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A Tale of Two Cities: Whole of Life Prison Sentences in Strasbourg and Westminster

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Abstract

The recent decision of the European Court of Human Rights (ECtHR) in *Hutchinson v United Kingdom* (2015) is the latest twist in the political legal struggle between Westminster and Strasbourg. Whilst the British government has made several successions to the ECtHR regarding the role of the executive in the imprisonment of lifers, the thorny issue of the whole of life tariff, and prospect of prisoner release under that tariff, has been an ongoing debate. Whilst the ECtHR appeared to directly challenge domestic policy in the preceding decision in *Vinter and Others v United Kingdom* this latest decision, the seeming retreat from *Vinter*, by the Fourth Section of the court, appears to be more of a response to hard line domestic politics than a continuation of holistic legal principle which the ECtHR has outwardly supported in the past.

Keywords

capital punishment alternatives – criminal justice politics – European Court of Human Rights – whole of life sentences

1 Introduction

...the extraordinary attachment of the English to their system of law (if indeed it can be called a system), the positive affection it inspires, the awe inspiring confidence, often unwarranted, which they repose in its ability to do justice, the tenacity, indeed ferocity with which they refuse

to modify it with foreign importations is one of the most important national characteristics.

JOHNSON, 2010, cited in Grieve, 2014

Contrary to popular belief, life imprisonment was not intended to have a literal meaning in the UK following the abolition of the death penalty (Shute, 2004). Although calls for 'life to mean life', particularly for those convicted of murder, have been persistent in recent years (see, for example, Clark, 2003; Dawar, 2011; Telegraph View, 2014), legislators have remained somewhat impervious to public opinion, even through a period of punitive populism. Although average sentence lengths have increased (Prison Reform Trust, 2014), declaring a person, at the imposition of sentence, to be unfit to ever be released back into society has been a rare occurrence. Although rare, politicians have been eager, since the inception of the whole of life tariff, to stress that life will mean life, for a select few. Rarity of imposition though has not precluded challenges to the sentence, most substantially in *Vinter and Others v United Kingdom* (2015). The decision of the Grand Chamber of the European Court of Human Rights (ECtHR) in *Vinter* went further than the Strasbourg court had ever gone before in its regulation of whole of life sentences: penological principles justifying continued imprisonment must be reviewed; and a process of review needs to be in place at the time sentence is imposed, so a prisoner will know what he or she has to do to be considered for release. The British political response to the *Vinter* decision was swift, robust, and confrontational. Rather than affirming its position though, based on holistic legal principle, the European Court has ameliorated that public confrontation with the most recent decision in *Hutchinson v United Kingdom*, a departure from the *Vinter* decision, seemingly in response to political pressure.

This paper explores the politics of whole of life sentences which, not only dominate their maintenance domestically but, have seemingly pushed the ECtHR into a retreat. This paper explores the assertion that politics have triumphed over legal principles and that the hardened position of the UK government, and the threat to withdraw from the European Convention and the Strasbourg court, is the reason for the ECtHR reversal of position in *Hutchinson v United Kingdom*.

At the end of December 2014 there were fifty five people serving a whole of life sentence in England and Wales, seven of those were held in secure hospitals, the remainder in the main prison estate: fifty three men, two women (Ministry of Justice, 2015).

Since the enactment of the Criminal Justice Act (2003) a whole of life order, now only imposed by a judge, is considered only when the seriousness

of the offence is exceptionally high involving, according to Section 21 of the Act:

- (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" (Criminal Justice Act 2003 Section 21)

Section 2 of this paper outlines the historical developments and context which have cultivated the current relationship between the executive and judiciary in the sentencing of lifers, and how that relationship has been adjudicated by the ECtHR. Section 3 then charts the different approaches to life sentencing in Westminster and Strasbourg. Section 4 notes the hardened position of Westminster in response to the decision of *Vinter and Others* and the ECtHR generally. Section 5 asserts the success of political pressure, and the consequent retreat from the position set out in *Vinter*, in the latest case at the ECtHR regarding whole of life sentences, *Hutchinson v United Kingdom*, before the conclusion notes that the issue of whole of life tariffs, and the subsequent tension between Westminster and Strasbourg, will not likely end here.

