



Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done?

Dirk van Zyl Smit^{*†}, Pete Weatherby^{**} and
Simon Creighton^{***}

^{*}Professor of Comparative and International Law, University of Nottingham

^{**}QC, Garden Court North Chambers, Manchester

^{***}Partner, Bhatt Murphy Solicitors

[†]Corresponding author. E-mail: Dirk.Van-Zyl-Smit@nottingham.ac.uk.

ABSTRACT

In *Vinter and Others v United Kingdom*,¹ the Grand Chamber of the European Court of Human Rights ruled that all offenders sentenced to life imprisonment had a right to both a prospect of release and a review of their sentence. Failure to provide for these twin rights meant that the applicants had been deprived of their right under Article 3 of the European Convention on Human Rights (ECHR) to be free from inhuman or degrading treatment or punishment. Two principles established in this judgment require changes in the enforcement of whole life orders that prevent some prisoners sentenced to life terms from being considered for release. (1) Implicit in the right to a prospect of release is a right to an opportunity to rehabilitate oneself. (2) Implicit in the right to review of the continued enforcement of a life sentence is a right to a review that meets standards of due process. This article focuses on the type of review now required to satisfy these principles. Such a review, a *Vinter review*, differs from the review by the Parole Board currently required in England and Wales after an offender has served a minimum period set by the sentencing court, a *post-tariff review*. The key difference is that in a *Vinter review* all the penological justifications for the original sentence—including the seriousness of the offence—must be reviewed to determine whether the balance between them has changed and continued detention is justified. In contrast, the *post-tariff review* is limited to a review of the risk to society posed by the offender, as detention for the minimum period is deemed sufficient for retribution and deterrence. Both the *Vinter review* and the *post-tariff review* should be undertaken

1 Application Nos 66069/09, 3896/10 and 130/10, Merits, 9 July 2013 ('*Vinter* [GC]').

at appropriate times during a life sentence. Moreover, both forms of review must satisfy the standards of due process set by Article 5(4) of the ECHR and common law. Major reform of the legal framework for the implementation of such sentences is required to fully satisfy European developments.

KEYWORDS: life imprisonment, whole life orders, inhuman and degrading punishment, rehabilitation, *Vinter and Others v United Kingdom*, Articles 3 and 5(4) European Convention of Human Rights.

1. BACKGROUND: RECENT CASE LAW

In 2008 Lord Phillips of Worth Matravers, then Lord Chief Justice, mused in the Court of Appeal in *R v Bieber* that '[t]here seems to be a tide in Europe that is setting against the imposition of very lengthy terms of imprisonment that are irreducible'.²

Prior to the decision in *Bieber*, the Grand Chamber of the European Court of Human Rights (ECtHR) had held in *Kafkaris v Cyprus* that a life sentence from which an offender had no prospect of release, *de jure* and *de facto*, might infringe Article 3 of the European Convention on Human Rights (ECHR) because it would be inhuman and degrading.³ This somewhat hypothetical formulation appears to have been adopted by the majority of the Grand Chamber in *Kafkaris* because they found that in terms of the Cypriot law and practice in force at the time *Kafkaris* did have a prospect of release and that the matter did not arise directly.⁴

Canute-like, Lord Phillips nevertheless interpreted the *Kafkaris* judgment as meaning that a life sentence accompanied by a whole life order, that is a sentence that did not set a period after which the sentence had to be reconsidered, could still be imposed. In Lord Phillips's view a possible infringement would only occur if a point were reached at which there was no legitimate ground for the further detention of the person sentenced to life imprisonment. In any event, he held that the power of the Secretary of State⁵ to set a prisoner free on compassionate grounds⁶ was sufficient provision for release to ensure that it could be applied in a way that would ensure Article 3 was not infringed.

The view that Lord Phillips expressed about the position of the ECtHR on irreducible life sentences was an extended *obiter dictum*, for it was not necessary for deciding the appeal. That he found it necessary to express it perhaps indicates the importance that he attached to upholding whole life sentences. On the facts of the case Lord Phillips, together with his fellow Court of Appeal judges, upheld *Bieber*'s appeal against the whole life order that the trial court had added to his life sentence and replaced it with a minimum period of 37 years that had to be served before his release could be considered. This too was draconian, for no European country sets a

2 [2008] EWCA Crim 1601; [2009] 1 WLR 223 at para 46.

3 ECHR Reports 2008; 49 EHRR 35 at paras 97–98, 103 and 108.

4 *Vinter and Others v United Kingdom* 55 EHRR 34 at Dissenting Opinion of Judges Garlicki, Thörn, Björgvinsson and Nicolaou, paras O-116–O-118.

5 Functions in connection with the release of offenders sentenced to life imprisonment shifted from the Secretary of State for the Home Office to the Secretary of State for Justice in 2007.

6 Section 30(1) Crime (Sentences) Act 1997.

minimum that high before the automatic reconsideration of all life sentences that most of them require.⁷

The European tide was indeed turning. In 2012, in *Vinter and Others v United Kingdom* the Fourth Chamber of the ECtHR recognised that a point might arise where the further detention of someone sentenced to whole life imprisonment might no longer be justified on penological grounds.⁸ It strongly questioned whether the limited power of compassionate release,⁹ narrowly interpreted by the Prison Service Orders to restrict it to the terminally ill and physically incapacitated,¹⁰ was sufficient to ensure that someone would not continue to be detained, even though their imprisonment could no longer be justified. It also doubted 'whether compassionate release for the terminally ill or physically incapacitated could really be considered release at all, if all that it means is that a prisoner dies at home or in a hospice rather than behind prison walls'.¹¹ However, by a majority of four to three, the Fourth Chamber of the ECtHR agreed with Lord Phillips that a person subject to a whole life order did not have a right to demand that, when he was sentenced, an appropriate mechanism to consider his release should already be in place, to give him hope and to ensure that he had a clear prospect of release.¹² A possible infringement would only occur if a point were reached at which there was no legitimate ground for the further detention of the person sentenced to life imprisonment and steps were not taken to release the person concerned. That position had not been reached in the case of *Vinter*, or of *Bamber* and *Moore*, his fellow applicants.

The decision of the Fourth Chamber was challenged before the Grand Chamber of the ECtHR by the applicants. Shortly before the Grand Chamber hearing in November 2012 a specially constituted five judge Court of Appeal attempted to shore up the English status quo. In *R v Oakes and Others* the Lord Chief Justice, Lord Judge, speaking for a unanimous court, confirmed that whole life orders remained lawful in England and Wales.¹³ He found support for this in the decision of the Fourth Chamber in *Vinter* and in two further decisions of the same Chamber dealing with extradition of persons facing potential sentences of life without parole in the USA,¹⁴ as well as in domestic English jurisprudence.¹⁵ Lord Judge concluded that the whole life order, 'the product of primary legislation', was justified and appropriate, if it were reserved only 'for the few exceptionally serious offences after which,

7 Van Zyl Smit, 'Outlawing Irreducible Life sentences: Europe on the brink?' (2010) 23 *Federal Sentencing Reporter* 39. A comprehensive comparative account is now provided in *Vinter* [GC], supra n 1 at para 68.

8 Supra n 4.

9 See Section 30(1) Crime (Sentences) Act 1997.

10 Chapter 12 Prison Service Order 4700.

11 Supra n 4 at para 94.

12 Ibid. The argument about a right to hope was advanced by the minority but did not find favour with the majority.

13 [2012] EWCA Crim 2435; [2013] QB 979.

14 *Harkins and Edwards v United Kingdom* and *Babar Ahmad and Others v United Kingdom*, infra n 104 and the text at that note.

15 *Bieber*, supra n 2; and *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72; [2009] 1 AC 335 (HL) in which the House of Lords had confirmed the approach adopted in *Bieber* at para 19 per Lord Hoffmann.

after reflecting on all the features of aggravation and mitigation, the judge [was] satisfied that the element of just punishment and retribution required [its] imposition'.¹⁶

In July 2013 the Grand Chamber turned the tide. By a majority of 16 to 1 its decision in *Vinter and others v United Kingdom* (referred to as *Vinter* [GC] below) swept aside the rulings of Lord Phillips and Lord Judge. In so doing the Grand Chamber not only ruled, as the Fourth Chamber had indicated, that the existing procedure for compassionate release was inadequate for ensuring that prisoners were released when there ceased to be a sufficient penological justification for their continued detention. The Grand Chamber also held that an adequate mechanism had to be in place at the time when the sentence of life imprisonment was imposed, for prisoners needed to have a real prospect of release. Such a mechanism should enable a review to be conducted that would determine whether there was still sufficient penological justification for the continued detention of the person on whom a whole life order had been imposed. This form of review of a life sentence with a whole life order is referred to as a *Vinter review* in this article.

