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A Vinter Retreat in Europe: Returning to the Issue of Whole Life Sentences in Strasbourg

Abstract:

In *Vinter and Others v United Kingdom* (2013), the Grand Chamber of the European Court of Human Rights held that domestic procedures for reviewing whole life prison sentences in England & Wales were in breach of Article 3 of the European Convention on Human Rights. In response, the domestic Court of Appeal declined to revise those procedures, or the material relating to them, and held that the Grand Chamber was incorrect in its finding; the law did in fact give prisoners hope for future release. Rather than reasserting the reasoning and findings of *Vinter*, the Grand Chamber has been appeased by the clarification offered by the UK court (*Hutchinson v United Kingdom* 2017). The contradictions in that retreat from the *Vinter* judgement are analysed here and the future standing of the court is prophesied in relation to that decision.

Keywords: whole life sentencing; European Court of Human Rights; *Hutchinson v United Kingdom*; *Vinter and Others v United Kingdom*

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)

After the judgement rendered by the Grand Chamber of the European Court of Human Rights (ECHR) in *Vinter v United Kingdom* (2013), the British government was put on notice that the Strasbourg court viewed the release mechanism from a whole life order in England & Wales as unsatisfactory. Specifically, the chamber held that a person sentenced to whole life imprisonment had the right to know, at the time of sentencing, what he or she needed to do to be considered for release from the order and, pivotally, that the current release mechanism was unsatisfactorily vague. The UK response was one of defiance, legally and politically. Domestically familiar opinions were expressed by a range of politicians and commentators that the ECHR was, unacceptably, intruding upon British sovereignty and going beyond the scope of what was intended by the founders of the European Convention. In a legal response, in *R v McLoughlin* (2014), the Court of Appeal specifically addressed the concerns of the *Vinter* court, clarifying and restating their view on English law, and the adequate, albeit restrictive, in their view, release mechanism for whole life tariff prisoners. The law remained unchanged whilst domestic views on the Strasbourg court became increasingly negative, corresponding to a strengthening opinion of nationalism; English law should be decided at home, and not abroad. So, it was somewhat of a pressure release on the tensions between Strasbourg and Westminster when, in 2015, the Fourth Section of the ECHR decided in a case that raised many of the same points as *Vinter*, *Hutchinson v United Kingdom*, that the domestic system regarding the review and release of whole life prisoners was in fact adequate and did not amount to a breach of Article 3 of the European Convention. The referral was accepted by the Grand Chamber and, in January 2017, in a reversal of the opinion and views that characterised the *Vinter* decision, it held

that, even without a change in the law, and without any written amendments to the instruments governing release of whole life tariff prisoners, the current system in England & Wales was sufficiently clear. For the time being, after a period of discontent with the ECHR that has been characterised by political threats to withdraw from the remit of the court, the British government has been placated. Although such appeasement may not, in the long term, be enough to keep the UK party to the European Convention and remit of the court, the ECHR has tentatively moved towards an unbalanced arrangement whereby the 'bigger players' within Europe are treated with greater leniency and afforded a wider margin of appreciation than smaller, newer, and less politically influential nations.

Part one of this paper overviews the decision of the Grand Chamber in *Vinter and Others v United Kingdom* (2013) and the British response to that ruling. The second part examines the case of *Hutchinson v United Kingdom* (2015) in the Fourth Section of the ECHR as a temporary pacifier to the tensioned relations between Strasbourg and Westminster. The third part of the paper then reviews the Grand Chamber ruling in *Hutchinson* before concluding with a reflection on the standing of the Court and its possible future relationship with the UK, and other European nations.

Part 1: *Vinter and Others v United Kingdom*

The judgement 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 (Judge Power-Forde, *Vinter and Others v United Kingdom* cited in Van Zyl Smit, Weatherby, and Creighton 2014:66).

