APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 6
HCA/2021/11/XM
HCA/2021/12/XM
HCA/2021/13/XM

Lord Justice General
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

the Appeals against a decision of the Sheriff of Lothian and Borders at Edinburgh

in the applications for the extradition of

JENNIFER AMNOTT, VALERIE PERFECT HAYES and GARY REBURN

Appellants

against

THE LORD ADVOCATE, on behalf of the Government
of the United States of America

Respondent

Appellant (Amnott): CM Mitchell QC, Henry; Thorley Stephenson SSC
Appellant (Hayes): McCall QC, Byrne; John Pryde & Co SSC (for Berlow Rahman, Glasgow)
Appellant (Reburn): McCluskey, C Miller; Faculty Services Ltd (for Houston Law, Glasgow)
Respondent: Lord Advocate (Bain QC), DJ Dickson (sol adv) AD; the Crown Agent

28 January 2022

Introduction

[1] The respondent seeks the extradition of the appellants pursuant to warrants for their arrest, dated 16 January 2019, issued by the District Court for the Western District of

Virginia. The warrants libel a number of offences, including: (1) conspiracy to commit kidnapping involving children; (2) conspiracy to kill witnesses with intent to prevent communication to a federal law enforcement officer; (3) kidnapping; (4) to (8) attempted kidnapping of a child (relating to five children); and (9) to (12) attempted killing of witnesses (relating to four parents) with intent to prevent communication to a federal law enforcement officer. On the second charge, the minimum sentence is imprisonment for life. The minimum on each of charges (1), and (4) to (8) is 20 years. There is no minimum on charges (3), and (9) to (12).

[2] There is no system of parole within the federal criminal justice system of the United States of America. The appeals raise the question of whether a potential mandatory life sentence, without parole, for a lesser crime than murder constitutes a breach of Article 3 of the European Convention on Human Rights (inhumane and degrading treatment) because it is grossly disproportionate and, in any event, not capable of being reduced thereafter.

[3] This issue has been raised in two recent cases in England (*Hafeez* v *Government of the United States* [2020] 1 WLR 1296 and *Sanchez* v *Government of the United States* [2020] EWHC 508 (Admin). On each occasion, the Queen's Bench Division of the High Court of Justice determined that no breach occurred. Neither case was deemed to raise a point of law of general importance and therefore no appeal to the Supreme Court of the United Kingdom was available (Extradition Act 2003, s 114(4)(a)). The appellant in at least one of the cases applied to the European Court of Human Rights for an *interim* measure to stay extradition (rule 39). This was granted on 13 June 2020. The case (*Sanchez-Sanchez* v *United Kingdom*, (no 22854/80) is due to be heard by the Grand Chamber on 23 February 2022.

[4] At the core of the dispute is the meaning to be given to the European Court's *dictum* in *Harkins and Edwards* v *United Kingdom* (2012) 55 EHRR 19 (p 561) (at paras 129-131) and repeated in *Ahmad* v *United Kingdom* (2013) 56 EHRR 1 (at paras 177-179) that Article 3 does not mean that any form of prospective ill-treatment will bar removal to a non-contracting state. According to the *dictum*, the Convention does not purport to be a means of imposing its standards on non-contracting states which have a long history of respect for democracy, human rights and the rule of law. Is that *dictum* consistent with or superseded by that in *Trabelsi* v *Belgium* (2015) 60 EHRR 21 (p 935) (at para 116), and repeated in *López Elorza* v *Spain*, 12 December 2017, (no 30614/15) (at para 103), that the fact that the ill-treatment is to be inflicted by a non-contracting state is "beside the point"?

The alleged crimes

[5] The crimes, which the appellants have allegedly committed, are extraordinary. All of the appellants are citizens of the United States of America. Mrs Amnott and her husband met Mrs Hayes in 2015. Mr Reburn was Mrs Hayes' then boyfriend. The Amnotts were desperate to start a family. Mrs Hayes said that she had three children who had been "captured" and were in the custody of two families in West Virginia. She told the Amnotts that, if they helped her to recover her children, they (the Amnotts) could keep one of those families' other children.