In *Vinter* [GC] the power of a sentencing court to impose whole life orders as part of sentences of life imprisonment was not challenged (as long as such sentences too were subject to review). Moreover, the Grand Chamber made it clear that if prisoners sentenced to life imprisonment with whole life orders continued to pose a risk to society, they could be detained in prison until the end of their lives. However, in the absence of a real prospect of release, reinforced by the existence of an appropriate mechanism for a *Vinter review*, prisoners subject to whole life orders would be denied hope of release, which would be inhuman and degrading and thus infringe Article 3 of the ECHR.

2. BACKGROUND: RELEASE MECHANISMS

Before considering the issues of principle raised by the decision in *Vinter* [GC], additional background information is necessary on the mechanisms for releasing prisoners serving life sentences in England and Wales and the rest of Europe.

The current English release-review system evolved from an earlier informal system involving the Secretary of State, the trial court, the Lord Chief Justice and the Parole Board. Under this system the Secretary of State would seek advice from the trial judge and the Lord Chief Justice as to the minimum term (or tariff) prisoners sentenced had to serve for purposes of punishment and then set a minimum term after which release could be considered. After that minimum term had been served the Secretary of State, having taken advice from the Parole Board, would decide whether such prisoners who had served the punishment component of their sentences should be released or should continue in detention.¹⁷ In rare instances the Secretary of State would come to the conclusion that the offence was so heinous that no tariff should be set at all. Even then the Secretary of State would conduct a review

¹⁶ Supra n 13 at para 29.

¹⁷ For the historical evolution, see Van Zyl Smit, *Taking Life Imprisonment Seriously in National and International Law* (The Hague: Kluwer, 2002) chapter 3 and particularly the House of Lords judgment in *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531.

‘from time to time’ and could set a tariff or, if the prisoner had made exceptional progress, order their release.¹⁸

Rulings by the ECtHR that setting the minimum term for someone sentenced to life imprisonment is a judicial function and that the decision on release also had to be made by an independent and impartial body, led to the current system. The ECtHR decisions culminated in the judgment of the Grand Chamber in *Stafford v United Kingdom*.¹⁹ In *Stafford* the Court observed that, in the case of mandatory life sentences for murder, continued detention after the expiry of the tariff depended solely on elements of danger and risk. Since these elements might change with time, and the detention might no longer be compatible with Article 5(1), the Grand Chamber held new issues of lawfulness arose. Article 5(4) of the ECHR required that the continued lawfulness of the detention had to be determined by an independent and impartial tribunal, with the power to order release, following a procedure containing the necessary judicial safeguards, including the possibility of an oral hearing. Following the decision of the ECtHR in *Stafford*, the House of Lords declared the existing regime for imposing minimum terms on lifers incompatible with the ECHR.²⁰ This led directly to the current statutory regime governing sentencing to life imprisonment and release from it.

The rules governing the sentencing of life sentence prisoners in England and Wales are contained in the 2003 Criminal Justice Act. They provide that in all cases where a life sentence has been imposed the trial court must specify the minimum term to be served by the offender before being considered for release.²¹ That term is designed to reflect the period an offender should serve to meet the requirements of retribution and deterrence. After that, the offender must be released by the Parole Board, which for this purpose is regarded as the equivalent of a court, if the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.²² This form of review is referred to below as a *post-tariff review*.

The provisions of the 2003 Criminal Justice Act relating to life imprisonment also include a schedule, Schedule 21, which give judges indications of the ‘starting points’ that they should use when setting the minimum periods for mandatory life sentences for murder. Thus, for example, the starting point for the murder of a police officer or prison officer in the course of their duty is 30 years,²³ while for a murder that does

18 The policy announced by the Secretary of State initially referred to a review after 25 years but, at the hearing before the House of Lords in *R v Secretary of State for the Home Department, ex parte Hindley* [1998] QB 751 (HL), counsel for the government gave an undertaking that it would be applied flexibly. The existence of such a backstop played an important part in the acceptance by the House of Lords that a whole life tariff was not illegal.

19 2002-IV; 35 EHRR 32. The ECtHR had earlier established a similar requirement for discretionary life sentences (*Weeks v United Kingdom* A 114 (1987); 10 EHRR 293) and for children sentenced to life imprisonment (*Hussain v United Kingdom* 1996-I; 22 EHRR 1; and *V and T v United Kingdom* 1999-IX; 30 EHRR 121).

20 *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837.

21 For a more detailed account of these provisions, see Creighton and Arnott, *Prisoners Law and Practice* (London: Legal Action Group, 2009) chapter 10.

22 Section 28 Crime (Sentences) Act 1997.

23 Para 5(2)(a) Schedule 21 Crime (Sentences) Act 1997.

not fall in one of the listed categories the starting point is 15 years.²⁴ The Schedule also provides that if:

- a. the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, and
- b. the offender was aged 21 or over when he committed the offence, the appropriate starting point is a whole life order.²⁵

The Schedule goes on to explain that cases that would normally fall within the criteria for a whole life order are:

- a. the murder of two or more persons, where each murder involves any of the following—
 - i. a substantial degree of premeditation or planning,
 - ii. the abduction of the victim, or
 - iii. sexual or sadistic conduct,
- b. the murder of a child if involving the abduction of the child or sexual or sadistic motivation,
- c. a murder done for the purpose of advancing a political, religious, racial or ideological cause, or
- d. a murder by an offender previously convicted of murder.²⁶

A 'whole life order' effectively removes the case from the jurisdiction of the Parole Board, because the prisoner is never 'post-tariff'. At the same time, the 2003 Act removed the general power of the Secretary of State to review a life sentence and order a release. As a result, today whole life sentences are not subject to a general review at any stage, with the limited exception for release on compassionate grounds—a power that has never been exercised.²⁷

It should be noted that whole life sentences make up only a small proportion of the very large number of prisoners serving indeterminate sentences in England and Wales. Only 51 of the 12,963 prisoners²⁸ serving life sentences and other fully indeterminate sentences on 30 September 2013 were subject to whole life orders. However, 1092 of those serving life sentences had minimum terms of more than 20 years.²⁹ There are strong indications that the overall length of minimum terms

24 Para 6 Schedule 21 Crime (Sentences) Act 1997.

25 Para 4(1) Schedule 21 Crime (Sentences) Act 1997.

26 Para 4(2) Schedule 21 Crime (Sentences) Act 1997.

27 *Vinter* [GC], supra n 1 at para 44.

28 Of these, 42 per cent were serving sentences of Imprisonment for Public Protection (5,468) and 58 per cent were serving life sentences (7,495): Ministry of Justice, *Offender Management Statistics Quarterly April to June 2013* at 8. Some information for 30 September 2013 is included in this statistical update in spite of the title of the report. Of the latter 5,151 were serving mandatory life sentences (that is, they had been sentenced for murder): Freedom of Information request 86730 reply dated 22 November 2013 (copy on file with the first author). Whole life orders are invariably imposed only on prisoners subject to mandatory life sentences. Forty-four of those subject to whole life orders were being held in prison and the other seven in secure hospitals.

29 *Ibid.* at Prison Population Tables 1.4. Of these prisoners, 39 were being held beyond their minimum term.

has increased since 2003, when Schedule 21 to the Criminal Justice Act set much higher points of departure than the then Lord Chief Justice had recommended,³⁰ as has the use of very long-minimum periods of up to 40 years.³¹

In most European jurisdictions that have life imprisonment, the procedure for the release of persons serving a life sentence is different to that in England and Wales, because the trial judge does not set an individualised minimum period. Legislation sets the general minimum term, usually of between 12 and 25 years, at which point all persons subject to life sentences are to be considered for release by a court, which may or may not have other functions relating to the enforcement of sentences.³² Unlike in England and Wales, the consideration at this stage is open ended. The court or tribunal responsible for release considers the seriousness of the original offence as a factor in its decision on whether to release the prisoner but also includes in its consideration the progress towards rehabilitation that a prisoner may have made in detention and the risk that he may still pose to society. These substantive criteria, as will be explained more fully below, are similar to those now required for a *Vinter* review.

3. HUMAN DIGNITY AND THE POSSIBILITY OF REHABILITATION

The significance of the decision in *Vinter* [GC] goes far beyond the procedural reform required in considering the justifications for the continued detention of a small group of offenders sentenced to life imprisonment. The Grand Chamber found limits to a state's power to punish to be inherent in the prohibition on inhuman or degrading treatment and punishment. At its core is the recognition of the human dignity of all offenders. No matter what they have done, they should be given the opportunity to rehabilitate themselves while serving their sentences, with the prospect of eventually functioning as responsible members of free society again. The Grand Chamber in *Vinter* found that the complete denial of this opportunity is inherently degrading and therefore prohibited.