2 History of Life in the UK

Over time, the release of murderers has provoked significant public backlash (Kandelia, 2011:70) with inevitable calls for truth in sentencing, mimicking the populist policies found across the Atlantic (Lubitz and Ross, 2001). Domestic policy has largely avoided such calls, weathering sporadic instances of serious crimes, including murder, being committed by known violent offenders released from prison (Steele, 2007; Whitehead, 2010; Robinson, 2013). Life imprisonment in the UK does not, for the overwhelming majority, mean life, nor was it ever planned to, despite misconceptions of what was intended at the time the death penalty was abolished (Blom-Cooper, 1996:708, 1999:900; Kandelia, 2011:72). Somewhat prophetically though, when abolition of the

death penalty was debated, the Home Secretary acknowledged that, in some circumstances, whole of life imprisonment may be required to protect society from an extremely dangerous offender (Kandelia, 2011:72).

Until the 1957 Homicide Act all those convicted of murder were sentenced to death. The 1957 Act then drew a distinction between capital and non-capital murders yet, proving an unsatisfactory distinction, the pace to abolish capital punishment quickened. Eventually the death penalty was abolished in the United Kingdom, in 1965, under the Murder (Abolition of the Death Penalty) Act. Following abolition, it was for the Home Secretary to determine the release of those convicted of murder. The Murder (Abolition of the Death Penalty) Act though imposed two changes upon the release procedures for murderers. Firstly, the trial judge could state in open court how long a murderer should serve in prison before he was to be considered for release. Secondly, the Home Secretary was required to consult the judiciary before releasing a murderer on licence (although the Home Secretary was free to depart from any judicial recommendation) (Shute, 2004:876; Kandelia, 2011:74). The executive occupying a judicial role was accepted as the norm, a practice that gave no cause for concern. The Home Secretary's power was absolute and unchallenged. That power would be drastically curtailed though, if not fully abandoned, following the establishment of the Parole Board in 1967.

Upon the creation of the Parole Board, the Home Secretary was then only able to order the release of a life sentenced prisoner after a positive recommendation from the board, and after consultation with the Lord Chief Justice (and trial judge if still available). Retaining some control, however, the Home Secretary decided, in the first place, which cases were referred to the Parole Board (Kandelia, 2011:74). Affirmative decisions for release were common and, coinciding with public fears over rising crime rates at the time, there came the inevitable backlash against early release for lifers (Shute, 2004:881). So, in 1983, the Home Secretary announced his intent to use his discretion to ensure a minimum of twenty years for those who had murdered a police or prison officer, those who had killed during the course of a robbery, child killers, terrorists, and those who committed murder of a sexual or sadistic nature (Shute, 2004:881; Kandelia, 2011:74).

New guidelines were announced, for both discretionary and mandatory life sentences which introduced two phases: the punishment phase and the risk phase. The punishment phase, that is the tariff, would be served to satisfy the principles of deterrence and retribution. After completion of the tariff, prisoners would be risk assessed to determine if it was safe for them to be released. For all prisoners sentenced to twenty years or more, there would be a review, by the Home Secretary, after they had served seventeen years (Shute, 2004:883).

Whilst the judiciary could advise on the length of time required to satisfy elements of retribution and deterrence the discretion to release would ultimately remain with the Home Secretary (Kandelia, 2011:75). This scenario, effective for all lifers, was somewhat short lived though after the intervention of the ECtHR.

In *Thynne Wilson and Gunnell v United Kingdom* (1991) the ECtHR held, in respect of discretionary life sentenced prisoners, that Article 5(4) of the European Convention on Human Rights which requires lawful detention to be imposed by a court, had been breached. In a concession to the court, as part of the Criminal Justice Act (1991), discretionary life sentenced prisoners would then have their tariff set by the trial judge, in open court, and their release would be considered by the Discretionary Lifer Panel, part of the Parole Board, a decision which the Home Secretary could not then veto (Kandelia, 2011:76). The situation for mandatory lifers, however, remained unchanged, the Home Secretary, in fact, frequently set a higher tariff, in excess of that recommended by the trial judge (Shute, 2004:885).

In *R v Secretary of State for the Home Department ex parte Doody* (1993) the House of Lords affirmed the sentencing role of the Home Secretary with respect to mandatory lifers. However, the Law Lords did agree that the prisoner should be informed of the judicial recommendation and be allowed to make written representations before the tariff was decided (Kandelia, 2011: 76). After Doody, the seventeen year review was unnecessary; all mandatory lifers would know their tariffs and could now expect a review three years before their tariff expired. For those few subject to a sentence of natural life a ministerial review was promised after twenty five years, to determine the suitability of converting the sentence to a determinate period. Further reviews would then take place every five years (Kandelia, 2011:77). One month following the Doody judgement, however, the Home Secretary reaffirmed his right in exceptional cases to raise or lower a tariff, stressing that his discretion to release a mandatory lifer would only occur upon his satisfaction that so doing would not threaten the maintenance of public confidence in the criminal justice system (Shute, 2004:886).

