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From *Vinter* to *Hutchinson* and Back Again? The Story of Life Imprisonment Cases in the European Court of Human Rights

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Abstract

The imposition of life sentences upon prisoners, and their compatibility with the European Convention on Human Rights, is a contentious legal and political issue, especially in the United Kingdom. Applications to the Strasbourg Court against the UK have resulted in a number of legally significant and sometimes seemingly contradictory outcomes. The Grand Chamber's controversial 2017 Hutchinson judgment seems to come to the opposite conclusion to the landmark Vinter judgment four years earlier, which may at first seem to demonstrate a watering-down of Convention standards. However, by looking at Hutchinson in its wider context, including its interpretation in the subsequent case of Matiošaitis v Lithuania, it seems to be the case that, at least in the eyes of the Second Chamber, the significance of Hutchinson is largely limited to the factual situation in the United Kingdom, and does not seem to signal a wider change of direction for the general Strasbourg jurisprudence.

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Over the last ten years, in what has been described by one judge as a “breathtakingly fast process”,¹ the European Court of Human Rights has handed down a series of rulings on whether so-called ‘life sentences’ – imprisonment for an indefinite term without any formal opportunity for parole, release or reduction – are compatible with the European Convention on Human Rights (“the Convention”). The relevant right engaged in such cases is Article 3, which prohibits the infliction of torture, inhuman or degrading treatment in absolute terms.² The Court has suggested that the imposition of a truly irreducible life sentence would constitute such treatment because:

“Even those who commit the most abhorrent and egregious acts nevertheless retain their essential humanity and carry within themselves the capacity to change... to deny them the experience of hope [of release] would be to deny a fundamental aspect of their humanity, and to do that would be degrading”³

Until recently, the jurisprudence in this area has been relatively clear, with the Court handing down a set of cases which were, albeit sometimes imperfectly, generally consistent with each other. Change, if it did come, tended to be incremental, and in one direction: towards greater protection for life prisoners, by imposing tighter conditions upon states subjecting prisoners to whole-life tariffs.

In January 2017, however, the Grand Chamber handed down its decision in *Hutchinson v UK*,⁴ holding that the whole-life sentence regime in the United Kingdom was at that point Convention compliant, departing from its contrary pronouncement four years earlier.⁵ The decision seems to take a comparatively less stringent position with regards to Article 3 than it

¹ *Matiošaitis and Others v Lithuania* (App Nos.22662/13, 51059/13, 58823/13, 59692/13, 57900/13, 60115/13, 69425/13 and 72824/13), judgment of 23 May 2017, concurring opinion of Judge Kūris at [3].

² Article 3, European Convention of Human Rights. See, for example, *Gäfgen v Germany* (2011) 52 E.H.R.R. 1 at [87].

³ *Matiošaitis* (App No.22662/13) at [180]. For further views on the link between life sentences and the dehumanisation of the person, see N. Mavronicola, “Inhuman and Degrading Punishment, Dignity, and the Limits of Retribution” (2014) 77(2) M.L.R. 292; A. von Hirsch and A. Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: OUP, 2005), p.86; *Wellington v Secretary of State for the Home Department* [2007] EWHC 1109 (Admin); [2008] 3 All E.R. 248, at [39 (vi)] (Laws LJ).

⁴ *Hutchinson v United Kingdom* (App No.57592/08), judgment of 17 January 2017 (Grand Chamber).

⁵ *Vinter v United Kingdom* (2016) 63 E.H.R.R. 1. The Grand Chamber judgment was handed down on 9 July 2013.

did in the preceding case law,⁶ *reducing* rather than *strengthening* prisoner protections, and, on its face, advocating a lower-intensity standard of review. This article seeks to go beyond this preliminary evaluation by assessing the *Hutchinson* case in its proper context; looking at the preceding case law, the judgment itself, and, crucially, the way in which the case was considered in the Court's more recent judgment of *Matiošaitis v Lithuania*.⁷ In doing so, it will be questioned whether *Hutchinson* really does signify a wider change of direction in the Court's jurisprudence, or whether, construed retrospectively, it should be treated as an exceptional case if applicable only to its own facts.

The emergence of the jurisprudence: The *Kafkaris* era

In 2008, the Grand Chamber handed down its judgment in *Kafkaris v Cyprus*,⁸ finding, for the first time, that the imposition of a whole-life sentence could violate Article 3 of the Convention. The Court established that where a prisoner was held without "any prospect of release"⁹ whatsoever, this would constitute degrading treatment and fall foul of Article 3. To remedy this possibility, the Court held that some "possibility of review"¹⁰ allowing for the consideration of release must be in place.

Whilst undoubtedly a landmark case, establishing important principles and setting the path for further development, *Kafkaris* and the cases that immediately followed it now seem relatively conservative in their scope. For example, in subsequent cases, when invoking *Kafkaris*, the Court tended to synthesise its principles into singular requirement – that the sentence is "de facto and de jure reducible."¹¹ Generally, this did not mandate a particularly high level of scrutiny; the Court said that if a prisoner was "not deprived of all hope" of release or reduction of their sentence, they could not rely on Article 3.¹² Thus prisoners were

⁶ M. Pettigrew, "A Vinter Retreat in Europe: Returning to the issue of whole-life sentences in Strasbourg" (2017) 8(2) *New Journal of European Criminal Law* 128.