Rehabilitation, the Grand Chamber explained, is not possible without the prospect of release:

[I]n cases where the sentence, on imposition, is irreducible under domestic law, it would be capricious to expect the prisoner to work towards his own

30 Ashworth, 'The Struggle for Supremacy in Sentencing', in Ashworth and Roberts (eds), *Sentencing Guidelines: Exploring the English Model* (Oxford: Oxford University Press, 2013) 15.

31 See, for example, *R v Oakes and Others*, supra n 13, where the Court of Appeal substituted a life sentence with a minimum term of 40 years for the whole life order imposed on one of the appellants.

32 In *Vinter* [GC], supra n 1 at para 68, 32 European countries were identified as having some mechanism to review the continued enforcement of life sentences. There are some variations amongst them. For example, there are some statutory minimum periods of more than 25 years: 30 years in Estonia and Moldova and in France for certain murders, and 36 years for 'aggregate sentences of aggravated life imprisonment' in Turkey. The actual review procedures may also vary slightly. For example, the reviewing court may not order release directly but instead change life sentences into fixed terms of years. Prisoners who have had their life sentences modified in this way are then considered for release in the same way as prisoners serving determinate sentences. These variations and the continuing small changes in the various legal regimes make an entirely accurate picture hard to obtain, but they do not distract from the overall model, which is posited here for purposes of comparison.

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.³³

Rehabilitation is, of course, a disputed concept.³⁴ However, by linking it so closely to providing prisoners with opportunities for self-improvement and to consideration of their release, the Grand Chamber makes it clear that it is focusing on the aspects of rehabilitation that will empower prisoners and enable their social reintegration rather than an earlier narrow notion of forced treatment with which the concept of rehabilitation is sometimes associated.³⁵

The judgment emphasised that all prisoners need to be able to retain some hope for a better future in which they can again become full members of society. In her concurring opinion in *Vinter* [GC] Judge Power-Forde explained briefly but eloquently why this matters so much:

The judgment recognises, implicitly, that hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.³⁶

This brief summary is also a response to the single dissenting opinion in *Vinter* [GC], that of the Judge Villiger of Lichtenstein.³⁷ In Judge Villiger's view, the majority judgment fails to ask whether the individual applicants had been subject to treatment prevented by Article 3 and, if so, whether the treatment was 'inhuman', 'degrading' or even 'torture'. As this passage from Judge Power-Forde's opinion indicates, the differentiation between individuals is unnecessary; for a sentence that denies any prisoner all hope of becoming part of free society crosses the threshold of treatment that is prohibited by Article 3 for all persons subject to it. Judge Power-Forde's holding that the denial of hope is inherently 'degrading' for all

33 *Supra* n 1 at para 122.

34 Van Zyl Smit and Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford: Oxford University Press, 2009) at 83.

35 For an early exposition of this more positive notion of rehabilitation, see Rotman, 'Do Criminal Offenders have a Constitutional Right to Rehabilitation?' (1986) 77 *Journal of Criminal Law and Criminology* 1023. See also Ward, 'Dignity and Human Rights in Correctional Practice' (2009) 1 *European Journal of Probation* 112. The Grand Chamber itself noted this change in *Dickson v United Kingdom* 2007-V; 46 EHRR 41 at para 28, where it commented on a tendency 'demonstrated notably by the Council of Europe's legal instruments' towards the emergence of more modern notions of rehabilitation that focus on 're-socialisation' of prisoners and preparing them for release.

36 *Supra* n 1 at concurring opinion of Judge Power-Forde.

37 *Ibid.* at partly dissenting opinion of Judge Villiger.

prisoners serving whole life sentences can also be read as a response to the second leg of the dissent's criticism.³⁸

In reaching its decision, the Grand Chamber in *Vinter* built upon its earlier decisions, finding that, while punishment remains one purpose of imprisonment, 'the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence'.³⁹ The Grand Chamber referred to an impressive range of material from Council of Europe and United Nations sources, to bolster its conclusion that 'there is also 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 is achieved'.⁴⁰ All the sources are relevant in the United Kingdom, which has acceded to the treaties mentioned or approved the soft law instruments cited.

At the European level that the rehabilitative objective should be reflected in the prospect of prisoners' return to free society should apply to all prisoners, even those sentenced to life imprisonment for the most heinous offences, is apparent particularly from recently published reports of the Committee for the Prevention of Torture (CPT), which have dealt with irreducible life sentences exceptionally imposed in Romania and Switzerland. In both reports the CPT formally held that it considered that 'it is inhuman to imprison a person for life without any realistic hope of release'.⁴¹ This is of considerable significance as the CPT is a treaty-based body and its finding that current practices are 'inhuman' goes to its core obligation to prevent torture and inhuman or degrading treatment of detainees.⁴² The CPT called on the authorities

38 In any event, it can be argued that in this instance a distinction between the different types of prohibited treatment is not as important as in other cases, for it is clear that the failure to provide the necessary hope including release procedures degrades all who are subject to it. If indeed the absence of such a procedure were to result in an individual case in further suffering, a court may have to consider whether the treatment could also be designated inhuman or, in an extreme case, torture. Here the question does not arise, as the treatment prohibited by Article 3 lies in the denial of human dignity implicit in the absence of the necessary mechanism for considering release of all prisoners with whole life sentences.

39 *Vinter* [GC], supra n 1 at para 115. Here the Grand Chamber referred to *Dickson v United Kingdom*, supra n 35 at para 75; and *Boulois v Luxembourg* ECHR Reports 2012; 55 EHRR 32 at para 83. In *Kafkaris v Cyprus*, supra n 3 at paras 68–74, the majority of the Grand Chamber referred to numerous European instruments that emphasise the importance of rehabilitation and the reintegration of prisoners into society but did not draw a direct conclusion from them. In their minority opinion Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens were critical of the majority for failing to draw more explicit conclusions from the sources it had quoted (at para 4). The minority came to the conclusion that social reintegration of offenders is an established European value. The minority argued (at para 5) that 'once it is accepted that the "legitimate requirements of the sentence" entail reintegration, questions may be asked as to whether a term of imprisonment that jeopardises that aim is not in itself capable of constituting inhuman and degrading treatment'.

40 *Vinter* [GC], supra n 1 at para 114. On the international law position generally, see Bernaz, 'Life Imprisonment and the Prohibition of Inhuman Punishments in International Human Rights Law: Moving the Agenda Forward' (2013) 35 *Human Rights Quarterly* 470.

41 CPT, Report on the visit to Bulgaria from 4 to 10 May 2012, CPT/Inf (2012) 4 December 2012 at para 32; see also CPT, Report on the visit to Switzerland from 10 to 20 October 2011, CPT/Inf (2012) 25 October 2012 at 26.

42 Article 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987 (CETS 126) provides that the CPT 'shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment'.

to make changes to the law to allow these prisoners to be considered for release and to improve their regimes by adding constructive activities that would allow them to improve themselves.⁴³

Other Council of Europe texts endorsed by the United Kingdom make similar recommendations. The 2003 Recommendation of the Committee of Ministers of the Council of Europe on the management by prisons administrations of life sentence and other long-term prisoners is a perfect example. It makes detailed recommendations on the treatment of such prisoners to avoid the destructive effects of imprisonment, and to 'increase and improve the possibilities for these prisoners to be successfully resettled in society and to lead a law-abiding life following their release'.⁴⁴ The 2003 Recommendation on Conditional Release (Parole) provides that parole should be considered for all prisoners.⁴⁵ Similarly, the 2006 European Prison Rules emphasised that the regime for all sentenced prisoners should be 'designed to enable them to lead a responsible and crime-free life'.⁴⁶ The Rules further require that mechanisms be put in place to prepare prisoners for release.

At the international level, the key treaty-level provisions on rehabilitation are contained in Article 10 of the International Covenant on Civil and Political Rights. Article 10(1) provides for prisoners to be treated with 'humanity and respect for the inherent dignity of the human person', while Article 10(3) specifies that the 'essential aim' of the treatment of prisoners in the penitentiary system shall be 'their reformation and social rehabilitation'. This provision has been accepted without qualification⁴⁷ by the United Kingdom and all other European countries.

