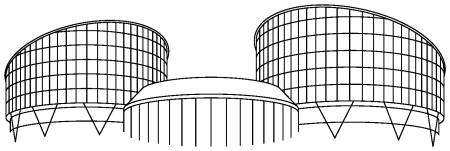

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF HUTCHINSON v. THE UNITED KINGDOM

(Application no. 57592/08)

JUDGMENT

STRASBOURG

3 February 2015

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

In the case of Hutchinson v. the United Kingdom,

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

Guido Raimondi, *President,*
George Nicolaou,
Ledi Bianku,
Nona Tsotsoria,
Zdravka Kalaydjieva,
Paul Mahoney,
Krzysztof Wojtyczek, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 13 January 2015,

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 was represented by Mr J. Turner, a lawyer practising in North Shields with Kyles Legal Practice, assisted by Mr J. Bennathan QC and Ms K. Thorne, counsel. The United Kingdom Government ("the Government") were represented by their Agent, Ms M. Addis, 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. On 10 July 2013 the complaint under Article 3 was communicated to the Government and the remainder of the application was declared inadmissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

6. In October 1983, the applicant broke into a family home, stabbed to death a man, his wife and their adult son and 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 the offences. At trial he pleaded not guilty, denying the killings and claiming that the sex had been consensual. On 14 September 1984, at Sheffield Crown Court, he was convicted of aggravated burglary, rape and three counts of murder.

7. The trial judge sentenced the applicant to a term of life imprisonment and recommended a minimum 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.

8. Following the entry into force of the Criminal Justice Act 2003, the applicant applied to the High Court for a review of his minimum term of imprisonment. On 16 May 2008, Tugendhat J handed down judgment in the applicant's case ([2008] EWHC 860 (QB)), finding that there was no reason for deviating from the Secretary of State's decision. The seriousness of the offences alone was such that the starting point was a whole life order. In addition, there were a number of very serious aggravating factors. Tugendhat J made express reference to an impact statement from the surviving victim, which described "sadistic as well as sexual conduct". There were no mitigating factors. On 6 October 2008, the Court of Appeal dismissed the applicant's appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

9. 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, 9 July 2013.

10. As regards the discretion of the Secretary of State for Justice to release a prisoner sentenced to a whole life order, section 30(1) of the Crime (Sentences) Act 1997 ("section 30") provides that he may at any time release a life prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds. The criteria for the exercise of that discretion are set out in chapter 12 of the Indeterminate Sentence Manual ("the Lifer Manual"), issued by the Secretary of State as Prison Service Order 4700 in April 2010.

Chapter 12 of the Lifer Manual, where relevant, provides:

> "The criteria for compassionate release on medical grounds for all indeterminate sentence prisoners (ISP) are 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 (Indeterminate Sentenced Prisoner) is bedridden or similarly incapacitated, for example, those paralysed or suffering from a severe stroke;
>
> 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."
>
> [underlining in the original]

11. Under section 6 of the Human Rights Act 1998 the Secretary of State, as a public authority, is bound to act compatibly with the scheduled Convention rights, including Article 3. Under section 3 of the Human Rights Act, legislation is to be interpreted so far as it is possible to do so compatibly with the Convention.

12. A summary of the existing domestic case-law relating to the compatibility of the whole life order scheme with Article 3 of the Convention, notably the Court of Appeal's judgments in *R v. Bieber* and *R v. Oakes and Others* and the House of Lords judgment in *R (Wellington) v. Secretary of State for the Home Department*, was set out in *Vinter and Others*, cited above, §§ 47-58.

13. The Grand Chamber delivered its judgment in *Vinter and Others* on 9 July 2013. For reasons discussed in more detail below, it held that there had been a violation of Article 3 in relation to the whole life orders imposed on the applicants because, given the lack of clarity in domestic law concerning the existence of an Article 3-compliant review mechanism, it appeared that the sentences were irreducible. Following the *Vinter and Others* judgment, a special composition of the Court of Appeal was constituted, 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, to consider three appeals by defendants on whom whole life orders had been imposed and a reference by the Attorney-General in a

case where it was 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 Court of Appeal's judgment in this case, *R v. Newell; R v. McLoughlin* [2014] EWCA Crim 188 was delivered on 18 February 2014. On the question whether whole life orders were reducible and thus compliant with Article 3, the Court of Appeal held:

