

---

Citation:

Pettigrew, M (2017) Retreating From Vinter In Europe: Sacrificing Whole Life Prisoners To Save The Strasbourg Court. European Journal of Crime, Criminal Law and Criminal Justice, 25 (3). ISSN 1571-8174

Link to Leeds Beckett Repository record:

<https://eprints.leedsbeckett.ac.uk/id/eprint/3878/>

Document Version:

Article (Accepted Version)

---

The aim of the Leeds Beckett Repository is to provide open access to our research, as required by funder policies and permitted by publishers and copyright law.

The Leeds Beckett repository holds a wide range of publications, each of which has been checked for copyright and the relevant embargo period has been applied by the Research Services team.

We operate on a standard take-down policy. If you are the author or publisher of an output and you would like it removed from the repository, please [contact us](#) and we will investigate on a case-by-case basis.

Each thesis in the repository has been cleared where necessary by the author for third party copyright. If you would like a thesis to be removed from the repository or believe there is an issue with copyright, please contact us on [openaccess@leedsbeckett.ac.uk](mailto:openaccess@leedsbeckett.ac.uk) and we will investigate on a case-by-case basis.

## Retreating From Vinter In Europe: Sacrificing Whole Life Prisoners To Save The Strasbourg Court

Mark Pettigrew

### Abstract:

In *Vinter and Others v United Kingdom* (2013) the Grand Chamber of the European Court of Human Rights ruled that existing release mechanisms from a whole life prison sentence in England & Wales contravened Article 3 of the European Convention. Domestically, the defiant legal, and political, response declared the current law as sufficiently clear with no amendments to procedures, or the material governing those procedures, being necessary. In a reversal of the reasoning of *Vinter*, the Grand Chamber has been persuaded by that response. The ramifications of that most recent ruling, *Hutchinson v United Kingdom* (2017), are explored which, in the long term, threaten the court's legitimacy and future.

**Keywords:** whole life sentences; European Court of Human Rights; criminal justice politics; sentencing reform

The recent decision of the Grand Chamber of the European Court of Human Rights (ECHR) in *Hutchinson v United Kingdom* (2017) is notable in two regards. Firstly, it is significant for the 65 whole life sentenced prisoners currently incarcerated in high security prisons and psychiatric hospitals in England & Wales (Ministry of Justice 2017:3). Secondly, it is significant due to the consequential standing of the Strasbourg court in Europe in regards to the UK and, ultimately, to all parties within the court's remit.

In a landmark ruling against the review mechanism of whole life sentences in England & Wales, the ECHR held that domestic procedures for that review, and prospect of release for those sentenced to whole life imprisonment were inadequate (*Vinter and Others v United Kingdom* 2013). Such was the inadequacy and vagueness of existing procedures that the subsequent denial of the future prospect of release was sufficient to amount to a violation of Article 3 of the European Convention on Human Rights. In the context of a plethora of decisions that resonated negatively with Britain; prisoner voting rights, artificial insemination, and offender extradition, for example, the political backlash was vehement, with a legal response as its underpinning. In an environment of increased hostility towards the institutions of Europe, amalgamated with general Euro scepticism and threats to withdraw from the remit of the Strasbourg court, the temporary relief to tensions between Strasbourg and Westminster was rendered by the decision of the Fourth Section of the European court in *Hutchinson v United Kingdom* (2015). Referred to the Grand Chamber, the ultimate arbiter, the authoritative decision on the case, and issue, for the time being at least, was published in 2017; a definitive retreat from the *Vinter* decision that is a placation of the British government but a troubling sign that the Strasbourg court is influenced by political threat. After that *Hutchinson* decision it has begun to increasingly look as though the yardstick of judgement in human rights cases is not uniformly applied but has become mistakenly deferential to forcefully stated domestic procedures, ostensibly, to secure the future of the court.