In *Vinter*, the appellants asserted that their whole life sentences amounted to ill treatment contrary to Article 3 of the European Convention on Human Rights; a claim which rested upon the denial of their future prospect for release. In its judgement, the Grand Chamber held that, not only do detainees under a whole life order have the right to a sentence review but also a prospect for future release. Whilst the court did not explicitly state a definitive time frame for review, drawing upon international standards, it contended the appropriateness of a twenty five year point:

...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 (*Vinter and Others v United Kingdom* 2013 at 68)

At the time of *Vinter*, and still now, the release procedures for whole life tariff prisoners are to be found in the Crime (Sentences) Act 1997, under which the Secretary of State may order the release of a prisoner on compassionate grounds. Those grounds are specified, restricted, by the Prison Service Orders (Chapter 12, Prison Service Order 4700) to cases where the offender is terminally ill and physically incapacitated. The *Vinter* court had reservations whether such a limited power for release would ensure that prisoners, for whom there was no continued penological justification for their imprisonment, actually had a real prospect for release. When a whole life order is imposed, the penological justifications for that order, requirements of retribution, deterrence, incapacitation, and rehabilitation, will not remain static and will shift over time. A comprehensive review is therefore required, suggested at twenty five years, to determine whether those justifications remain for keeping the prisoner detained under a whole life order. Moreover, a clear review mechanism should be in place at the time the prisoner is sentenced so he or she can know what is required of them to be considered for future release. When such a review, and mechanism, is absent, whole life prisoners are denied a real prospect of release in contravention of Article 3.

In Britain, the legal response to the *Vinter* judgement was rendered in *R v McLoughlin* (2014). In its ruling, the Court of Appeal specifically rejected the view of the Grand Chamber that section 30 of the Crime (Sentences) Act 1997 was unclear and therefore did not provide an adequate means for a prisoner to demonstrate that his or her continued imprisonment was no longer justified. In fact, the Court of Appeal was explicit in its reasoning that domestic law did provide 'hope' or 'possibility' for release of whole life sentenced prisoners at some point.

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 at 36)

Whilst the Grand Chamber asserted that a prisoner is entitled to know what efforts he can make to be considered for release, both the legal and political response were of one voice: nothing, at least nothing that has been specified. Section 30 of the Crime (Sentences) Act (1997) refers to the power to release a life sentenced prisoner on compassionate grounds. The relevant Prison Order states that a prisoner must be bedridden with a prognosis of 3 months or less to live; this is not a state an individual can strive for. Perversely, such a state is one to naturally be avoided, and it is certainly not one that can be brought about by a prisoner through rehabilitative efforts; terminal illness can provide no hope.

Despite this fallacy, the political response to *Vinter*, noteworthy as the whole life tariff in England and Wales is fiercely political – any release decision still rests with the executive rather than the judiciary or an independent review panel or parole board - affirmed the legal response, in the most

vociferous terms. In context, the Vinter decision was the latest in a procession of decisions from the Strasbourg court that resonated negatively in Britain. The year following the Vinter decision, the Conservative party, in their preliminary campaign for the 2015 general election, published a manifesto for their plans to repeal the UK Human Rights Act and thus break the country's link to the European Court of Human Rights. Underpinned by the contention of mission creep of the court, the paper lists Strasbourg decisions regarding prisoner voting, artificial insemination, prisoner extradition, and whole life sentencing as reasons to withdraw from the remit of the court (Conservatives 2014:3). Even before the unfavourable Grand Chamber judgement in Vinter, the Home Secretary announced a national need for a plan to 'deal with' the ECHR (BBC News: 2013), whilst Prime Minister, David Cameron, added further weight to the strength of opinion against the 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)

On the Vinter decision, in particular, David Cameron was quoted as, "very, very, very, very disappointed ... profoundly disagree(ing) with the court's ruling ... a strong supporter of whole life tariffs" (Watt and Travis, 2013). Meanwhile, the then Justice Secretary, Chris Grayling, sent a formal note to the Council of Europe, asserting British sovereignty, that the UK Supreme Court should be the final arbiter of the law and, tellingly, that whole life tariff prisoners would not be receiving reviews of their sentences (Kern, 2014). Such an assertion, in line with historic promises that, for some offenders, life will most certainly mean life (Watt and Travis 2013; Kern 2014; Dyer 2002), directly conflicts with the judgement, and reasoning, of Vinter. When the decision for release rests with an elected, publicly accountable minister, the Vinter court was correct in its belief that there is no real prospect for release for whole life sentenced prisoners. Public opinion, and confidence in the criminal justice system, remain the decisive factors, above prisoner rehabilitation (Cavadino and Dignan 2002:275; Gould 1998). The threat, however, to the ECHR, by a founding member of the Council of Europe, was strong,

