2016:

> "The sentence therefore upon the counts of murder is a sentence of life imprisonment; I decline to set a minimum term; the result is a whole life sentence and the defendant will die in prison."

33. It bears mention at this stage that the Grand Chamber itself admitted the "inaccessibility" of the Court of Appeal's interpretation in paragraph 65 of the present judgment, in what is obviously a complacent understatement of reality[71]. This complacency goes hand in hand with the diminished role assigned to the Court by the pivotal paragraph 63 of the judgment. In it, the majority is supposed to provide the ultimate justification for not finding a violation. The paragraph disappoints the reader. The present lack of clarity

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69. "Types of prison sentences (…) Whole life term. A whole life term means there's no minimum term set by the judge, and the person's never considered for release." (https://www.gov.uk/types-of-prison-sentence/life-sentences, Last updated: 23 September 2016). I consulted the site on 24 November 2016.

70. "Whole life order: For the most serious cases, an offender may be sentenced to a life sentence with a whole life order. This means that their crime was so serious that they will never be released from prison" (https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/life-sentences/, referring to the situation as of 30 June 2016, with 59 offenders serving a whole life sentence). I consulted the site on 24 November 2016.

71. Although specifically asked why, if the intention is to follow Vinter and Others, the Lifer Manual has not been amended, no reply was given by the respondent Government.

and certainty in the domestic legal framework is saved by the Court's generous assumption that the Secretary of State will follow a certain policy while exercising section 30 powers, different from that which he has deliberately maintained in force since *Vinter and Others*.

34. It is odd that the majority pretend that a future clarification of the law is capable of remedying its present lack of clarity and certainty and thus the violation that exists today, but it is even odder to assume that this clarification will result from the adhesion of the Secretary of State to the Court's desired policy[72]. In any event, like Judge Kalaydjieva in the Chamber, I fail to see the bearing of the progressive development of the law since the *Bieber* decision in 2009 on the applicant's situation a year earlier, in 2008, when his complaints were submitted to the Court, or at the time of their examination by the Chamber in 2015 and the Grand Chamber in 2016.

V. What lies ahead for the Convention system? (§§ 35-47)

A. The seismic consequences of the present judgment for Europe (§§ 35-40)

35. The Court of Appeal stated that it was right in *Bieber* and that the Court was wrong in *Vinter and Others*. Now, the Grand Chamber is backtracking from *Vinter and Others* and admitting that the Court of Appeal was right and English law already had, since at least *Bieber*, a Convention-compatible parole mechanism for lifers. This is not an isolated event. In *Al-Khawaja and Tahery*[73], the Grand Chamber accepted the principle set out in the Supreme Court's *Horncastle* judgment, and in *Horncastle v. the United Kingdom*[74], the Chamber found no violation of Article 6 despite the use of hearsay evidence leading to the conviction. After the *Al-Khawaja and Tahery* retreat on the issue of conviction based solely or to a decisive extent on hearsay evidence[75], the *RMT* regression in the role of other international sources of law in the interpretation of the Convention labour rights[76], the *Animal Defenders* reversal on the issue of prohibition of

72. The sentence in § 63 of the judgment reads: "The exercise of the section 30 power will … be guided by all of the relevant case-law of this Court".
73. Al-Khawaja and Tahery v. the United Kingdom [GC], nos. 26766/05 and 22228/06, § 147, 15 December 2011.
74. Horncastle and Others v. the United Kingdom, no. 4184/10, 16 December 2014.
75. See the joint partly dissenting and partly concurring opinion of judges Sajó and Karakaş in Al-Khawaja and Tahery, cited above.
76. Contrast National Union of Rail, Maritime and Transport Workers v. the United Kingdom, no. 1045/10, ECHR 2014-II, with Demir and Baykara [GC], no. 34503/97, ECHR 2008-V.

political advertisement[77], and still suffering from the ongoing *Hirst* saga on the voting rights of prisoners[78], the Court is faced with an existential crisis. The pre-catastrophic scenario is now aggravated by the unfortunate spill-over effect of *Hirst* on the Russian courts[79].