> "25. The questions therefore arise as to whether the provisions of s.30 provide such a regime compatible with Article 3 as interpreted by the Grand Chamber and on the assumption that, discharging our duty under s.2 of the Human Rights Act to take into account the decision of the Strasbourg Court, we should adopt that interpretation.
>
> 26. Lord Phillips CJ in giving the judgment of this court in *R v Bieber* concluded that the regime was compatible and a whole life order was reducible, because of the power of the Secretary of State under s.30 of the 1997 Act. He said at paragraph 48:
>
> 'At present it is the practice of the Secretary of State to use this power sparingly, in circumstances where, for instance, a prisoner is suffering from a terminal illness or is bedridden or similarly incapacitated. If, however, the position is reached where the continued imprisonment of a prisoner is held to amount to inhuman or degrading treatment, we can see no reason why, having particular regard to the requirement to comply with the Convention, the Secretary of State should not use his statutory power to release the prisoner.'
>
> In *R v Oakes*, this was reaffirmed in the judgment of this court – see paragraph 15.
>
> 27. The Grand Chamber whilst accepting that the interpretation of s.30 of the 1997 Act as set out in *R v Bieber* would in principle be consistent with the decision in *Kafkaris*, was concerned that the law might be insufficiently certain. It added at paragraphs 126-7:
>
> 'The fact remains that, despite the Court of Appeal's judgment in *Bieber*, the Secretary of State has not altered the terms of his explicitly stated and restrictive policy on when he will exercise his s.30 power. Notwithstanding the reading given to s.30 by the Court of Appeal, the Prison Service Order remains in force and provides that release will only be ordered in certain exhaustively listed, and not merely illustrative, circumstances, ...
>
> These are highly restrictive conditions. Even assuming that they could be met by a prisoner serving a whole life order, the Court considers that the Chamber was correct to doubt whether compassionate release for the terminally ill or physically incapacitated could really be considered release at all, if all it meant was that a prisoner died at home or in a hospice rather than behind prison walls. Indeed, in the Court's view, compassionate release of this kind was not what was meant by a "prospect of release" in *Kafkaris*, cited above. As such, the terms of the Order in themselves would be inconsistent with *Kafkaris* and would not therefore be sufficient for the purposes of Article 3.'
>
> 28. The Grand Chamber therefore concluded that s.30 did not, because of the lack of certainty, provide an appropriate and adequate avenue of redress in the event an offender sought to show that his continued imprisonment was not justified. It concluded at paragraph 129:
>
> 'At the present time, it is unclear whether, in considering such an application for release under s.30 by a whole life prisoner, the Secretary of State would apply his existing, restrictive policy, as set out in the Prison Service Order, or would go beyond

the apparently exhaustive terms of that Order by applying the Article 3 test set out in *Bieber*. Of course, any ministerial refusal to release would be amenable to judicial review and it could well be that, in the course of such proceedings, the legal position would come to be clarified, for example by the withdrawal and replacement of the Prison Service Order by the Secretary of State or its quashing by the courts. However, such possibilities are not sufficient to remedy the lack of clarity that exists at present as to the state of the applicable domestic law governing possible exceptional release of whole life prisoners.'

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

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

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

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

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

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

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

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

s.30 we have set out provides for that possibility and hence gives to each such prisoner the possibility of exceptional release.

Conclusion

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

14. 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. Admissibility

15. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

16. The applicant submitted that his case was indistinguishable from *Vinter and Others*, cited above. The clarification offered by the Court of Appeal in *R v. Newell; R v. McLoughlin* was in substance identical to that set out in the earlier Court of Appeal judgments in *R v. Bieber* and *R v. Oakes*, which were considered by the Grand Chamber in *Vinter and Others* before it came to a finding of violation. Moreover, the applicant argued that the Convention was a living instrument and that there was a rapidly developing international consensus that the review of whole life orders required a judicial or quasi-judicial decision, rather than the decision of a Government Minister. The views expressed by the Secretary of State

for Justice on the subject of whole life orders demonstrated that there was no realistic prospect of a fair, balanced and certain system under political control, and judicial review was no remedy for this, since it provided a review of process and not of substance. The reviewing court could examine whether the Secretary of State's decision was taken on improper grounds or was so unreasonable that no reasonable politician could have made it, but it was not open to the court to impose its own solution. In conclusion, in the applicant's submission, a mechanism "pieced together" from an executive discretion, a statutory provision limited to compassionate grounds and supervised at a distance by judicial review was too uncertain, lacked clarity and offered too vague a hope of release to pass the standard set out in *Vinter and Others*.