⁷ *Matiošaitis* (App No.22662/13).

⁸ *Kafkaris v Cyprus* (2009) 49 E.H.R.R. 35.

⁹ *Kafkaris* (2009) 49 E.H.R.R. 35 at [98].

¹⁰ *Kafkaris* (2009) 49 E.H.R.R. 35 at [98].

¹¹ see, for example: *Ahmad v United Kingdom* (2013) 56 E.H.R.R. 1, at [242]; *Törköly v Hungary* (App No.4413/06), decision of 5 April 2011; *Kafkaris* (2009) 49 E.H.R.R. 35 at [98].

¹² *Streicher v Germany* (App No.40384/04), decision of 10 February 2009. See also *Iorgov v Bulgaria* (No. 2) (App No.36295/02), judgment of 2 September 2010, at [52]: a state cannot "deprive the applicant of all hope of release or reduction of sentence".

held not to be deprived of all such hope where their sentence was subject to a discretionary Presidential (or Vice-Presidential) power of clemency,¹³ nor when the possibility of parole fell on a date outside their expected lifespan.¹⁴ On one occasion the Court found that the mere existence of “mechanisms... available” was enough to satisfy the requirements Article 3, without further scrutiny.¹⁵ It would seem that the Court was reluctant to find a breach of Article 3 so long as it could identify *any* potential avenue for release, however remote or unrealistic. Perhaps because of this, the early case law indicates no real trouble in applying *Kafkaris*; its application in each case was presented as relatively straightforward in practice, without the need for any major elaboration.¹⁶

The advent of *Vinter*

In 2013, the Grand Chamber handed down its judgment in *Vinter and Others v UK*.¹⁷ It became – and probably remains – the leading Strasbourg authority on life sentences; it is generally promulgated as the definitive statement of the law in this area (which is sometimes now even referred to by shorthand as “Vinter standards”).¹⁸ This is partially because it is a more recent Grand Chamber decision, but also because, vitally, it is taken to have expanded and elaborated on the requirements of Article 3 beyond the embryonic statements in *Kafkaris*. Indeed, commentators have drawn a distinction between the early case law on the one hand and the “post-Vinter case law”¹⁹ on the other.

Vinter upheld much of the essence of the previous law; the Court repeated that in order to comply with Article 3, any sentence must be “de facto and de jure reducible”,²⁰ requiring a

¹³ *Kafkaris* (2009) 49 E.H.R.R. 35; *Iorgov (No. 2)* (App No.36295/02).

¹⁴ *Törköly* (App No.4413/06).

¹⁵ *Ahmad* (2013) 56 E.H.R.R. 1 at [244].

¹⁶ *Garagin v Italy* (App No.33290/07), decision of 29 April 2008; *Streicher* (App No.40384/04); *Iorgov (No 2)* (App no.36295/02); *Lynch and Whelan v Ireland* (App Nos.70495/10 and 74565/10), decision of 18 June 2013. A possible exception might be the partly dissenting opinions in *Kafkaris* (2009) 49 E.H.R.R. 35 itself.

¹⁷ *Vinter* (2016) 63 E.H.R.R. 1.

¹⁸ see e.g. *Matiošaitis* (App No.22662/13), concurring opinion of Judges Lemmens and Spano.

¹⁹ *TP and AT v Hungary* (App Nos. 37871/14 and 73986/14), judgment of 4 October 2016, dissenting opinion of Judge Kūris, at [16]; *Matiošaitis* (App No.22662/13), concurring opinion of Judge Kūris, at [2], [3], [19].

²⁰ *Vinter* (2016) 63 E.H.R.R. 1 at [107]

“possibility of review” (executive or judicial)²¹ regarding a “prospect of release”.²² Article 3, therefore, was read as “requiring the reducibility of the sentence”²³ and later cases explicitly confirmed that the absence of any review mechanism would, therefore breach Article 3.²⁴ All of this sits easily with *Kafkaris*.

However, the Court went further. In the case itself, and through its progeny,²⁵ it established that in order for a sentence to be reducible in practice, in addition to the mere existence of a review mechanism, four additional criteria must be met: firstly, the review must meet a certain standard; secondly, the conditions of that review must be clear and knowable to the prisoner; thirdly, the review mechanism must be in place from the imposition of the sentence; fourthly, the conditions must be clear and knowable from the imposition of the sentence.

In elucidating the first requirement, a sufficient standard of review, the Court set out what a review mechanism must do to ensure a sentence is really ‘de facto and de jure reducible’. Thus, the conditions of review must relate to the appropriateness of the sentence under relevant penological grounds.²⁶ As the Court put it in *Öcalan (No 2)*, any review must assess:

*“whether the applicant’s continued incarceration is still justified... either because the requirements of punishment and deterrence have not yet been entirely fulfilled or because the applicant’s continued detention is justified by reason of his dangerousness”*²⁷

²¹ *Vinter* (2016) 63 E.H.R.R. 1 at [119]-[121].

²² *Vinter* (2016) 63 E.H.R.R. 1 at [108].

²³ *Vinter* (2016) 63 E.H.R.R. 1 at [119].