[6] The appellants and Mr Amnott formed a plan which involved travelling from Maryland to conduct prolonged and sophisticated surveillance on the houses where the two families lived, the organisation of transport and the obtaining of firearms. They planned to

achieve armed entry to the house, the securing of the children and the murdering of the parents by shooting them. This plan was put into action.

[7] On 29 July 2018, the group approached the house of the first family in the rural setting of Dayton, West Virginia. In order to familiarise themselves with the layout, they entered it while the family, including children aged 2 years and 8 months respectively, were in church. Later, during the hours of darkness, they approached the house again. Two of them were armed. The father opened the door, saw the firearms, and attempted to close the door. The group forced entry and secured the father in the basement, binding his wrists. The mother had managed to escape and contacted the police. When the police arrived, only Mr Amnott was still in the house, along with the father and the children. He was holding the father at gunpoint. He was arrested. The others had left and, within days, had fled to Scotland. Amended arrest warrants were issued on 16 January 2019. All three appellants are on remand. Meantime, Mr Amnott has pled guilty to at least charge (2), which carries the mandatory life sentence. He has not yet been sentenced. There is a suggestion that his co-operation with the federal authorities in the prosecution of the appellants may result in him avoiding such a sentence.

[8] At the extradition hearing before the sheriff, a number of matters, which were said to bar extradition, were raised. These included: the absence of appropriate mental and physical healthcare for Mrs Hayes and Mrs Amnott within the federal prison system; the potential for mistreatment of Mr Reburn as a vulnerable person within that system; and the potential for sexual assaults to be perpetrated on Mrs Hayes and Mrs Amnott in prison. The sheriff did not consider that the evidence on these matters, or on prison conditions generally, was sufficient for him to hold that there would be a breach of Article 3 in the

event of extradition. These matters have not been re-raised in these appeals. The remaining aspect of the case is, as outlined above, whether the mandatory life sentence on charge (2) is grossly disproportionate and irreducible and therefore a breach of Article 3.

The sheriff's decision

[9] Mrs Hayes appeared before the sheriff as early as 29 November 2018. Mrs Amnott appeared on 29 October 2020 and Mr Reburn on 31 May 2021. A full hearing was repeatedly postponed for a variety of reasons, partly related to the incidence of Covid 19 but also to allow the appellants further time to prepare their cases on the psychiatric and physical condition of the appellants and on the US prison system generally. The hearing eventually took place over five days from 31 May to 4 June 2021. The sheriff's judgment was issued on 30 July 2021.

[10] On proportionality, the sheriff recognised that principles of sentencing largely fell outside the scope of the European Convention (*Ahmad* v *United Kingdom* at para 237), although a grossly disproportionate sentence could amount to ill-treatment in breach of Article 3. The test for a breach was a high one and would be met only on "rare and unique occasions" (*ibid*). Quoting from an affidavit from the US Attorney for Western Virginia, the sheriff held that it was:

> "hard to imagine a more egregious set of facts. The defendants sought to eliminate the parents of young children as witnesses so that they could successfully escape with their kidnapped children … [B]ut for the quick thinking of one of the victims, … five innocent children would have been kidnapped and four innocent parents would have been murdered".

The sheriff did not consider that the existence of a mandatory sentence on charge (2) could be said to be grossly disproportionate in the event of a conviction.

[11] On the irreducible nature of the sentence, the respondent's submission was that the sentences were reducible on the basis of: (1) assistance which may be given to the prosecution; (2) compassionate release; and (3) executive clemency. The sheriff did not consider that assistance to the prosecution was relevant, since this pre-dated sentence. Compassionate release was governed by the US Code, Title 18, paragraph 3582(c)(1)(A) whereby a court could reduce a term of imprisonment where there were extraordinary and compelling reasons to do so and the defendant was at least 70 years old, had served at least 30 years in prison and was not a danger to the public. Relevant factors included the nature and circumstances of the offence and the history and characteristics of the defendant but, in terms of USC 28, paragraph 994(t), rehabilitation alone was not sufficient. On executive clemency, the sheriff noted that this process did not: involve any consideration of the justification for continued imprisonment on penological grounds; have specified criteria; involve the issuing of any reasons; or inform the prisoner of what was required in order to qualify. There could be multiple applications.