Whilst the ECtHR accepted the UK government's claim that murder was an exceptional crime, and that it was lawful for the Home Secretary to decide upon the imprisonment of mandatory life sentenced prisoners in *Wynne v United Kingdom* (1994), decided a year after Doody, that position would last less than a decade. In *Stafford v United Kingdom* (2002) the ECtHR held that the power of the Home Secretary to veto release decisions made by the Parole Board was in contravention of Article 5(1) and 5(4) of the European Convention on Human Rights. As a result, later in the same year the House of Lords, in *R (on the*

application of Anderson) *v Secretary of State for the Home Department* (2002), held that the Home Secretary's power of setting the tariff for mandatory lifers amounted to a sentencing exercise and was therefore contrary to Article 6 of the European Convention on Human Rights. In response to *Anderson*, Section 269 of the Criminal Justice Act 2003 transferred the power of setting tariffs to the trial judge (although the government produced guidelines for judges to follow in deciding the appropriate starting point for a tariff), and, as a consequence of that power transfer, whole of life tariffs found their way into legislation.

3 Life in Strasbourg and Life in Westminster

The issue of whole of life tariffs reached the ECtHR in the case of *Kafkaris v Cyprus* in 2003. Domestically, the issue had been regarded as resolved after *R v Secretary of State for the Home Department ex parte Hindley* (2000) in which the House of Lords had rejected Myra Hindley's¹ challenge of the legality of her sentence. In so doing, the Law Lords relied upon the policy statement of then Home Secretary, Jack Straw, that he would review whole of life tariffs from time to time and at the point of twenty five years (Kandelia, 2011:78). Whole of life sentences then were regarded as both legal and justifiable by the judiciary and, repeatedly, by politicians (Daily Mail News, 2002). Indeed, the debate on the fate of Hindley produced several pledges from government ministers that some prisoners, on the basis of their offences alone, would never again see freedom (BBC News, 1998). Myra Hindley died in 2002, whilst still in custody, and so never had the opportunity to have her case heard by the ECtHR. In *Kafkaris* though, in a similar scenario to Hindley, a prisoner, found guilty of premeditated murder, who had had their whole of life tariff imposed by the government, appealed to the Strasbourg court. Whilst the court upheld the imposition of a mandatory sentence it did state there may be an issue with respect to Article 3 of the European Convention on Human Rights if the sentence was irreducible. The Cypriot government contended that whole of life was not irreducible as the President, on the recommendation of, or in

1 Myra Hindley, Britain's longest serving female prisoner, was convicted of the murder of two children, and as an accessory to one other, in 1966. In 1974 she was sentenced to an additional year's imprisonment for her role in a prison escape plot. Although in 1987 Hindley admitted committing a further two murders, she was not charged or convicted of either. In 1990, then Home Secretary, David Waddington ruled that in Hindley's case life must mean life. The tariff was supported and affirmed by successive Home Secretaries: Jack Straw, Michael Howard and David Blunkett (The Guardian, 2002; Stanford, 2002).

agreement with, the Attorney General could order the release of a whole life sentenced prisoner. Although the ECtHR noted that the release mechanism was limited, it did, at the time, satisfy the requirements of Article 3.

The issue would later be addressed domestically by the Court of Appeal in *R v Bieber* (2008). The first part of the appeal was in fact upheld, that the circumstances of the particular case did not warrant the imposition of a whole of life term.² The second part of the appellant's claim, however, was rejected, that whole of life orders were in contravention of Article 3 of the European Convention on Human Rights. The Court of Appeal drew on both domestic jurisprudence and that of the ECtHR to reach its decision that whole of life sentences were permissible under the Convention. Although narrower than the release procedures in Cyprus, reviewed in *Kafkaris*, the Home Secretary's power of release under Section 30 of the Crime (Sentences) Act 1997 was found to be enough to render the whole of life tariff not fully irreducible and, therefore, not in violation of Article 3.

