



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

DECISION

Application no. 71537/14
Phillip HARKINS
against the United Kingdom

The European Court of Human Rights, sitting on 15 June 2017 as a Grand Chamber composed of:

Guido Raimondi, *President*,
Angelika Nußberger,
Ganna Yudkivska,
Helena Jäderblom,
Robert Spano,
Mirjana Lazarova Trajkovska,
Luis López Guerra,
Ledi Bianku,
Işıl Karakaş,
Kristina Pardalos,
Julia Laffranque,
André Potocki,
Aleš Pejchal,
Carlo Ranzoni,
Pauliine Koskelo,
Tim Eicke,
Lətif Hüseyinov, *judges*,

and Lawrence Early, *Jurisconsult*,

Having regard to the above application lodged on 11 November 2014,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court,

Having regard to the decision of 5 July 2016 by which the Chamber of the First Section to which the case had originally been assigned relinquished its jurisdiction in favour of the Grand Chamber (Article 30 of the Convention),

Having regard to the observations submitted by both the respondent Government and the applicant,

Having regard to the parties' oral submissions at the hearing on 11 January 2017, and

Having deliberated on 11 January 2017 and 15 June 2017, decides as follows:

THE FACTS

1. The applicant, Mr Phillip Harkins, is a British national who was born in 1978 and lives in Manchester. He was represented before the Court by Ms Y. Aslam of AGI Criminal Solicitors, a lawyer practising in Manchester.

2. The United Kingdom Government ("the Government") were represented by their Agent, Ms R. Sago of the Foreign and Commonwealth Office.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

1. The applicant's indictment

4. On 3 February 2000 the applicant was indicted in the state of Florida, in the United States of America, for first degree murder and attempted robbery with a firearm.

5. He was released on bail and ordered to appear before a court on 12 July 2002.

2. The extradition proceedings in the United Kingdom

6. On 25 January 2003 the applicant was arrested in the United Kingdom following a fatal car accident. The United States' Government made an extradition request on 7 March 2003.

7. On 21 July 2003 the District Judge sitting at Bow Street Magistrates' Court concluded that the evidence established a *prima facie* case against the applicant and ordered that he be committed to prison to await the decision of the Secretary of State for the Home Department as to his surrender to the United States.

8. In a Diplomatic Note issued on 3 June 2005 the United States' Embassy assured the United Kingdom Government that, based on an assurance the Department of Justice had received from the State Attorney of the State of Florida, the death penalty would not be sought or imposed on the applicant. Therefore, if convicted of first degree murder, the sentence in Florida would be one of mandatory life imprisonment without parole.

9. On 1 June 2006 the Secretary of State ordered the applicant's surrender. On the basis of the assurance from the United States' Government, he concluded that the death penalty would not be imposed on him and that extradition would not otherwise violate his Convention rights.

10. The applicant sought judicial review of the Secretary of State's decision on the ground, *inter alia*, that the assurance that he would not be subject to the death penalty was inadequate. However, on 14 February 2007 the High Court refused the application for judicial review as it found that there was no real risk of the death penalty being imposed. On the same date it also refused the applicant's application for certification of a point of law of general public importance and permission to appeal to the House of Lords.

3. The applicant's first application to this Court

11. On 19 February 2007 the applicant lodged an application with this Court in which he complained that his extradition would be in breach of Article 3 of the Convention on account of the risk that if convicted he would face either the death penalty or a mandatory sentence of life imprisonment without the possibility of parole.

12. On 2 April 2007 the President of the Chamber to which the application was allocated decided to apply Rule 39 of the Rules of Court and to indicate to the Government of the United Kingdom that the applicant should not be extradited until further notice. It was also decided, under Rule 54 § 2 (b), that notice of the application should be given to the Government of the United Kingdom and that the Government should be invited to submit written observations on the admissibility and merits of the case, including on whether the imposition of a mandatory life sentence without parole on the applicant would be compatible with Article 3 of the Convention.

4. Further proceedings in the United Kingdom

13. After the Government's observations had been received, the applicant indicated that he had submitted fresh representations to the Secretary of State on the issue of the imposition of a mandatory life sentence. Proceedings before this Court were adjourned while those representations were considered by the Secretary of State.