[12] The sheriff embarked on a discursive account of some 13 cases before the European Court of Human Rights and a further four cases before the courts in England and Wales. What the sheriff deduced from these cases is not always apparent. He took particular note of *R (Wellington)* v *Home Secretary* [2009] 1 AC 335, in which the dangers of creating safe havens for fugitives was recognised. *R (Wellington)* decided that a mandatory life sentence was not irreducible when a state governor had the power to pardon or commute a sentence. In contrast, in *Trabelsi* v *Belgium* the European Court had determined that neither compassionate release, nor executive clemency, met the requirements of Article 3. The European jurisprudence emphasised the need for rehabilitation and re-integration

(*Hutchinson* v *United Kingdom*, 17 January 2017, no. 57592/08 (GC); *Murray* v *Netherlands* (2017) EHRR 3). Executive clemency required sufficient procedural safeguards to avoid a sentence being regarded as irreducible (*TP and AT* v *Hungary*, 4 October 2016, nos. 37831/14 and 37986/14). The existence of a presidential pardon was insufficient (*Matiošaitis* v *Lithuania*, 23 August 2017, no. 22662/13; *Petukhov* v *Ukraine*, 9 September 2019, no. 41216/13). The sheriff noted that the European Court cases since *Trabelsi* concerned states which were signatories to the Convention.

[13] The sheriff identified a tension between the jurisprudence in the European Court and that of the courts in England and Wales. In extradition, the bar for establishing a violation of Article 3 was very high (*Harkins and Edwards* v *United Kingdom*). The European Court had rarely found a violation where the person was to be removed to a state which had a long history of respect for democracy, human rights and the rule of law, such as the United States (*Hafeez* v *Government of the United States of America* and *Sanchez* v *Government of the United States of America*). The sheriff decided that the European authorities were not a relevant consideration where "UK authority has precedence".

[14] The sheriff accepted that the respondents would face considerable difficulties in obtaining either compassionate release or executive clemency. That was not relevant. The remedies were features of the US criminal justice system. They were exercised in a regulated manner and overseen either by the judiciary or by an executive office. The sheriff considered that he was bound by the principles in *R (Wellington)* and he followed those in *Hafeez* and *Sanchez*. *R (Wellington)* had determined that, even if a sentence were irreducible, it would, in the extradition context, only be a contravention of Article 3 if the likely sentence was grossly disproportionate. Since there were no grounds for considering that the likely

sentences on charge (2) were grossly disproportionate, whether the sentence was irreducible was not relevant.

[15] In any event, the sheriff held that the mandatory life sentences were not irreducible, having regard to the existence of both compassionate release and executive clemency. Following *Hafeez* and *Sanchez*, *Trabelsi* was to be regarded as an exceptional case which did not form part of a clear and constant jurisprudence. The court had to recognise the context of extradition and the existence of an extradition agreement as a relevant factor (*R (Wellington)* at para 24; *Dean* v *Lord Advocate* [2017] UKSC 44 at para [37]). On this basis, the sheriff held that there was no bar to extradition.

Submissions

Appellants

[16] The appellants presented four grounds of appeal. The first was that the sheriff erred in failing to apply the "greater scrutiny test" when considering whether the sentence was grossly disproportionate. That test stemmed from *Harkins and Edwards* (at para 138) and *Ahmad* v *United Kingdom* (at para 242). The sheriff had not applied this test. Mandatory sentences of life without parole were more likely to be grossly disproportionate than other sentences, such as those with an eligibility for release or where there was a discretion on whether to impose a life sentence without parole.

[17] The second ground was that the sheriff erred in holding that a mandatory life sentence without parole for a lesser crime than murder was not grossly disproportionate. The courts required to apply the principles of the European Court, even if only indirectly relevant (*D* v *Commissioner of Police of the Metropolis* [2019] AC 196 at paras 77 and 153;

Human Rights Act 1998, section 2(1)(a)). The sheriff erred in finding that the absence of any European Court authority dealing precisely with the issue amounted to straying into the sentencing policy of a non-convention country. In the absence of exceptional circumstances, mandatory life imprisonment for a crime other than murder was grossly disproportionate. The courts in England and Wales would not countenance a whole life order for a crime other than murder in the absence of such circumstances.