Specifically, the criteria that must be met by a prisoner to be considered for release is set down in chapter 12 of the Indeterminate Sentence Manual ("the lifer manual") issued by the Secretary of State as Prison Service Order 4700,

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

Prison Service Order 4700

2 The applicant in *Bieber* had been convicted on one count of murder, two counts of attempted murder, and two counts of possession of a firearm and ammunition with intent to endanger life. His whole of life tariff was substituted with a term of 37 years (*Kandelias*, 2011:83).

In *Bieber*, the domestic situation was confirmed and, until the case of *Vinter and Others v United Kingdom*, the ECtHR seemingly appeased. Vinter though challenged the restricted policy of review and asserted, moreover, that an adequate and clear policy of review (and possible release) needed to be in place at the time sentence was passed. In reviewing the appropriate time period for review the Strasbourg court, consulting various EU and international law materials, recommended a twenty five year standard,

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.

Vinter and Others v the United Kingdom

This standard had already been promised by former Home Secretaries in 1994 and then again in 1997, a review of a whole life order, one that even encompassed exceptional progress made in prison (although this was not formalised in the 2003 Criminal Justice Act). However, *Vinter* required more; it required an adjudication of penological principles for continued imprisonment. This was further than the court had gone before, prior to *Vinter* the court had “strongly insisted” that a life prisoner did not have a right under the Convention to have their sentence reconsidered by a national authority with a view to its alteration or termination (Szydło, 2013:502). All that had previously been required was that a whole life sentence not be irreducible (*Kafkaris v Cyprus*, 2003). The *Vinter* demand, however, if adhered to would create a significant inconsistency in domestic sentencing procedures. Whilst the whole of life tariff is reserved for exceptional cases, murder with the presence of significant aggravating factors, as detailed under Section 21 of the 2003 Act, since the passage of the Act, between 2004 and 2013, 596 tariffs of 25 years or more have been handed out in cases that failed to meet that seriousness threshold (FOI Request 94091). With the implementation of *Vinter*, those cases would not require review, but whole of life tariffs (just 34 handed out in the same period (FOI Request 94091)) would. Reasonably then, if the direction of *Vinter* were followed, in essence a gross disproportionality test, more serious offenders, having committed more serious offences could be liable for release earlier than those who had committed less serious crimes; surely undermining the very philosophy and reasoning of the Strasbourg court.

The response to *Vinter* both legally and politically was swift and robust. Britain's Lord Judge was highly critical of the Strasbourg court which, in his

view, was undemocratically claiming too much power (Kern, 2014). A view echoed by Lord Justice Laws, the longest serving appeals court judge in the country (Kern, 2014). The official judicial response, however, came with the decision rendered in *R v McLoughlin*,

It is entirely consistent with the rule of law that such requests (for release) 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.

LORD THOMAS, *R V MCLOUGHLIN*, 2014, Section 36:13

The Court of Appeal noted that the release criteria were highly restrictive, but asserted that the Vinter court was mistaken in concluding that the statutory regime for the reducibility of the sentence was uncertain (*R McLoughlin*, 2014, Section 12). The Vinter court found a lack of clarity in applicable domestic law governing possible release from a whole of life tariff; the McLoughlin court disagreed and simply reaffirmed its position and view that the law, before Vinter, and unchanged after Vinter, provided hope and possibility of release in exceptional circumstances, circumstances which render the whole of life sentence no longer justifiable (*R v McLoughlin*, 2014, Section 35).

4 The Response to Vinter

What must be noted though, even before the Vinter decision and the instruction to conduct a meaningful review of whole life sentences, there had been a political standoff between Strasbourg and Westminster, after the UK had quite openly attacked the ECtHR and what it perceived to be unfavourable decisions. Indeed, the most senior human rights official in Europe, in response, had gone as far as defiantly telling the UK that it should in fact leave the Convention and remit of the court (acknowledging the ramification of a policy of selectively adhering to ECtHR judgements),

If the UK, a founding member of the Council of Europe and one which has lost relatively few cases at the Court, decides to 'cherry pick' and selectively implement judgements, other states will invariably follow suit and the system will unravel very quickly.