14. The Secretary of State refused the applicant's representations on 9 March 2010, relying on this Court's judgment in *Kafkaris v. Cyprus* [GC], no. 21906/04, ECHR 2008. He noted that the Governor had commuted the sentences of forty-four prisoners convicted of first-degree murder between 1980 and 1996. Although clemency had not yet been granted to anyone who had been given a sentence of life imprisonment without parole, that was immaterial since the sentence had only been introduced in 1994.

15. The Secretary of State also had regard to the fact that under the felony murder rule a mandatory sentence of life imprisonment without parole could be imposed in Florida if the applicant was found to have been committing a serious felony offence at the time of the murder. However, the Secretary of State was not satisfied that a mandatory sentence of life imprisonment without parole, even as a result of the felony murder rule, would be grossly disproportionate. The Secretary of State considered that no separate issues arose under Articles 5 and 6 of the Convention.

16. The applicant sought judicial review of the Secretary of State's decision, arguing that mandatory life imprisonment without parole as a consequence of the felony murder rule would be in violation of Article 3 of the Convention. The High Court dismissed that application on 14 April 2011 ([2011] EWHC 920 (Admin)). Lord Justice Gross (with whom Mr Justice Davis agreed) observed that the sentence of mandatory life imprisonment without parole was manifestly severe and different from the sentence the applicant would face in the United Kingdom. Nevertheless, in view of the applicant's alleged conduct, even if he were to be convicted under the felony murder rule, a sentence of life imprisonment without parole would not be grossly disproportionate. He further found that the sentence would not be irreducible, although even if it were he did not accept that its imposition *per se* would be incompatible with Article 3 of the Convention.

17. The applicant applied to the High Court for certification of a point of law of general public importance and leave to appeal to the Supreme Court. On 14 June 2011 the High Court refused both applications.

5. *The Court's judgment in Harkins and Edwards v. the United Kingdom, nos. 9146/07 and 32650/07, 17 January 2012*

18. On 17 January 2012 a Chamber of the Fourth Section gave judgment in *Harkins and Edwards*. Insofar as the applicant complained about the risk of imposition of the death penalty, it found that the assurances contained in the Diplomatic Note were sufficient to remove any risk that he would be sentenced to death if extradited.

19. It further found that a mandatory life sentence without the possibility of parole would not be "grossly disproportionate", and the applicant had not demonstrated that there was a real risk of treatment reaching the Article 3 threshold as a result of his sentence were he to be extradited. In particular, the applicant had not shown that, if convicted, his incarceration would serve no penological purpose, so no Article 3 issue could arise at that time. If a time was reached when his incarceration could be shown not to serve any legitimate penological purpose, it was "still less certain" that the Governor of Florida and Board of Executive Clemency would refuse to avail themselves of their powers to commute his sentence.

20. On the same day a Chamber of the Fourth Section also gave judgment in *Vinter and Others v. the United Kingdom*, nos. 66069/09 and

2 others, 17 January 2012, which concerned the compliance of “whole life orders” with Article 3 in the domestic context. The Chamber found that an Article 3 issue would only arise when it could be shown that continued imprisonment could no longer be justified on any legitimate penological grounds and the sentence was irreducible *de facto* and *de jure*. As the applicants in that case had not demonstrated that their continued incarceration served no legitimate penological purpose, the Chamber held that an Article 3 issue had not yet arisen.

21. The applicants in both *Vinter and Others* and *Harkins and Edwards* requested a referral to the Grand Chamber. The request was accepted in *Vinter and Others* but rejected in *Harkins and Edwards*. As a consequence, that judgment became final on 9 July 2012.

6. Further proceedings in the High Court

22. Following the *Harkins and Edwards* judgment, the applicant was not extradited and made further representations to the Secretary of State, which were rejected on 29 January 2013. On 20 June 2013 the applicant issued an application to judicially review the Secretary of State’s decision.

