Free Life after Life Imprisonment as a Human Right under the European Convention

European Court of Human Rights, Grand Chamber, Judgment of 9 July 2013, *Vinter and Others* v. *The United Kingdom*

Marek Szydło*

Introduction

The recent judgment of the Grand Chamber of the European Court of Human Rights ('the ECtHR' or 'the Court') in *Vinter and Others*[1] reflects a very significant change in the Court's attitude to those actions of the states parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention' or 'the ECHR') that consist in the imposition and further execution of whole life sentences. In this judgment, the Court concluded that Article 3 of the Convention – which prohibits torture, inhuman or degrading punishment – requires the reducibility of all whole life sentences as imposed by national courts, in the sense of a review mechanism which allows domestic authorities to conclude whether in the course of a life sentence the legitimate penological grounds justifying the further incarceration of a life prisoner still exist. Moreover, such a mechanism or possibility for review of a whole life sentence must be provided for by a national law and, consequently, must be known to a life prisoner already at the moment of imposition of the whole life sentence. What is also important, a life prisoner, at the outset of his/her sentence, must know when (i.e. after how many years) and under what conditions a review of his/her sentence will take place or may be sought, and what he/she must do to be considered for release. Otherwise, the very imposition of a life sentence by a national court infringes Article 3 of the Convention.[2]

This stance of the ECtHR is remarkable insofar as, before this judgment was delivered, the ECtHR had strongly insisted that the Convention did not confer

* Ph.D., D.Sc. (Dr. Hab.), Professor at the University of Wrocław, Poland. This case note forms part of a project which has been financed from the funds of Polish National Science Centre granted by decision number DEC-2013/08/A/HS5/00642.

[1] Judgment of 9 July 2013, *Vinter and Others* v. *the United Kingdom* [Grand Chamber], Nos. 66069/09 and 130/10 and 3896/10 (*Vinter and Others* [Grand Chamber]).

[2] *See* §§ 119-122 of *Vinter and Others* [Grand Chamber].

European Constitutional Law Review, 9: 501–512, 2013

doi: 10.1017/S1574019612001265

on a life prisoner the right to have his/her sentence reconsidered by a national authority with a view to its remission or termination, and did not require the existence of a minimum term of unconditional imprisonment after which the review of a life sentence may be sought. The Court had hitherto claimed that all that the ECHR mandated was a simple reducibility of a life sentence, with a reservation that in light of Article 3 of the ECHR this reducibility was even allowed to have a very limited scope, and did not have to entail a review mechanism, i.e., a possibility of reviewing the continued existence of penological grounds for life incarceration.[3]

This truly revolutionary step undertaken by the ECtHR (Grand Chamber) in *Vinter and Others* provokes the question of what the expected implications of this new stance of the ECtHR are for the convention states' law and practice, and whether or not it should be the last word of the Court in this regard.

Factual and legal background of *Vinter and Others*

The *Vinter and Others* case arose because of complaints of three applicants who were found guilty of murders and sentenced to life imprisonment without parole in separate criminal proceedings in England and Wales. Since all three applicants have been given whole life orders, they cannot apply for conditional release on licence. The only possibility for them to be released is the discretionary decision of the Secretary of State, who is competent to release every prisoner on compassionate grounds.[4] In practice, however, such a release on compassionate grounds is extremely exceptional.[5]

According to the applicants, in light of Article 3 of the Convention the conditional release (i.e., other than on compassionate grounds) must be permitted in the case of all life sentences. As a result, the irreducible life sentences imposed on them violated Article 3 of the Convention because the effect of those sentences was imprisonment without hope of release.

[3] *See Josef Johann Kotälla* v. *the Netherlands*, No. 7994/77, Commission decision of 6 May 1978, Decisions and Reports ('DR') 14, p. 240; *Einhorn* v. *France* (dec.), No. 71555/01, ECHR 2001-XI – (16.10.01), §§ 27-28; *Kafkaris* v. *Cyprus* [Grand Chamber], No. 21906/04, ECHR 2008 – (12.2.08), §§ 97-99.