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 (Justice Secretary Chris Grayling, cited in Watt and Bowcott, 2014)

Part 2: Hutchinson, the interim pacifier

In Hutchinson¹, two years after the Vinter judgement, the similar claim was presented to the Fourth Section of the Strasbourg Court: the imposition of a whole of life sentence was contrary to Article 3 of the European Convention. However, the Fourth Section was to reach a different conclusion than the Grand Chamber in Vinter. In a withdrawal from the position set out in Vinter, Hutchinson's claim was dismissed. However, this dismissal of the appellant's claims was despite the assertion that the Hutchinson case was in fact a replica of the Vinter case that preceded it. However, nothing had changed in England & Wales, legally, after the Vinter decision, except an increased amount of defiance to the Strasbourg court from the judiciary, in the responding case of McLoughlin. Indeed, that lack of change was a key point in 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).

However, the majority felt that the McLoughlin court had satisfactorily answered the charges presented by the Grand Chamber in Vinter. Particularly, the Fourth Section noted the Court of Appeal's strenuous assertion that the Secretary of State was bound to act compatibly with Convention rights, including Article 3, by virtue of the Human Rights Act (1998). The Strasbourg court was convinced by the McLoughlin court's assertion that it was of no consequence that Chapter 12 of the Lifer Manual had not been revised by the Secretary of State, after Vinter, since he was bound to exercise his power in a manner compatible with Article 3. The exceptional circumstances referred to in McLoughlin would be elucidated by the circumstances of each case, and subject to judicial review; no further explanation was prudent or necessary since the meaning would evolve under common law. However, in more than thirty years, it is important to note, no whole life tariff prisoner has been released. Still, the Fourth Section held that the national court had specifically addressed the points of concern in the Vinter judgement and clarified, unequivocally, the domestic position.

Whilst satisfactory for Britain, the appellant's claim was accepted on referral by the Grand Chamber. The applicant argued, with merit, that his claim was indistinguishable from that in Vinter and the clarification offered in *R v McLoughlin* was, in substance, identical to that previously offered by the same court in previous cases (*R v Bieber* (2008) and *R v Oakes* (2012)). Also noted were the political statements after Vinter, undermining the domestic legal position, and, similarly, the contentious role of a government minister taking on a judicial function in determining release of whole life sentenced prisoners (*Hutchinson v United Kingdom* 2015 at 16).

¹ 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 life imprisonment, a tariff since upheld by the Court of Appeal.

Part 3: Hutchinson in the Grand Chamber

...the violation in Vinter rests on two grounds, the first one being the lack of certainty and the second one being the absence of a dedicated review mechanism. They remain untouched (Hutchinson v United Kingdom 2017, dissenting opinion of Pinto De Albuquerque at 16).

In January 2017, by a vote of fourteen to three, the Grand Chamber held, in *Hutchinson v United Kingdom*, there had been no violation of Article 3.