23. On 9 July 2013 the Grand Chamber gave judgment in *Vinter and Others v. the United Kingdom* ([GC], nos. 66069/09 and 2 others, ECHR 2013 (extracts)). It held that, in the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which would allow the domestic authorities to consider whether any changes in the life prisoner were so significant, and such progress towards rehabilitation had been made in the course of the sentence, as to mean that continued detention could no longer be justified on legitimate penological grounds. Furthermore, a whole life prisoner was entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Where domestic law did not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground would therefore already arise at the moment of the imposition of the whole life sentence and not at a later stage of incarceration (*ibid.*, §§ 119-122).

24. The applicant thereafter substituted his judicial review grounds with a submission that the Grand Chamber had radically changed the law on Article 3, with the consequence that his extradition would violate that Article since there was virtually no prospect of release in cases where a life sentence without the possibility of parole was imposed by a court in the state of Florida and, in any event, there was no dedicated review mechanism that accorded with the criteria laid down in *Vinter and Others* [GC]. Later, he also argued that his extradition would violate Article 5, since a life sentence without the possibility of parole would be “arbitrary”, and Article 6, since the sentencing court would be unable to consider any

mitigating factors on account of the mandatory nature of the sentence that would be imposed were he to be convicted.

25. The High Court held a hearing on 9 and 10 July 2014 and reserved judgment. On 8 September 2014 the High Court was informed that the Court had given judgment in *Trabelsi v. Belgium* (no. 140/10, ECHR 2014 (extracts)), finding that an applicant's extradition to the United States had been in breach of Article 3 of the Convention as it exposed him to a risk of a life sentence without the possibility of parole. After considering written submissions on the relevance of *Trabelsi*, the High Court held a further hearing on 29 October 2014.

26. On 7 November 2014 the High Court refused permission to reopen proceedings in the Article 3 claim and refused permission to apply for judicial review in relation to the Articles 5 and 6 claims. The High Court decided that in the very unusual circumstances of the case it should apply a test analogous to that in Rule 52.17 of the Civil Procedure Rules for reopening appeals, pursuant to which the Court of Appeal or the High Court could not reopen a final determination of any appeal unless it was necessary to do so in order to avoid real injustice; the circumstances were exceptional and made it appropriate to reopen the appeal; and there was no alternative effective remedy (see paragraph 29 below). Having regard to the aforementioned test, it accepted that if there had been a change in the law such as fundamentally to affect the human rights of an applicant, that could, in sufficiently exceptional circumstances, give grounds for reopening a case that had already been determined. However, it found that there had been no such change in the law in the present case.

27. With respect to the applicant's Articles 5 and 6 claims, the High Court found that they could have been made before the Divisional Court in 2011 or before this Court in 2012. In any event, neither argument had any merit. The Article 5 complaint could be rejected for the same reason this Court disposed of Mr Edwards' similar complaint in *Harkins and Edwards* (namely that, if convicted and sentenced to life imprisonment without parole, the lawfulness of the detention would be incorporated in the sentence imposed by the trial court, and no further review would be required by Article 5 § 4). In respect of Article 6, the court noted that if the applicant was convicted a sentence of life imprisonment without parole was mandatory. The sentence would be dealt with as part of the trial process and he would not be denied his right to a fair trial.

7. The applicant's second application to this Court

28. On 11 November 2014 the applicant submitted a further application to this Court. A second interim measure under Rule 39 of the Rules of Court was granted on 14 November 2014 to stay his extradition. On 31 March 2015 the case was communicated to the parties, and on 5 July 2016,

following receipt of the parties' observations, the Chamber relinquished its jurisdiction in favour of the Grand Chamber.

B. Relevant domestic law

Rule 52.30 of the Civil Procedure Rules (formerly Rule 52.17)

29. Rule 52.30 of the Civil Procedure Rules reads, insofar as is relevant, as follows:

“(1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless—

- (a) it is necessary to do so in order to avoid real injustice;
- (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
- (c) there is no alternative effective remedy.”

C. Relevant international law

30. The 1969 Vienna Convention on the Law of Treaties provides in so far as relevant:

“Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”

COMPLAINTS

31. The applicant complained that following the Court's judgment in *Trabelsi* (cited above), his extradition to the United States of America to face a mandatory sentence of life imprisonment without parole would breach Article 3 of the Convention since the sentencing and clemency regime in Florida did not satisfy the mandatory procedural requirements identified by the Grand Chamber in *Vinter and Others* [GC]. (cited above). He further submitted that the imposition of a mandatory sentence of life imprisonment without parole would be "grossly disproportionate".