²⁴ *Öcalan v Turkey (No 2)* (App Nos. 24069/03, 197/04, 6201/06 and 10464/07), judgment of 19 March 2014, at [204]; *László Magyar v Hungary* (App No.73593/10), judgment of 20 May 2014, at [52].

²⁵ *Vinter* (2016) 63 E.H.R.R. 1 and the subsequent case law will be referenced interchangeably; whilst some later cases have been viewed as developing the law beyond *Vinter* (e.g. the Court in *TP and AT* (App Nos. 37871/14 and 73986/14) suggested one later case “further developed” the law, at [38]), the subsequent case law tends to treat this group of cases synonymously – see *Hutchinson* (App No.57592/08) at [42].

²⁶ *Vinter* (2016) 63 E.H.R.R. 1 at [119]; *László Magyar* (App No.73593/10) at [50]; *Čačko v Slovakia* (App No.49905/08), judgment of 22 July 2014, at [73].

²⁷ *Öcalan* (App Nos. 24069/03, 197/04, 6201/06 and 10464/07), at [207].

As such, post-*Vinter*, a review based on unrelated considerations such as ill-health or the whim of a president will not meet such criteria.²⁸ In addition, these conditions have to be *possible* to attain; prisoners must be given “a chance, however remote, to someday regain their freedom”²⁹ and impossible conditions or insurmountable barriers, such as the inclusion of psychiatric requirements in a facility without relevant facilities to identify these³⁰ will not grant the prisoner the necessary hope of release. In relation to this, the Court has set out a broad timeframe in which the review must take place; it has established a 25-year consensus,³¹ with 30 potentially permitted,³² but not 40.³³ A disproportionately long waiting time before review becomes available to a prisoner risks creating a situation where a prisoner is unable to challenge the legitimacy of their continued incarceration at a time when penological justifications may have legitimately altered.³⁴ Article 3, therefore, requires a proper review, whether executive or judicial in nature,³⁵ of the necessity of continued incarceration within a reasonable time as to ensure the utility of such a review.

The second requirement relates to the clarity of the requirements of release. The conditions themselves must be sufficiently clear and understandable. It must be clear “what [a prisoner] must do to be considered for release and under what conditions”³⁶ and these conditions must be made known to the prisoner, to the extent that they can gain a “precise cognisance” of such requirements.³⁷

²⁸ *Vinter* (2016) 63 E.H.R.R. 1 at [127]; [129]; *Öcalan* (App Nos. 24069/03, 197/04, 6201/06 and 10464/07), at [203]; *Bodein v France* (App No.40014/10), judgment of 13 November 2014, at [56]; *Kaytan v Turkey* (App No.27422/05), judgment of 15 September 2015, at [65]; *Murray v Netherlands* (2017) 64 E.H.R.R. 3, at [100].

²⁹ *Harakchiev and Tolumov v Bulgaria* (App Nos.15018/11 and 61199/12), judgment of 8 July 2014, at [264].

³⁰ *Murray* (2017) 64 E.H.R.R. 3 at [125].

³¹ *Vinter* (2016) 63 E.H.R.R. 1 at [120].

³² *Bodein* (App No.40014/10) at [61]-[62].

³³ *TP and AT* (App Nos. 37871/14 and 73986/14) at [45].

³⁴ *TP and AT* (App Nos. 37871/14 and 73986/14) at [48].

³⁵ *Vinter* (2016) 63 E.H.R.R. 1 at [119]-[121]. Some judges have questioned whether the later case law mandates a judicial, rather than executive review – see *Matiošaitis* (App No.22662/13), concurrence of Judge Kūris; *Murray* (2017) 64 E.H.R.R. 3, partly concurring opinion of Judge Pinto de Albuquerque, at [13] cf. *Hutchinson* (App No.57592/08) at [47]-[50] and *Lendore v Attorney General of Trinidad and Tobago* [2017] 1 W.L.R. 3369, at [67]: Art 3 does not “mandate any particular form of review.”

³⁶ *Vinter* (2016) 63 E.H.R.R. 1 at [122].

³⁷ *Trabelsi v Belgium* (2015) 60 E.H.R.R. 21 at [137].

The third requirement is that the review mechanism must be in place from the imposition of the sentence. In other words, if no review mechanism is in place, the breach of Article 3 will be found from the very imposition of the sentence.³⁸ The corollary of this position is that the review mechanism must exist through all stages of the incarceration. If at any point the prisoner does not have at their disposal a possibility of review, Article 3, it would seem, will be breached for the duration of that period, even if remedied at a later stage.³⁹

The fourth requirement is that like the existence and effectiveness of a review mechanism, the necessary clarity of the conditions of that mechanism must also be in place from the start of the sentence.⁴⁰ In *Trabelsi*, the Court used the language of “objective, pre-established criteria” allowing the prisoner to know the conditions of release “at the time of imposition of the sentence”.⁴¹ Like with the third requirement, a level of clarity is continuously required. If conditions are not sufficiently clear and cognisable, Article 3 will be breached for the duration of their absence, even if clear rules are introduced later.⁴²

The Court applied these requirements stringently to the cases which came before it, including in *Vinter* itself. The case concerned the UK’s life sentencing practice, in which a life sentence, once imposed, was only able to be mitigated through the statutory power of compassionate release, exercised by the Home Secretary.⁴³ Such a release required, as a prerequisite, something akin to terminal illness or serious incapacitation.⁴⁴ To bolster their argument, the UK government suggested that since the Home Secretary had a duty to act compatibly with Article 3, she would not (and legally *could* not) interpret the compassionate release guidelines restrictively, and would instead adopt a broad position with regards to its use, compatible with the Court’s case law.⁴⁵

³⁸ *Vinter* (2016) 63 E.H.R.R. 1 at [122]; *Kaytan v Turkey* (App No.27422/05) at [66]; *Matiošaitis* (App No.22662/13), concurring opinion of Judge Kūris, at [6].