NIELS MUITZNIEKS cited in Cohen, 2013

The Vinter case needs thus to be contextualised as the latest decision of the Strasbourg court that resounded negatively in Westminster; anti ECtHR feeling was already running high after unfavourable decisions regarding the extradition of foreign offenders and prisoner voting rights. After Vinter, the standoff in practice, and in principle, was public and clear. This was more confrontational than in recent years where officials in Strasbourg had publicly stated they did not wish to antagonise the UK on the issue of human rights (Bowcott, 2012). Still, the Conservative Party persistently noted the option (an intention if winners of the 2015 general election) to abolish the Human Rights Act (1998) which dictates compliance with Article 3 of the European Convention, and its reconsideration of remaining bound by the convention itself. Indeed, the Home Secretary had, quite publicly before the Vinter decision, announced the need for 'a plan to deal with the ECtHR' (BBC News, 2013), and a dissatisfaction that the British Supreme Court was not 'supreme' (EurActiv News, 2013). Calls by the Home Secretary were then only affirmed by the Prime Minister, David Cameron, a litany of issues; extradition of offenders, prisoner voting rights, and whole of life sentences, being used to consecrate the rhetoric of withdrawal from the Convention and court,

As a Prime Minister, what I want to know is can I keep our country safe. For instance, are we able to chuck out of our country people who have no right to be here, who threaten our country. I say we should be able to do that. Whatever that takes, we must deliver that outcome. And this is what I think we have the next 20 months to do, and put in our manifesto.

Prime Minister DAVID CAMERON, cited in Kirkup, 2013

Through the political rhetoric the assertion of domestic sovereignty is clear, "there's a real debate about who governs Britain and that the remit of the court has gone too far with the unlimited jurisprudence that it has and that that is no longer acceptable" (Justice Secretary Chris Grayling, cited in Bowcott, 2013). Days before the Vinter decision the Justice Secretary was, pre-emptively, asserting the lack of legitimacy of the Strasbourg court, "I think that what we've got to a situation where the European Court of Human Rights has lost its legitimacy in the UK by doing things that frankly, the people of this country and

their elected representatives do not want" (Justice Secretary Chris Grayling, cited in Mason, 2013).

In the wake of the decision of the Grand Chamber in *Vinter*, numerous politicians were quick to voice their dismay and anger (Barrett, 2013); the Prime Minister was quoted as being "very, very, very, very disappointed ... profoundly disagree(ing) with the court's ruling ... a strong supporter of whole life tariffs" (Watt and Travis, 2013). The *Vinter* rebuttal from Westminster was unwavering in its defiance to yet another perceived intrusion into domestic policy. The political rhetoric after *Vinter* has underscored that of recent years, certain prisoners, no matter what, will never again see beyond a prison cell (Kern, 2014) (meaning that the appellants in *Vinter* were no doubt correct then, that the possibility for release, for some prisoners at least, does not exist in any substantive way). Chris Grayling, Justice Secretary, in the most explicit rejection of *Vinter* sentiment, sent a formal note to the Council of Europe, stating that whole of life sentenced prisoners in the UK would not receive a review of their sentence (at all) and that the British Supreme Court should be the final arbiter of British law, not the Strasbourg court (Kern, 2014).

The *Vinter* judgement only added weight to domestic calls to review and renew, at least, the relationship between the UK and Europe on the issue of human rights. Such threats were an accumulation of challenges to the remit of the Strasbourg court, "...the Strasbourg court should first rethink its purpose when a country such as Britain reconsiders its membership" (Justice Secretary Chris Grayling, cited in Mason, 2013). Anti-Strasbourg sentiment was prevalent in sound-bites from Westminster. The European courts had 'nothing to offer the UK' (Justice Secretary Chris Grayling, cited in Bowcott, 2013). Pivotaly, the *Vinter* decision strengthened calls to withdraw from the convention and court altogether (Kirkup, 2013; Mason, 2013). Such an unprecedented withdrawal though would be 'disastrous' with far reaching consequences for both the convention and the court (Grieve, 2014; Gibb, 2014) (a revision of the relationship with the court would be a legal and practical impossibility leaving only the option (and strengthened threat) of withdrawal).

By 2014, preceding the recent retreat from *Vinter* in *Hutchinson v United Kingdom*, other nations were citing the position of the United Kingdom as a defence of their abrogation of responsibility under various human rights laws and treaties,

...our departure (from the Convention) as one of its principal creators and supporters will be so damaging to it. It is already the case that countries such as Russia are using the UK position to try to procrastinate on

implementing judgments. Indeed the effect of our conduct will go further as the UK's ambivalence is being cited by countries such as Venezuela in ignoring obligations under the American Convention on Human Rights arising prior to its denunciation of it in 2012 and citing Britain's approach as a justification and by the president of Kenya over the jurisdiction of the ICC. It bodes ill for all whose lives have been or could be beneficially affected by the existence of the Convention and the work of the Strasbourg Court and by Human rights conventions generally.