32. The applicant complained under Article 6 of the Convention that the imposition of a mandatory sentence of life imprisonment would constitute a "flagrant denial of justice".

THE LAW

A. Article 3 of the Convention

33. Article 3 of the Convention provides as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

34. The Government submitted that the present Article 3 complaint was "substantially the same", within the meaning of Article 35 § 2 (b) of the Convention, as that determined by the Chamber on 17 January 2012 in the case of *Harkins and Edwards*.

35. Article 35 § 2 (b) of the Convention provides as follows:

"2. The Court shall not deal with any application submitted under Article 34 that

...

(b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information."

1. The parties' submissions as to the admissibility of the Article 3 complaint

36. The Government submitted that the present complaint was "substantially the same" as the one determined by the Chamber on 17 January 2012 since both complaints were based on the same facts: the same murder, the same facts found by the domestic courts to amount to a case to answer, the same charge, the same sentencing regime, and the same clemency process in Florida. Furthermore, the basis for the complaint was also the same: that is, that if convicted the applicant would face a mandatory

sentence of life imprisonment without parole which would be *de facto* irreducible.

37. The only change had been the subsequent development of the Court's case-law, which did not amount to "relevant new information" within the meaning of Article 35 § 2 (b). For the Government, the concept of "relevant new information" had to be interpreted in light of the purpose of Article 35 § 2 (b); namely, the principle of legal certainty and finality, which was one of the fundamental aspects of the rule of law requiring that where the courts had finally determined an issue, their ruling should not be called into question (*Brumărescu v. Romania* [GC], no. 28342/95, §§ 60-61, ECHR 1999-VII). This principle would be undermined if "relevant new information" were to include changes in the Court's jurisprudence, since that jurisprudence regularly develops and the Court could not bear the burden of reopening applications on that basis.

38. The Government further contended that the principle of legal certainty was of particular importance in extradition cases due to the overwhelming public interest in the proper functioning of extradition agreements and the interests of justice that those accused of very serious crimes be tried as quickly as possible. In the present case, the applicant faced allegations relating to a killing some sixteen years ago for which he had yet to stand trial. Both the extradition process within the United Kingdom and his application to the Court had provided him with every opportunity to challenge his extradition on human rights grounds. The Court's judgment in 2012 had been a full and final judgment that his extradition would not be incompatible with Article 3. A panel of the Grand Chamber subsequently considered whether the application raised any serious issue going to the interpretation of the Convention but concluded that the case had been properly settled by the Chamber. There had been no material change in the applicant's circumstances since then. Changes or consequences which arose as a result of the passage of time were not sufficient changes to warrant wholesale consideration of precisely the same issue as was litigated in 2012. Consequently, it would be contrary to the principle of legal certainty for the Court to once again consider the applicant's Article 3 complaint.

39. The applicant, on the other hand, submitted that the present complaint was not "substantially the same" as that made in his previous application as the injustice complained of was different and would occur in a different legal landscape. In particular, he contended that the judgments in *Harkins and Edwards v. the United Kingdom* (nos. 9146/07 and 32650/07, 17 January 2012), *Vinter and Others v. the United Kingdom* [GC] (nos. 66069/09 and 2 others, ECHR 2013 (extracts)), *Trabelsi v. Belgium* (no. 140/10, ECHR 2014 (extracts)) and – more recently – *Murray v. the Netherlands* [GC] (no. 10511/10, ECHR 2016) taken together had

established new and more exacting criteria that had to be met before extradition to face a whole life sentence would be consistent with Article 3.

40. Furthermore, the applicant argued that this evolution in the Court's case-law constituted "relevant new information", as did the further review of his case, first by the Secretary of State and then by the High Court, and further affidavits which had been produced by expert witnesses in support of the present application to the Court and which addressed the compatibility of the Florida regime for the review of sentences of life without parole with the principles established in *Vinter and Others* [GC], *Trabelsi* and *Murray*.