[4] Section 30(1) of the Crime (Sentences) Act 1997 provides that the Secretary of State may at any time release a life prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds.

[5] The British government admitted itself before the ECtHR that since 2000 no prisoner serving a whole life term had been released on compassionate grounds – § 44 of *Vinter and Others* [Grand Chamber].

https://doi.org/10.1017/S1574019612001265 Published online by Cambridge University Press

Fourth Section judgment and the Grand Chamber judgment in *Vinter and Others*

Initially, the *Vinter and Others* case was dealt with by the Court's Fourth Section. In its judgment, delivered on 17 January 2012,[6] the latter examined first under what circumstances, if any, a life sentence constitutes a violation of Article 3 of the ECHR at the moment when such a sentence is imposed. Second, it considered at what point in the course of a life or other very long sentence the continued execution of such a sentence infringes Article 3 of the Convention.[7] As regards the first issue, the Court's Fourth Section held that while, in principle, matters of appropriate sentencing largely fall outside the scope of Convention,[8] a 'grossly disproportionate' sentence could amount to ill treatment contrary to Article 3 of the ECHR at the moment of its imposition. However, as the Court emphasized, 'gross disproportionality' is a strict test and it will only be on 'rare and unique occasions' that the test will be met.[9]

As to the second issue, the Court held that both in the case of discretionary and mandatory life sentences, an Article 3 issue will only arise when it can be shown: (i) that the applicant's continued imprisonment can no longer be justified on any legitimate penological grounds (such as punishment, deterrence, public protection or rehabilitation); and (ii) the sentence is irreducible *de facto* and *de iure*.[10] Having said that, the Court went on to verify whether in the case of the three applicants in the present case those two conditions were indeed fulfilled. Although the Court did not express it clearly, from its considerations it follows that the sentences imposed on the applicants were indeed irreducible *de facto* and *de iure* within the above-mentioned meaning.

However, that latter circumstance alone did not allow the qualification of these life sentences as violating Article 3 of the Convention, because at the same time the sentences in question were assessed by the ECtHR as really serving the legitimate penological purposes.[11]

A few months later the applicants requested referral of the case to the Grand Chamber. On 9 July 2012 the Panel of the Grand Chamber accepted this request.

[6] *Vinter and Others* v. *the United Kingdom*, Nos. 66069/09 and 130/10 and 3896/10 (Sect. 4) – (17.01.12) ('*Vinter and Others* (Sect. 4)').

[7] § 87 of *Vinter and Others* (Sect. 4).

[8] *See also* the previous Court's judgments: *Sawoniuk v. the United Kingdom* (dec.), No. 63716/00, ECHR 2001-VI – (29.5.01), *part: 'The Law', point 3*; *Léger* v. *France*, no. 19324/02 (Sect. 2), ECHR 2006 – (11.4.06), § 72.

[9] § 89 of *Vinter and Others* (Sect. 4).

[10] §§ 92-93 of *Vinter and Others* (Sect. 4).

[11] §§ 95-96 of *Vinter and Others* (Sect. 4).

https://doi.org/10.1017/S1574019612001265 Published online by Cambridge University Press

A public hearing before the Grand Chamber took place on 28 November 2012, and on 9 July 2013 the Grand Chamber delivered its judgment.