GRIEVE, 2014

The year after *Vinter*, the Conservative Party published a paper, 'Protecting Human Rights in the UK', which (whilst remaining within the EU) advocated breaking the link between British courts and the Strasbourg court so that the UK would take no further account of the rulings of the ECtHR (Grieve, 2014). Particularly, the paper accuses the ECtHR of 'mission creep', expanding beyond its original scope and the intention of the framers of the Convention, "...there is mounting concern at Strasbourg's attempts to overrule decisions of our democratically elected Parliament and overturn the UK courts' careful applications of Convention rights", cited in a list of examples of the court's mission creep was the *Vinter* decision (Conservatives, 2014:3). According to the proposals, 'fundamental changes would restore common sense and put Britain first', specifically, reforms would make the ECtHR no longer binding over the UK Supreme Court and the ECtHR would become an advisory body only, unable to order a change in UK law (Conservatives, 2014:5).

The Council of Europe responded "We take note of these proposals by the Conservative Party. We also take note they are not draft legislation. As they stand, the proposals are not consistent with the ECHR" (Morrison, 2014). The threat from the Conservative Party remained, "In the event that we are unable to reach that agreement (with the Council of Europe) (for renegotiation of terms), the UK would be left with no alternative but to withdraw from the European Convention on Human Rights..." (Morrison, 2014).

Threats to withdraw the UK from the European Convention on Human Rights thus only strengthened and increased after the *Vinter* decision, aggravated by decisions regarding prisoner voting (Creighton, 2013) and a litany of unfavourable and unpopular decisions regarding offenders' extradition.

If we cannot reach agreement that our courts and our parliament will have the final say over these matters then we will have to withdraw. We have the right to withdraw, it is specifically provided for in the convention. We would exercise that right. There is always a first time for

everything... We cannot go on with a situation where crucial decisions about how this country is run and how we protect our citizens are taken by the ECHR and not by our parliament and our own courts. We also have to be much clearer about when human rights laws should be used, and those rights have to be balanced with responsibilities. People in this country are fed up with human rights being used as an excuse for unacceptable behaviour. We will always stand against real human rights abuses and political persecution. But these plans will make sure that we put Britain first and restore common sense to human rights in this country.

Justice Secretary CHRIS GRAYLING, cited in WATT AND BOWCOTT, 2014

The Conservative position was quickly being characterised as the future plan for the country, in light of the impossibility, practically and legally, of forging a separate relationship with the Convention and court,

We can no longer tolerate this mission creep...What we have effectively is a legal blank cheque, where the court can go where it chooses to go. We will put in place a provision that will say that the rulings of Strasbourg will not have legal effect in the UK without the consent of parliament. Effectively, what we are doing is turning Strasbourg into an advisory body.

Justice Secretary CHRIS GRAYLING, cited in BOWCOTT, 2014

Such a position, of course, signified and demonstrated an opposition to Strasbourg,

On the face of it (after the Vinter decision) the Conservative Party is now committed to the UK's withdrawal from the Convention – since amending the Convention to accord the UK a veto over the European Court's judgments impossible.

MORRISON, 2014

5 Hutchinson, a Response to Westminster Politics

The most recent decision of the European Court of Human Rights, the Fourth Section, in *Hutchinson v United Kingdom*, has somewhat ameliorated the tension between Westminster and Strasbourg (Benge, 2015) and tempered the politicised response to Vinter. Whilst an outright confrontation had previously been kept at bay with favourable, yet somewhat concessionary legal interpretations of

European cases by domestic courts and politicians, the long held advocacy of whole of life had not required a public defence until the Vinter decision. The Vinter decision, however, forced the issue into a public arena: the UK could not appease domestic voters with promises of whole of life outright, and also satisfy its commitment to the Strasbourg court. Indeed, the opposition to the court and a conservative policy of law and order, and domestic sovereignty, speaks well to conservative voters, who might otherwise defect to more right wing political parties,

...the new Conservative “policy” is a useful anti-European dog whistle to help keep voters in the Conservative fold and out of the clutches of UKIP at next May’s General Election. Lest there be any doubt that the new “policy” is first and foremost an anti-European dog whistle, listen to the following from David Cameron’s speech...