2. *The Court's assessment on admissibility*

(a) **General principles**

41. In preventing the Court from dealing with any application which is substantially the same as a matter already decided, the admissibility criterion under the first limb of Article 35 § 2 (b) of the Convention is intended to ensure the finality of the Court's decisions and to prevent applicants from seeking, through the lodging of a fresh application, to appeal against previous judgments or decisions of the Court (see *Lowe v. the United Kingdom* (dec.), no. 12486/07, 8 September 2009 and *Kafkaris v. Cyprus* (dec.), no. 9644/09, § 67, 21 June 2011).

42. An application will generally fall foul of the first limb of Article 35 § 2 (b) where an applicant has previously brought an application which related essentially to the same person, the same facts and raised the same complaints (see *Vojnovic v. Croatia* (dec.), no. 4819/10, § 28, 26 June 2012; *Anthony Aquilina v. Malta*, no. 3851/12, § 34, 11 December 2014; and *X. v. Slovenia* (dec.), no. 4473/14, § 40, 12 May 2015). It is insufficient for an applicant to allege relevant new information where he or she has merely sought to support his or her past complaints with new legal argument (see, for example, *I.J.L. v. the United Kingdom* (dec.), no. 39029/97, 6 July 1999 and *Kafkaris* (dec.), cited above, § 68). In order for the Court to consider an application which relates to the same facts as a previous application, the applicant must genuinely advance a new complaint or submit new information which has not previously been considered by the Court, within the six-month time-limit set out in Article 35 § 1 of the Convention (see *Lowe* (dec.) and *Kafkaris* (dec.), § 68, both cited above).

(b) **Application of the general principles to the present case**

43. Contrary to the applicant's submission, the Court considers that his present Article 3 complaint is "substantially the same" as that raised in his previous application lodged in 2007 (see paragraph 11 above). In both applications he alleged that his extradition to the United States of America would be in breach of Article 3 of the Convention due to the risk that, if

convicted, he would face a mandatory sentence of life imprisonment without the possibility of parole, and that such a sentence would be “grossly disproportionate”. Furthermore, as the Government have pointed out (see paragraph 36 above), since the Court adopted its final judgment in *Harkins and Edwards* on 17 January 2012 the facts upon which the applicant’s original complaint was based have not changed. He is facing the same charges in respect of the same criminal offences, and both the sentencing regime and clemency process in Florida are the same today as they were in 2012.

44. However, the applicant contends that the application should not be rejected pursuant to Article 35 § 2 (b) of the Convention because “relevant new information” exists in the form of the Court’s judgments in *Vinter and Others* [GC], *Trabelsi* and *Murray*; the reconsideration of his complaints at the domestic level in light of the first two of those judgments; and the supplementary affidavits relating to the Florida sentencing regime and clemency process prepared by experts.

45. Insofar as the applicant relies on the recent domestic proceedings, the Court recalls that in respect of new complaints concerning the failure by States to execute its judgments, it has accepted that a fresh examination of the case by the domestic authorities, whether by reopening the proceedings or by initiating an entirely new set of domestic proceedings, may in certain circumstances constitute “relevant new information” capable of giving rise to a new violation (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 65, ECHR 2009; *Egmez v. Cyprus (dec.)*, no. 12214/07, §§ 48-56, 18 September 2012; and *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 34, ECHR 2015). Therefore, the Court would not exclude the possibility that for the purposes of the first limb of Article 35 § 2 (b) of the Convention a fresh consideration of a complaint by the domestic courts could also constitute “relevant new information”, provided that the new domestic proceedings were not based on facts previously considered by the Court (see *Kafkaris (dec.)*, cited above, §§ 68-69, in which the Court found that neither a fresh application to the Attorney-General for a pardon or conditional release nor the subsequent appeal proceedings constituted “relevant new information”, since the fresh application was based on a fact previously considered by the Grand Chamber when examining whether the applicant’s life sentence was compatible with Article 3 of the Convention).