³⁹ *Hutchinson* (App No.57592/08), dissenting opinion of Judge Pinto de Albuquerque.

⁴⁰ A. Ashworth, “R. v Newell (Lee William): sentencing – life imprisonment – whole life orders” (2014) 6 Crim. L.R. 471, 472.

⁴¹ *Trabelsi* (2015) 60 E.H.R.R. 21 at [137].

⁴² *László Magyar* (App No.73593/10) at [153]; *Čačko* (App No.49905/08) at [75].

⁴³ Crime (Sentences) Act 1997, s.30.

⁴⁴ *Vinter* (2016) 63 E.H.R.R. 1 at [12], [43].

⁴⁵ *Vinter* (2016) 63 E.H.R.R. 1 at [94]; See *R. v Bieber* [2009] 1 W.L.R. 223; *R. v Oakes and Others* [2012] EWCA Crim 2435.

Ultimately, the Court found against the government. It stated that the strict compassionate release grounds, taken literally, did not meet the substantive criteria required by Article 3⁴⁶ and the Court was unconvinced with the government's claim that the power operated more widely in practice.⁴⁷ Moreover, it found that the guidelines for the power were deemed too unclear⁴⁸ and were not in any case made known to prisoners.⁴⁹ A violation of Article 3 resulted.⁵⁰

It is clear, then, that although both Grand Chamber judgments are often cited together as authoritative propositions of law⁵¹ that *Vinter* extended the 'de facto and de jure reducible' requirement far beyond the initial framework introduced in *Kafkaris*. The requirements for satisfying Article 3 as laid down in *Vinter* are different – or at least more developed - than those in *Kafkaris*; Judge Kūris goes so far as to suggest *Vinter* effectively over-rules the previous case law.⁵² In addition, it is doubtful that certain early cases which passed the *Kafkaris* threshold would survive post-*Vinter*. In *Harakchiev*, for example, the Court, in finding a violation of Article 3, compared its conclusion with its previous finding to the contrary some years earlier in an almost identical factual situation. In justifying the difference, the Court pointed out that it was “decided after *Kafkaris*... but before *Vinter* and *Others*” and that it “cannot adopt the same approach... in light of the Grand Chamber's later ruling, in... *Vinter*”.⁵³

⁴⁶ *Vinter* (2016) 63 E.H.R.R. 1 at [127].

⁴⁷ *Vinter* (2016) 63 E.H.R.R. 1 at [126].

⁴⁸ *Vinter* (2016) 63 E.H.R.R. 1 at [125], [129].

⁴⁹ *Vinter* (2016) 63 E.H.R.R. 1 at [128].

⁵⁰ *Vinter* (2016) 63 E.H.R.R. 1 at [130].

⁵¹ *TP and AT* (App Nos. 37871/14 and 73986/14), dissenting judgment of Judge Kūris, at [27].

⁵² *Matiošaitis* (App No.22662/13), concurring opinion of Judge Kūris, at [2], [5].

⁵³ *Harakchiev and Tolumov* (App Nos.15018/11 and 61199/12) at [252]-[253]; compare *Iorgov (No 2)* (App No.36295/02). See also similar assessment of Judge Kūris in *TP and AT* (App Nos. 37871/14 and 73986/14), (dissenting opinion of Judge Kūris, at [6]-[8]) regarding that case and *Törköly* (App No.4413/06).

In sum, through *Vinter*, the Court ushered in a new understanding of what the Convention required in terms of life sentences. The case was followed faithfully in a number of decisions,⁵⁴ resulting in relatively consistent and authoritative line of case law.⁵⁵

A change in approach? *Hutchinson v UK*

After the Grand Chamber's ruling in *Vinter*, the English Court of Appeal handed down its ruling in *McLoughlin*.⁵⁶ It 'clarified' the operation of the Home Secretary's statutory power of compassionate release, describing it as having a "wide meaning"⁵⁷ beyond its literal (and non-binding) wording, allowing (and requiring) the evaluation of penological grounds for incarceration. As a result, and disagreeing with the European Court's conclusion in *Vinter*, the Court of Appeal concluded that the UK system met the Article 3 criteria.⁵⁸

Following this, in January 2017, the Grand Chamber availed itself of a new opportunity to examine the situation in the UK. In that case, *Hutchinson v UK*,⁵⁹ the Court essentially accepted the Court of Appeal's argument, and found that the UK's life sentences framework did *not* breach Article 3. This, of course, is the opposite conclusion to the one it reached in *Vinter*. But in *Hutchinson*, the Grand Chamber cited both *Vinter* and *Murray* in its judgment⁶⁰; nowhere in the judgment does it over-rule or overtly disregard any previous authority. In setting out the relevant law, the Court reiterated the post-*Vinter* principles: there must be review on legitimate penological grounds,⁶¹ these grounds of review must be clear, and crucially, must be in force and knowable "from the outset".⁶² This clearly matches up

⁵⁴ However, there have been some accusations that later case law subsequently developed the jurisprudence beyond that which was set out in *Vinter*, notably, from the Privy Council in *Lendore*, who regarded the subsequent expansion of the law as a "misunderstanding" of *Vinter* – see *Lendore* [2017] 1 W.L.R. 3369 at [29].