[18] The third ground was that the sheriff erred in preferring "English authorities" over the jurisprudence of the European Court. The sheriff erred in considering that he was bound to follow *R (Wellington)*, notably the relativist approach, and to regard *Haveez* and *Sanchez* as persuasive. The sheriff erred in adopting a threshold for Article 3 treatment, which contained balancing elements between the legitimate aim presented by extradition generally and the prospective treatment. This was inconsistent with the absolute prohibition contained in Article 3. It had been disapproved in *Harkins and Edwards* (at paras 126-127) which had concluded that the same principles applied to extradition as they did to other types of removal (para 128). Article 3 applied equally between "domestic" (Convention state) and extradition to non-Convention state cases (*Harkins* at paras 119-131; *Ahmad* at paras 167-179).

[19] It was incorrect to describe *Trabelsi* as anomalous. It had been followed in *López Elorza* v *Spain* and *Saidani* v *Germany*, 4 September 2018 (no. 17675/18), to which the courts in England had not been referred. They had not been put before the sheriff either, but that was because the appellants had not thought that this area would be regarded as central. The sheriff ought to have found that: (1) there was clear and constant European Court jurisprudence that Article 3 applied equally in the domestic and extradition contexts; (2) the

European jurisprudence on life sentences applied equally in the domestic and extradition context; (3) the application of Article 3 in the extradition context was not to be modified whereby the threshold was reduced. The cases on healthcare, which were cited in *Harkins and Edwards* (fn 99) were distinguishable; and thus (4) the findings to the contrary in *R (Wellington), Hafeez* and *Sanchez* should not be followed.

[20] The fourth ground was that the sheriff failed to apply the consistent authority from the European Court on irreducibility. The European jurisprudence had moved on significantly in *Vinter* v *United Kingdom* (2016) 63 EHRR 1 (at paras 109-115). The key features were that, in order to be Article 3 compliant, a system had to involve: (1) a prospect of release from a life sentence and the possible review of it; (2) release where the prisoner could establish that he had changed to the extent that his continued detention could no longer be justified on penological grounds; (3) an opportunity for rehabilitation (*Hutchinson* v *United Kingdom* at para 43); and (4) an ability to review the sentence and to consider whether rehabilitation had been achieved. Executive clemency lacked clarity and certainty. It did not involve a consideration of the penological grounds. It was wholly discretionary. There was no possibility of judicial review. It was akin to a pardon, which was insufficient (*Murray* v *Netherlands* (2017) 64 EHRR 3 (p 132) at para 100; *Matiošaitis* v *Lithuania*, and *Peukhov* v *Ukraine*). It was not possible to seek compassionate release on the basis of rehabilitation. This was the vice in the US system. The US could provide assurances on these matters, but they had not done so. If it had been the case that any form of review mechanism was sufficient, that was no longer the position. The European jurisprudence was now clear and consistent.

Respondent

[21] The respondent argued that the sentencing policy of each state was a matter of its sovereignty (*Grigelevicius* v *Lithuania* [2015] EWHC 1828 (Admin); *Polish Judicial Authorities* v *Celinski* [2015] EWHC 1274 (Admin) at para 10). English law provided for the imposition of a whole of life sentence which was compatible with Article 3 and was appropriate punishment for extreme criminality (*R* v *Bamber* [2009] EWCA Crim 962 at paras 32, 33 and 36). In *Hutchinson* v *United Kingdom* the European Court departed from the view expressed in *Vinter* v *United Kingdom* that a whole life order breached Article 3. It acknowledged that there was a wide margin of appreciation for states to regulate their sentencing policy. That policy fell outwith the scope of the Court's supervision at a European level (*Kafkaris* v *Cyprus* [2009] 49 EHRR 35 at para 100; *Hutchinson* at para 45).