46. In the present case the new domestic proceedings were based on the Court’s judgments in *Vinter and Others* [GC] and *Trabelsi*, both of which were handed down following the judgment in *Harkins and Edwards*. Therefore, while the facts of the case had not changed, it cannot be said that the arguments raised by the applicant in the new domestic proceedings were the subject of previous examination by the Court. Nevertheless, the sole question before the High Court was whether the judgments in *Vinter and*

Others [GC] and *Trabelsi* had sufficiently developed the case-law so as exceptionally to permit it under the domestic rules to reopen its final determination (see paragraph 26 above). Having answered this question in the negative, it declined to reopen the case. As such, the question of whether the recent domestic proceedings constitute “relevant new information” is inextricably linked to the question of whether the development of the Court’s case-law in *Vinter and Others* [GC], *Trabelsi* and *Murray* constitutes “relevant new information”.

47. Likewise, since the applicant claims in essence that the Florida sentencing regime and clemency process do not comply with the requirements set out in *Vinter and Others* [GC] and the Court’s subsequent case-law, the new affidavits relied on by him constitute nothing more than “new legal argument” based on those judgments (see *Kafkaris* (dec.), cited above, § 68).

48. Consequently, the real question for the Court to decide in the present case is whether the development of its case-law following its judgment in *Harkins and Edwards* by itself constitutes “relevant new information” for the purposes of the first limb of Article 35 § 2 (b) of the Convention.

49. In this regard, the Court has emphasised that, as an international treaty, the Convention must be interpreted in light of the rules of interpretation provided for in Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties (for a recent example, see *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 118, ECHR 2016). In accordance with the Vienna Convention, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in light of the object and purpose of the provision from which they are drawn (*ibid.*, § 119, and Article 31 § 1 of the Vienna Convention quoted in paragraph 30 above). Regard must also be had to the fact that the Convention is an instrument for the effective protection of individual human rights and must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory (*ibid.*, §§ 120-121).

50. To date, the Court has not provided precise guidance on the meaning of “relevant new information”. However, while the English text of Article 35 § 2 (b) uses the term “relevant new information”, the French text speaks of “*faits nouveaux*”, a difference which can only be reconciled if the ordinary meaning of “relevant new information” is understood to be relevant new *factual* information (compare *X. v. the United Kingdom* (dec.), no. 8206/78, 10 July 1981). Such an interpretation would be consistent with the Court’s approach in deciding whether an application should be rejected under the first limb of Article 35 § 2 (b). While in *X. v. the Federal Republic of Germany* (dec.), no. 4256/69, 14 December 1970 the Commission accepted that in a case concerning a “continuing situation” a change in the legal classification of a complaint brought about by the coming into force of Protocol No. 4 in the respondent State would constitute

“relevant new information”, in subsequent case-law the Convention organs have tended to focus on the existence of *new facts* (see, for example, *Vojnovic* (dec.), §§ 28-30; *Anthony Aquilina*, §§ 34-37; and *X. v. Slovenia* (dec.), §§ 40-42, all cited above) and rejected attempts to support past complaints with new legal argument (see, for example, *I.J.L. v. the United Kingdom* (dec.) and *Kafkaris* (dec.), § 68, both cited above).

51. The Court must therefore turn to the object and purpose of the admissibility criterion laid down in the first limb of Article 35 § 2 (b). As already noted at paragraph 41 above, the principal purpose of this admissibility criterion is to serve the interests of finality and legal certainty by preventing applicants from seeking, through the lodging of a fresh application, to appeal against previous judgments or decisions (*Kafkaris* (dec.), cited above, § 67).

52. Moreover, in addition to serving the interests of finality and legal certainty, 35 § 2 (b) also marks out the limits of the Court’s jurisdiction. In dealing with applications which have already been submitted to another procedure of international investigation or settlement, the Court has repeatedly stated that Article 35 § 2 (b) excludes its jurisdiction in relation to any application falling within its scope (see, for example, *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, § 520, 20 September 2011; *POA and Others v. the United Kingdom* (dec.), no. 59253/11, § 27, 21 May 2013; and *Hilal Mammadov v. Azerbaijan*, no. 81553/12, §§ 103 and 105, 4 February 2016). Although the Court has not made specific reference to jurisdiction or competence in its case-law concerning applications which are substantially the same as matters it has already decided, it sees no logical reason for treating the two situations provided for in Article 35 § 2 (b) differently. If its jurisdiction is excluded in relation to an application which falls within the second limb of Article 35 § 2 (b), it must similarly be excluded in relation to an application which falls within the first limb of that Article.