⁵⁵ 'Relatively' perhaps rather than absolutely, as the requirement of imposition from the start of the sentence had been applied somewhat flexibly in some of the cases – see, e.g. *Čačko* (App No.49905/08) at [79]-[81]; *Koky and Others v Slovakia* (App No.13624/03), judgment of 12 June 2012, at [31]-[33].

⁵⁶ *R. v McLoughlin* [2014] EWCA Crim 118; [2014] 1 W.L.R. 3964.

⁵⁷ *McLoughlin* [2014] EWCA Crim 118; [2014] 1 W.L.R. 3964 at [33].

⁵⁸ *McLoughlin* [2014] EWCA Crim 118; [2014] 1 W.L.R. 3964 at [35], [37].

⁵⁹ *Hutchinson v United Kingdom* (App No.57592/08).

⁶⁰ *Hutchinson* (App No.57592/08) at [42].

⁶¹ *Hutchinson* (App No.57592/08) at [43].

⁶² *Hutchinson* (App No.57592/08) at [44].

with the requirements of *Vinter* as outlined above. Why, then, did the majority of judges in the Grand Chamber come to the opposite conclusion to those in *Vinter* when the principles it espoused were identical?

The answer falls to the very dubious application of the law to the facts. As regards the first criterion, the standard of review, the Court accepted and upheld the Court of Appeal's statement of the law, accepting that it had "clarified"⁶³ the UK position and, by implication, admitted it had previously misunderstood it in *Vinter*. Thus, the Court agreed that the Home Secretary's power of compassionate release, properly understood, actually required her to review the penological justifications of an individual sentence. This is, of course, a contestable claim,⁶⁴ especially as the same argument was emphatically rejected in *Vinter*.⁶⁵ Nothing had changed in practice between *Vinter* and *Hutchinson*, after all.

Even more troublesome is the application of the 'clarity' criterion. Thus, even if the Home Secretary's power is construed widely enough to include a proper review of the sentence, this does not in itself satisfy Article 3 unless the conditions in which this will take place are clear and knowable to the prisoner(s) serving a life sentence. The Home Secretary's powers stem not from a clear code or legislation, but the abstract legal requirement to act in a way that is compliant with Article 3. It is not obvious how this can be sufficiently clear and knowable to prisoners, especially given that this had been unclear to the Grand Chamber four years prior.⁶⁶ Indeed, the only document prisoners had at their disposal indicating the possible conditions of release – the 'Lifer Manual' detailing the operation of the 'compassionate grounds' for release – was problematic for two reasons: it was both non-binding in nature and

⁶³ *Hutchinson* (App No.57592/08) at [38]-[41].

⁶⁴ See e.g. M. Pettigrew, "A *Vinter* Retreat in Europe: Returning to the issue of whole-life sentences in Strasbourg" (2017) 8(2) *New Journal of European Criminal Law* 128, 136-137. Alternatively, it might be said that the Court of Appeal's so-called 'clarification' itself had the effect of widening the UK position so that it is (from that point) compliant with Strasbourg standards. But this does not solve other related problems, such as the fact that this policy was not in force from the beginning of the sentence, violating *Vinter*'s third and fourth requirements – see below.

⁶⁵ *Vinter* (2016) 63 E.H.R.R. 1 at [126].

⁶⁶ This point has been made forcefully number of commentators in the area: A. Beetham, "Whole life orders and article 3" (2017) 81(3) *Journal of Criminal Law* 236, 237-238; J. Bild, "The whole life sentence in England and Wales" (2015) 74(1) C.L.J. 1, 2-3; N. Hart, "Whole Life Sentences in the UK: Voite-Face at the European Court of Human Rights?" (2015) 74(2) C.L.J. 205, 207-208. A. Ashworth, "R. v Newell (Lee William): sentencing – life imprisonment – whole life orders" (2014) 6 *Crim. L.R.* 471, 473. See also *Hutchinson* (App No.57592/08), dissenting opinion of Judge Pinto de Albuquerque, at [31]-[34].

actually set out incorrect information,⁶⁷ pointing exclusively to ill-health or similar circumstances as conditions of release and not anything like the post-*Vinter* penological grounds, which the Court accepted were nonetheless operational and crucial to satisfy Article 3. This clearly seems to be out of step with the previous post-*Vinter* application of the principle.