[22] The imposition of a sentence of life imprisonment on an adult offender was not prohibited by, or incompatible with, Article 3 (*Harkins and Edwards* v *United Kingdom* at para 138). The court had to consider any opinion of the European Court and to keep pace with the jurisprudence of that Court. Nevertheless, the sheriff was not bound to follow the European Court. The reasoning in *Sanchez* v *United Kingdom,* to the effect that *Trabelsi* v *Belgium* was an unexplained departure from the approach of the European Court meant that there was no clear and constant jurisprudence. The Court had agreed with *R (Wellington)* that the Convention did not purport to be a means of requiring contracting states to impose Convention standards on other states (*Harkins and Edwards* at para 129; *Ahmad* v *United Kingdom* at para 169). Standing the absence of a reasoned opinion in *Trabelsi,* the United Kingdom courts had preferred to follow the European Court jurisprudence as it was expounded in the extradition context in *Kafkaris* v *Cyprus* and followed in *Harkins and*

Edwards. *Saidani* v *Germany* had not relied on *Trabelsi*. In *López Elorza* reducibility did not arise.

[23] The European Court had been very cautious before finding that removal would be contrary to Article 3. It had only rarely reached such a conclusion (*Harkins and Edwards* at para 130). A life sentence did not become irreducible because in practice it might be served in full. It was enough for the purposes of Article 3 that the sentence was in fact and in law reducible (*Hafeez* v *United Kingdom* at para 58; *Sanchez* v *United Kingdom* at para 61). The precise mechanism by which a review was conducted was not to be the subject of close scrutiny (*Kafkaris* at para 100, *Haveez* at para 55 and *Sanchez* at para 58). As the sheriff accepted, there were two routes available in the US system for a mandatory life sentence to be reducible; compassionate release and executive clemency. The European Court had endorsed the view that, provided such a review was available, the wide margin of appreciation allowed it to be undertaken by the executive or the judiciary (*Hutchinson* at para 45). There was then no tension between the jurisprudence of the European and the United Kingdom courts. Provided that the criminal justice system of the requesting state allowed a review of the mandatory sentence in light of the circumstances of the extradited person, the form of that review was a matter for the requesting state.

Decision

Precedent

[24] This court is not generally bound by decisions of the House of Lords, and hence the Supreme Court of the United Kingdom. An exception must exist in relation to UK Supreme Court decisions in Scottish criminal cases complaining of European Convention

infringements (compatibility issues). This is because there is now the prospect of an appeal from this court to the Supreme Court in relation to such infringements (Criminal Procedure (Scotland) Act 1995, s 288AA(1)). Where the facts and domestic law are sufficiently similar, this court will regard decisions of the House of Lords and now the Supreme Court, in cases emanating from the other jurisdictions in the UK, as highly persuasive. They are not, however, binding precedent. *R (Wellington)* v *Home Secretary* [2009] 1 AC 335 is one such case. It is not binding in Scotland. The sheriff erred in that regard.

[25] The court is bound to "take into account" the decisions of the European Court of Human Rights in a matter involving Convention Rights (Human Rights Act 1998, s 2(1)(a)). The court requires to ascertain and to apply the European jurisprudence unless there is a sound reason for not doing so.

[26] In matters involving an area of law which applies across the United Kingdom, such as extradition and Convention rights, the court will regard decisions of the Courts of Appeal in England & Wales and Northern Ireland and those of a Queen's Bench Division as persuasive.

The Greater Scrutiny Test

[27] There is no basis for holding that the sheriff failed to apply the correct level of scrutiny when determining whether a mandatory life sentence without parole was grossly disproportionate. It is almost self-evident that such a sentence is more likely to be regarded as grossly disproportionate, since it is imposed without regard to factors which would otherwise be regarded as mitigation (*Harkins and Edwards* v *United Kingdom* (2012) 55 EHRR 19 (p 561) at paras 135 to 138). A mandatory life term is not *per se* grossly disproportionate given that a proportionate life term may be imposed as a matter of discretion, depending

upon the nature of the crime. In either case, in the absence of gross disproportionality, an Article 3 issue will only arise when the prisoner's incarceration can no longer be justified on penological grounds (eg punishment, deterrence, public protection and rehabilitation) and the sentence is irreducible (*ibid*; *Hutchinson* v *United Kingdom* (2017) 43 BHRC 667 at para 42). The sheriff correctly addressed himself to that question.