This paper asserts that political pressure brought to bear upon the ECHR, by Britain, has permeated the Strasbourg court and precipitated an increasing margin of appreciation given to the UK, in contrast to other Member States. In response to threats to withdraw from the remit of the court, the ECHR has made a volte face in its pronunciation of the English review mechanism of whole life sentences as a breach of the European Convention. This paper will demonstrate that the recent reversal of the court's thinking is not part of a dialogue between the ECHR and Britain but, instead, a simple retreat, in the face of hardening political opposition to the court, for the purpose of safeguarding the future of the court and the UK as part of its remit; a concession in the short term for long term preservation.

Part one of this paper details the background to the most recent decision of the Grand Chamber in *Hutchinson v United Kingdom*: the finding in *Vinter and Others v United Kingdom*, as well as the domestic political and legal responses to that judgement. The second part overviews the decision of the Fourth Section in *Hutchinson* and the political climate in which that judgement was rendered. Part three then analyses the Grand Chamber decision in *Hutchinson*, particularly the dissenting opinion of Judge Pinto De Albuquerque, and the wide margin of appreciation given to the UK in this case. The paper concludes with the assertion that the future of the court's legitimacy is in doubt should it continue down a path of favourable decisions that appear to be made in response to political pressure.

### ***Section I: Hostility Towards the ECHR***

In *Vinter and Others v United Kingdom* (2013) the appellants contended that the sentence imposed upon them amounted to ill treatment contrary to Article 3 of the European Convention on Human Rights, owing to the inherent denial of future parole. The Grand Chamber held that those subject to a whole of life sentence have both the right to a review of their sentence, and a future prospect of release. In its decision, the Strasbourg court determined that a review of continued detention under a whole life order is necessary, a review to determine whether there is continued penological justification for keeping an offender incarcerated (*Vinter and Others v United Kingdom* 2013). Although previous Home Secretaries had pledged a review of whole of life sentences, a ministerial 25 year review, followed by further reviews at five year intervals (Kandelia 2011:77), the proposed *Vinter* review demanded a more thorough, penological review with a suggestion, based on various international standards, of 25 years. However, from a legal perspective, adherence to the *Vinter* judgement would create an inconsistency in domestic sentencing. Whole life tariffs are reserved for homicide cases of particular severity; the murder of two or more people involving a substantial degree of planning or premeditation, abduction of the victim, or with sadistic sexual conduct; murder of a child involving abduction or with sadistic motivation; murder to advance a political, racial or ideological cause; murder committed by a person previously convicted of murder (s.21 Criminal Justice Act 2003), or murder of a prison guard or police officer (s.27 Criminal Justice and Courts Acts 2015). Between 2010 and 2015 alone, 278 tariffs of 25 years or more were dispensed in England and Wales (FOI Request 106251); those with a whole life sentence would be entitled to a sentence review whilst those who did not meet the severity threshold for a whole life tariff to be imposed would not be entitled to such a review.

The sentencing inconsistency of adhering to the Vinter decision notwithstanding, the mainstream response to the Vinter decision was heavily characterised by anti Strasbourg sentiment and an assertion of domestic sovereignty; whole life tariffs being one issue, amongst others, such as prisoner voting rights, that had been decided against Britain,

Yesterday's verdict from the European Court of Human Rights, branding whole life tariffs for murderers in British prisons as 'inhuman and degrading', represents an insulting intrusion into our national affairs, made by people who are quite unfit to influence them. Of course, this is merely the latest of many foolish and inappropriate judgements, but that does not make it more acceptable . . . It is grotesque that a cluster of ill-qualified judges, several of them drawn from the most corrupt and ill-governed nations in Europe, should abuse their powers to lay down law, quite literally, to the Government of Britain. (Hastings 2013)

The legal response to Vinter is found in *R v McLoughlin* (2014). The Court of Appeal specifically rejected the view of the Grand Chamber that section 30 of the Crime (Sentences) Act 1997 (the power to release life sentenced prisoners on compassionate grounds) 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. 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)