If the first and second *Vinter* requirements, that the conditions of release meet a certain substance and clarity, were dealt with poorly in *Hutchinson*, more worrisome still is that the third and fourth requirements – that conditions for release should be in force and knowable from the imposition of the sentence – were barely acknowledged at all. It is unclear whether the Court deemed the ‘clarification’ of the law to apply from the point of its enunciation (either when given by the Court of Appeal in 2014 or accepted by the Grand Chamber in 2017) or whether it applied *ex tunc*.⁶⁸ Naomi Hart notes that the prisoner in question in *Hutchinson* was sentenced prior to the the Human Rights Act 1998 becoming coming into force in the UK, and thus the Home Secretary would have been under no direct Article 3 obligations from that source at the time of the imposition of the prison sentence.⁶⁹ Thus even if accepted that the Home Secretary had a sufficiently substantive power to review sentences at the time of the prisoner’s imposition, it seems impossible to suggest that this was sufficiently clear and knowable to the prisoner from the start of their sentence. Frustratingly, the Court glossed over this aspect of the case law altogether. The Court explicitly stated that it would evaluate only on the position of the law as in force at the time,⁷⁰ specifically going against both the earlier case law and the Court’s own statement of the law earlier in the case.⁷¹ Dissenting Judge Lopez Guerra suggested, not without merit, that this could have been fatal to the government’s case.⁷²

⁶⁷ *Hutchinson* (App No.57592/08) at [65]: The Grand Chamber recommended revising the Manual because it did not reflect the law at the time.

⁶⁸ A point that was previously made by Judge Kalaydjewa: see *Hutchinson v United Kingdom* (2015) 61 E.H.R.R. 13, dissenting opinion of Judge Kalaydjewa.

⁶⁹ N. Hart, “Whole Life Sentences in the UK: Voite-Face at the European Court of Human Rights?” (2015) 74(2) C.L.J. 205, 207.

⁷⁰ *Hutchinson* (App No.57592/08) at [73].

⁷¹ *Hutchinson* (App No.57592/08) at [44].

⁷² *Hutchinson* (App No.57592/08), dissenting opinion of Judge Lopez Guerra.

What is to be made of *Hutchinson*? On its face, the case seems to show a “backtracking”⁷³ or “retreat”⁷⁴ from *Vinter*, either by applying an unusually lenient standard of assessment or declining to assess some parts of the post-*Vinter* framework altogether. But the wider significance of this is obfuscated by the fact that the Court places this new approach *alongside* a promulgation of the otherwise orthodox principles of the case law. This disingenuous tactic – saying one thing and doing another – leaves the law in a state of confusion.⁷⁵ It is unclear from the judgment alone whether *Hutchinson* should be seen as the Court pulling back from *Vinter* and adopting a new, weaker standard of review,⁷⁶ or whether the Court is continuing to adhere to the *Vinter* standard, but just applying it sloppily to the facts of this case, perhaps mindful of the particular political implications behind its judgment.⁷⁷ Given that “the Convention is what the Strasbourg Court says it is”,⁷⁸ the Court in *Hutchinson* – the Grand Chamber, no less – succeeded only in making the Convention requirements inherently more uncertain.

Testing the waters: *Matiošaitis*

So what is the status of the *Vinter* case-law post-*Hutchinson*? A first indication was given by the UK Privy Council in July 2017. In *Lendore*,⁷⁹ perhaps unsurprisingly, that court treated *Hutchinson* as confirming a narrower Article 3 standard and bolstering the UK’s own preferred position,⁸⁰ consistently with *McLoughlin*. In fact, it deemed cases like *Trabelsi* –

⁷³ A. Beetham, “Whole life orders and article 3” (2017) 81(3) *Journal of Criminal Law* 236, 237.

⁷⁴ M. Pettigrew, “A *Vinter* Retreat in Europe: Returning to the issue of whole-life sentences in Strasbourg” (2017) 8(2) *New Journal of European Criminal Law* 128, 135.

⁷⁵ The Privy Council in *Lendore* remarked that the case law authorities “are by no means consistent among themselves” (*Lendore* [2017] 1 W.L.R. 3369 at [63])

⁷⁶ Case Comment, “Life Imprisonment without prospects of release”, (2017) 3 E.H.R.L.R. 329, 331

⁷⁷ *Hutchinson* (App No.57592/08), dissenting opinion of Judge Pinto de Albuquerque. Whilst this article can make only a fleeting reference to the UK’s political circumstances, it is worth mentioning that UK politicians have in recent times made a number of threats to withdraw from the European Convention; the Conservative party took a position in their 2015 manifesto which was explicitly hostile to the ECHR. See S. Greer and R. Slowe, “The Conservatives’ Proposals for a British Bill of Rights: Mired in Muddle Misconception and Misrepresentation?” (2015) 4 E.H.R.L.R. 370, especially 379-381.

⁷⁸ *Matiošaitis* (App No.22662/13), concurring opinion of Judge Kūris at [4].

⁷⁹ *Lendore* [2017] 1 W.L.R. 3369.