17. Prior to the delivery of the Court of Appeal's judgment in *R v.Newell; R v. McLoughlin*, the Government recognised that the principles set out by the Grand Chamber in *Vinter and Others* (cited above) "would appear on their face to apply to this case" and that they did not, therefore, consider themselves in a position to submit observations on the merits. However, after the delivery of the Court of Appeal's judgment the Government indicated that they wished to submit observations. They underlined that the judgment in *R v. Newell; R v. McLoughlin* was now the binding and authoritative statement of the law in England and Wales. In that judgment the Court of Appeal set out the operation of domestic law, finding that the Secretary of State's power to release under section 30 of the 2003 Act functioned in precisely the way which the Grand Chamber held was in principle sufficient to render a whole life order reducible and this was compatible with Article 3 of the Convention. The Court of Appeal was uniquely well placed to determine this issue and its judgment had put to rest any suggestion that domestic law was in any relevant respect unclear.

2. The Court's assessment

a. General principles relating to the need for a review mechanism in respect of whole life sentences

18. It is well-established in the Court's case-law that a State's choice of a specific criminal justice system, including sentence review and release arrangements, is in principle outside the scope of the supervision the Court carries out at the European level, provided that the system does not contravene the principles set forth in the Convention. Contracting States must remain free to impose life sentences on adult offenders for especially serious crimes such as murder: the imposition of such a sentence on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention. This is particularly so when such a sentence is not mandatory but is imposed by an independent judge after he or she has

considered all of the mitigating and aggravating factors which are present in any given case (see *Vinter and Others*, cited above, §§ 104-106).

19. However, if the life sentence is as a matter of law or practice irreducible, this may raise an issue under Article 3 (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 97, ECHR 2008). In *Vinter and Others*, cited above, the Grand Chamber reviewed in detail the relevant considerations flowing from the Court's case-law and from recent comparative and international-law trends in respect of life sentences (ibid., §§ 104-18; see also *Öcalan v. Turkey (no. 2)*, nos. 24069/03, 197/04, 6201/06 and 10464/07, §§ 193-198, 18 March 2014; *László Magyar v. Hungary*, no. 73593/10, §§ 46-53, 20 May 2014; *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, §§ 245-246, ECHR 2014 (extracts). On that basis, because a prisoner could not be detained unless there were legitimate penological grounds for incarceration, it held that a life sentence could remain compatible with Article 3 of the Convention only if there was both a prospect of release and a possibility of review (ibid., §§ 109-10). The Court noted in particular that the balance between the justifications for incarceration, such as punishment, deterrence, public protection and rehabilitation, could shift in the course of the sentence and it was only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that those factors or shifts could properly be evaluated. If a prisoner was incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there was the risk that he could never atone for his offence and that whatever he did in prison, however exceptional his progress towards rehabilitation, his punishment would remain fixed (ibid., §§ 111-12). The Court therefore held that it would be incompatible with human dignity – which lay at the very essence of the Convention system – forcefully to deprive a person of his freedom without striving towards his rehabilitation and providing him with the chance someday to regain that freedom (ibid., § 113). It went on to note that there was now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation was achieved (ibid., § 114). While punishment remained one of the aims of imprisonment, the emphasis in European penal policy, as expressed in Rules 6, 102.1 and 103.8 of the European Prison Rules, Resolution 76(2) and Recommendations 2003(23) and 2003(22) of the Committee of Ministers, statements by the Committee for the Prevention of Torture, and the practice of a number of Contracting States, and in international law, as expressed, *inter alia*, in Article 10 § 3 of the International Covenant on Civil and Political Rights and the General Comment on that Article, was now on the rehabilitative aim of imprisonment, even in the case of life prisoners (ibid., §§ 115-18).

20. Based on that analysis, the Grand Chamber established the following propositions in relation to life sentences:

(a) In the context of a life sentence, Article 3 of the Convention must be interpreted as requiring reducibility of the sentence, in the sense of 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 (ibid., § 119);

(b) Having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing, it is not the Court's task to prescribe the form – executive or judicial – which that review should take, or to determine when that review should take place. However, the comparative and international law materials 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 (ibid., § 120);

(c) Where domestic law does not provide for the possibility of such a review, a whole life sentence will not comply with Article 3 (ibid., § 121);