It was the Court of Appeal's view that the law does in fact provide 'hope' or 'possibility' for release 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 court maintained that release was possible, the popular political rhetoric of the time fully endorsed whole life sentences for the 'worst crimes' and 'worst offenders' (Mason 2014, Slack and Robinson 2014); underscoring 'promises' of recent years that certain prisoners, no matter what, would never again see beyond a prison cell (Kern 2014). In Westminster, it would seem the nature of the offence can indelibly fix the tariff regardless of any progress made whilst imprisoned, for the executive at least (Schone 2000); the executive remains the only mechanism by which a whole life prisoner can be released. *Although the power to impose whole life sentences was transferred to the judiciary by the 2003 Criminal Justice Act, the power to release a prisoner from that tariff was not similarly transferred and remains with the Secretary of State.*

The appellants in Vinter were seemingly correct in their assertion that the possibility for release was not a real prospect in any substantive way. Indeed, it is important to note that no whole of life sentenced prisoner has been released upon compassionate grounds and when that power has been exercised in regard to other prisoners, those not serving whole life, the public and media backlash has been quick and forceful<sup>1</sup> (Slack and Wright 2009; Camber and Shipman 2012). Whilst the Vinter court held that the prisoner must know what efforts he can make to be considered for release, both the legal and political response were, in essence, identical: nothing. For the Prison Order states that a prisoner must be bedridden with a prognosis of 3 months or less to live; that is not a state an individual can strive for. Moreover, it is most certainly not a state that can be brought about by a prisoner through rehabilitative efforts.

Yet, despite any legal, logical, or compassionate grounds on which the Strasbourg decision could safely stand upon, in the UK the issue of whole life tariffs is purely political. 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. The Vinter case thus needs to be contextualised; anti ECHR feeling was already running high after unfavourable decisions regarding the extradition of foreign offenders and prisoner voting rights. *Through the political rhetoric directed towards the Strasbourg court, 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,

---

<sup>1</sup> Particularly notable in the recent releases of Ronnie Biggs, the 'great train robber', and Lockerbie bomber Abdelbaset Ali al-Megrahi.

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).

After Vinter, the divide between the Strasbourg court and the UK both in practice, and in principle, was public and clear. The Conservative Party persistently noted the option (an intention if they were to be 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 ECHR’ (BBC News 2013), stressing 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; artificial insemination; and whole of life sentences, being used as objective justifications for withdrawal from the Convention and court (Kirkup 2013).

The Conservative Party, in the year after Vinter, published a paper, ‘Protecting Human Rights in the UK’, which 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 ECHR (Grieve 2014; Conservatives 2014). Particularly, the paper accuses the ECHR 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 ECHR no longer binding over the UK Supreme Court and the ECHR 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). However, 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). Indeed, threats to withdraw the UK from the European Convention on Human Rights thus only strengthened and escalated after the Vinter decision,

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).

Yet, the response to Vinter was not merely in rhetoric, or enshrined in political party documents. The response to Vinter, the defiance, became cemented in legislation. In 2015 the Criminal Justice and Courts Act was passed, section 27 of which states,

(1) Schedule 21 of the Criminal Justice Act 2003 (determination of minimum term in relation to mandatory life sentence) is amended as follows.

(2) ...cases for which a whole life order is the appropriate starting point)

“(a) the murder of a police officer or prison officer in the course of his or her duty”.

So, far from accepting Vinter, and further than the defiant political rhetoric in immediate response to the decision, conditions in which to impose whole of life were expanded. **In a symbolic act of defiance, rather than concede to the Vinter decision, the steadfast political attachment to whole life sentence provision was demonstrated by expanding those instances when the sentence could be applied. That expansion occurred even though the Vinter court had held that the sentence should not be imposed unless a person knows at the time of imposition what he or she must do in order to be considered for release from the tariff. The murder of police or prison officers was not a particular issue which required remedy: between 1945 and 2015 87 police officers were murdered, in the year before the legislation was passed alone, there were 868 murders recorded in England & Wales (Pettigrew 2016:265). It was, it is asserted, more fruitful as a symbolic message. Without any revisions to domestic procedures, in line with the dicta of the Vinter judgement, the response was, instead, to widen the pool of offenders eligible for the sentence. That action is further highlighted as defiant by its contrast to other nations in Europe who have begun to move away from imposing whole life sentences (Netherlands Committee of Jurists for Human Rights (2015)).**