36. No great effort is needed to identify the source of the crisis. It lies in the attractive force of the *Horncastle* "rare occasions" argument. The problem is that "rare occasions" tend to proliferate and become an example for others to follow suit. Domestic authorities in all member States will be tempted to pick and choose their own "rare occasions" when they are not pleased with a certain judgment or decision of the Court in order to evade their international obligation to implement it, especially when the issue is about the protection of minorities, such as prisoners, LGBT people, asylum seekers, migrants, aliens, Roma and other non-State peoples living in Contracting Parties, such as, for example, the Kurdish people, to mention but a few. There is always a minority that the majority is prone to treat as a scapegoat for all the ills in society, by imposing on them objectionable restrictions and limitations on the exercise of Convention rights and freedoms[80].

37. The risk of self-interested manipulation becomes intolerably high when domestic authorities pretend that they are only bound by a "clear and constant" line of Strasburg case-law, denying the *res interpretata* effect to "incongruous", "stray", "overly broad" Chamber judgments or even Grand Chamber judgments. The domestic authorities' test for acceptance of the Court's judgments guidance then becomes even more discretionary, based on an admittedly very fluid distinction between clear/unclear, constant/not

77. Contrast Animal Defenders International v. the United Kingdom [GC], no. 48876/08, ECHR 2013-II, with VgT Verein gegen Tierfabriken v. Switzerland, no. 24699/94, ECHR 2001‑VI.

78. See the fair assessment of the situation by Council of Europe Commissioner for Human Rights, Memorandum to the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, CommDH (2013)23, 17 October 2013.

79. See the July 2013 Anchugov and Gladkov Chamber judgment (finding Article 32 § 3 the Russian Constitution on prisoners' voting rights incompatible with European standards as set out in Hirst), the July 2015 Russian Constitutional Court judgment on the Federal Law On the Accession of the Russian Federation to the ECHR, the December 2015 Russian Law on the Constitutional Court's power to declare rulings of international bodies non-executable (including with regard to compensation) if they contradict the Russian Constitution, and, finally, the first application in April 2016 of this law in a Constitutional Court judgment, delivered precisely in the Anchugov and Gladkov case.

80. See the Council of Europe Human Rights Commissioner, Non-implementation of the Court's judgments: our shared responsibility, 23 August 2016: "Some judgments may be difficult to implement because of technical reasons, or because they touch extremely sensitive and complex issues of national concern, or because they are unpopular with the majority population. Nevertheless, the Convention system crumbles when one member State, and then the next, and then the next, cherry pick which judgments to implement. Non-implementation is also our shared responsibility and we must not turn a blind eye to it any longer."

constant case-law, allowing for the rejection of the binding and interpretative force of any Court judgment on new or polemic issues[81]. As if the Convention system did not have its own internal mechanisms for guaranteeing consistency and coherence, including, *inter alia*, referral to the Grand Chamber and the office of the Jurisconsult. As if any attempt by the Court to enter unchartered waters or to change course had to be accorded an *ex post fiat* by domestic authorities. As if, ultimately, the domestic authorities were entrusted with the power of Article 19 of the Convention, and not the Court.

38. In this context, the present judgment may have seismic consequences for the European human-rights protection system. The majority's decision represents a peak in a growing trend towards downgrading the role of the Court before certain domestic jurisdictions, with the serious risk that the Convention is applied with double standards[82]. If the Court goes down this road, it will end up as a non-judicial commission of highly qualified and politically legitimised 47 experts, which does not deliver binding judgments, at least with regard to certain Contracting Parties, but pronounces mere recommendations on "what it would be desirable" for domestic authorities to do, acting in an mere auxiliary capacity, in order to "aid" them in fulfilling their statutory and international obligations[83]. The probability of deleterious consequences for the entire European system of human-rights protection is heightened by the current political environment, which shows an increasing hostility to the Court. As one commentator put it:

> "The Court has never, in its 50-year history, been subject to such a barrage of hostile criticism as that which occurred in the United Kingdom in 2011. Over the years

81. One telling example is the divergence of views in Ambrose between the majority, who felt that no rule could clearly be found in Strasbourg jurisprudence that police questioning of a suspect, without legal advice, is unfair unless he is in custody, and Lord Kerr, who considered that the Strasbourg case-law was sufficiently clear to allow the following principle to be recognised: where a person becomes a suspect, questions thereafter put to him that are capable of producing inculpatory evidence must be preceded by information of his right to legal representation and, if he wishes a lawyer to be present, any questions must be asked to the suspect, whether in custody or not, in the presence of a lawyer.