The Grand Chamber agreed with the Fourth Section that a grossly disproportionate sentence would violate Article 3 of the Convention, and that it will only be on rare and unique occasions that this test will be met.[12] Then the Grand Chamber went on to state that the imposition of an irreducible life sentence on an adult may raise an issue under Article 3 of the ECHR.[13] A life sentence, however, does not become irreducible by the mere fact that in practice it may be served in full. No issue arises under Article 3 if a life sentence is *de jure* and *de facto* reducible.[14] In turn, for a life sentence to remain reducible and consequently compatible with Article 3, there must be both 'a prospect of release and a possibility of review.'[15] According to the Grand Chamber, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.[16] While it is not the Court's task to prescribe the form (executive or judicial) which that review should take, and it is not for the Court to determine when that review should take place,[17] it nonetheless follows that, where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention.[18] In that regard a very crucial conclusion is included in § 122 of the Grand Chamber's ruling:

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

[12] § 102 of *Vinter and Others* [Grand Chamber].
[13] § 107 of *Vinter and Others* [Grand Chamber].
[14] § 108 of *Vinter and Others* [Grand Chamber].
[15] § 110 of *Vinter and Others* [Grand Chamber].
[16] § 119 of *Vinter and Others* [Grand Chamber].
[17] § 120 of *Vinter and Others* [Grand Chamber].
[18] § 121 of *Vinter and Others* [Grand Chamber].

https://doi.org/10.1017/S1574019612001265 Published online by Cambridge University Press

> at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration.

Applying the aforementioned general rules to the specific facts of the case, the Grand Chamber observed that in light of the current legislation on life sentences in England and Wales, there is a lack of clarity as to the current law concerning the prospect of release of life prisoners. On one hand it is true that Section 30 of the 1997 Act provides the Secretary of State with the power to release any prisoner, including one serving a whole life order, and in exercising that power – as with all statutory powers – the Secretary of State is legally bound to act compatibly with the Convention.[19] On the other hand, the Prison Service Order remains in force and provides that release will only be ordered in certain exhaustively listed, and not merely illustrative, circumstances, namely if a prisoner is terminally ill or physically incapacitated and other additional criteria can be met.[20] According to the Grand Chamber, these are highly restrictive conditions. Even assuming that they could be met by a prisoner serving a whole life order, the Court expressed its doubts whether compassionate release for the terminally ill or physically incapacitated could really be considered release at all, if all it meant was that a prisoner died at home or in a hospice rather behind prison walls. Indeed, in the Court's view, compassionate release of this kind was not what is meant by a 'prospect of release'.[21] The Grand Chamber accordingly found that the requirements of Article 3 in this respect have not been met in relation to any of the three applicants.[22]

Comment

The very imposition of a life sentence as an infringement of Article 3 of the Convention

After the judgment of the Grand Chamber in *Vinter and Others* it is now entirely clear that there are two separate grounds which render the very imposition of a whole life sentence incompatible with Article 3 of the Convention. First, this is the case when a whole life sentence is 'grossly disproportionate.' Second, this is

[19] § 125 of *Vinter and Others* [Grand Chamber].
[20] § 126 of *Vinter and Others* [Grand Chamber].
[21] § 127 of *Vinter and Others* [Grand Chamber].
[22] § 130 of *Vinter and Others* [Grand Chamber].

https://doi.org/10.1017/S1574019612001265 Published online by Cambridge University Press

the case when at the moment of imposition of the whole life sentence it is not determined with sufficient clarity, neither in the sentence itself, nor in the relevant rules of national law, under what conditions a life prisoner can seek to reduce his/her whole life sentence in the future, and/or if there is no real prospect of release.

A gross disproportionality of a life sentence is a concept which was introduced for the first time to the Court's jurisprudence by the Fourth Section judgment in *Vinter and Others,*[23] and has then been accepted by the judgment of the Grand Chamber.[24] While advancing this concept, the Court was clearly inspired by the jurisprudence of many – especially non-European – states where 'gross disproportionality' is used as a test enabling the verification of whether individual convicting sentences, including life sentences, are in compliance with constitutional norms prohibiting inhuman or degrading (or cruel) punishment.[25] In *Vinter and Others* the Court's considerations in that regard are very scant. However, they can prompt the conclusion that in order for the life sentence to be qualified as grossly disproportionate, there must be an enormously huge discrepancy between, on the one hand, the value of the remainder of the offender's life and, on the other hand, the severity or cruelty of the offence and the degree of the offender's culpability. Such a discrepancy brought about by a life sentence, however, does not seem to be sufficient in that regard. It must also be identified that from the point of view of an average citizen, this discrepancy is truly shocking to one's sense of justice and decency, and that society is not ready to accept such a life sentence as retaliation for the offence. Such a grossly disproportionate life sentence infringes the very core of human dignity of the offender and weakens the trust of citizens in their own state, which may then be perceived as cruel and unjust.[26]