Similar emphasis on the importance of rehabilitation is found in numerous and varied national legal instruments of all kinds. The Grand Chamber in *Vinter* relied upon a wide range of comparative law and jurisprudence, both European and non-European, to underline the importance of a rehabilitative objective of imprisonment.⁴⁸ However, its emphasis on German jurisprudence⁴⁹ is significant. The Grand Chamber fully equated its understanding of rehabilitation with the German term '*Resozialisierung*' and did so not only in its comparative law section,⁵⁰ but also in its own argument. Indeed, in reaching its conclusion, it returned to the

43 CPT reports, supra n 41.

44 At para 2 of the Recommendation Rec(2003)23 of the Committee of Ministers to Member States on the Management by Prison Administrations of Life Sentence and other Long-term Prisoners adopted by the Committee of Ministers on 9 October 2003 at the 855th meeting of the Ministers' Deputies.

45 Recommendation Rec(2003)22 of the Committee of Ministers to Member States on Conditional Release (Parole) adopted by the Committee of Ministers on 24 September 2003 at the 853rd meeting of the Ministers' Deputies.

46 Rule 102.1 of Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules (EPR) adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies.

47 Only the USA has officially recorded that it 'understands that paragraph 3 of Article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system': US reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily edn, 2 April 1992).

48 Supra n 1 at paras 68–79.

49 The same German jurisprudence was referred to by Lord Phillips in *Bieber*, supra n 1, but it does not appear to have influenced his decision.

50 Supra n 1 at paras 69–70.

leading German case on life imprisonment,⁵¹ explaining that the German Federal Constitutional Court had recognised that

it would be incompatible with the provision on human dignity in the Basic Law for the State forcefully to deprive a person of his freedom without at least providing him with the chance to someday regain that freedom. It was that conclusion which led the Constitutional Court to find that the *prison authorities had the duty to strive towards a life sentenced prisoner's rehabilitation and that rehabilitation was constitutionally required in any community that established human dignity as its centrepiece.*⁵²

The Grand Chamber noted further that the German Federal Constitutional Court had gone on to explain in a subsequent decision⁵³ that this rehabilitation oriented approach 'applied to all life prisoners, whatever the nature of their crimes, and that release only for those who were infirm or close to death was not sufficient'.⁵⁴ The Grand Chamber then concluded by emphasising that it associated itself fully with the German mode of analysis: 'Similar considerations must apply under the Convention system, the very essence of which, as the Court has often stated, is respect for human dignity.'⁵⁵

It follows from this strong emphasis on human dignity that life sentence prisoners should now be able to claim as a matter of right that they should be given opportunities for rehabilitation. This has already been recognised explicitly by the ECtHR for prisoners serving some indeterminate sentences in both the United Kingdom and in Germany. For example, offenders sentenced to imprisonment for public protection in England and Wales were imprisoned for an indeterminate term. Their sentences included a minimum period after which they were to be released by a Parole Board if their detention was no longer necessary for the protection of the public. The British Government had made a commitment to address the underlying behaviour of such prisoners while they were in prison and to rehabilitate them if possible.⁵⁶ During their minimum term, however, they were not offered rehabilitative programmes and the English courts held that the Minister of Justice was in breach of a public law duty to provide such programmes. The English courts did not, however, find that the continued enforcement of their sentences was immediately threatened.⁵⁷ In *James, Wells and Lee v the United Kingdom* the ECtHR went further and found that the detention of applicant was arbitrary and thus contravened Article 5(1) of the ECtHR. This applied to the period 'following the expiry of the applicants'

51 45 BVerfGE 187, Decision, 21 June 1977.

52 Supra n 1 at para 113 (emphasis added).

53 72 BVerfGE 105, Decision, 24 April 1986.

54 *Vinter* [GC], supra n 1 at para 113.

55 Ibid.

56 Speech by Baroness Scotland Minister of State in the Home Office, House of Lords on 14 October 2003 quoted in *James, Wells and Lee v United Kingdom* 56 EHRR 12 at para 152.

57 *R (on the application of Wells) v Parole Board* [2009] UKHL 22; [2010] 1 AC 553.

tariff periods and until steps were taken to progress them through the prison system with a view to providing them with access to appropriate rehabilitative courses'.⁵⁸

Rangelov v Germany provides another recent example of the importance of rehabilitation programmes to the legality of an indeterminate sentence.⁵⁹ In that case, a Bulgarian national was refused access to a therapeutic programme that a German national in his position would have been able to follow, contributing to his continued preventive detention. The ECtHR held that such discrimination made the continued detention arbitrary and that thus Article 14 (the anti-discrimination provision of the ECtHR) together with Article 5(1) (the prohibition on arbitrary detention) had been infringed.

Both examples link opportunities for rehabilitation with release and thus engage Article 5. They illustrate—as do other Grand Chamber decisions such as *Dickson v United Kingdom*⁶⁰ and *Enea v Italy*,⁶¹ which respectively link rehabilitation to the interpretation of provisions relating to the right to family life (Article 8) and to due process in judging civil rights (Article 6)—the importance of the overall conception of rehabilitation as the objective of imprisonment in the jurisprudence of the ECtHR. The link that the Grand Chamber in *Vinter* now explicitly makes between the possibility of release required by Article 3 of the ECHR and rehabilitation is part of this wider pattern. Once it has been recognised that all life sentenced prisoners, including those with whole life orders, and indeed all other (sentenced) prisoners should have the opportunity to improve themselves so that they can hope for release, the inescapable logic is that they should also all have a claim to be able to improve themselves, lest they be given no hope of eventual release because no means of (self) improvement are available.

The implications for English law on the execution of sentences of this recognition of a right to the opportunity to rehabilitate go beyond the immediate focus of the *Vinter* case on what the minority in the Fourth Chamber called a procedural Article 3 right to a prospect of release.⁶² In her comparative study of German and English prison law Liora Lazarus has demonstrated convincingly that having a clearly articulated purpose for the implementation of prison law is a crucial element in the consistent interpretation of substantive provisions that specify how prisons should be administered.⁶³ While some limitations on prisoners' rights are necessary and justified by the exigencies of prison administration, a clearly articulated purpose makes it harder to limit rights further based on unspoken assumptions about secondary penal purposes of imprisonment. This reflects the insight of Alexander Paterson, the English prison reformer of the 1930s, that sentenced prisoners are sent to prison as

58 *James, Wells and Lee v United Kingdom*, supra n 56 at para 221.

59 Application No 5123/07, Merits, 22 March 2012.

60 Supra n 35.

61 ECHR Reports 2009, 51 EHRR 3.

62 *Vinter and Others v United Kingdom*, supra n 4.

63 Lazarus, 'Conceptions of Liberty Deprivation' (2006) 69 *Modern Law Review* 738; and Lazarus, *Contrasting Prisoners' Rights: A Comparative Examination of Germany and England* (Oxford: Oxford University Press, 2004).

punishment not for punishment.⁶⁴ A clear rehabilitative purpose has a positive function too, for it provides a point of departure for law governing all aspects of the implementation of prison sentences. The story behind the decision of the German Federal Constitutional Court on life imprisonment is that previously the Court had articulated a constitutional right to 'resocialisation' as the key purpose of the implementation phase of imprisonment and had then compelled the legislature to enshrine it in primary prison legislation.⁶⁵ A line of decisions of the ECtHR, including now several of the Grand Chamber of the Court, of which *Vinter* is the latest manifestation, identifies a similar general human right to rehabilitation opportunities, which underpins more specific provisions of the ECHR relating to the treatment of all prisoners and their release from detention.

If the British government is not to suffer serial defeats before the ECtHR in matters of prisoners' rights it should recognise a right to rehabilitation in its own prison legislation and set up appropriate judicial mechanisms to guarantee its comprehensive implementation. This has major implications for root and branch reform of the antiquated 1952 Prison Act and legislation relating to the release of prisoners, beyond the narrow category of prisoners serving sentences of life imprisonment to which whole life orders have been attached. Before spelling out what should be done to concretise an enforceable right to rehabilitation opportunities for prisoners serving whole life sentences, it is necessary to consider in detail what the Grand Chamber in *Vinter* had to say about the process that may be required to prevent an infringement of Article 3.