82. See the joint dissenting opinion of judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano, annexed to Animal Defenders International, cited above. Cautioning against the danger of "double or triple standards according to the countries and concerning the same problems", see also President Costa, Interview, (2007), 5 Droits de l'Homme, pp. 77 and 78, and President Spielmann, "Allowing the right margin: the European Court of Human Rights and the national margin of appreciation doctrine: Waiver or Subsidiarity of European Review?", (2011) 14 Cambridge Yearbook of European Legal Studies, p. 381. See also my speech at the University of Paris-Sorbonne-Assas, on 20 November 2015: "Réflexions sur le renforcement de l'obligation des arrêts de la Cour", published in Sébastien Touze (ed.), La Cour Européenne des Droits de l'Homme, Une confiance nécessaire pour une autorité renforcée, Paris, Pedone, pp. 217-226.

83. See paragraphs 63 and 65 of the judgment.

> certain governments have discovered that it is electorally popular to criticise international courts such as the Strasbourg court: they are easy targets, particularly because they tend, like all courts, not to answer back."[84]

Lord Mance confirms this assessment:

> "I have heard it said that, when the Strasbourg court disagrees with a decision taken in France, the blame is France is directed at the French decision-maker, whereas, in the United Kingdom, it would be directed at the Strasbourg court."[85]

Lord Moses is of the same view:

> "Criticism of our judges has been diverted onto foreign judges in an international court... It was hoped that by increasing the power of judges to construe and apply the Convention in solving domestic challenges to the actions of public authorities, the power of the judges in Strasbourg would be reduced. What a paradox, that the attempts to diminish the force of Strasbourg influence should thereafter have merely strengthened vociferous complaint as to the invasive growth of what is condemned as alien jurisprudence!"[86]

Lord Neuberger calls this campaign "exaggerated" and "slanted"[87]. In fact, the Strasbourg-sceptic rhetoric is not really new[88]. The easy, superficial scepticism indulged in by the cynics and the contemptuous, inconsequent criticism expanded by the scoffers has always been there. It reflects a deep-rooted attitude *vis-a-vis* international law and courts, which disputes the universality of human rights.

39. The fact is that some domestic authorities have always been reluctant to learn from the Court, considering the good of human rights as being for export only, not for import. To put it in the words of Lord Hoffmann:

> "[W]hen we joined, indeed, took the lead in the negotiation of the European Convention, it was not because we thought it would affect our own law, but because we thought it right to set an example for others and to help to ensure that all the Member States respected those basic human rights which were not culturally determined but reflected our common humanity"[89].

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84. The then Deputy Registrar of the Court, Michael O'Boyle, "The Future of the European Court of Human Rights", in German Law Journal, 12 (2011), 10: 1862-77.

85. Lord Mance, "Destruction or metamorphosis of the legal order?", World Policy Conference, Monaco, 14 December 2013.

86. Lord Moses, "Hitting the Balls out of the Court: are Judges Stepping Over the Line?", Creaney Memorial Lecture, 26 February 2014.

87. See The Guardian, 5 March 2013: "Senior judge warns over deportation of terror suspects to torture states".

88. To shore up this argument one example suffices. Following the McCann v. the United Kingdom judgment, the media reported: "Ministers said they would ignore it and were not ruling out the ultimate sanction of a withdrawal from the court's jurisdiction. 'Every possible option is being kept open, including walking away,' said one insider." "Downing Street said the ruling in the so-called Death on the Rock case 'defied common sense'. Deputy Prime Minister Michael Heseltine branded it 'ludicrous'". See the Daily Mail, 28 September 1995.