Of course, it’s not just the European Union that needs sorting out – it’s the European Court of Human Rights. When that charter was written, in the aftermath of the Second World War, it set out the basic rights we should respect. But since then, interpretations of that charter have led to a whole lot of things that are frankly wrong. Rulings to stop us deporting suspected terrorists. The suggestion that you’ve got to apply the human rights convention even on the battle-fields of Helmand. And now – they want to give prisoners the vote. I’m sorry, I just don’t agree. Our Parliament – the British Parliament – decided they shouldn’t have that right.

Prime Minister DAVID CAMERON, cited in MORRISON, 2014

In Hutchinson³ the claim was that the imposition of a whole of life sentence on Mr Hutchinson was contrary to Article 3 of the European Convention: ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment’. In a retreat from the position set out by the Grand Chamber in Vinter, the fourth section dismissed Hutchinson’s claim. Yet, the decision of the Fourth Section in Hutchinson was only a response to the UK’s hardened political position, not to any legal change that occurred after Vinter: the claim in Hutchinson

3 Arthur Hutchinson was convicted of three counts of murder and one of rape in 1984 and sentenced to life imprisonment. At the time, the trial judge recommended a tariff of 18 years. Four years later the judge recommended a whole of life tariff “for the requirements of retribution and deterrence”. The Lord Chief Justice concurred, “I do not think that this man should ever be released, quite apart from the risk which would be involved”. In December 1994, it was communicated to Hutchinson that his tariff had been increased to one of whole of life imprisonment, a tariff since upheld by the Court of Appeal.

was that his case was a replica of the Vinter case that preceded it, and so a finding of a convention violation was likely,

The applicant submitted that his case was indistinguishable from Vinter and Others... The clarification offered by the Court of Appeal judgements in *R v Newell*; *R v McLoughlin* was in substance identical to that set out earlier in *R v Bieber* and *R v Oakes*, which were considered before the Grand Chamber in Vinter and Others before it came to a finding of violation ... 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... 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. 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 'would appear on face value to apply to this case'....

Hutchinson v United Kingdom, 2015 at 16

The key element then is the reasoning of the court in *R v Newell*; *R v McLoughlin* yet, this is unchanged in substance from previous judgements, and unchanged since the decision in Vinter.

...the Court of Appeal delivered a judgement in which it expressly expressed responded to the concerns in Vinter and Others... 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.

Hutchinson v United Kingdom, 2015:23

The Court of Appeal in *R v Newell*; *R v McLoughlin* did no more than to say the power of the Secretary of State was commensurate with Article 3 of the European Convention; there has been no substantive change yet, the Strasbourg Court supported the response, without any change in procedure, law, or the role of the executive. This lack of change is the key point of the dissenting opinion of Judge Kalaydjieva in *Hutchinson*;

...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*.

Dissent of Judge KALAYDJIEVA, *Hutchinson v United Kingdom*, 2015

6 Conclusion

What had changed then is the perception in Strasbourg, at least of the fourth section. It is contended that whilst the legal position had not altered, the attitude of the UK government had hardened further, the opposition to Strasbourg strengthened, and more ammunition given to a campaign to withdraw from the European Convention and the Court. The *Vinter* decision came at the tail end of what Westminster perceived to be a string of unfavourable decisions it was, in essence, poised to be the straw that broke the camel's back. After *Vinter* political rhetoric of withdrawal became formalised in a Conservative party paper, and an empty threat took on a very real form. The decision in *Hutchinson* not only backs down from *Vinter*, it goes someway to diffusing the tension with Westminster. *Hutchinson* was a decision of the Fourth Section, it is now up to the Grand Chamber to take referral of the case or, retreat from the *Vinter* decision and allow the issue to rest. Whether or not the Conservative Party is in power at that point may be a pivotal factor in that decision but, if the Grand Chamber remains unpersuaded by either the *Hutchinson* decision, or political threat, the issue of whole of life tariffs will take another turn and, quite possibly, the political threat of withdrawal will be put to the test.

Should the case not proceed from the Fourth Chamber, any respite for the issue is only likely to be temporary. With an average of more than 3 whole of life tariffs handed out per year in the 10 years after the passage of the 2003 Criminal Justice Act (and with the scope of imposition widened to now include the murder of police officers and prison guards (under the Criminal Justice and Courts Act 2015)), the whole of life tariff is perhaps becoming less rare than was ever intended; a consequence likely to have been neither foreseen in Westminster or Strasbourg.

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