In practice then, the public, who support whole of life sentences<sup>2</sup>, have been favoured as final arbiters over UK law rather the judiciary of Strasbourg. However, hostility towards the ECHR was somewhat ameliorated when the case of *Hutchinson v United Kingdom* (2015) was heard by the Fourth Section of the court.

### **Section II: *Hutchinson*, A European U-Turn**

In *Hutchinson*<sup>3</sup> the similar claim was heard: the imposition of a whole of life sentence was contrary to Article 3 of the European Convention. Yet, the Fourth Section was to reach a different conclusion

---

<sup>2</sup> In research commissioned by the Nuffield Foundation, in which respondents were given nine different murder scenarios, there was support for a whole of life tariff in each case, ranging from 4% to 52% (Mitchell & Roberts 2010:30) and none of the theoretical scenarios reached the current threshold for imposing a whole of life sentence under the 2003 Criminal Justice Act, or its amendment under the 2015 Criminal Justice and Courts Act. Other opinion polls place support for whole life sentencing, in hypothetical scenarios involving the murder of children, for example, as high as 90% (YouGov 2013).

<sup>3</sup> 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

than the Grand Chamber had previously. In a retreat from the position set out in *Vinter*, the Fourth Section dismissed Hutchinson's claim. However, given that parties representing Hutchinson asserted his case was in fact a replica of the *Vinter* case that preceded it, a position agreed by the British government, a contrary finding is, on face value, surprising.

The key element in the reasoning of the Fourth Section was the judgement of the Court of Appeal in *R v McLoughlin* (2014) subsequent to *Vinter*. Yet, this is unchanged in substance from previous judgements (*R v Bieber* 2008), and unchanged since *Vinter* decision.

...the Court of Appeal delivered a judgement in which it expressly expressed responded to the concerns in *Vinter* and Others... *In 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 at 23).

The Court of Appeal in *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. **It was, indeed, a reply to the ECHR but not a reply that invited further dialogue. The law had been clarified, in so much as reiterating that domestic procedures would remain unchanged and that the Lifer Manual, which stipulates release conditions being restricted to those instances when a prisoner is terminally ill, had not and would not be revised. If previous cases could be construed as a conversation between Westminster and Strasbourg, McLoughlin, and the political rhetoric that contextualised it, was an end to that conversation.**

So, the Fourth Section supported the response, without any change in procedure, law, or the role of the executive in determining release of whole life prisoners. All that had been given was a clarification of English law, of, in the Court of Appeal's view, "the highly restrictive conditions" of s.30 of the 1997 Crime (Sentences) Act. It was that lack of change which became 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).

What had changed, after *Vinter*, was the political response from Westminster. Whilst reinforced by the Court of Appeal, the responding rhetoric to the decision took on a corporeal form: firstly, the Conservative Party published plans to withdraw from the Convention and remit of the ECHR and, secondly, a legislative amendment was made to expand the scope of whole of life sentencing.

With rising anti ECHR political rhetoric, in a climate of Euroscepticism, the relationship between Westminster and Strasbourg was approaching breaking point. The decision of the Fourth Section in

---

be involved". In December 1994, it was communicated to Hutchinson that his tariff had been increased to one of whole life imprisonment.



Hutchinson would have, most certainly, far reaching and severe consequences had it ruled in favour of the appellant. Whilst explicit recognition of the context in which Hutchinson was decided, and the weight of that context upon the decision, will not be formally recognised by the ECHR, it is contended that they could not be anything other than factors influencing the decision and the retreat from the position set out by the Grand Chamber in Vinter. After the decision of the Fourth Section, referral was sought and accepted by the Grand Chamber.