Hutchinson claimed that the review of whole life sentences was still vague, particularly when entrusted with a government minister, and that the chamber should rule that such a function should be entrusted to an independent judiciary, rather than a partisan politician. Such a vague system of review was compounded by the fact that the key terms ‘exceptional circumstances’ and ‘compassionate grounds’ had not been sufficiently elucidated since the Vinter judgement, undermining any attempt at prisoner rehabilitation. This view is not without substance; the most infamous of whole life sentenced appellants in Britain, Myra Hindley, was widely recognised as a ‘prison success story’ having earned a slew of favourable reports from those who worked with her; religious conversion; prisoner mentoring; and educational achievement, all of which could not overcome the adamant public view that she should never be released. The public, as demonstrated in the Hindley case, holds a powerful view when the decision to release rests with a publicly elected minister (Pettigrew 2016a; Pettigrew 2016b). In fact, neither Myra Hindley, nor any other life sentenced prisoner, had been released “in the way envisaged by Vinter” (*Vinter v Hutchinson* 2017 at 31). The Grand Chamber, however, affirmed its position that it is for each State to determine whether sentence review is conducted by the executive or the judiciary. The Grand Chamber was mindful that the Secretary of State could order release of a whole life tariff prisoner at any time, despite no such order having ever been made, but it was not for the court to speculate how efficiently such a system, which it acknowledges is minimally regulated, might operate in practice (*Hutchinson v United Kingdom* 2017 at 69). In practice, there is no meaning to any review and regulation, when an elected government minister undertakes the ‘review’, it becomes coloured by public opinion. As Pettigrew notes, in regard to Hindley,

If, for all Hindley’s efforts to improve herself whilst in prison (even if they were entirely self-serving, to impress those who could move her towards release) she was not deemed to have made “exceptional progress”, it is then hard to imagine any prisoner that could reach that point. Hindley devoted over three and a half decades to all the self-improvement and educational courses she was offered whilst in prison and still, that was not enough to persuade politicians (or the public) of a change in her character. Hindley has, in effect, placed the bar so high that for other prisoners with whole of life tariffs, after her death, and after her efforts for release, are left with very little hope of achieving release by that mechanism (Pettigrew 2016a:61)

Despite the role played by public opinion in the review of whole life sentences, the Grand Chamber maintained, in *Hutchinson*, that an executive review does not amount to a breach of the Convention and falls within the margin of appreciation given to member states. That holding is despite there being clear support in the international materials referred to in the *Vinter* case for review to be a judicial function (*Hutchinson v United Kingdom* 2017 at 28).

Although the Court of Appeal, in *McLoughlin*, had noted the restrictive nature of the current release policy, that they had stated the Lifer Manual cannot restrict the duty of the Secretary of State to consider all circumstances relevant to release under section 30 of the Crime (Sentences) Act was enough to pacify the Grand Chamber. Noted by the Court of Appeal, and accepted by the Grand Chamber, the failure to reword and revise official policy in line with relevant statutory provisions and case law was inconsequential as a matter of domestic law,

The Court considers that the Court of Appeal has brought clarity as to the content of the relevant domestic law, resolving the discrepancy identified in the *Vinter* judgement. Although *Vinter* contemplated that the policy might be replaced or quashed in the course of judicial review proceedings, the court notes the government's submission that the Lifer Manual retains its validity in relation to release on compassionate (in the narrow sense of humanitarian) grounds. What is important is that, as confirmed in *McLoughlin*, this is just one of the circumstances in which the release of a prisoner may, or indeed must, be ordered (*Hutchinson v United Kingdom* 2017 at 40).

The other circumstances remain unidentified.

Key to the Grand Chamber's retreat from *Vinter*, as in the Fourth Section, is the assertion of the Court of Appeal in *McLoughlin* that the power of the Secretary of State to order release from a whole life order is bound by the Human Rights Act (1998). Section 3 of the Act, regarding the interpretation of legislation states, "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights" (Human Rights Act 1998 s.3). Furthermore, section 6, regarding the acts of public authorities, states "It is unlawful for a public authority to act in a way which is incompatible with a Convention right" (Human Rights Act 1998 s.6). The obligations of the Human Rights Act, however, are somewhat undermined by successive declarations that, for some, 'life will mean life' (Watt & Travis 2013, Dyer 2002) and further jeopardised by repeated stated intentions to repeal that domestic legislation (Travis 2013; Conservatives 2014; Stone 2015; Stone 2016).