A separate ground for finding the very imposition of a life sentence incompatible with Article 3 of the ECHR is the irreducibility of such a life sentence, in the sense that at the moment of imposition of the whole life sentence, there is no mechanism or possibility for review of a whole life sentence at the national level which would give a life prisoner a prospect of future release, and/or that at the

[23] *See* §§ 88-89 of *Vinter and Others* (Sect. 4).

[24] § 102 of *Vinter and Others* [Grand Chamber].

[25] *See* e.g., the jurisprudence in the following States: 1) the United States (*Graham* v. *Florida* 130 S. Ct. 2011, 2021 (2010); *Coker* v. *Georgia* 433 US 584 (1977); *Roper* v. *Simmons* 543 US 551 (2005); *Solem* v. *Helm* 463 US 277 (1983); *Rummel* v. *Estelle* 445 US 263 (1980); *Ewing* v. *California* 538 US 11 (2003); *Lockyer* v. *Andrade* 538 US 63 (2003)); 2) Canada (*R* v. *Smith (Edward Dewey)* [1987] 1 S.C.R. 1045; *R* v. *Luxton* [1990] 2 S.C.R. 711; *R* v. *Latimer* [2001] 1 S.C.R. 3); 3) Mauritius (*State* v. *Philibert* [2007] SCJ 274); 4) Namibia (*State* v. *Tcoeib* [1997] 1 LRC 90; *State* v. *Vries* 1997 4 LRC 1; *State* v. *Likuwa* [2000] 1 LRC 600); 5) South Africa (*Niemand* v. *The State* (CCT 28/00) [2001] ZACC 11; *Dodo* v. *the State* (CCT 1/01) [2001] ZACC 16); 6) Hong Kong (*Lau Cheong* v. *Hong Kong Special Administrative Region* [2002] HKCFA 18).

[26] M. Szydło, 'Vinter v. United Kingdom: European Court of Human Rights Judgment on Permissibility of Irreducible Life Sentences', 106 *American Journal of International Law* (2012), p. 628.

https://doi.org/10.1017/S1574019612001265 Published online by Cambridge University Press

outset of his/her sentence, a life prisoner does not know with sufficient certainty under what conditions, including when, a review of his/her sentence will take place or may be sought, and what he/she must do to be considered for release. In light of the Grand Chamber's findings, reducibility of a life sentence required by Article 3 of the Convention does not mean any review mechanism or possibility of release whatsoever, but only such which allows the domestic authorities to conclude whether in the course of the life sentence there still exist the legitimate penological grounds justifying the further incarceration of a life prisoner (these grounds include: punishment, deterrence, public protection and rehabilitation). What is equally important, from the moment when he/she begins serving a life sentence, is that the life prisoner must already know in a sufficiently precise manner when (i.e., after how many years) and under what conditions this review mechanism could be activated, and through the prism of what specific criteria, which should relate to the aforementioned penological grounds justifying any incarceration, the relevant domestic authorities will evaluate the eligibility of that life prisoner to be released on license. As a result, 'a prospect of release', to which the Grand Chamber refers in § 110 of its judgment, must be a real one, although it does not have to be equivalent to a certainty of release.