4. REVIEWING THE LEGALITY OF CONTINUED DETENTION UNDER A LIFE SENTENCE

Having determined that an irreducible life term is a violation of Article 3, *ab initio*, the judgment of the Grand Chamber in *Vinter* turned to guidance as to the form review procedures for life sentences subject to whole life orders should take. According to the Grand Chamber there must be

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.⁶⁶

In the next paragraph, the Grand Chamber noted its default position on prescribing remedial action for violations, stating that:

[H]aving 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 ECtHR's] task to prescribe the form (executive or judicial) which that

64 Ruck (ed.), *Paterson on Prisons. Being the Collected Papers of Sir Alexander Paterson* (London: Muller, 1951).

65 See, in particular, the *Lebach* judgment: BVerfGE 35, 202, Decision, 5 June 1973.

66 *Supra* n 1 at para 119.

review should take. For the same reason, it is not for the Court to determine when that review should take place.⁶⁷

However, the Grand Chamber then went as close as it properly could in identifying and approving the international norm:

This being said, the Court would also observe that the comparative and international law materials before it 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.⁶⁸

This approach requires examination. The Grand Chamber knew that its conclusions were controversial. An appeal to the margin of appreciation that states are allowed was not just politic—being as accommodating to the UK government as possible—it was an assertion the ECtHR regularly makes. The Court is rarely prescriptive, and a recitation of the margin of appreciation was not going to placate critics of the overall outcome.⁶⁹

In endorsing the international consensus on rehabilitation, the Grand Chamber was putting to the sword the idea that all Article 3 requires is a procedure that would give a prisoner a tenuous prospect of release—a ‘faint hope’ as Judge Mahoney characterised it in his separate concurring opinion.⁷⁰ The British government had chosen to implement its remaining power of release on compassionate grounds very restrictively—by limiting it in a Prison Service Order to prisoners physically incapacitated or terminally ill within three months of dying. It had shown no sign of wishing to broaden its interpretation following the decision in *Bieber*⁷¹ and indeed, had strongly reiterated that position in *Oakes*.⁷² But the *Vinter* [GC] judgment represented an explicit rejection of executive compassionate release as an appropriate release mechanism. The Grand Chamber concluded that such a power was not sufficient to give prisoners subject to whole life orders any hope of redress, ‘should they ever seek to demonstrate that their continued imprisonment was no longer justified on legitimate penological grounds and thus contrary to Article 3 of the Convention’.⁷³

A weak and vague executive power should be rejected as unnecessarily hesitant, for both the ECHR and English common law provide clear guidance on what should be done procedurally where the legality of continued detention is in issue.

67 Ibid. at para 120.

68 Ibid.

69 Nor did it: see, for example, Barrett, ‘European court ruling: authors of Human Rights treaty would be “turning in their graves”’, *Daily Telegraph*, 9 July 2013, quoting the Secretary of State for Justice, Chris Grayling. The Prime Minister was quoted as being ‘very, very disappointed’ in the same article. For a particularly intemperate response, see Hastings, ‘The danger is we’ve become immune to Human Rights lunacy. It’s vital we stay angry’, *Daily Mail*, 9 July 2013.

70 Supra n 1 at concurring opinion of Judge Mahoney, para 17.

71 *R v Bieber*, supra n 2. The British government did not amend these self-imposed restrictions in order to make them open to including changing penological justifications other than those relating narrowly to compassionate release: see *Vinter* [GC], ibid. at para 126.

72 Supra n 13.

73 Supra n 1 at para 129.

Furthermore, an executive power is out of kilter with the judicialised scheme of the English domestic legislation that is applied in most cases relating to release from life imprisonment.

The decision on whether to release someone subject to a whole life order involves a decision about individual liberty, which is of the greatest importance to the individual concerned. In *Vinter* the Grand Chamber established beyond doubt that there is no legal authority whatsoever for the state to continue to detain under such an order someone whose detention is no longer penologically justifiable. One would expect the decision-making mechanism to reflect the gravity of the determination to be made, that is, the liberty of the prisoner. The decision-making mechanism to be adopted can be traced back to the principle of human dignity.⁷⁴ As the UK Supreme Court concluded in *Osborn v The Parole Board*,⁷⁵ human dignity requires a procedure that respects the persons whose rights are significantly affected by decisions. In the *Osborn* case, human dignity required that prisoners serving indeterminate sentences be given a hearing before the Parole Board when possible release was being considered and when the Parole Board was asked to advise on their possible transfer to open conditions.

The Grand Chamber in *Vinter* could have developed its own more specific approach to procedure had it followed the German life imprisonment jurisprudence on which it relied so heavily for its finding that human dignity requires opportunities for rehabilitation for all prisoners. In its major decision on life imprisonment⁷⁶ the German Federal Constitutional Court argued that respect for human dignity required a procedure that goes beyond a loosely structured pardon process in order to make life imprisonment tolerable for the person subjected to it. Even prisoners serving life sentences for very serious crimes were entitled to legal certainty in a state that respects the rule of law. Accordingly the Federal Constitutional Court ordered the legislature to amend the Penal Code to provide for a judicially controlled form of release which, given the enormity of what is at stake for the individual, would have appropriate due process protections.⁷⁷ The legislature complied and the consequent amendment established the current procedure in terms of which all prisoners sentenced to life imprisonment must be considered for release by a court after they have served 15 years. At that stage the prisoner must be released if the gravity of his guilt does not necessitate his continuing to serve his sentence and if the release can be justified while taking into account the security interests of the general public.⁷⁸

74 Waldron, 'How Law Protects Dignity' (2012) 71 *Cambridge Law Journal* 200 at 210.

75 [2013] UKSC 61.

76 *Supra* n 51.

77 The Federal Constitutional Court did not specify the precise form this should take, but its instruction led directly to the current legislation.

78 Article 57a read with Article 57 of the German Penal Code. The prisoner must also consent to being released. Subsequently, the law was developed by the Federal Constitutional Court. It held that the trial court had to make a finding about the gravity of the guilt of the offender (BVerfGE 86, 288, Decision, 3 June 1992). Only if the trial court found that it was exceptionally grave (*besonders schwer*) could the subsequent court consider this factor and use it as a basis for ordering the detention of the prisoner beyond 15 years. If a finding of exceptional gravity had not been made, release after 15 years should be determined only on the basis of the competing security interests of the public.

To understand what procedures could be adopted in the future for the release of prisoners sentenced to life imprisonment with whole life orders in England and Wales, one needs to return to those that are currently in operation. In the background section of this article we described briefly the major mechanisms existing in Europe at the time of the decision in *Vinter* [GC] for releasing prisoners serving life sentences. We distinguished the mechanism existing in the United Kingdom from the European norm. In the United Kingdom an individualised minimum period (also known as a ‘tariff’) is set after which release must be considered and granted if the offender poses no further risk to the public. According to the European norm, the release decision also takes into account the heinousness of the offence when making release decisions. It is clear that the decision on release that the Grand Chamber now envisages in cases where a life sentence with a whole life order has been imposed requires a full review of all factors including the nature and seriousness of the original offence, the rehabilitation of the prisoner and, relatedly, the risk, if any, he may pose to society. Such a *Vinter* review is like those release decisions required for all life sentences in most European countries.

Continuation of detention beyond its justification is a violation of the person’s right to liberty and as such is an extremely serious matter. Appropriate procedures must be put in place to prevent it. That is the basis for *habeas corpus*, and the reversal of the normal burden in domestic false imprisonment claims. And that is why the German Federal Constitutional Court demanded due process in all decisions on whether persons serving life sentences should continue to be detained. The particular importance of respect for liberty is recognised in the *lex specialis* that is Article 5(4) of the ECHR, which provides:

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

There are strong indications that Article 5(4) may be relevant to all types of life sentences, including English life sentences which include whole life orders. In his separate concurring opinion in the Grand Chamber decision in *Kafkaris v Cyprus* Judge Bratza speculated that the ECtHR could require an Article 5(4) compliant procedure to determine whether the offender continued to pose a risk to society and whether he should be released, also in cases where the trial judge did not specify a minimum term representing the element of punishment. Judge Bratza noted that, in *Kafkaris’s* case, whether conditional release should have been granted depended on two questions:

an assessment of whether the term of imprisonment already served satisfies the necessary element of punishment for the particular offence and, if so, whether the life prisoner poses a continuing danger to society.⁷⁹

79 Supra n 3 at concurring opinion of Judge Bratza.

In order to support his argument, Judge Bratza returned to the decision in *Stafford*,⁸⁰ making it clear that that decision required that ‘the determination of both questions should in principle be in the hands of an independent body, following procedures containing the necessary judicial safeguards, and not of an executive authority’. However, because the issue had not been raised in the pleadings before the Grand Chamber in *Kafkaris*, it could not be decided.⁸¹

Although the application of Article 5(4) to the review of whole life orders was raised by the applicants in *Vinter* [GC], the Grand Chamber again declined to consider it; this time on the procedural ground that the Fourth Chamber in *Vinter* had held this aspect of the applicants’ case to be inadmissible.⁸² Therefore, one needs to examine why the Fourth Chamber held the Article 5(4) issue to be inadmissible.

The Fourth Chamber found the Article 5(4) application inadmissible because it considered it indistinguishable from a similar finding of inadmissibility in the 2011 case of *Kafkaris v Cyprus (No 2)*.⁸³ In *Kafkaris (No 2)*, the applicant, who had gone back to the First Chamber of the ECtHR with a fresh application after the decision by the Grand Chamber in *Kafkaris v Cyprus*, argued that the release procedures applied to him infringed Article 5(4). The First Chamber considered the argument but ruled that it was inadmissible as no issue under Article 5(4) arose because Kafkaris’s situation was crucially different from that which pertained in *Stafford v United Kingdom*, the leading case on the application of Article 5(4) to release from life imprisonment.