In his dissent, Judge Pinto De Albuquerque recalled the Grand Chamber's judgement of *Murray v the Netherlands* (2016), an intervening decision between *Vinter* and *Hutchinson*. In *Murray* it was held that a parole mechanism must comply with five binding principles: (1) the principle of legality; there must be a sufficient degree of clarity and certainty, (2) the principle of the assessment of the penological grounds for continued incarceration based on objective and pre-established criteria including special and general prevention (deterrence) as well as retribution, (3) the principle of assessment within a specified time frame, 25 years in the case of life sentenced prisoners, (4) the principle of fair procedural guarantees, including the obligation to give reasons for the decision not

to order the release of the prisoner, (5)the principle of judicial review. For Judge Pinto De Albuquerque those principles have now been disregarded,

...having established the above-mentioned 'relevant principles', it could be expected that the Court had reached in Murray a point of no return in its standard-setting function for the protection of human rights of prisoners in Europe. Unfortunately this expectation proved to be wrong in the present case (*Hutchinson v United Kingdom* 2017, dissenting opinion of Judge Pinto De Albuquerque at 10).

The crux of his assertion is based on the lack of change since Vinter, and the still not clarified terms of reviewing life sentences; particularly the Court of Appeal in McLoughlin had not clarified what was meant by 'exceptional circumstances'. Whilst the McLoughlin court held that it was of no legal consequence that the Lifer Manual had not been revised, Judge Pinto De Albuquerque points out the heading remains 'compassionate release on medical grounds' which shows the intention of s.30. For the McLoughlin court the wide meaning of compassionate grounds encompasses 'legitimate penological reasons' a view which was explicitly rejected by the Vinter court (at 129). As noted by Judge Pinto de Albuquerque, it was explicitly stated in Murray that penological grounds do not equate to, and should not be confused with compassionate grounds of ill health, physical integrity and old age (*Murray v the Netherlands* at 100). The unchanged lifer manual, issued by the Secretary of State as Prison Service Order 4700, still stipulates the criteria for release being restricted to cases when,

...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 (Prison Service Order 4700)

The Strasbourg court, on more than one occasion since the Vinter judgement, had faulted the lack of clear criteria that was to be taken into account in reviewing whole life sentences, so Hutchinson stands in contradiction to those cases (*László Magyar v Hungary* 2014; *Trabelsi v Belgium* 2014). In the *László Magyar* case the second section of the court was critical of the lack of specificity regarding the governing criteria and applicable conditions for exercising presidential clemency. The remedial suggestion was legislation that would enable prisoners to see 'with some degree of precision' what was required of them in order to be considered for release (*László Magyar v Hungary* 2014 at 71). The Fifth Section of the court went further in its direction for clear and specific guidance, referring to "objective, pre-established criteria of which the prisoner had precise cognisance at the time of imposition of the life sentence, whether, while serving his sentence, the prisoner has changed and progressed to such an extent that continued detention can no longer be justified on legitimate penological grounds" (*Trabelsi v Belgium* 2014 at 137). Britain rejects the need for pre-established criteria, holding that it is neither necessary nor practical to describe what a whole life sentenced

prisoner must do in order to be considered as having made exceptional progress towards their rehabilitation.

Aptly pointed out in his dissenting opinion Judge Pinto De Albuquerque refers to the sentencing remarks of judges in recent English cases where sentences of whole life were imposed: *R v Mair* (2016) and *R v Port* (2016).

[this offence] is of such a high level of exceptional seriousness that it can only properly be marked by a whole life sentence. That is the sentence which I pass. You will, therefore, only be released, if ever, by the Secretary of State exercising executive clemency on humanitarian grounds to permit you to die at home. Whether or not that occurs will be a matter for the holder of that office at the time (*R v Mair* 2016)

The sentence therefore upon the counts of murder is a sentence of life imprisonment; I decline to set a minimum term; the result is a whole life sentence and the defendant will die in prison (*R v Port* 2016)

This is the assumption of the judiciary based on, ostensibly, a literal meaning, not a wide interpretation of s.30, as asserted by the court in *McLoughlin*; a whole life sentence is just that, short of being 'reduced' on compassionate grounds to allow the prisoner to die at home, a prison term with a true meaning.