89. Lord Hoffmann, "Human Rights and the House of Lords", (1999) MLR 159, p. 166.

In his 2009 Judicial Studies Board Annual Lecture, Lord Hoffmann made the point even clearer, pledging against uniformity of the application of the Convention "abstract rights" and attacking in severe words "the basic flaw in the concept of having an international court of human rights to deal with the concrete application of those rights in different countries."[90] The avowed purpose was to put in question the authority of the Court to set European-wide human-rights standards. This approach squares perfectly with a certain *Weltanschauung* which was aired by Milton's *The Doctrine and Discipline of Divorce* in these terms: "Let not England forget her precedence of teaching nations how to live."[91]

40. Seen through these lens, the relationship between national law and the Convention is peculiarly unbalanced: the impact of national law on the Convention should be maximised, whereas the impact of the Convention on the domestic law should be minimised, if not downright rejected, sometimes even with an explicit call for solutions that are supposedly home-grown and sensitive to Britain's legal inheritance and that would enable people to feel they have ownership of their rights. In this context, the "human rights diversity" argument reveals its real face as a politically unidirectional, sovereigntist card, played with regard to the import of human rights and justifying the refusal of "alien", i.e., Convention standards imposed by an international court. At the same time, the "human rights diversity" card is consciously downplayed with regard to the export of human rights and the imposition, by means of an international court, of domestic values and policies on the other Contracting Parties. Of course, this also entails a biased understanding of the logical obverse of the doctrine of the "diversity of human rights", namely the doctrine of the margin of appreciation[92]: the margin should be wider for those States which are supposed "to set an example for others" and narrower for those States which are supposed to learn from the example. This evidently leaves the door wide open for certain governments to satisfy their electoral base and protect their favourite vested interests. In my humble view, this is not what the Convention is all about.

B. *Argentoratum locutum, iudicium finitum* (§§ 41-47)

41. Two different situations must be distinguished. When the level of domestic protection of human rights is higher than the one afforded by the Convention, it may be convincingly argued that the European standards set

90. Lord Hoffmann, "The Universality of Human Rights", Judicial Studies Board Annual Lecture, 19 March 2009.
91. John Milton, Selected Prose, New and Revised edition, ed. Patrides, Columbia, 1985, p. 120.
92. Among others, associating both doctrines, Bernhardt, Thoughts on the interpretation of Human-Rights Treaties, in Matscher and Petzhold (eds.), Protecting Human Rights: the European Dimension. Studies in Honour of Gérard Wiarda, Carl Heymanns, 1988, p. 71.

out by the Court are supererogatory. The Convention itself allows for this (Article 53). Nothing prevents the domestic authorities from leaping ahead of the Strasbourg standard in the protection of human rights, and not only on issues that the Court had declared to be within the national margin of appreciation[93]. The "greater danger", perceived by Lord Brown, "in the national court construing the Convention too generously in favour of the Applicant than in construing it too narrowly"[94], misunderstood this point: from the Strasbourg perspective, there is never an erroneous, "too generous" domestic interpretation of the Convention, simply because domestic courts may err on the side of caution, but they certainly do not err on the progressive side. When domestic authorities, courts included, choose the path of a more *pro persona* Convention interpretation, this interpretation is safeguarded by Article 53.

42. Also from the UK perspective, the *Ullah*-type reticence[95], according to which domestic courts should not go where Strasbourg has not yet gone, or in the words of Lord Brown, should do "no less but certainly no more"[96], seems unfounded, and this for a variety of reasons[97]. Firstly, in *Ullah* Lord Bingham was not concerned with the situation where Strasbourg had not yet pronounced[98]. Secondly, the lack or insufficiency of Strasbourg case-law should not be used to inhibit domestic courts from giving full effect to Convention rights. Such an agnostic, passive position would defraud the obligations of the Contracting Parties as frontline administrators of the Convention. Thirdly, the Human Rights Act itself was meant to allow British judges to "contribute to this dynamic and evolving interpretation of the Convention"[99], in other words, to the development of Convention law on human rights in new directions. So it is entirely correct to hold in this

93. Lord Hoffmann in Re G (Adoption: Unmarried Couple) 2008 UKHL 38, § 31; Lord Brown in Rabone and Another v. Pennine Care NHS Trust (2012) UKSC 2, §§ 111 and 112; and Lord Hodge in Moohan and Another v. The Lord Advocate (2014) UKSC 67, § 13.