According to the First Chamber, Article 5(4) was relevant in *Stafford* because the release decision had to be made by applying only the continued danger to society test. The review process applicable in *Kafkaris (No 2)* was different. It involved life sentences where release was warranted only if the overall penological justification for continued detention changed. The First Chamber concluded that—unlike the situation in *Stafford*—the initial life sentence allowed detention without an Article 5(4) compliant review being necessary again, for it argued that no new criteria for a second decision were specified in law.

The basic distinction drawn in *Kafkaris (No 2)*—between release decisions that apply limited criteria and release decisions in whole life cases where all criteria are relevant—is accurate and to that extent the decision is correct. However, the conclusion that different procedural standards are therefore to be applied when deciding whether to release persons from life imprisonment does not stand up to close scrutiny. It is problematic to hold that a life sentence without a minimum period is sufficient to ensure that the detention of a person subject to it is lawful for purposes of Article 5(4), for the rest of that person’s life. Certainly, after the decision in *Vinter*

80 Supra n 19.

81 Judge Bratza’s argument as to the relevance of Article 5(4) to decisions on the release of prisoners sentenced to life imprisonment in general, including those that did not follow the *Stafford* model, was considered and supported by Lord Brown in *Wellington v Secretary of State for the Home Department*, supra n 15 at para 78.

82 This was an unfortunately strict application of a procedural rule as the primary conclusion reached in *Vinter* [GC], that a review procedure was required to be in place at the time of sentence, reversed the holding of the Fourth Chamber in this regard and thus provided a substantive basis for considering the matter, which was argued before it, afresh.

83 Application No 9644/09, Admissibility, 21 June 2011.

[GC], which accepts without reservation that a point may be reached where there are not sufficient further penological justifications for continued detention, the decision in *Kafkaris (No 2)* cannot stand. It cannot be argued any more, as the Court in *Kafkaris (No 2)* did, that ‘the review of the lawfulness of the applicant’s detention required under Article 5(4) is incorporated in the conviction pronounced by the courts’⁸⁴ and that no further review is therefore required. On the contrary, we now know that the balance of justifications for detention can shift. Once the penological justifications for further detention are not sufficient any more, further implementation becomes disproportionately severe and therefore unlawful. An appropriate, Article 5(4) compliant, procedure to review all life sentences including those to which whole life orders have been attached, would ensure that such a point is never reached.

This wider conclusion has important implications for indeterminate sentences of all kinds. It is clear that the need to review their continued implementation is what makes them different from fixed term sentences. In fixed term sentences, the ECtHR has consistently declined to intervene in matters relating to early or conditional release, arguing that the original sentence made their implementation lawful for their full duration.⁸⁵ That position no longer holds for life sentences where the continued justification of the detention has to be regularly reassessed.⁸⁶

This conclusion militates against a minimalist response to *Vinter* [GC], which would allow the United Kingdom to focus on widening the existing powers of the Secretary of State to release prisoners on compassionate grounds. The British Judge Mahoney⁸⁷ suggested that the requirements of Article 3 could arguably be met by merely removing self-imposed restrictions contained in the Prison Service Orders that limit the power of the Secretary of State to release prisoners on compassionate grounds to instances of terminal illness and physical incapacity. The minimalist response would be that if it were to be shown that there were no further penological grounds for continuing to incarcerate a prisoner on whom a whole life order had been imposed, the Secretary of State could simply order the release by including it as an exceptional circumstance justifying the release of the prisoner on (more widely defined) compassionate grounds.

Given the important liberty interests that are at stake, such a limited review would not be acceptable on grounds of fundamental principle. Moreover, a review based solely on the existing statutory power of the Secretary of State to order compassionate release would soon be subject to further challenge, not least because of the wide discretion afforded to the Secretary of State. The first question would be whether its criteria would be clear enough to justify the hope—the prospect of release—to which prisoners with whole life orders are entitled under Article 3 of the ECHR.

84 Ibid. at para 61.

85 Van Zyl Smit and Snacken, *supra* n 34 at chapter 8.

86 The existence of such regular assessment in Germany explains why applicants serving life sentences in that country have been unable to challenge the release procedures to which they are subject on the grounds that they infringe either Article 3 or Article 5 of the ECHR: see *Streicher v Germany* Application No 40384/04, Admissibility, 10 February 2009; and *Meixner v Germany* Application No 26958/07, Admissibility, 3 November 2009.

87 *Supra* n 1 at concurring opinion, para 21.

Other challenges are likely to be procedural and could be brought in terms of English common law as well as the ECHR. If one looks back at the evolution of the procedures for the *post-tariff review* of life sentences prior to the ECtHR requiring that they be undertaken by a court like body, it is clear that the English courts too were developing a series of checks and balances to ensure that the Secretary of State exercised this review power fairly. For example, at the instance of the English courts, the procedures adopted by the Secretary of State were tightened up to ensure that affected prisoners had to be given sufficient information to allow them to make representations and were entitled to reasons for the decisions that were taken.⁸⁸ The recent decision of the UK Supreme Court in *Osborn* has reasserted the importance of common law due process in cases related to the implementation of life imprisonment. A particular example refers to the ECtHR decision in *Waite v United Kingdom*⁸⁹ where the ECtHR had held that an Article 5(4) compliant procedure was required to consider whether a young offender who had been sentenced to a de facto term of life imprisonment should have been returned to prison for infringing the conditions of his licence. Lord Reed who wrote the judgment of the Supreme Court in *Osborn* agreed with the decision in *Waite* and then remarked that application of the common law could have achieved the same result.⁹⁰

Even an enhanced compassionate release procedure would not be capable of meeting the requirements of Article 5(4), particularly if it were operated by the Secretary of State. At most, compassionate release could be retained as an additional fall back mechanism to deal with urgent cases for release that could arise before a full review could be conducted. In effect, it would be the equivalent of a pardon to deal with exceptionally urgent cases.

5. A VINTER REVIEW: HOW AND WHEN?

The purpose of a *Vinter review* is to determine the legality of further detention and with it to assert the right to liberty. Given the fundamental interests at stake, a review process fully compliant with Article 5(4) should be adopted immediately to assess the continued enforcement of whole life orders. It is virtually mandated for the reasons of principle discussed in the previous section. Although the Grand Chamber did not address the applicability of Article 5(4) in *Vinter*, the ECtHR may revisit the issue and for the reasons of principle discussed in the previous section find Article 5(4) applicable to these review proceedings.

Such a *Vinter review* would have to have a judicial character and be buttressed by a number of formal procedural guarantees, including a form of adversarial proceedings with oral hearing where appropriate. Applicants for release would be entitled to legal assistance and to time and facilities to prepare their applications.⁹¹ If the review does not lead to release, due process would require that there must be provision for the matter to be considered again after a reasonable, fixed period.

88 Van Zyl Smit and Snacken, *supra* n 34 at chapter 3 and the references cited there.

89 36 EHRR 1001.

90 *Supra* n 75 at para 110.

91 For a detailed discussion of what an Article 5(4) compliant review requires, see Harris, O'Boyle, Bates and Buckley, *Law of the European Convention of Human Rights*, 2nd edn (Oxford: Oxford University Press, 2009) at 182–96.

If the above view were incorrect, and the inadmissibility decision in *Kafkaris* (No 2) was sustained—that the whole life order removed any need for an Article 5(4) procedure at any time—the *Vinter* review would remain under Article 3. As discussed, the nature of that review would require consideration of the continuing justification of the penal element—a process linked to the original sentencing—and consideration of continuing risk to life and limb. Such a process would therefore necessarily have to include the procedural safeguards commensurate with the seriousness of the right at stake. It is clear that a review aimed at ensuring the prevention of inhuman or degrading treatment or punishment would need to meet the high procedural safeguards more generally required under Article 6 and Article 5(4) of the ECHR, respectively. These would include consideration by a court-like body with determinative powers, and with suitable due process: in particular, disclosure of evidence, adversarial proceedings, and legal representation.⁹² The result would be the same.