⁸⁰ *Lendore* [2017] 1 W.L.R. 3369 at [70]

with its emphasis on “objective, pre-established criteria” as representative of an overzealous misapplication of the Article 3 requirement, later corrected by *Hutchinson*.⁸¹

However, more illustrative is the May 2017 Second Chamber judgment of *Matiošaitis v Lithuania*.⁸² In that case, life prisoners complained that their sentences, indefinite but for the possibility of presidential pardon, breached Article 3. The Court took its usual route of setting out the case law before applying it to the facts. In doing so, it re-emphasised that there must exist a review mechanism allowing for the prospect of release, that review being on proper grounds; an “actual assessment of the relevant information [of] whether his or her continued imprisonment is justified on legitimate penological grounds”⁸³ rather than of capricious things like age and illness.⁸⁴ It also emphasised that the conditions must be attainable in practice⁸⁵ and reiterated the principle that any grounds for review need to be sufficiently clear and knowable.⁸⁶ *Murray*⁸⁷ was cited and paraphrased as authority for this, part of the case law canon seemingly discarded in the earlier Privy Council judgment.⁸⁸

Crucially, when applying these principles to the facts, unlike in *Hutchinson*, the Court in *Matiošaitis* applied a fairly rigorous test to Lithuania’s prison regime. Whilst in the applicants’ cases, their possibility of release came in the form of a presidential pardon, the Lithuanian review system was much more formalised than the one in, say, *Kafkaris*. Unlike in *Hutchinson*, there existed a published list of qualifying considerations, all of which related to the ongoing justification of the sentence, which the authorities would take into account when reviewing the sentence. Whilst this list was non-exhaustive, this was not in itself fatal.⁸⁹ The Court accepted that the review criteria went unchanged during the tenure of the applicants’ incarceration,⁹⁰ that it was available to them and any other prisoner at any point⁹¹ and that that the prison authorities had also put in place certain programs aimed at social

⁸¹ *Lendore* [2017] 1 W.L.R. 3369 at [70]-[71].

⁸² *Matiošaitis* (App No.22662/13).

⁸³ *Matiošaitis* (App No.22662/13) at [174].

⁸⁴ *Matiošaitis* (App No.22662/13) at [162]-[163].

⁸⁵ *Matiošaitis* (App No.22662/13) at [177].

⁸⁶ *Matiošaitis* (App No.22662/13) at [168].

⁸⁷ *Murray* (2017) 64 E.H.R.R. 3.

⁸⁸ *Matiošaitis* (App No.22662/13) at [174].

⁸⁹ *Matiošaitis* (App No.22662/13) at [168].

⁹⁰ *Matiošaitis* (App No.22662/13) at [166].

⁹¹ *Matiošaitis* (App No.22662/13) at [167].

rehabilitation of prisoners, thus enabling them to take steps towards attaining the conditions required for their release.⁹²

Despite this, the Court found that the system did *not* meet Convention standards. The review mechanism, despite the merit of the pre-established criteria, was nonetheless found to be insufficient for prisoners “to know what [they] must do to be considered for release and under what conditions”⁹³ especially due to the lack of specific reasons given alongside rejections of review applications.⁹⁴ The absence of such specific reasons meant that prisoners, according to the Court, would be left in “a conundrum as to what he or she must do” to gain a pardon.⁹⁵ This, coupled with the fact that applications for release were very rarely successful in practice,⁹⁶ caused the Court to deign the pardon system a royal prerogative of mercy rather than the type of sophisticated review mechanism necessary for Article 3.⁹⁷

In addition, whilst accepting that a social rehabilitation program was a positive initiative, the Court still found that the poor living conditions within the prison, particularly the number of hours life prisoners spend in total isolation, mitigated the effectiveness of any reform program: the “deleterious effects of such life prisoners’ regime must have seriously weakened the possibility of the applicants reforming”⁹⁸ and therefore the ability to meet the conditions for release. Taking these issues together, the Court ultimately found that the Lithuanian system ultimately fell beneath the high standard required to satisfy the requirements of Article 3.⁹⁹

The decision is striking when compared directly to *Hutchinson* for several reasons. Firstly, in *Hutchinson*, the Court easily accepted the claim that the Home Secretary’s discretion would be carried out in a way which allowed the assessment of penological grounds without any real evidence to support this; in *Matiošaitis*, on the other hand, the Court very carefully considered whether the required assessment of the required penological grounds would be

⁹² *Matiošaitis* (App No.22662/13) at [178].

⁹³ *Matiošaitis* (App No.22662/13) at [175], [181]

⁹⁴ *Matiošaitis* (App No.22662/13) at [170], [181].

⁹⁵ *Matiošaitis* (App No.22662/13) at [176].

⁹⁶ *Matiošaitis* (App No.22662/13) at [172].

⁹⁷ *Matiošaitis* (App No.22662/13) at [173].

⁹⁸ *Matiošaitis* (App No.22662/13) at [179].

⁹⁹ *Matiošaitis* (App No.22662/13) at [181]-[182].

carried out de facto. To this effect the frequency and operation of the pardoning mechanism in practice was not an issue in *Hutchinson*¹⁰⁰ but was deemed very important in *Matiošaitis*.

Secondly, the mere existence of an abstract legal obligation stemming from the operation of Article 3 (clarified only through case law, no less) upon the Home Secretary was enough to satisfy Article 3's clarity requirements in *Hutchinson*; from this, prisoners were apparently able to know what they must do to be eligible for release.¹⁰¹ On the other hand, the detailed published list of considerations available to prisoners was not enough in *Matiošaitis*, partially because of a lack of reasons given by the president in practice. On this point, *Hutchinson* simply said that to act compatibly with Article 3 and the Human Rights Act, the Home Secretary would be required to "give reasons" - without analysing whether this had ever occurred.¹⁰²

Thirdly, the adequacy of reform programs or the de facto possibility of achieving the conditions for release, so fatal a problem in the *Matiošaitis* judgment, were not even mentioned in *Hutchinson*.