### ***Section III: Hutchinson in the Grand Chamber***

In January 2017 the Grand Chamber of the ECHR published its judgement in the Hutchinson case. By fourteen votes to three, there had been no violation of Article 3 of the European Convention on Human Rights.

The Grand Chamber, at face value, responded to the Court of Appeal judgement in McLoughlin, but it was not a retort or a reply in an ongoing judicial conversation or dialogue, it was simply a retreat. There was nowhere further to which the conversation could progress; a stalemate was reached, in essence demanding a concession of defeat on the issue by the ECHR. The judges in McLoughlin noted previous domestic judgements in R v Bieber and R v Oakes, where the reducibility of the whole life tariff was declared in relation to the power of Secretary of State under s.30 of the Crime (Sentences) Act, although a power used sparingly, to release a prisoner if his or her continued imprisonment were to amount to inhuman or degrading treatment. The Court took pains to clearly state that the Secretary of State was obliged to exercise that power in a manner consistent with the principles of domestic administrative law and with Article 3. It was of no consequence that the policy set out in the Lifer Manual had not been reworded or revised: the term “exceptional circumstances” is, of itself, sufficiently certain. S.30 of the 1997 Act required the Secretary to take into account all exceptional circumstances relevant to the prisoner’s case, but it could not specify what might be considered “exceptional”. Moreover, the term “compassionate grounds”, also to be read in manner compatible with Article 3, has a wide meaning which can be elucidated by the development of the common law, on a case by case basis. This clarification was enough to appease the Grand Chamber, recalling “it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic law” (Hutchinson v United Kingdom 2017 at 23).

Since 2013, the political climate in which the ECHR, as well as domestic judges, operate has become increasingly hostile towards the Strasbourg court, pivotally noted by Judge Pinto De Albuquerque in his dissenting opinion (Hutchinson v United Kingdom 2017, dissenting opinion of Judge Pinto De Albuquerque at 38). The UK, in particular, has become increasingly hostile towards Europe and its institutions, only worsening since the Vinter decision. The aftermath of that decision was not isolated but characterised an ongoing sentiment of ECHR mission creep and EU dictatorship. Pivotally though, the Hutchinson decision was not the first retreat of the Grand Chamber when faced with political threat, a precedent had already been set and followed.

In R v Horncastle (2009), the Supreme Court of the United Kingdom explicitly declared that domestic courts are not required to follow judgements of the ECHR in every circumstance,

There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course (Lord Phillips, *R v Horncastle* 2009 at 11).

This view was accepted by the Grand Chamber in *Horncastle v United Kingdom* (2014), finding no violation of Article 6 of the European Convention, despite the use of hearsay evidence in securing a conviction. In *Animal Defenders International v United Kingdom* (2013), the Grand Chamber had already though, confirmed its 'lenient' approach to the UK and its wide margin of appreciation,

The Court, for its part, attaches considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom and to their view that the general measure was necessary to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process (*Animal Defenders International v United Kingdom* 2013 at 116).

Perhaps the most striking deference that has been given to the adamant opposition of Britain concerned prisoner voting rights, what Judge Pinto De Albuquerque refers to as the "ongoing Hirst saga" (*Hutchinson v United Kingdom* 2017, dissenting opinion of Judge Pinto De Albuquerque at 35). The 'saga' is essentially the steadfast refusal, or at the very least truculence, in giving prisoners voting rights in the UK even though such a blanket prohibition has been ruled by the ECHR to be a violation of the European Convention. Just as British 'ambivalence' towards its convention obligations was being cited internationally by countries in their refusal to abide by regional human rights agreements (Grieve 2014), the abject refusal to allow prisoners to vote has been cited by other member states in declaring their law supreme over ECHR rulings. Following a UK precedent, in 2015 Russia adopted legislation that allows the judgements of Strasbourg to be overruled (BBC News 2015), after Russia's ban on prisoner voting was found to be a violation of the European Convention (*Anchugov and Gladkov v Russia* (2013)). Such a law is particularly significant, not only for offering the means to cast aside unfavourable ECHR judgements, but for the future of human rights arbitration in Europe given the particularly high number of cases that emanate from Russia.