(d) Although the requisite review is a prospective event necessarily subsequent to the passing of the sentence, a whole life prisoner should not be obliged to wait and serve an indeterminate number of years of his sentence before he can raise the complaint that the legal conditions attaching to his sentence fail to comply with the requirements of Article 3 in this regard, since this would be contrary both to legal certainty and to the general principles on victim status within the meaning of that term in Article 34 of the Convention. Furthermore, in cases where the sentence, on imposition, is irreducible under domestic law, it would be capricious to expect the prisoner to work towards his own rehabilitation without knowing whether, at an unspecified, future date, a mechanism might be introduced which would allow him, on the basis of that rehabilitation, to be considered for release. A whole life prisoner 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 of the Convention on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration (ibid., § 122);

21. It must be emphasised, however, that the fact that in practice a life sentence may be served in full does not make it irreducible. No Article 3 issue could arise if a life prisoner had the right under domestic law to be considered for release but this was refused, for example, on the ground that he or she continued to pose a danger to society (ibid., § 108).

b. Whether the review mechanism available to the applicant is sufficient to comply with the requirements of Article 3

22. The dispute between the parties in the present case centres on whether the Secretary of State's discretion to release a whole life prisoner under section 30 of the 2003 Act (see paragraph 10 above) is sufficient to make the whole life sentence imposed on the applicant legally and effectively reducible. In *Vinter and Others*, cited above, the Court held that, if section 30 were to be interpreted, in the light of section 6(1) of the Human Rights Act, as imposing a duty on the Secretary of State to exercise his power of release if it could be shown that the prisoner's continued detention was no longer justified on penological grounds, as the Court of Appeal had held it should be in *R v. Bieber* and *R v. Oakes* (see paragraph 12 above), this would, in principle, be consistent with the requirements of Article 3 of the Convention (ibid., § 125). However, the Court considered that there was a lack of clarity in the law (ibid., §§ 125 and 126). In particular, it held that the fact that, despite the two Court of Appeal judgments, the Secretary of State had not amended chapter 12 of the Lifer Manual (see paragraph 10 above), which provided that release would be ordered only if the prisoner were terminally ill or physically incapacitated, gave rise to uncertainty as to whether the section 30 power would be exercised in a manner compliant with Article 3. In addition, the fact that the Lifer Manual had not been amended meant that prisoners subject to whole life orders derived from it only a partial picture of the exceptional conditions capable of leading to the exercise of the Secretary of State's power under section 30 (ibid., § 128).

23. However, subsequent to the Court's consideration of section 30 in *Vinter and Others* (cited above) the Court of Appeal delivered a judgment in which it expressly responded to the concerns detailed in *Vinter and Others* (*R v. Newell; R v. McLoughlin*: see paragraph 13 above). In *R v. Newell; R v McLoughlin* the Court of Appeal held that it was of no consequence that the Lifer Manual had not been revised, since it was clearly established in domestic law that the Secretary of State was bound to exercise his power under section 30 in a manner compatible with Article 3. If an offender subject to a whole life order could establish that "exceptional circumstances" had arisen subsequent to the imposition of the sentence, the Secretary of State had to consider whether such exceptional circumstances justified release on compassionate grounds. Regardless of the policy set out in the Lifer Manual, the Secretary of State had to consider all the relevant circumstances, in a manner compatible with Article 3. Any decision by the Secretary of State would have to be reasoned by reference to the circumstances of each case and would be subject to judicial review, which would serve to elucidate the meaning of the terms "exceptional circumstances" and "compassionate grounds", as was the usual process under the common law. In the judgment of the Court of Appeal, domestic law therefore did provide to an offender sentenced to a whole life order

hope and the possibility of release in the event of exceptional circumstances which meant that the punishment was no longer justified.

24. The Court recalls that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, amongst many other authorities, *Vučković and Others v. Serbia* [GC], no. 17153/11, § 80, 25 March 2014; *Söderman v. Sweden* [GC], no. 5786/08, § 102, ECHR 2013; and *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I). Moreover, the Court recalls that in the United Kingdom, as in the other Convention States, the progressive development of the law through judicial interpretation is a well-entrenched and necessary part of legal tradition (see, *mutatis mutandis*, *C.R. v. the United Kingdom*, 22 November 1995, § 34, Series A no. 335-C).

25. In the circumstances of this case where, following the Grand Chamber's judgment in which it expressed doubts about the clarity of domestic law, the national court has specifically addressed those doubts and set out an unequivocal statement of the legal position, the Court must accept the national court's interpretation of domestic law (see, *mutatis mutandis*, *Cooper v. the United Kingdom* [GC], no. 48843/99, § 125, ECHR 2003-XII). Further, as the Grand Chamber observed in *Vinter and Others*, the power to release under section 30 of the 2003 Act, exercised in the manner delineated in the Court of Appeal's judgments in *Bieber* and *Oakes*, and now *R. v. Newell; R v. McLoughlin*, is sufficient to comply with the requirements of Article 3 (and compare, also, the review mechanisms accepted by the Court to be Article 3-compliant in *Kafkaris*, cited above, §§ 100-105 [and] *Harakchiev and Tolumov*, cited above, §§ 257-261.

