Focusing on good rather than contemporaneous reasons can lead to unfairness, if the public body is permitted to bolster its position by including additional reasons in documents filed with the court. Affected individuals might well take the view that, had they been aware of these additional reasons for a decision before it was implemented, they could have advanced counter-arguments that might have convinced the public body to choose a different course of action. Extending Lord Kerr's hard line to other areas would doubtless cause some public bodies to complain of administrative inconvenience. To this one might well respond that good administration would be helped, not hindered, if public bodies were to be given incentives to reach optimal decisions at the first time of asking. Preventing them from brewing up reasons post hoc would be fairer to those affected by their decisions and incentivise effective and efficient administration.

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WHOLE LIFE ORDERS: ARTICLE 3 COMPLIANT AFTER ALL

The exercise of the Secretary of State's power to release from prison a murderer sentenced to a whole life order would be controversial and politically fraught. The Grand Chamber of the European Court of Human Rights' ("ECtHR") succinct summary of the offending leading to the whole life order imposed on the applicant in *Hutchinson v United Kingdom* (57592/08), Judgment of 17 January 2017, demonstrates quite why a Secretary of State would find exercising their compassionate release powers so politically unpalatable: "In October 1983, the applicant broke into a family home, where he stabbed to death a man, his wife and their adult son. He then repeatedly raped their 18-year-old daughter, having first dragged her past her father's body" (at [10]). Yet the power to release life sentence prisoners on compassionate grounds under s. 30 of the Crime (Sentences) Act 1997 has become the fig leaf covering a more fundamental disagreement between the domestic courts and the ECtHR: whether it is possible to commit offences of such gravity that, for the purposes of retribution and deterrence, a person must forfeit their right to liberty for the duration of their life.

In July 2013, the Grand Chamber of the ECtHR had held in *Vinter and others v United Kingdom* (2016) 63 EHRR 1 that the English whole life order was incompatible with Article 3 of the European Convention on Human Rights, which proscribes torture and inhuman and degrading treatment. This followed the Court's earlier decision in *Kafkaris v Cyprus* (2009) 49 EHRR 35 that the imposition of an irreducible life sentence "may raise an issue under Article 3" (at [97]). In *Vinter*, the UK

Government had argued that whole life orders in England and Wales were not irreducible, as the Secretary of State retained the power to release a life sentence prisoner at any time "if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds" (Crime (Sentences) Act 1997, s. 30(1)). However, the only published policy underpinning this power suggested that its exercise is applicable only where the lifer is terminally ill, with death likely to occur very shortly (usually within three months) or where they are very significantly physically incapacitated. In *Vinter*, the Grand Chamber held that Article 3 required more than this:

> 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 (at [119]).

In *Hutchinson* it fell to the Grand Chamber to reconsider the compatibility of the English whole life order with Article 3 in light of the Court of Appeal's robust defence of the sentence in *Attorney General's Reference (No. 69 of 2013)* [2014] EWCA Crim 188; [2014] 1 W.L.R. 3964.

It is likely that the Court of Appeal did not view the decision in *Vinter* as a welcome one. In what might be seen as a warning shot following the *Kafkaris* decision, Lord Phillips C.J. set out the Court of Appeal's view on whole life orders in *R. v Bieber* [2008] EWCA Crim 1601; [2009] 1 W.L.R. 223:

> Where a whole life term is specified this is because the judge considers that the offence is so serious that, for purposes of punishment and deterrence, the offender must remain in prison for the rest of his days .... We do not consider that the Strasbourg court has ruled that an irreducible life sentence, deliberately imposed by a judge in such circumstances, will result in detention that violates Article 3. *Nor do we consider that it will do so* (at [45], emphasis added).

The view expressed in *Bieber* merely reiterated the long-standing approach of the domestic courts towards whole life sentences, first articulated by Lord Bingham of Cornhill C.J. in *R. v Secretary of State for the Home Department, ex parte Hindley* [1998] Q.B. 751: "I can see no reason, in principle, why a crime or crimes, if sufficiently heinous, should not be regarded as deserving lifelong incarceration for purposes of pure punishment .... Successive Lord Chief Justices have regarded such a tariff as lawful, and I share their view" (at 769).