In addition to these basic protections guaranteed by an Article 5(4) or similar review process, the timing of the review must be determined. A decision needs to be made on how long persons subject to a whole life order have to serve before they are entitled to a *Vinter* review. Clearly, a fixed period must be set after which such a review has to be conducted. Only the most serious offenders subject to life sentences are given whole life orders,⁹³ so it is highly unlikely that their release will be justifiable after they have served only a few years. It is against this background that the careful observation of the Grand Chamber ‘that the comparative and international law materials before it show[ed] 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’⁹⁴ should be understood. This accords with the position prior to the institution of the 2003 Act where such a review was conducted at the 25 year stage, and the Rome Statute (which founds the jurisdiction of the International Criminal Court), which requires such a review at that stage.⁹⁵

However, a review after 25 years raises one other practical issue that requires detailed consideration. It is far from unusual in England and Wales for minimum terms to be longer than 25 years. Indeed, the higher starting point (relevant, for example, to all murders by shooting) is 30 years.⁹⁶ This would mean that life sentenced prisoners with minimum terms of 37 or even 40 years, would not have had a *post-tariff* review at the stage when life sentenced prisoners with whole life orders would qualify for a *Vinter* review. This would create an apparent anomaly as the imposition of a fixed minimum term is supposed to indicate that the offences for

92 *A and Others v United Kingdom* ECHR Reports 2009; 49 EHRR 29 at paras 203–4.

93 *R v Oakes and Others*, supra n 13.

94 Supra n 1 at para 118, emphasis added; see also the separate concurring opinion of Judge Mahoney at para 21.

95 Article 110 of the Rome Statute of the International Criminal Court (1998), 2187 UNTS 90, referred to in *Vinter* [GC], supra n 1 at paras 65 and 118, provides for automatic reconsideration after 25 years of all life sentences that it may impose. However, Article 77 of the Rome Statute reserves life sentences for exceptionally grave offences, such as mass genocide. One may legitimately ask whether all whole life orders in England and Wales are imposed for crimes of equivalent seriousness.

96 Para 5 Schedule 21 Criminal Justice Act 2003.

which it is imposed are less heinous than those offences that result in a sentence of life imprisonment with a whole life order. Because relatively these offences are not as serious, one would also think that the offenders are more likely to respond to rehabilitation and be less dangerous.

However, a *Vinter review* is distinct from a *post-tariff review*. The proper way of dealing with those who are currently serving very long minimum terms, would be to subject the sentences of all prisoners to a *Vinter review* after they have served 25 years.⁹⁷ This would include those who subsequently would also be entitled to *post-tariff review* at the end of their lengthier minimum terms.

At the 25-year stage the *Vinter review* will look at all the penological justifications for punishment and see whether the balance between them has changed to the extent that the prisoners should be released. This passage of time may lead to a re-evaluation of the salience of one or more of the initial factors and thus also of the balance between them. After 25 years have elapsed the seriousness of the offence may be seen in a different light. For example, a moral panic, which led to the setting of a particularly high minimum period for a firearm related offence, may have abated with the decline of such offences in the quarter of a century since it was committed. Or the prisoner may be found to have behaved blamelessly in prison for many years and to pose a low risk to the public.⁹⁸ In contrast, at the *post-tariff review* the punishment part of the sentence is regarded as completed. The only and less onerous question that remains is whether the prisoner concerned would still pose a risk to the public if he were to be released.

Procedurally a full, Article 5(4) compliant, *Vinter review* should meet the same requirements as the *post-tariff review*. In the same way as the Parole Board conducting a *post-tariff review* can order the release of a person who does not pose further risk to society, a *Vinter review* should lead to the body conducting it making a final decision on whether to order a release on the narrower criterion that such a review must deploy.

Given the similar procedural requirements of the two forms of review, an immediate and logical reform would therefore be to extend the jurisdiction of the Parole Board to conduct *Vinter reviews* and to ensure that they are conducted by the specialist lifer panels which the Parole Board is required to deploy for post-tariff reviews. This proposal is subject to the more general comments on the Parole Board below.

6. WIDER REFORMS

The reforms discussed thus far may be sufficient to meet the procedural concerns related most directly to permanent release into the community of prisoners serving life sentences with whole life orders. Many other related problems with the imposition and implementation of life imprisonment in England and Wales remain. For

97 In order to ensure that long determinate sentences are not used to sidestep the review of the continued enforcement of life sentences, fixed term sentences of longer than 25 years should also be included in a *Vinter review*. This is done in South Africa where Section 73(6) of the Correctional Services Act 111 of 1998 provides that prisoners with life sentences and those who have very long determinate sentences, including cumulative sentences, must all be considered for release after they have served 25 years.

98 *Vinter* [GC], *supra* n 1 at para 108, emphasises that nobody should be released following a *Vinter review* if they still pose a risk to society.

example, many commentators doubt whether life imprisonment for murder should be mandatory, for the crime of murder is very broadly defined in this jurisdiction.⁹⁹ More urgently, the law regarding the setting of minimum terms is in need of reform, particularly as there is a clear trend for these terms to become longer and thus to contribute to the growing population of prisoners serving life sentences in English prisons, a number wholly disproportionate to the equivalent populations across Europe.¹⁰⁰ However, these wider problems are beyond the scope of this article.¹⁰¹ What can be addressed briefly here are the implications of the finding of *Vinter* [GC] and other major decisions of the ECtHR that all prisoners serving life or other indeterminate sentences, as with all other prisoners, should have a right to opportunities for rehabilitation and, flowing from it, a realistic prospect of release.

A. Extradition

Should this last right also apply to prisoners facing extradition from the United Kingdom to jurisdictions, where they may face life sentences without a clear prospect of release? This question has not been fully resolved. In 2010 in *Wellington v Secretary of State for the Home Department*¹⁰² the House of Lords was unanimously of the view that a prospective life without parole sentence in the USA did not raise an issue under Article 3 of the ECHR. The House of Lords took this view, notwithstanding any procedural shortcomings that might be thought by European standards to exist in the exercise by the governor of a US state of the power to pardon someone who did not have a possibility of parole. Like the Court of Appeal in *Bieber*, the House of Lords adopted the position that the mere imposition of a whole life sentence did not conflict with the ECHR, as it was then interpreted by the ECtHR. In coming to their conclusions three of the five judges also held that in such cases the desirability of extradition is a factor to be considered when deciding whether the punishment likely to be imposed in the receiving state attained the level of severity necessary to amount to a violation of Article 3.¹⁰³ They argued that punishment which may be regarded as inhuman or degrading in the domestic context will not necessarily be regarded in the same way when a choice has to be made between either extraditing or allowing a fugitive offender to evade justice altogether.

In *Babar Ahmad and Others v United Kingdom*, this approach was rejected explicitly.¹⁰⁴ However, the ECtHR emphasised that the Convention was not a means

99 Mitchell and Roberts, *Exploring the Mandatory Life Sentence for Murder* (Oxford: Hart, 2012); and Fitz-Gibbon, 'The Mandatory Life Sentence for Murder: An Argument for Judicial Discretion in England' (2013) 13 *Criminology and Criminal Justice* 506.

100 Ashworth, *supra* n 30.

101 For an analysis of the issues involved, see Mitchell 'Sentencing Guidelines for Murder: From Political Schedule to Principled Guidelines', in Ashworth and Roberts (eds), *supra* n 30 at 52–70.

102 *Supra* n 15.

103 See the speeches of Lord Hoffmann, Baroness Hale of Richmond and Lord Carswell in *Wellington*, *ibid.* at paras 22, 24, 36, 49, 51–52 and 56–58.

104 56 EHRR 1 at para 176; see also *Harkins and Edwards v United Kingdom* 55 EHRR 19.

of requiring state parties to impose Convention standards on other states and explained that:

This being so, treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case.¹⁰⁵

On this weaker test the Court in *Babar Ahmad* also held, as had the House of Lords in *Wellington*, that life without parole sentences as applied in the United States did not contravene Article 3. This weaker test has been heavily criticised. Critics suggest that it should be abandoned, and the same standard applied in extradition cases as is applied to European states.¹⁰⁶

Life without parole sentences, which persons who fall to be extradited may face in the United States, should be re-evaluated in the light of *Vinter* [GC], for it sets criteria requiring hope, that is a realistic prospect, of eventual release at the time of the imposition of sentence. This last criterion was not used by the Fourth Chamber in *Vinter*, which was the leading case at the time *Babar Ahmad* was decided. The need for such re-evaluation is underlined by the assessment of the US Supreme Court that life in prison without the prospect of parole ‘foreswears altogether the rehabilitative ideal’ and ‘gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope’.¹⁰⁷

B. A Right to Rehabilitation in English Legislation?

Fundamental reform should seek to embed the right to rehabilitation directly in English law to enable it to serve as an interpretative guide for all decisions relating to the treatment and release of prisoners. One possibility would be include in a future UK Bill of Rights a requirement, such as that found in the constitutions of Spain and Italy, that all sentences should be oriented towards the rehabilitation of offenders.¹⁰⁸ That possibility is remote. However, a revised Prison Act encompassing a specific interpretative principle along the lines of the requirement of the European Prison Rules that ‘all detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty’¹⁰⁹ would provide a useful point of departure, particularly if it were also made clear that it should be applied when interpreting the legal rules governing release decisions.