In essence then, the claims made in *Vinter* remain valid; the domestic law remains unchanged, there is no case law that illuminates any meaning given to exceptional circumstances, the 'Lifer Manual' – the only document accessible to whole life prisoners that can inform them of what is required of them to be considered for release – has not been revised for clarity. The Fourth Section and Grand Chamber judgements wholly rely on the elucidation of the law in *McLoughlin* which, in reality, is no elucidation at all; the life sentenced prisoner still does not know, at the time of sentence, or at any point, what they can do to enhance their prospect for release. As discussed elsewhere, the threshold would seem to be very high (*Pettigrew* 2016a; 2016b) and, it should be remembered that still no whole life sentenced prisoner has been released. Moreover, as highlighted in recent cases, just weeks before the Grand Chamber published its judgement, judges in Britain are imposing whole life orders fully expecting that the recipients will spend their natural life in prison, notwithstanding the slim chance that they may be allowed to die at home (Sentencing Remarks of Mr Justice Wilkie, *R v Thomas Mair* (2016)). What has changed, after *Vinter*, is the strength and depth of animosity towards the Strasbourg court in Westminster. Indeed, political intimidation has taken on a very real substance seen, for example, in the domestic widening of the scope of whole life orders in a European climate that sees the rest of Europe moving away from literal life sentencing.

Part 4: Concluding Remarks

The majority's decision represents a peak in a growing trend towards downgrading the role of the Court before certain domestic

jurisdictions, with the serious risk that the Convention is applied with double standards (Hutchinson v United Kingdom 2017, dissenting opinion of Judge Pinto De Albuquerque at 38)

The decision of the Grand Chamber in Hutchinson resonates more widely than the 65 whole life sentenced prisoners currently incarcerated in England & Wales (Ministry of Justice 2017:3). Indeed, it resonates more widely than the individual issue of whole life prison sentences and mechanisms for release and parole. The reversal of the Grand Chamber, with no action taken by England & Wales in response to the concerns raised in Vinter other than the Court of Appeal's proclamation that the domestic law was good law, raises questions regarding the extent to which the ECHR is influenced by political pressure both directly, in this case, and that found within the wider climate of growing Euro scepticism. Indeed, that climate is one which is increasingly hostile towards the Strasbourg court (Hutchinson v United Kingdom 2017, dissenting opinion of Judge Pinto De Albuquerque at 38).

Appropriately noted in the dissent of Judge Pinto De Albuquerque are the words of Lord Hoffman,

When we joined, indeed, took the lead in the negotiation of the European Convention, it was not because we thought it would affect our own law, but because we thought it right to set an example for others and to help to ensure that all the Member States respected those basic human rights which were not culturally determined but reflected our common humanity (cited in the dissenting opinion of Judge Pinto De Albuquerque, Hutchinson v United Kingdom 2017 at 39)

When founding countries believe that human rights are for export not import, and condemn the imposition of 'alien jurisprudence' upon them, the legitimacy of the court should overpower any such complaints. However, when those member states are given a wider margin appreciation, for their placation, the legitimacy of the court suddenly rests on quicksand. This is not the first instance of such latitude being given to hardened domestic opinion that contradicts the court's findings and philosophy. On the issue of prisoner voting (Hirst v United Kingdom No 2 2005) the court found a breach of the convention but after years of the UK failing to implement the ruling it was not sanctioned in anyway; a policy of diplomatic restraint suggesting that "officials in Strasbourg do not wish to antagonise any further the UK's increasingly fraught relations with the ECHR" (Bowcott 2012). Since that time, a litany of issues, and the ECHR's pronouncement of them, has resonated negatively with Britain and, it would seem, in response to increasing hostility and substantial threats to repeal the Human Rights Act which demands compliance with the ECHR, the Strasbourg court has responded with a measure of favourability. Whilst such a move may prevent, in the short term, the departure of a key Member State from the remit of the Strasbourg Court, it simultaneously casts doubt upon its legitimacy, objectivity, and future role as arbiter of universal human rights in Europe.

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