Fourthly, as regards to *Hutchinson*'s most glaring omission, namely the lack of examination into whether the incarceration breached Article 3 from the start of the sentence, *Matiošaitis* is less directly helpful. The particular case facts established that the review mechanism here had been in force, relatively unchanged, since the imposition of the sentence.¹⁰³ *Matiošaitis* does reiterate that an absence of review mechanisms from the beginning of a sentence would mean that a breach of Article 3 "arises at the moment of the imposition of the life sentence",¹⁰⁴ although *Hutchinson* also relied on authority suggesting the same.¹⁰⁵ Nonetheless, the more oblique nature of that statement, alongside an emphasis on the fact that Article 3 was breached in one applicant's case despite the fact that he had not yet reached the time period to make him eligible for review,¹⁰⁶ as well as the apparent examination of how long the review mechanism has been in force,¹⁰⁷ emphasised the temporal aspect of Article 3 and strongly

¹⁰⁰ *Hutchinson* (App No.57592/08) at [53]

¹⁰¹ *Hutchinson* (App No.57592/08) at [63]-[64].

¹⁰² *Hutchinson* (App No.57592/08) at [51].

¹⁰³ *Matiošaitis* (App No.22662/13) at [167].

¹⁰⁴ *Matiošaitis* (App No.22662/13) at [182].

¹⁰⁵ *Hutchinson* (App No.57592/08) at [44].

¹⁰⁶ *Matiošaitis* (App No.22662/13) at [182].

¹⁰⁷ *Matiošaitis* (App No.22662/13) at [167].

suggests that the requirement of a framework from the imposition of the sentence has not been jettisoned from the jurisprudence.

To summarise, it is clear that the Court in *Matiošaitis* employed a more penetrating assessment of Lithuania's prison system than the *Hutchinson* Court did with regards to the UK. It emphasised to a much greater extent the reducibility of the sentence de facto and the clarity of associated criteria for this; asserted a higher standard of proof; applied greater scrutiny to the State's claims, and, crucially, seemed to reassert the strand of jurisprudence that Article 3 requirements must be present from the start of the sentence, a facet so gravely overlooked in *Hutchinson*.

Conclusions: the current law and the status of *Vinter* in a post-*Hutchinson* landscape

Matiošaitis, then, helps shed light on how best to construe *Hutchinson*, at least according to the European judges. It seems like the Court takes an approach that is more consistent with the rest of the post-*Vinter* case law than the Court in *Hutchinson* did. How is that possible, given *Hutchinson* was decided by the Grand Chamber just six months prior?

One possible explanation is that the Court in *Matiošaitis* cleverly engineered its way around the *Hutchinson* precedent. Elements of this could be gleaned from the language of the *Matiošaitis* judgment; in the sections dealing with the Court's findings, *Hutchinson* is mentioned just six times, compared to nine times for *Vinter* and fourteen times for *Murray*. Where *Hutchinson* is cited, it is used as authority for setting out a useful overview of the case law¹⁰⁸ or as a citation for the use of the margin of appreciation.¹⁰⁹ It could be, then, that the Court in *Matiošaitis* was doing exactly what the Court in *Hutchinson* did – saying one thing and doing another - by saying a case (here, *Hutchinson*) applies without actually applying it in practice.

¹⁰⁸ *Matiošaitis* (App No.22662/13) at [156], [160].

¹⁰⁹ *Matiošaitis* (App No.22662/13) at [181].

But the Court need not be framed such a duplicitous way. Rather than viewing *Hutchinson* as establishing a new approach which must be artificially worked around, we can - as it seems the Court in *Matiošaitis* did - instead take *Hutchinson* as authority only as regards to its own factual situation, rather than for a general change in the case law. *Hutchinson* can be retrospectively classified as a case of bad application of the existing law, rather than the good application of some modification of it.

This sits more easily with the Court's approval of *Hutchinson* in *Matiošaitis*; it is cited alongside authorities like *Vinter* and *Harakchiev* without distinction,¹¹⁰ and nowhere in the judgment does the Court suggest that *Hutchinson* represents any sort of departure from the previous case law; on the contrary, from the outset, it is presented as an equally authoritative statement of the law, standing for exactly the same principles, as the post-*Vinter* case of *Murray*.¹¹¹ In confirming *Hutchinson* in this way, the Court, seemingly paradoxically, also confirms *Vinter*.

In conclusion, the Court in *Matiošaitis* has shown that *Hutchinson* need not necessitate the discarding of the stringent post-*Vinter* requirements. On the contrary, *Hutchinson* can be treated as an orthodox statement of law, with the specific application of its facts an isolated example, rather than indicating a general trend in the case law. However seemingly fictitious this may seem, this seems to be the way the Court is squaring that circle. With at least two forthcoming cases in the near future,¹¹² time will tell whether this narrative will prevail in the long-term.

¹¹⁰ *Matiošaitis* (App No.22662/13) at [160], [171], [181].

¹¹¹ *Matiošaitis* (App No.22662/13) at [156].

¹¹² *Tekin and Baysal v Turkey* (App Nos.40192/10 and 8051/12), communicated to the Turkish government on 20 July 2015 and *Viola v Italy* (App No.77633/16), communicated to the Italian government on 30 May 2017.