105 Ibid. at para 177.

106 Mavronicola and Messineo, ‘Relatively Absolute? The Undermining of Article 3 ECHR in *Ahmad v UK*’ (2013) 76 *Modern Law Review* 589.

107 *Graham v Florida* 130 S Ct (2011) at 2030 and 2032. Although this was said in the context of life without parole for a juvenile in a non-homicide case, it is a proposition of general relevance. See also *Solem v Helm* 463 US 277 (1983) at 300–1 in which, in a case involving an adult, the US Supreme Court emphasised the difference between parole and the remote possibility of executive clemency that did not mitigate the harshness of the whole life sentence.

108 Article 25(2) Constitution of Spain; and Article 27 Constitution of Italy.

109 Rule 6 European Prison Rules.

C. Deciding on Rehabilitation

The United Kingdom should recognise, as the ECtHR has, that all decisions relating to the release of prisoners should be made:

against the background of the development of the law on execution of sentences which can be observed both at international level and in domestic law and which has the role of providing a legal basis for all matters concerning the execution of sentences which, until recently, fell almost entirely within the responsibility of the executive and the competent administrative authorities.¹¹⁰

This development of a legal basis goes together with a judicial process for assessing prisoners' rehabilitation. This is particularly important where decisions of relevance to rehabilitation relate to 'prisoners' external legal status, which encompasses the various measures whereby prisoners retain or regain their liberty, whether fully or partially, temporarily or permanently'.¹¹¹

Release decisions and other decisions on how to treat prisoners may be closely related. For example, a decision to move a prisoner to an open regime requires a clear legal framework and careful judicial supervision, because how a prisoner responds to being held in such conditions is likely to be crucial to a subsequent decision on whether or not to release him fully into the community. Currently the Parole Board is involved in both types of decisions but in the case of moving a prisoner to open conditions its role is only advisory, while in the case of release of a prisoner serving an indeterminate sentence it makes binding decisions. This means that formal Article 5 procedural standards have to be met in the case of the latter, but not the former. This distinction is anomalous.

In *Osborn v The Parole Board*¹¹² the UK Supreme Court has taken a major step forward by requiring that procedural safeguards, such as having an oral hearing where appropriate, also have to be applied by the Parole Board when it is conducting a hearing on whether to advise that a prisoner be moved to open conditions. However, the fact that the Secretary of State can simply decline to follow the advice of the Parole Board and thus effectively block the release of a prisoner serving a life or other indeterminate sentence, raises serious doubts about whether the powers of the Parole Board are sufficient.

Doubts have been raised about the independence of the Parole Board too and in 2008 the Court of Appeal ruled that its status as independent court with the power to make certain release decisions, which had been recognised by the ECtHR many years previously,¹¹³ could not continue to be accepted because of its close working

110 These words are taken from the dissenting opinion of Judges Tulkens and Yudkivska in *Boulois v Luxembourg*, supra n 39 at para 2. However they reflect a tendency in the approach of the ECtHR and not the basis for the dissent in that matter.

111 Ibid. at para 3.

112 Supra n 75.

113 *Weeks v United Kingdom*, supra n 19.

relationship with the executive and the influence that the Secretary of State exercised over its judicial functions.¹¹⁴

Some minor changes to the rules of the Parole Board followed,¹¹⁵ and this may again happen in the aftermath of the recent decision in *Osborn*. What is required though, as more far sighted reformers have recognised,¹¹⁶ is a fully independent and properly funded tribunal with the specialist knowledge¹¹⁷ to enable it to make binding decisions that cover the full range of issue that affect the external legal status of prisoners, and in particular those serving life and other indeterminate sentences.

Around Europe there are structural arrangements that respect the relative autonomy of the various components of the penal process within some form of overall judicial supervision separate from the initial sentencing decision-making. As a result, they allow the primarily rehabilitative and re-integrative focus of the post-sentencing phase to be combined with formal due process. At the core of these arrangements is the combination of the direct involvement of a specialist arm of the judiciary in internal prison matters, with decision-making relating to release and to key aspects of the continued enforcement sanctions in the community. For example, the judges of the German *Strafvollstreckungskammern* are supposed to be experts in both the internal and external aspects of the implementation of sentencing.¹¹⁸ These specialist German courts have parallels with similar tribunals that deal with offenders who serve longer sentences in other countries: the *tribunal de l'application des peines* in France¹¹⁹ and the similarly named tribunal in Belgium,¹²⁰ for example, both deal with cases involving prisoners serving more than 3 years. Although there are important differences among them, these courts and tribunals have in common that they involve a member or members of the judiciary, often sitting as a specialist chamber of a court, who have a function in safeguarding prisoners' rights. They ensure that prison conditions meet minimum standards, while at the same time deciding on the early conditional release of prisoners and on how aspects of it, including potentially the revocation of such release, will be implemented.

114 *R (on the application of Brooke) v Parole Board* [2008] EWCA Civ 29; [2008] 1 WLR 1950 (CA (CivDiv)). For an in-depth account of the significance of the status of the Parole Board, see Creighton 'The Parole Board as a Court', in Padfield (ed.), *Who to Release? Parole, Fairness and Criminal Justice* (Cullompton: Willan, 2007) at 109–25.

115 Padfield, 'Amending the Parole Board Rules: A Sticking Plaster Response?' [2011] *Public Law* 691.

116 Justice Report, *A New Parole System for England and Wales* (London: Justice, 2009); Padfield, Morgan and Maguire, 'Out of Court, Out of Sight? Criminal Sanctions and Non-Judicial Decision-Making' in Maguire, Morgan and Reiner (eds), *The Oxford Handbook of Criminology*, 5th edn (Oxford: Oxford University Press, 2012) 955 at 970–73.

117 As long as the necessary procedural protections are in place such knowledge can be ensured by using mixed panels in which judges sit jointly with experts in psychiatry and criminology.

118 Dünkel, 'Germany', in Padfield, van Zyl Smit and Dünkel (eds), *Release from Prison: European Policy and Practice* (Cullompton: Willan, 2010) at 185–212.

119 Reuflet, 'France', in Padfield et al., *ibid.* at 169–84.

120 Snacken, Beyens and Beernaert, 'Belgium', in Padfield et al., *ibid.* at 70–103.

7. CONCLUSION

Engagement with root and branch procedural reform is also connected to more substantive rights. In *Osborn* Lord Reed refers to research¹²¹ on the workings of the current Parole Board that reveals ‘the frustration, anger and despair felt by prisoners who perceive the board’s procedures as unfair, and the impact of those feelings upon their motivation and respect for authority’.¹²² He then comments laconically that ‘[t]he potential implications [of such reactions] for the prospects of rehabilitation, and ultimately for public safety, are evident’.¹²³

In *Vinter* [GC] there was uncontradicted evidence of the stress that Vinter and one of the other applicants suffered and of the deterioration of their personalities in a situation where they had no prospect of release. It may safely be surmised that the impact of the complete loss of hope of even a prospect of rehabilitation is much greater than the impact of anger at procedural shortcomings in the release process. The achievement of the Grand Chamber in *Vinter* was to recognise this problem, to note that most European states had developed a way of dealing with it, and to develop its Article 3 jurisprudence in order to compel a state like the United Kingdom, which was not addressing the problem, to respond to it. In so doing, the Grand Chamber treated the ECHR as a ‘living instrument’.¹²⁴ It was following directly in the tradition of the pioneering judgment in *Tyrer v United Kingdom*, which held that state-imposed corporal punishment of a juvenile, which by the 1970s had been rejected in almost all European countries, was degrading and thus in contravention of Article 3 of the ECHR.¹²⁵

Much remains to be done on the procedural side in particular, for, as the Grand Chamber explained in 1999 in *Selmouni v France*, ‘the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies’.¹²⁶ *Vinter* [GC] has demonstrated that the need for a comprehensive and manifestly fair procedure to evaluate progress towards release is most urgent for the persons who are likely to remain in prison for the longest on grounds of punishment and deterrence. It should be addressed immediately.

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121 Attrill and Liell, ‘Offenders’ Views on Risk Assessment’, in Padfield et al., supra n 114 at 191–201; and Padfield, *Understanding Recall 2011* (University of Cambridge, Faculty of Law, Research Paper No 2/2013).

122 Supra n 75 at para 70.

123 Ibid.

124 *Selmouni v France* 1999-IV; 33 EHRR 59 at para 101.

125 A 26 (1978); 2 EHRR 1.

126 Supra n 124 at para 101.