It is perhaps this underlying principle that best explains the Court of Appeal's effective neutralising of *Vinter* in *Attorney General's Reference (No. 69 of 2013)*. By asserting that the Grand Chamber had overestimated

the importance of the published policy in relation to the exercise of the power under s. 30, and had not acknowledged that the Secretary of State was bound to exercise it in a manner compatible with principles of domestic administrative law and with Article 3, the Court of Appeal adroitly returned the ball to the ECtHR's court. In *Hutchinson*, the Grand Chamber was faced with a stark choice. One option was to instigate a stand-off not only with the UK Government but also the domestic courts by reaffirming their earlier decision in *Vinter* that English whole life orders violated Article 3 because the compassionate release provisions still did not provide a sufficiently clear process to review such sentences, with the review process offering the whole lifer the prospect of release on the grounds of their rehabilitation. The other was to accept the Court of Appeal's wider interpretation of s. 30 to include its applicability, in addition to the compassionate grounds set out in the guidance, to cases where the whole lifer's rehabilitation meant that continued detention could no longer be justified on legitimate penological grounds. By 14 votes to three the Grand Chamber chose the latter option. The whole life order in England and Wales is, after all, compliant with Article 3.

So, will whole life order prisoners see any practical benefit from the Grand Chamber's decisions in *Vinter* and *Hutchinson*? It is difficult to see how they will. The decision in *Vinter* envisioned a more formal review process, to begin no later than 25 years after sentence with periodic reviews thereafter, with a clear set of criteria to enable the whole life order prisoner to understand, from the outset of their sentence, what they must do in order to have a prospect of release. In light of the decisions in *Attorney General's Reference (No. 69 of 2013)* and *Hutchinson*, it appears to be settled that simply the Secretary of State's exercise of s. 30 in an Article 3 compliant manner will suffice. However, in the absence of any further published criteria for release, it will always be open to the Secretary of State to reject applications on the basis that the legitimate penological grounds for continuing detention, namely retribution and deterrence, are not yet exhausted. Indeed it is axiomatic to the whole life order in England and Wales that, irrespective of later rehabilitation, these grounds can never be exhausted in the offender's lifetime; they are the very purpose of, and justification for, the sentence imposed.

It is not easy to square the Grand Chamber's decision in *Hutchinson* with its earlier decision in *Vinter*. A generous interpretation of *Hutchinson* is that it represents an uneasy compromise in which compassionate release might now have a wider applicability than it would have had without the ECtHR's intervention. However, the dissenting opinion of Judge Pinto de Albuquerque could scarcely be more damning of the majority, warning that "the present judgment 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" (at [38]). The blunt truth is that the Court of Appeal's view has prevailed over that of the ECtHR on this matter. In *Bieber*, some five years before the Grand Chamber decision in *Vinter*, the Court of Appeal held that a whole life order could only potentially infringe Article 3 at some distant point in the sentence when a prisoner could contend that any further detention would constitute degrading or inhuman treatment. In such circumstances, "compassionate release" might be the appropriate phraseology to explain the basis of release. However, the Grand Chamber expressly rejected this approach in *Vinter* by holding that the violation of Article 3 occurs at the point of sentencing if there are no clear criteria for how that sentence might be reducible on the grounds of rehabilitation; it placed potential future release in the realm of "rights" rather than "compassion". The acceptance now in *Hutchinson* that the power under s. 30 is a sufficient release mechanism, despite the absence of any published criteria as to how it might operate to offer whole life order prisoners the prospect of release on the grounds of rehabilitation, is consistent with the view expressed in *Bieber* but not the decision in *Vinter*. It is difficult to conclude that *Hutchinson* represents anything other than a retreat by the ECtHR on English whole life orders.

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ONE STEP FORWARD AND TWO STEPS BACK IN PRODUCT LIABILITY: THE SEARCH FOR CLARITY IN THE IDENTIFICATION OF DEFECTS

PRODUCT liability law has struggled to develop a test for identifying when products are defective under the Consumer Protection Act 1987 ("CPA"). In *Wilkes v Depuy International Ltd.* [2016] EWHC 3096 (QB), Hickinbottom J. offered the most prolonged reflection on product defect since *A v National Blood Authority* [2001] EWHC 446 (QB), and rejected much of the framework of *NBA*. However, *Wilkes* provides little guidance regarding when products should be identified as being defective, reinforcing the need for a more deeply grounded approach.

The claimant in *Wilkes* suffered a fracture of an artificial hip replacement three years after its surgical implantation. The fracture occurred due to mechanical fatigue (at [109]). Though the parties disputed which variables contributed to the fatigue (at [110]–[111]), Hickinbottom J. concluded that the account of the failure incorporating a broader range of factors (including, for example, the weight of the patient) was more convincing (at [112]).

The claimant sought damages under the CPA from the manufacturer of the hip replacement, alleging the device's design posed too great a risk