The Grand Chamber's strong insistence that every life prisoner must have an actual (and not only faint) prospect of release can be explained by the Court's huge respect for the human dignity of all people, including those convicted for most serious offences. Human dignity, being the very essence of the Convention system,[27] does not allow one to deprive a person of his/her freedom without at least providing him/her with the chance to someday regain that freedom.[28] The state strikes at the very heart of human dignity if it strips the prisoner of all hope of ever earning his/her freedom.[29] That hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts nevertheless retain their fundamental humanity. Therefore 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.[30]

[27] *See* e.g., *Pretty* v. *the United Kingdom*, No. 2346/02 (Sect. 4), § 65, ECHR 2002-III; *V.C.* v. *Slovakia*, No. 18968/07 (Sect. 4), § 105, ECHR 2011.

[28] § 113 of *Vinter and Others* [Grand Chamber].

[29] *See* the judgment of the German Federal Constitutional Court in the *Life Imprisonment case* (*lebenslange Freiheitsstrafe*) of 21 June 1977, 45 BVerfGE 187; on this judgment, *see* D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press 1997), p. 306-313.

[30] *See* the concurring opinion of Judge Power-Forde in *Vinter and Others* [Grand Chamber]; *see also* a very significant judicial statement taken from an entirely different jurisdiction: 'Hope is the necessary condition of mankind, for we are all created in the image of God. A judge should

The continued incarceration of a life prisoner as an infringement of Article 3 of the Convention

A dedicated mechanism aimed at reviewing the continued existence of penological grounds for further incarceration of a life prisoner – which should be present under a given jurisdiction already at the moment of imposition of a life sentence, and which should be sufficiently precise and give real prospect of release – must be indeed activated in practice in due time. During this review, a relevant national authority (judicial or administrative one) should very thoroughly examine if in the case of a given life prisoner, the penological grounds, such as: punishment, deterrence, public protection and rehabilitation, that justify the further incarceration of that life prisoner, still exist. If the aforementioned verification of existence of penological grounds for life imprisonment – conducted after a minimum term of unconditional imprisonment has passed – reveals that in the case of the given life prisoner there are no longer such penological grounds because they have already ceased to exist, then such a life prisoner should be released on licence as quickly as possible. The further detention of this prisoner would violate Article 3 of the Convention: it is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention.[31] The continued detention of a life prisoner, who has possibly spent many years or even decades in prison, and whose further detention is no longer justified by any penological grounds, is clearly the manifestation of an inhuman punishment within the meaning of Article 3 of the Convention because the aforementioned prisoner is then treated purely instrumentally.

If, in turn, a minimum term of unconditional imprisonment of a given life prisoner, as established in his/her life sentence, has passed, and the follow-up verification of the continued existence of penological grounds for the further incarceration of this life prisoner results in a conclusion that any of these penological grounds still exist, then such a life prisoner may still be lawfully incarcerated, and the further execution of his/her life sentence does not violate Article 3 of the Convention.[32] It has to be remembered that Article 3 of the Convention, as interpreted by the Court, does not give a life prisoner an absolute right to be released, or a certainty that he/she will be released once a set period expires. In light of Article 3 of the ECHR, a life prisoner has merely a right to have his/her life sentence reconsidered by the relevant national authorities from the point of view of the continued existence of penological grounds for his/her incarceration, once a

be hesitant before sentencing so severely that he destroys all hope and takes away all possibility of useful life', *U.S.* v. *Carvajal*, 2005 WL 476125 (S.D.N.Y. Feb. 22, 2005).

[31] § 111 of *Vinter and Others* [Grand Chamber].

[32] *See* § 131 of *Vinter and Others* [Grand Chamber].

https://doi.org/10.1017/S1574019612001265 Published online by Cambridge University Press

minimum term of unconditional imprisonment has passed. If this review leads to the conclusion that any of the penological grounds for his/her incarceration still exist, then he/she cannot demand release on licence relying on Article 3 of the Convention.