94. Lord Brown in R (Al-Skeini and others) v. Secretary of State of Defence, cited above, § 107.

95. As named by Lord Kerr, dissenting in Ambrose v. Harris (Procurator Fiscal, Oban) (2011) UKSC 43, § 126; but see Lord Hope, § 20: "It is not for this court to expand the scope of the Convention rights further than the jurisprudence of the Strasbourg court justifies." Lord Irvine approved this opinion in his lecture "A British Interpretation of Convention Rights", at the UCL's Judicial Institute, 14 December 2011. For a response, see Lord Sales, "Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine", in Public Law, Issue, 2, 2012, pp. 253-267.

96. Lord Brown in R (Al-Skeini and others) v. Secretary of State of Defence, cited above, § 106.

97. Also in this direction, Lady Hale, Warwick Law Lecture 2013, cited above, and President Bratza, "The relationship between the UK courts and Strasbourg", (2011) EHRR 505, p. 512.

98. Lord Kerr, Clifford Chance Lecture, cited above.

99. The White Paper, Rights Brought Home: The Human Rights Bill, 1997, Cm 3782, § 2.5.

context that Strasbourg is not "the inevitable and ultimate source of all wisdom"[100]. One could say, amending the amended judgment of Lord Kerr, "*Argentoratum non locutum, nunc est nobis loquendum* – Strasbourg has not spoken, now it is our time to speak"[101].

43. But when the domestic level of human-rights protection is lower than that of the Court, when the domestic reading of the Convention rights is more circumscribed than that of Strasbourg, the domestic authorities, courts included, must act as faithful trustees of the Convention values and concede preponderance to the Court's ultimate and authoritative reading (see Article 19 of the Convention), indeed even over Parliament, the different branches of Government and the judiciary of the United Kingdom. This is not a mere obligation of means, to find, as far as possible, the best possible way of harmonising domestic law and European standards, or to look for a Convention-friendly interpretation of domestic law where such an interpretation appears tenable in view of the traditionally recognised methods of statutory and constitutional interpretation. It is much more than that[102]. It is an obligation of result, to implement fully and in good faith the Court's judgments and decisions and the principles that they set out[103]. Even though we are dealing with rights under a United Kingdom statute, in reality, the domestic authorities have no choice, as Lord Rodger so brilliantly put it: "*Argentoratum locutum, iudicium finitum* - Strasbourg has spoken, the case is closed".[104]

44. This is also the understanding ratified at the highest political level by the representatives of the Contracting Parties in the Brighton declaration: "All laws and policies should be formulated, and all State officials should discharge their responsibilities, in a way that gives full effect to the

100. To use the words of Lord Kerr, Clifford Chance Lecture, cited above.

101. To use the expression coined by Lord Kerr, Clifford Chance Lecture, cited above.

102. Lord Sumption (with whom Lord Hughes agrees) stated clearly in R (on the Application of Chester), cited above, § 120, that "The international law obligation of the United Kingdom under Article 46.1 of the Convention goes further than section 2(1) of the Act, but it is not one of the provisions to which the Act gives effect."

103. On the implementation of the principles set out in the judgments, see Lord Bingham's comments in Secretary of State for the Home Department v. JJ (2007) UKHL 45, § 19; Lord Mance in Kennedy v. Charity Commission, cited above, § 60; and Lady Hale in Moohan and Another, cited above, § 53.

104. The perfect synthesis, in Lord Rodger's words in AF v. Secretary of State for Home Department and Another (2009) UKHL 28, § 98; and also Lord Hoffmann's, § 70: "But the United Kingdom is bound by the Convention, as a matter of international law, to accept the decisions of the ECtHR on its interpretation. To reject such a decision would almost certainly put this country in breach of the international obligation which it accepted when it acceded to the Convention. I can see no advantage in your Lordships doing so." Lord Hoffmann's views are particularly important because he thought that "the decision of the ECtHR was wrong and that it may well destroy the system of control orders which is a significant part of this country's defences against terrorism. Nevertheless, I think that your Lordships have no choice but to submit."