For Judge Pinto De Albuquerque, the foundation of the problem is the acceptance of Lord Phillips' declaration in the *Horncastle* judgement by the ECHR.

The problem is that 'rare occasions' tend to proliferate and become an example for others to follow suit. Domestic authorities in all member States will be tempted to pick and choose their own 'rare occasions' when they are not pleased with a certain judgement or decision of the Court in order to evade their international obligation to implement it, especially when the issue is about the protection of minorities, such as prisoners.... (*Hutchinson v United Kingdom* 2017, dissenting opinion of Judge Pinto De Albuquerque at 36).

The Council of Europe's Human Rights Commissioner makes the same point, prophesising the future of the court and the system if selective adoption of judgements persists,

Some judgements may be difficult to implement because of technical reasons, or because they touch extremely sensitive and complex issues of national concern, or because they are unpopular with the majority population. Nevertheless, the Convention system crumbles when one member State, and then the next, and then the next, cherry pick which judgements to implement. Non-implementation is also our shared responsibility and we must not turn a blind eye to it any longer (cited in *Hutchinson v United Kingdom* 2017, dissenting opinion of Judge Pinto De Albuquerque at 36)

There is then a doubt as to the future of the Convention, and the Strasbourg court, when member States do not uniformly implement ECHR decisions. Further adding to the problem are the string of Grand Chamber judgments which seem reluctant to stand firm in an increasingly hostile political climate. Instead the ECHR is beaten into retreat and an ever growing margin of appreciation is given to states, particularly the United Kingdom, and that is not without consequence.

...the present judgement may have seismic consequences for the European human-rights protection system. The majority's decision represents a peak in a growing trend towards downgrading the role of the Court before certain domestic jurisdictions, with the serious risk that the Convention is applied with double standards... The probability of deleterious consequences for the entire European system of human-rights protection is heightened by the current political environment, which shows increasing hostility to the Court (*Hutchinson v United Kingdom* 2017, dissenting opinion of Judge Pinto De Albuquerque at 38)

When the margin of appreciation is wider for some states, like Britain, on the basis of their legal traditions, and sensitivity to laws being pronounced by what it views as a supra-national legal authority, then the legitimacy, authority, and future of the court and convention are in doubt.

Either the Convention and the Court's judgements and decisions are honoured fully and faithfully or friction between Strasbourg and the domestic authorities will become the norm rather than the exception. This would evidently be to the detriment of the individuals and legal persons who come to Strasbourg for justice, and ultimately determinative of the fate of the system itself. The choice between two opposite paths is now clear for Governments all over Europe[,] between the isolationist, sovereigntist temptation and the genuine commitment to a 'greater unity' between European States pursuing the 'further realisation of human rights and Fundamental Freedoms' (*Hutchinson v United Kingdom* 2017, dissenting opinion of Judge Pinto De Albuquerque at 47).

However, the UK is not seeking unity with Europe on issues which it feels should be decided domestically. Although relatively small in number, there have been cases which have resonated particularly negatively in Britain and, as one has followed the next, the calls to reconsider being bound by the Strasbourg court become louder and more widespread. When the Prime Minister, Justice Secretary, and Home Secretary all publicly declare that the relationship with the ECHR needs to be rethought, Strasbourg has been forced to take notice; if a founding member withdraws from its remit, and other countries such as Russia are already heading the British example and passing legislation that allows domestic courts to ignore ECHR rulings, then conciliatory action is required. It is perhaps a common sense approach for the European court to capitulate to political threat in order to secure its future, but that makes for bad case law and risks resentment from other Member States, which are perhaps less influential.