There are good reasons to think that the process of reviewing the continued existence of penological grounds for life prisoner's incarceration should be conducted regularly. This requirement of regularity can be inferred from the Court's case-law interpreting Article 5(4) of the Convention. Under this latter provision, the Court consistently maintains that a judicial review of the lawfulness of detention of prisoners must be conducted regularly.[33]

The practical implications of the Grand Chamber's judgment in Vinter and Others for the convention states

As far as criminal law of convention states is concerned, life sentences without parole are currently in force in the laws of the Netherlands, England and Wales, and Turkey only. The other convention states which have life sentences in their legislation provide for some dedicated mechanisms, integrated within the sentencing legislation, that guarantee a review of those life sentences after a set period, usually after twenty-five years' imprisonment.[34] However, the very existence of such review mechanisms at the national level does not mean that the Grand Chamber's judgment in *Vinter and Others* has no practical implications for the latter states. It is by no means self-evident that all life sentences imposed under such legislations are reducible within the meaning adopted by the Grand Chamber in *Vinter and Others*. In particular, there is no guarantee that the aforementioned review mechanisms, as adopted by individual states, are regulated sufficiently precisely (in the sense that they give life prisoners sufficient certainty as regards the legal conditions of this review mechanism), or give all life prisoners a prospect of release that would be qualified by the Court as real and actual.

The practical importance of standards of reducibility of life sentences, standards which were established by the Grand Chamber in *Vinter and Others,* becomes also apparent in extradition cases, i.e., when a convention state considers the request for extradition of a person who can be sentenced to life imprisonment in the requesting non-convention state. According to the settled case-law of the Court, a convention state acts contrary to Article 3 of the Convention, if it knowingly surrenders a person to another state where there are substantial grounds for believing

[33] *Oldham* v. *the United Kingdom*, No. 36273/97 (Sect. 3), ECHR 2000-X – (26.9.00), §§ 28-37; *Hirst* v. *the United Kingdom (no. 1)*, No. 40787/98 (Sect. 3) (Eng) – (24.7.01), §§ 35-44; *Terence Dancy* v. *the United Kingdom*, No. 55768/00 – (21.03.2002), Part: 'The Law', point 2; *Blackstock* v. *the United Kingdom*, No. 59512/00 (Sect. 4) (Eng) – (21.6.05), §§ 41-49.

[34] *See* §§ 68 and 117 of *Vinter and Others* [Grand Chamber].

https://doi.org/10.1017/S1574019612001265 Published online by Cambridge University Press

that a person in question would be in danger of being subjected to practices which are prohibited under Article 3 of the Convention.[35] There is no doubt that many non-convention states, including for example some states of the US, apply a policy of imposing life sentences or releasing life prisoners on parole that does not meet the standards of Article 3 of the Convention as interpreted by the Grand Chamber in *Vinter and Others*.[36] A corollary of this latter judgment is therefore that if a convention state considers the request for extradition of a person who can be sentenced to life imprisonment in the requesting non-convention state, then the requested convention state is permitted to find the person extraditable only if it appears that there is the required review mechanism available in the requesting state.

Human right to free life after life imprisonment under the Convention: did the Court reach the borderline?

One of the most crucial points within a system of review of life sentences, as required under Article 3 of the Convention, is the understanding (or concretisation) of the penological grounds justifying further incarceration of a life prisoner and the verification conducted by the relevant national authorities as to whether in the case of a given life prisoner these penological grounds still exist. It is exactly this verification – which must be conducted regularly – that finally decides if a given life prisoner will be released on license or will still stay in prison, possibly for the rest of his/her life. While in *Vinter and Others,* the Grand Chamber forced the convention states to review individual life sentences through the prism of penological grounds, it did not determine in its judgment, neither in general and abstract terms, nor with regard to the applicants in this case, how the national authorities should understand the penological grounds for further incarceration, or how the relevant national authorities should assess whether the aforementioned penological grounds still exist. The discussed judgment also fails to prejudge whether the Court would be ready to control the decisions taken by national authorities reviewing life sentences, and, if so, what standard of review of decisions of national authorities the Court would then apply.

[35] *Soering* v. *the United Kingdom*, *No. 14038/88,* Series A No. 161, p. 35 – (7.7.89), § 88; Nivette v. France (dec.), No. 44190/98, ECHR 2001-VII – (3.7.01), part: 'The Law', point 1; *Einhorn* v. *France* (dec.), *supra* n. 3, § 25.