53. The Court has held that certain rules on admissibility must be applied with a degree of flexibility and without excessive formalism, having regard to the object and purpose of those rules and of the Convention generally, which as a treaty for the collective enforcement of human rights and fundamental freedoms must be interpreted and applied so as to make its safeguards practical and effective (see *İlhan v. Turkey* [GC], no. 22277/93, § 51, ECHR 2000-VII, as regards compatibility *ratione personae*; and *Akdivar and Others v. Turkey*, 16 September 1996, § 69, *Reports of Judgments and Decisions* 1996-IV, in respect of the exhaustion of domestic remedies).

54. However, the Court has adopted a more rigorous approach in applying those admissibility criteria whose object and purpose is to serve the interests of legal certainty and mark out the limits of its competence (see, for example, *Sabri Güneş v. Turkey* [GC], no. 27396/06, §§ 39-42,

29 June 2012 and *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000-I, both of which concerned the application of the six-month time-limit). Limitations on the Court's competence provide legal stability by indicating to individuals and the State authorities when its supervision is or is not possible (see, for example, *Sabri Güneş*, cited above, § 42, and *Walker*, cited above), while legal certainty constitutes one of the fundamental elements of the rule of law which requires, *inter alia*, that, where a court has finally determined an issue, its ruling should not be called into question (*Brumărescu*, cited above, § 61). If this were not the case, the parties would not enjoy the certainty or stability of knowing that a matter had been subject to a final disposal by the Court. It is precisely for this reason that Rule 80 of the Rules of Court restricts the circumstances in which a party may seek revision of a final judgment to the discovery of a fact which might by its nature have a decisive influence and which was unknown to the Court and could not reasonably have been known to that party at the date of judgment.

55. As the object and purpose of Article 35 § 2 (b) is to serve the interests of legal certainty and mark out the limits of its competence (see paragraphs 51 and 52 above), it is not open to the Court to expand the notion of "relevant new information" beyond the ordinary meaning as expressed in both the English and French texts of the Convention and thus far applied in its case-law (see paragraph 50 above).

56. Having given that term its ordinary meaning, the Court cannot but conclude that the development in its jurisprudence does not constitute "relevant new information" for the purposes of Article 35 § 2 (b) of the Convention. The Court's case-law is constantly evolving and if these jurisprudential developments were to permit unsuccessful applicants to reintroduce their complaints, final judgments would continually be called into question by the lodging of fresh applications. This would have the consequence of undermining the strict grounds set out in Rule 80 for permitting revision of the Court's judgments (see paragraph 54 above) as well as the credibility and authority of those judgments. Moreover, the principle of legal certainty would not apply equally to both parties, as only an applicant, on the basis of subsequent jurisprudential developments, would effectively be permitted to "reopen" previously examined cases, provided that he or she were in a position to lodge a fresh application within the six-month time-limit.

57. Accordingly, both the applicant's Article 3 complaints – that his extradition to the United States to face a mandatory sentence of life imprisonment without parole would be incompatible with the Court's requirements, and that such a sentence would be "grossly disproportionate" – are substantially the same as the complaints already examined by the Court on 17 January 2012 in *Harkins and Edwards*. The Court's subsequent case-law does not constitute "relevant new information" for the purposes of

Article 35 § 2 (b) of the Convention. Therefore, the complaint under Article 3 of the Convention must be rejected as inadmissible pursuant to Article 35 § 4.

B. Article 6 of the Convention

58. Article 6 of the Convention provides as relevant:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

1. The parties' submissions as to the admissibility of the Article 6 complaint

59. As the applicant could have raised – but did not raise – an Article 6 complaint in his 2007 application to the Court, the Government argued that it would be contrary to the principles of legal certainty and finality in litigation for the Court now to entertain such a complaint. In any case, they submitted that the applicant's Article 6 complaint should be rejected as manifestly ill-founded. According to *Vinter and Others* [GC], a mandatory term of life imprisonment without parole was not incompatible with the Convention. Once it was accepted that a mandatory life sentence was permissible under Article 3 of the Convention, it followed that no issue could arise under Article 6.