Gross Disproportion

[28] It is not possible to conclude that a life sentence without parole is grossly disproportionate, for the purposes of triggering a breach of Article 3, given the extreme gravity of the crimes charged. If proved, this was a premeditated conspiracy to kidnap five children and to murder their four parents. The plan had passed the preparation phase and had entered that of perpetration when the police intervened. Although whole of life terms are not considered appropriate in this jurisdiction, they are permitted by statute in England and Wales. They have been determined to be Convention compliant, provided that the sentence is reducible; ie there is both a prospect of release and the possibility of review. The review must assess whether there are penological grounds for the continued incarceration of the prisoner (*Hutchinson* v *United Kingdom* at para 42, reversing the effect of *Vinter* v *United Kingdom* (2013) 63 EHRR 1 in light of the clarification provided by *R* v *McLoughlin* [2014] 1 WLR 3964). It is not for the European Court to set tariffs for the sentencing of persons either within or outwith contracting states. There will no doubt be some cases in which it can be said that a sentence is grossly disproportionate. This is not one of them. The seriousness of the offences, if proved, would merit very substantial custodial, including life, terms.

[29] If a jurisdiction considers that conspiracy to kill witnesses should be met with a mandatory life term, even within a system with no parole, then that is a matter for that

jurisdiction's democratic processes to determine. As it was put in *Polish Judicial Authority* v *Celinski* [2015] EWHC 1274 (admin) (Lord Thomas CJ, delivering the judgment of the Division, at para 13(iii)):

> "it will … rarely be appropriate for the court in the UK to consider whether the sentence was very significantly different from what a UK court would have imposed, let alone to approach extradition issues by substituting its own view of what the appropriate sentence should have been".

Reducibility

[30] A useful starting point from which to examine the European Court jurisprudence on extradition is *Kafkaris* v *Cyprus* (2008) 49 EHRR 35. This involved extradition to a contracting state. The court said (para 98) that the imposition of a life sentence on an adult offender was not, of itself, prohibited by the Convention but an irreducible one "may raise an issue under article 3". In deciding if a sentence is irreducible, the court looks to see if the prisoner has "any prospect of release" (para 99). The court continued:

> "…[W]here national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy article 3… It follows that a life sentence does not become 'irreducible' by the mere fact that in practice it may be served in full. It is enough… that a life sentence is de jure and de facto reducible…
>
> 100. … [A] state's choice of a specific criminal justice system, including sentence review and release arrangements, is in principle outside the scope of the supervision the court carries out at European level, provided that the system chosen does not contravene the principles set forth in the Convention…".

This proviso may be seen as somewhat difficult to reconcile with the earlier parts of the sentence.

[31] Before considering the jurisprudence on extradition which is specific to the US mandatory life sentence without parole, there are certain general propositions, emanating from the European Court, which bear mentioning. They are succinctly put in *Harkins and*

Edwards (at paras 119 *et seq*) and repeated *verbatim* in *Ahmad* v *United Kingdom* (2013) 56 EHRR 1 (at paras 168 *et seq*). First, no distinction is to be made between extradition cases and those involving other forms of removal (*Harkins* at para 120; *Ahmad* at para 168)). Secondly, in assessing whether there is a prospective breach of Article 3, no distinction is to be made between torture and other forms of ill treatment (*Harkins* at para 123; *Ahmad* at para 171). Thirdly, contrary to *R (Wellington)* v *Home Secretary* [2009] AC 335, there is no proportionality exercise, balancing the risk of ill treatment against the reason for the extradition, to be carried out (*Harkins* at para 125; *Ahmad* at para 172). However, agreeing with Lord Brown in *R (Wellington)* (at 365), the absolute nature of Article 3 did not mean that any form of ill treatment would act as a bar to extradition (*Harkins* at para 129; *Ahmad* at para 178). Echoing what it had said in *Kafkaris* v *Cyprus*, the court said that the Convention does not purport to be a means of requiring contracting states to impose Convention standards on other states:

> "This being so, treatment which might violate art 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of art 3 in an expulsion or extradition case" (*Harkins* at para 129; *Ahmad* at para 177).