Convention"[105]. Or to use the wise words of Lord Neuberger, when he referred to the regrettable *Hirst* saga: "We may think that it is inappropriate that Strasbourg pokes its nose into the votes for prisoners' issues on the basis that it should be left to our Parliament to decide." But he also added, "It may be thought to be a small price to pay for a civilised Europe that we sometimes have to adapt our laws a little."[106] And certainly this corresponds to the best international-law tradition of Britain, synthesised in the words of the 1949 Grotius lecture of Professor Lauterpacht when he affirmed

> "the undeniably large measure of surrender of sovereignty implied in the proposed European Court and Commission of Human Rights... For the proposals imply not only the power, to be vested in international agencies, to investigate and review judicial decisions of the highest municipal tribunals. They imply the authority to review legislative acts of sovereign Parliaments."

He went on with the indication of a long list of "questions which might arise in Great Britain", including arbitrary imprisonment. The point was made even more explicitly when he admitted that

> "These possibilities must be clearly kept in mind and fully disclosed to the point of admission that, in a distinct sense, a portion of national sovereignty will be vested in the seven persons comprising the European Court of Human Rights. After we have done that – but only after that – we may be at liberty to urge that some such consummation is inevitable if the proclamation of allegiance to the rights of man is not to remain mere lip service"[107].

On the same occasion, Mr Barrington, who had been with Sir David Maxwell Fyfe in the meetings of the European Movement and in the drafting of the European Convention on Human Rights, stated the visionary, principled position of the British delegation:

> "I think governments will be reluctant to accept anything which involves a surrendering of sovereignty, but it is up to us to break down their reluctance. Anyone who can support the efforts being made in Strasbourg to carry this Convention will make an important contribution to the world-wide cause of human rights."[108]

45. Consequently, domestic authorities, courts included, must act in a way that coheres with the principle of *pacta sunt servanda* and therefore comply with the letter and abide by the principles underlying the Court's judgments and decisions, including those delivered against other Contracting Parties. As administrators of first resort of the Convention, the

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105. The High Level Conference on the Future of the European Court of Human rights, Brighton Declaration, paras. 7, 9 (c) IV and 12b.

106. Lord Neuberger, "Who are the Masters now?", Second Lord Alexander of Weedon Lecture, 6 April 2011, § 64.

107. Lauterpacht, "The proposed European Court of Human Rights", in The Grotius Society, Part II, Papers read before the Society in 1949, pp. 37 and 39.

108. Ibid., p. 43. Referring to Sir Lauterpacht, Mr Barrington admitted that "we quite shamelessly borrow many ideas from his draft Convention on the Rights of Man prepared for the International Law Association in 1948."

domestic authorities must therefore be deferential to the final say of the Court, which is entrusted with the uniform upholding of the "constitutional instrument of European public order"[109], whenever the domestic level of human-rights protection is lower than that of the Court.

46. As Lady Hale wrote, "It stands to reason that, once a State has committed itself to certain minimum standards, it cannot contract out of those by defining the terms used in its own way."[110] Neither the supremacy of Parliament nor the independence of the judiciary may be invoked to fail to perform the Convention obligation of implementation of the Court's judgments and decisions (Article 27 of the Vienna Convention on the Law of Treaties). The Convention "makes no distinction as to the type of rule or measure concerned and does not exclude any part of the member States' 'jurisdiction' from scrutiny under the Convention"[111].