Other Member States, in contrast to Britain, have modified their approach to life sentencing to be consistent with ECHR rulings. The Netherlands, for example, which issues life sentences as true life sentences, and where Presidential pardons are rare has, in serious cases of homicide, instead imposed 30 year terms, so as to comply with the rulings of the European court (Netherlands Committee of Jurists for Human Rights 2015). When other countries have not complied with the jurisprudence of the Strasbourg court then the ECHR has ruled against them. In fact, the court, on more than one occasion since the *Vinter* judgement, has 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). When the UK rejected 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, the Strasbourg court has simply agreed. At best then, the ECHR has been inconsistent in its adjudication of cases coming from different Member States, more realistically it has been deliberately differential in its handling of cases in response to political threat. There are now life imprisonment cases pending before the court from Lithuania, Turkey, and Slovakia; it remains to be seen whether the ECHR will enforce its *Vinter* thinking upon those Member States, newer parties with less influence, thus preserving an exception for the UK and the *Hutchinson* judgement, or whether the Strasbourg Court will reconsider its stance in *Hutchinson*, shortening the temporary impasse in hostile relations with Britain. Most likely, it seems, that an approach of differential treatment will continue.

#### ***Section IV: Conclusion***

In a climate of growing nationalism and resentment towards 'human rights' generally (or at least how those rights have been construed by supranational European institutions) Europe, and all its structures, is weathering a storm of hostility and discontent. Indeed, the sentiment of 'domestic authorities know best' is one that is rapidly prevailing, particularly in member states such as Britain. Moreover, a sense of superiority is beginning to reveal itself in political rhetoric and reaction to judgements of the ECHR, as if some nations should set a standard for others to follow and should that conflict with Strasbourg then it is the European court which is wrong. This is actually confirmed by the ECHR when it retreats from previous decisions, seemingly in the face of political pressure, and increases the margin of appreciation given to some states in order to pacify discontent. Judge Pinto De Albuquerque asserts that when domestic reading of Convention rights is more circumscribed than in Strasbourg, it is the duty of the Member State to concede to the Court's authoritative ruling (*Hutchinson v United Kingdom* 2017, dissenting opinion of Judge Pinto De Albuquerque at 43). That is undoubtedly true, but there is an onus of responsibility upon the court to stand firm in those 'authoritative' rulings. The fork in the road is now evident and the signs are that the sovereign and nationalist approach is prevailing. That direction of travel will not be circumscribed by a Court that is allowing domestic resoluteness to force a retreat from its own judgements. Although backing down provides temporary relief and a transient peace, the lasting damage will be to the authority of the court, the long term future of which is beginning to look increasingly uncertain.

### *References*

BBC News (2013) 'Theresa May: Tories to Consider Leaving European Convention on Human Rights', March 9

BBC News (2015) 'Russia passes law to overrule European human rights court', December 4

Bowcott, O. (2013), 'Conservatives Clash over European Court Ruling on Prisoner Voting Rights', *The Guardian*, November 20

Camber, R. Shipman T. (2012) 'Cameron Dashes Hopes for Relatives of Lockerbie Victims by Rejecting Call for New Inquiry after Bomber Al-Megrahi Dies', *Daily Mail*, May 20

Conservatives (2014) 'Protecting Human Rights in the UK', [Conservative Party Paper available online at [https://www.conservatives.com/~media/files/downloadable%20Files/human\\_rights.pdf](https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf)] [last accessed March 19 2015]

EurActiv News (2013) 'Interior Minister Urges Britain to Leave Human Rights Convention', March 11

FOI Request 106251 (on file with the author)

Grieve, D. Rt Hon (2014) 'Why it Matters that the Conservatives should Support the European Convention on Human Rights' [UCL Judicial Institute Lecture, December 3, 2014 available online at [https://www.ucl.ac.uk/laws/judicial-institute/files/Dominic\\_Grieve\\_s\\_Speech.pdf](https://www.ucl.ac.uk/laws/judicial-institute/files/Dominic_Grieve_s_Speech.pdf)] [last accessed March 19, 2015]