60. The applicant, on the other hand, argued that the imposition of a sentence of life imprisonment without parole without any opportunity for the court to consider the facts of the individual offence and of the offender would be contrary to all concepts of due process and would constitute a “flagrant denial of justice” in breach of Article 6 of the Convention.

2. The Court's assessment on admissibility

61. Insofar as the Government's invocation of the principles of legal certainty and finality can be interpreted as a submission that the applicant's Article 6 complaint should also be rejected under Article 35 § 2 (b) of the Convention, the Court does not consider it necessary to reach any conclusion on the issue since, for the reasons set out at paragraphs 62-68 below, it considers this complaint to be manifestly ill-founded.

62. In this regard, the Court recalls that the right to a fair trial in criminal proceedings, as embodied in Article 6 of the Convention, holds a prominent place in a democratic society. Consequently, it has not excluded that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country (see *Soering v. the United Kingdom*, 7 July 1989, § 113, Series A no. 161). However, in the Court's case-law the term “flagrant denial of justice” has been synonymous

with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein (see *Sejdovic v. Italy* [GC], no. 56581/00, § 84, ECHR 2006-II).

63. Although it has not yet been required to define the term more precisely, the Court has nonetheless indicated that certain forms of unfairness could amount to a “flagrant denial of justice”. These have included: conviction *in absentia* with no subsequent possibility of a fresh determination of the merits of the charge (see *Einhorn v. France* (dec.), no. 71555/01, § 33, ECHR 2001-XI; *Stoichkov v. Bulgaria*, no. 9808/02, § 56, 24 March 2005; and *Sejdovic*, cited above § 84); a trial which is summary in nature and conducted with a total disregard for the rights of the defence (see *Bader and Kanbor v. Sweden*, no. 13284/04, § 47, ECHR 2005-XI); detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed (see *Al-Moayad v. Germany* (dec.), 35865/03, § 101, 20 February 2007); a deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country (*ibid.*); and the use in criminal proceedings of statements obtained as a result of torture of the accused or a third person in breach of Article 3 (see *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, § 267, ECHR 2012 (extracts) and *El Haski v. Belgium*, 649/08, § 85, 25 September 2012).

64. Consequently, “flagrant denial of justice” is a stringent test of unfairness which goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State. What is required is a breach of the principles of a fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article (see *Othman (Abu Qatada)*, cited above, § 260). The Court has to date never found it established that an extradition would be in violation of Article 6 (in contrast to the deportation case of *Othman (Abu Qatada)*, cited above, § 285, and the rendition cases of *Al Nashiri v. Poland*, no. 28761/11, § 568, 24 July 2014 and *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, § 560, 24 July 2014).

65. In assessing whether this stringent test of unfairness has been met, the Court considers that the same standard and burden of proof should apply as in Article 3 expulsion cases. Therefore, it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the Government to dispel any doubts about it (see *Othman (Abu Qatada)*, cited above, § 261).

66. In the present case the applicant relies solely on the mandatory nature of the sentence of life imprisonment without parole. However, as noted by the High Court, that sentence will follow from a trial process

which the applicant does not suggest would be in itself unfair (see paragraph 27 above). In particular, having regard to the case-law discussed at paragraph 63 above, the Court observes that there is no evidence to suggest that the trial court would be anything other than “independent and impartial”; that the applicant would be denied legal representation; that there would be any disregard for the rights of the defence; that there would be any reliance on statements obtained as a result of torture; or that on other grounds the applicant would risk suffering a fundamental breach of fair trial principles.

67. In light of the above considerations, the Court concludes that the facts of the present case do not disclose any risk that the applicant would suffer “a flagrant denial of justice” within the meaning of Article 6 of the Convention in the United States.

68. The applicant’s Article 6 complaint must therefore be declared inadmissible as manifestly ill-founded pursuant to Article 35 § 3 (a) of the Convention.

C. The interim measure

69. In view of the above conclusions, it is appropriate to lift the interim measure indicated under Rule 39 of the Rules of Court.

For these reasons, the Court,

1. by a majority, *declares* inadmissible the complaint under Article 3 of the Convention;
2. unanimously, *declares* inadmissible the complaint under Article 6 of the Convention.

Done in English and in French, and notified in writing on 10 July 2017.

Lawrence Early
Jurisconsult

Guido Raimondi
President