47. As a matter of constitutional law, not even the core of the national constitution, where the political stakes are higher (such as the provisions on the composition of the highest political and judicial bodies of the State), may be determinative in case of conflict with international obligations derived from the Convention and its Protocols[112]. Any other approach, which pays lip service to the Court's judgments and decisions but ultimately rejects its legal force as *res judicata* among the parties and *res interpretata* for all Contracting parties, will breach the principle of *pacta sunt servanda* and the instrumental precept of good faith (Article 26 of the Vienna Convention on the Law of Treaties). As the first President of the Court, Lord McNair, put it, "the performance of treaties is subject to an overriding obligation of mutual good faith"[113]. Either the Convention and the Court's judgments and decisions are honoured fully and faithfully or friction between Strasbourg and the domestic authorities will become the norm rather than the exception. This would evidently be to the detriment of the individuals and legal persons who come to Strasbourg for justice, and ultimately determinative of the fate of the system itself. The choice between

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109. Loizidou v. Turkey (preliminary objections), 23 March 1995, § 75, Series A no. 310, and the Court's Opinion on the Reform of the control system of the ECHR, 4 September 1992, para. I (5). See my opinion in Fabris v. France [GC], no. 16574/08, 7 February 2013, and the opinion of Judges Pinto de Albuquerque and Dedov in Baka v. Hungary [GC], no. 20261/12, 23 June 2016.

110. Lady Hale, "Common law and Interpretation: the limits of interpretation", 2011 EHRLR, p. 538.

111. Among many authorities, United Communist Party of Turkey and Others v. Turkey, 30 January 1998, § 29, Reports of Judgments and Decisions 1998 I, and more recently, Anchugov and Gladkov v. Russia, no. 11157/04 and 15162/05, § 50, 4 July 2013.

112. See Seidjic and Finci v. Bosnia [GC], no. 27996/06 and no. 34836/06, for a case of conflict between constitutional provisions on the composition of highest political bodies of the State and the European standards, and more recently Baka v. Hungary [GC], cited above, on a case of conflict between constitutional provisions on the composition of the Supreme Court of Hungary and the Convention.

113. McNair, The Law of Treaties, 2nd edition, Oxford, 1961, p. 465.

two opposite paths is now clear for Governments all over Europe. Between the isolationist, sovereigntist temptation and the genuine commitment to a "greater unity" between European States pursuing the "further realisation of Human Rights and Fundamental Freedoms"[114], it is expected that the founding fathers of the system will not be the architects of its demise, and respect for Sir Hersch Lauterpacht's inspirational legacy and Sir David Maxwell Fyfe's accomplishing work will prevail.

Conclusion (§§ 48-50)

48. The "great benefits to the law and to a great many people" brought about by the Human Rights Act are unquestionable[115]. As much as the substantive developments that the Court beget in a country in which "the idea that the citizen might have rights which he could assert against the State itself was unknown to us."[116] But *McLoughlin* illustrates the potential weakness of the Human Rights Act model, when a domestic court does not take full account of the Strasbourg case-law. The Court of Appeal did not cure the defects of the domestic law following *Vinter and Others*.

49. If *McLoughlin* represents as much as can be achieved judicially to respond to *Vinter and Others*, then, as already admitted in the proposal of the United Kingdom Parliament's Joint Committee on Human Rights, amending legislation is required. As Lord Nicholls once stated, "Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making provision Convention-compliant, and the choice may involve issues calling for legislative deliberation"[117].

50. In any event, in the case of the present applicant the violation of Article 3 crystallised on 6 October 2008 when the Court of Appeal dismissed his appeal, confirming the High Court's finding that there was no reason to depart from the Secretary of State's decision to impose the whole life term. At least since then he has been deprived of his Article 3 right to parole.

SEPARATE OPINION OF JUDGE SAJÓ

To my regret I could not follow the majority, for the reasons expressed in the separate opinion of Judge Paulo Pinto de Albuquerque. Even assuming

114. The words are from the Preamble to the Convention.
115. See Lady Hale, in The Guardian, 14 March 2013, "Judges would regret Human Rights Act repeal, warns Lady Hale".
116. Lady Hale, Warwick Law Lecture 2013, cited above.
117. Lord Nicholls in Ghaidan, cited above, § 33. Lord Neuberger was even more incisive: "The fact remains though that when Strasbourg speaks, it is ultimately for Parliament to consider what action needs to be taken." ("Who are the Masters now?", cited above, § 67).

that "compassionate grounds" may mean anything a judge finds reasonable in the United Kingdom, it certainly cannot provide the specific guidance to the prisoner that was stipulated in *Murray v. the Netherlands* ([GC], no. 10511/10, § 100, ECHR 2016) a mere six months ago.