Hastings, M. (2013) 'The danger is we've become immune to human rights lunacy', *Daily Mail*, 9 July

- Mason, C. (2014) 'Cameron Backs 'Life Means Life' Sentences for Murderers, BBC News, January 2
- Kandelia, S. (2011) 'Life Meaning Life: Is There Any Hope of Release for Prisoners Serving Whole Life Orders?', *The Journal of Criminal Law* 75, 70 - 87
- Kern, S. (2014) 'European Court Undermining British Sovereignty', Gatestone Institute, January 17 [available online at <http://www.gatestoneinstitute.org/4134/echr-uk>] [last accessed 26/06/2014]
- Kirkup, J. (2013) 'Britain May Need to Withdraw from European Convention on Human Rights, says Cameron', *The Telegraph*, September 29
- Mason, R. (2013), 'Grayling says European Court of Human Rights has Lost Legitimacy', *The Guardian*, December 30
- Ministry of Justice (2017) 'Offender Management Statistics Bulletin, England and Wales', Ministry of Justice, January 26
- Mitchell, B. Roberts, J. V. (2010) 'Public Opinion and Sentencing for Murder: An Empirical Investigation of Public Knowledge and Attitudes in England and Wales', Coventry University/Nuffield Foundation, October
- Morrison, D. (2014) 'Will a Conservative Government Withdraw From the European Convention on Human Rights?', *Huffington Post*, October 15
- Netherlands Committee of Jurists for Human Rights (2015) 'Life Imprisonment in the Netherlands Is at Odds with the ECHR' [available online at <http://www.liberties.eu/en/news/netherlands-life-imprisonment-at-odds-with-echr>] [last accessed April 7, 2017]
- Pettigrew, M. (2016) 'American Politics, British Policy: Whole of Life Imprisonment and Transatlantic Influence', *International Journal of Comparative and Applied Criminal Justice*, 40(3); 263-273
- Schone, J. M. (2000) 'The Hardest Case of All: Myra Hindley, Life Sentences, and the Rule of Law', *International Journal of the Sociology of Law* 28, 273 - 289
- Slack, J. Robinson M. (2014) 'UK Judges Defy Europe to say Life Prison Sentences Mean Life', *Daily Mail*, February 18
- Slack, J. Wright, S. (2009) 'Bed-Ridden Ronnie Biggs 'Released' from Prison', *Daily Mail*, August 6
- Watt, N. Bowcott, O. (2014) 'Tories Plan to Withdraw UK from European Convention on Human Rights', *The Guardian*, October 3
- YouGov (2013) 'Sentencing for Murder' [available online at [http://cdn.yougov.com/cumulus\\_uploads/document/viwh311g5h/YG-Archive-prison-sentence-results-160513-life-sentences-death-penalties.pdf](http://cdn.yougov.com/cumulus_uploads/document/viwh311g5h/YG-Archive-prison-sentence-results-160513-life-sentences-death-penalties.pdf)] [last accessed February 28, 2017]

#### *Cases cited*

Vinter and Others v United Kingdom [2013] ECHR 66069/09

Hutchinson v United Kingdom [2015] [Section IV] ECHR 57592/08

Hutchinson V the United Kingdom [2017] ECHR 57592/08

R v Bieber (aka Coleman) [2008] EWCA Crim 1601

R v Ian McLoughlin & R Lee William Newell. [2014] EWCA Crim 188

R v David Oakes and Others [2012] EWCA Crim 2435

R v Horncastle & Others [2009] UKSC 14

Animal Defenders International v United Kingdom [2013] ECHR 48876/08

Anchugov and Gladkov v Russia [2013] ECHR 11157/04

László Magyar v Hungary [2014] ECHR 73593/10

Trabelsi v Belgium [2014] ECHR 140/10