This appears to distinguish the level of severity in cases involving removal to a contracting state from those involving a non-contracting state.

[32] The court set out (*Harkins* at para 130; *Ahmad* at para 178) a number of elements to be considered, emphasising that they depended closely on the particular facts, which were not readily established prospectively. These include whether the measure is calculated to break the will of the prisoner or intended to debase or humiliate him. They also consist of measures without specific justification or involving arbitrary punitive elements. The length of time for which a measure is imposed is also relevant. The court stressed (*Harkins* at

para 131; *Ahmad* at para 179) that it had been very cautious in finding that removal from a contracting state would be contrary to Article 3. Except in death penalty cases, it had even more rarely found that a violation would occur when the extradition was to a state with a long history of respect for democracy, human rights and the rule of law. Once again, a distinction between levels of severity is apparent.

[33] By way of slight digression, the European Court has examined the compatibility of a whole life order, which is available in England and Wales. In *Vinter* v *United Kingdom* it held that such an order did infringe Article 3 because the Secretary of State's discretionary power to reduce the sentence on compassionate grounds in exceptional circumstances did not satisfy the requirement in *Kafkaris* that a life sentence had to be reducible. In *R* v *McLoughlin* [2014] 1 WLR 3964, the Court of Appeal in England and Wales (Lord Thomas CJ, Sir Brian Leveson, Hallett, Treacy LJJ and Burnett J) disagreed with *Vinter*. *Hutchinson* v *United Kingdom* reached a different conclusion from *Vinter* and held that the system of review by the Secretary of State did meet Article 3 requirements, notwithstanding that it was not conducted by the judiciary. A margin of appreciation was afforded to contracting states in that regard.

[34] However, in what may be seen as a significant change of tack, in *Trabelsi* v *Belgium* (2014) 60 EHRR 21, which involved extradition to the USA on terrorist charges where mandatory life imprisonment without parole was an option, the court said (para 116) that the fact that the potential violation occurred in a non-contracting state was "beside the point". In considering the situation in relation to compassionate release and executive pardons, the court held (para 137) that neither of those amounted to a review mechanism which required to examine:

> "on the basis of objective, pre-established criteria… 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".

Extradition was refused. *Murray* v *Netherlands* (2016) 64 EHRR 3 emphasised the need for an assessment for release based upon objective criteria. *R (Harkins*) v *Home Secretary* (No 2) [2015] 1 WLR 2975 was an attempt to revisit the extradition on the basis that *Trabelsi* had changed the law. This was unsuccessful on the basis that *Trabelsi*: (1) had ignored the basic principle in *Kafkaris* (at para 100) as repeated in *Vinter*; and (2) was "wholly unreasoned".

[35] The central issue of irreducibility then came to be examined recently by the Queen's Bench Division of the High Court of Justice in England and Wales (*Hafeez* v *Government of the USA* [2020] 1 WLR 1296). The court, consisting of Lord Hamblen JSC and William Davis J, carried out a thorough review of the relevant cases in the European Court of Human Rights and those in England, which had in turn also reviewed the current state of the European Human Rights' jurisprudence. The judgment in *Hafeez*, in respect of an area of the law which is common to the United Kingdom, is persuasive. In *Hafeez* it was observed (para 47) that there had already been an earlier review of the same issue by the same court in *R (Harkins)* v *Home Secretary* (No 2). The court noted that, whilst it was bound to take account of a relevant decision of the European Court, it was "not obliged to follow the decision if a reasoned analysis of the position leads to a contrary conclusion".