26. In conclusion, there has been no violation of Article 3 in the present case.

FOR THESE REASONS, THE COURT

1. *Declares* by a majority, the complaint concerning Article 3 of the Convention admissible;

2. *Holds* by six votes to one that there has been no violation of Article 3 of the Convention.

Done in English, and notified in writing on 3 February 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Guido Raimondi
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Kalaydjieva is annexed to this judgment.

GR
FA

DISSENTING OPINION OF JUDGE KALAYDJIEVA

I voted against the conclusion of the majority that the applicant's complaints are admissible in so far as they concern the compatibility of whole life sentences as such with Article 3 of the Convention. To the extent that these complaints concern the availability of *de jure* and *de facto* possibilities for release, their admissibility might be questionable in so far as it is unclear whether the applicant ever availed himself of the opportunity to apply to the Secretary of State for Justice in order to test the manner in which the latter would exercise his power to assess whether any exceptional circumstances justified the applicant's release. The applicant was entitled to do so at any time after 16 May 2008, when Tugendhat J found it "right that the applicant should remain in prison for the rest of his life by way of punishment" and ordered "that the early release provisions are not to apply to [him]".

It should be noted that Mr Hutchinson's application (no. 57592/08) was registered (one and two years respectively) earlier than those in the cases of *Vinter and Others* (nos. 66069/09, 130/10 and 3896/10) which were examined by the Grand Chamber of this Court in 2013. To the extent that the majority in the present case considered the applicant's complaints admissible and identical to the ones in *Vinter*, I find no reasons to disagree with the observation of the respondent Government of 14 January 2014 that "the principles of the judgment of the Grand Chamber in this case appear on their face to apply to this case" as well.

The reasoning of the majority in the present case is based on the premise that the Grand Chamber erred in its understanding of the domestic law as expressed in the case of *Vinter and Others* in 2013, and also on the fact that, since "it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation" (see paragraph 24 of the judgment), they were prepared to accept that the correct interpretation of the domestic law was provided in the post-*Vinter* judgment delivered by the special composition of the Court of Appeal on 18 February 2014 in the case of *R v. Newell; R v. McLoughlin* [2014] EWCA Crim 188. In that judgment, the Court of Appeal disagreed with the Grand Chamber's views on the clarity and certainty of the domestic law as first set out in *R v. Bieber* [2009], and reaffirmed that this interpretation was sufficiently clear and certain. Assuming that this is so, I fail to see the bearing of this progressive development of the law 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 Court in 2015.

Unlike in the unanimous judgment of the same Section in the case of *Harakchiev and Tolumov v. Bulgaria* (nos. 15018/11 and 61199/12, ECHR 2014), the majority in the present case failed to express any view as to whether, how and at what point the interpretation of the domestic law

established in *Bieber* [2009] and *R v. Newell; R v. McLoughlin* [2014] changed, ceased to apply or made the applicant's situation more compatible with the principles laid down by the Grand Chamber in examining the situation of the applicants in *Vinter*.

The issue in the case of Mr Hutchinson is not whether the Court (see paragraph 25) "must accept the national court's interpretation of the domestic law" as clarified in the process of "progressive development of the law through [the] judicial interpretation" (paragraph 24) provided by the Court of Appeal after *Vinter* as being the correct one, but whether or not in 2008 the applicant was in fact "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" as required by the principles established in *Vinter* (§ 122). These principles were not in themselves contested either by the 2014 judgment of the Court of Appeal or by the representative of the respondent Government in the present case.

I do not deem myself competent to determine whether the Court of Appeal expressed an *ex tunc* trust or an *ex nunc* hope that, even though to date the Secretary of State for Justice has not amended the content of the Lifers Manual after *Vinter*, he was, is and always will be "bound to exercise his power ... in a manner compatible with Article 3" (see paragraph 23). I have no doubt that the Grand Chamber was informed as to the scope of his discretion and the manner of its exercise in reaching their conclusions in *Vinter*. In this regard, and in so far as the Court of Appeal's part in the admirable post-*Vinter* judicial dialogue said "Repent!", I wonder whom it meant?