[36] On situation in the US in that regard, *see* for more e.g., C.J. Ogletree and A. Sarat (eds.), *Life without Parole: America's New Death Penalty?* (New York University Press 2012) *passim*; A. Nellis, 'Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States', 23 *Federal Sentencing Reporter* (2010), p. 27 et seq.; R. Johnson and S. McGunigall-Smith, 'Life without Parole, America's Other Death Penalty: Notes on Life under Sentence of Death by Incarceration', 88 *Prison Journal* (2008), p. 328 et seq.

https://doi.org/10.1017/S1574019612001265 Published online by Cambridge University Press

For reasons which will be explained below, it is argued that under the Convention the process of interpreting (and developing) the penological grounds for life incarceration, as well as the process of evaluation of their continued existence, should not be determined in the Court's jurisprudence, but it should be left entirely to national instances. How the penological grounds for further incarceration of life prisoners should be understood or concretised is the matter of policy choices that must be made at the national level only. The answers to these latter questions should be determined by the national legislatures (in national criminal law), by national courts imposing life sentences (in these very sentences), or by other competent national authorities which are responsible for pursuing the national criminal policy. From the standpoint of Article 3 of the Convention, the main point is to give the life prisoners, from the moment they begin to serve their life sentences, a precise knowledge and legal certainty of what the conditions are for potential release, in light of penological grounds for their further incarceration (for instance, not posing an immediate threat for society). But what these prisoners must specifically do in that regard cannot be determined by the Court. Similarly, the national authorities reviewing life sentences should be granted a far-reaching leeway in deciding whether in the case of individual life prisoners, the penological grounds for their further detention still really exist. In other words, the relevant national authorities should enjoy a wide margin of appreciation in assessing whether individual life prisoners meet the criteria for release. This margin of appreciation should not be curtailed by the Court: neither by the general and abstract determination, nor by the guidelines concerning individual cases.

Moreover, even if one could imagine that individual decisions taken in that regard by national authorities (especially decisions rejecting a request for release) could be challenged before the Court as infringing Article 3 of the Convention, the Court must not then control the outcome of national authority's appreciation, i.e. the result of assessment of whether a given life prisoner indeed meets the criteria for release. The presumptive control exerted by the Court over the decisions of national authorities qualifying life prisoners for release – leaving aside the possible control of some procedural infringements on the ground of Article 5(4) of the Convention – must be confined, at most, to the identification of enormously gross and manifest errors, and should come into play on extremely rare occasions.

The reason why the process of interpreting (and developing) penological grounds for life incarceration, as well as the process of evaluation of their continued existence, should, under the Convention, not be determined in the Court's jurisprudence, but should rather be left to national instances entirely, is that the national authorities are responsible for pursuing national criminal policies and must protect their societies against dangerous offenders. This responsibility of national instances cannot be taken up by the ECtHR, not least because there are no efficient in-

https://doi.org/10.1017/S1574019612001265 Published online by Cambridge University Press

struments which could make the ECtHR legally and politically accountable to national societies for taking incorrect decisions in such sensitive matters. If the Court were to determine the aforementioned issues, it would encroach upon sovereign powers of convention states to an unacceptable extent, undermining the subsidiarity principle underlying the Convention, and destroying the criminal policy of democratically legitimised national authorities that are directly accountable to their societies.

Therefore, while the current stance of the Court's Grand Chamber regarding the imposition and execution of life sentences, as revealed in *Vinter and Others*, deserves full support, it is argued that the Court should not go any further in extending the substantive rights of life prisoners under Article 3 of the Convention. In particular, life prisoners should not be given an absolute right to be released on license, and the concretisation of the penological grounds for incarceration of life prisoners and the verification of their continued existence must still rest solely with the national authorities.

https://doi.org/10.1017/S1574019612001265 Published online by Cambridge University Press