[36] It was commented (*Hafeez* at para 55), in error (see *infra*) that in no subsequent case had the European Court confirmed the view, as expressed in *Trabelsi*, that no distinction could be drawn between removal and extradition cases and cases involving the criminal justice system of a contracting state. The court agreed (para 56) with its earlier conclusions on *Trabelsi* in *R (Harkins)*. The alignment of cases involving violations in contracting states

with extradition cases was, it said "unsupported in any other [European Court] jurisprudence". The court analysed (para 58) the compassionate release provisions and held that, although rehabilitation alone would not be a ground for release, it was a factor to be taken into account. There was no need for the system to permit release by reference to rehabilitative efforts. Penological grounds included punishment and deterrence. Executive clemency had clear criteria provided by the Department of Justice. A prisoner could make any number of applications. On that basis, the sentence of life imprisonment without parole, which Mr Hafeez faced, did not violate Article 3.

[37] A few days after *Hafeez*, it was followed by a different Queen's Bench Division (Fulford LJ and Elisabeth Laing J) in *Sanchez* v *United States of America* [2020] EWHC 508 (Admin). The appellant in Sanchez had recognised the problem which *Hafeez* posed to his argument, but the court again reviewed the authorities (paras 38-49) and reached the same conclusion (paras 60-61).

[38] This court agrees broadly with the reasoning in these two Queen's Bench Division cases. The European Court recognised in *Harkins and Edwards* (at para 129) and in *Ahmad* (at para 177) that there is a distinction to be made between extraditions or removals within contracting states and those involving non-contracting states. It was not for contracting states to impose Convention standards in non-contracting states. It would therefore require a high level of ill treatment, including death or torture, to amount to a bar to extradition to states with a long history of respect for democracy, human rights and the rule of law. Although the judiciaries in Europe may not, in the context of Article 3, agree with all aspects of the penal system in the USA, it is not for them to insist upon that system abiding strictly by the Convention standards, which apply to contracting states, before granting an order for

extradition. The existence of compassionate release and executive clemency within the US criminal justice system is sufficient to meet the requirements of Article 3 in the extradition context, even if it may not be likely that the appellants will be afforded either remedy over time. In reaching this decision, the court is attempting to apply the central tenets of the European Court jurisprudence which, before *Trabelsi*, it does not regard as differing from that adopted by the courts in England and Wales.

[39] There is no doubt that the sections of the European Court in *Trabelsi* and *López Elorza* v *Spain*, 12 December 2017, no 30614/15, reached a different conclusion. *Hafeez* is in error (at para 55) in stating that no case had followed *Trabelsi*. *López Elorza* adopted its reasoning. In *Trabelsi* (at para 114) and *Elorza* (at para 99) the Court moved away from the idea, emanating from *Kafkaris* (at para 99), that the "sole" or "mere" possibility of an adjustment to a life sentence is sufficient for Article 3 purposes. It reverted to *Vinter* in the context of the need for progress towards rehabilitation (*Trabelsi* at para 115; *Elorza* at para 100). The life prisoner had to know, at the outset of his sentence, what he must do to be considered for release. If the domestic law did not provide any mechanism or possibility for review, the incompatibility with Article 3 arose at the point when the sentence was imposed, and not at a later stage.

[40] It may be that in the upcoming case of *Sanchez-Sanchez* the Grand Chamber of the European Court will follow this new line rather than what the approach in the earlier cases. If it does so, and holds that any prospective ill-treatment, in a country which has a long history of respect for democracy, human rights and the rule of law, is sufficient to bar extradition, that could have a profound influence on the practical operation of extradition treaties with non-contracting states. It has the potential to create safe havens for fugitives

from justice, who are charged with very serious crimes, including, as here, those perpetrated in their states of origin. That is not an attractive prospect. Application of the mainstream European Court jurisprudence, as illustrated in *Kafkaris*, *Harkins and Edwards* and *Ahmad*, may be thought to be preferable for those parts of the world governed by the rule of law. It attaches considerable importance to the sovereignty principle under which the Convention should not be used as a means of imposing the criminal justice values of contracting states on non-Convention countries. It should require some obvious and serious form of ill-treatment to bar the extradition to a country such as the United States for the crimes of conspiracy to murder parents and to steal their children.

[41] The appeals are refused.