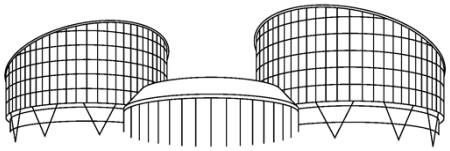

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF SANCHEZ-SANCHEZ v. THE UNITED KINGDOM

(Application no. 22854/20)

JUDGMENT

Art 3 • No evidence showing a real risk of a sentence of life imprisonment without parole in the event of the applicant's extradition to, and conviction in, the USA • Contracting States not to be held responsible under the Convention for deficiencies in the system of a third state when measured against the full *Vinter and Others* standard comprising both a substantive obligation and procedural safeguards • Court's judgment in *Trabelsi v. Belgium* overruled • Adapted two-stage approach developed for extradition cases • 1) Assessment whether the applicant has adduced evidence capable of proving that there were substantial grounds for believing that, in the event of conviction, there was a real risk of a sentence of life imprisonment without parole • 2) Assessment whether, as from the moment of sentencing, there is a review mechanism in place allowing the domestic authorities to consider the prisoner's progress towards rehabilitation or any other ground for release based on his or her behaviour or other relevant personal circumstances • Availability of procedural safeguards for serving "whole life prisoners" in the requesting State not a prerequisite for compliance by the sending Contracting State with Art 3 • Applicant not facing a mandatory sentence of life imprisonment

STRASBOURG

3 November 2022

This judgment is final but it may be subject to editorial revision.

In the case of Sanchez-Sanchez v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Robert Spano, *President*
Jon Fridrik Kjølbro,
Síofra O'Leary,
Georges Ravarani,
Marko Bošnjak,
Krzysztof Wojtyczek,
Yonko Grozev,
Alena Poláčková,
Tim Eicke,
Arnfinn Bårdsen,
Erik Wennerström,
Raffaele Sabato,
Saadet Yüksel,
Anja Seibert-Fohr,
Peeter Roosma,
Ana Maria Guerra Martins,
Ioannis Ktistakis*, judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 24 February 2022 and 21 September 2022,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 22854/20) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Mexican national, Mr Ismael Sanchez-Sanchez ("the applicant"), on 11 June 2020.

2. The applicant was represented by Mr R. Sahota of Berkeley Square Solicitors, a lawyer practising in London. The Government of the United Kingdom ("the Government") were represented by their Agent, Mr James Gaughan of the Foreign, Commonwealth and Development Office.

3. The applicant alleged that his extradition to the United States of America ("US") would violate Article 3 of the Convention because, if convicted of the charges against him, he would be at risk of receiving a sentence of life imprisonment without the possibility of parole.

4. On 12 June 2020 the Government were given notice of the application.

5. A hearing took place in public in the Human Rights Building, Strasbourg, on 23 February 2022.

There appeared before the Court:

(a) *for the Government*
Mr F. JANECZKO, *Agent*,
Mr D. PERRY QC,
Ms V. AILES, *Counsel,*

(b) *for the applicant*
Mr D. JOSSE QC
Mr B. KEITH, *Counsel*,
Mr R. SAHOTA, *Adviser.*

The Court heard addresses by Mr Perry QC, Mr Josse QC and Mr Keith.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant, who was born in 1968, is currently detained in HMP Wandsworth.

7. He was arrested in the United Kingdom on 19 April 2018 pursuant to a request from the US. According to information provided by the US Department of Justice, he was believed to have been the joint head of a Mexico-based drug trafficking organisation who supervised and managed the work of US-based conspirators to distribute drugs in Atlanta, Georgia.

8. The extradition request related to the following four offences:

1. Conspiracy to possess with intent to distribute marijuana, heroin and fentanyl (maximum sentence of life imprisonment, with a mandatory minimum sentence of twenty years imprisonment);
2. Aiding and abetting the possession with intent to distribute marijuana (maximum sentence of life imprisonment, with a mandatory minimum sentence of ten years imprisonment);
3. Aiding and abetting the possession with intent to distribute heroin and fentanyl (maximum sentence of life imprisonment, with a mandatory minimum sentence of twenty years imprisonment);
4. Conspiracy to import marijuana, heroin and fentanyl in to the US (maximum sentence of life imprisonment, with a mandatory minimum sentence of ten years imprisonment).

9. These charges arose from the shipment of 2,613 kilograms of marijuana to a warehouse in Atlanta, Georgia, which was seized in January 2017, and the seizure of fourteen kilograms of fentanyl-laced heroin and about 430 grams of fentanyl from an apartment in Sandy Springs, Georgia which was used by the conspirators to store drugs and money. The first charge on the indictment indicated that a co-conspirator had died as a result of using the

fentanyl. According to the US Department of Justice, as far as the US is aware the applicant has no prior convictions.

10. The extradition hearing was conducted before the District Judge on 24 January 2019 (*Government of the United States of America v. Ismael Sanchez-Sanchez*). The applicant argued that his extradition would breach his rights under Article 3 of the Convention due to the conditions of pre-trial and any post-conviction detention, and because there was a real risk that he would be sentenced to life imprisonment without parole.

11. The District Judge did not consider that the applicant had established a real risk of a breach of Article 3 as a result of the conditions of pre-trial or post-conviction detention.

12. In respect of his complaint concerning the risk of a life sentence without parole, the applicant relied on *Trabelsi v. Belgium*, no. 140/10 ECHR 2014 (see paragraph 90 below). The District Judge, however, considered herself bound by the domestic decision in *R (Harkins) v. Secretary of State for the Home Department* [2014] EWHC 3609 (Admin) (see paragraphs 35-47 below), which had fully analysed all the authorities, including *Trabelsi*. According to *R(Harkins)*, the mere imposition of a life sentence on an adult offender was not contrary to Article 3 of the Convention; provided that the sentence was not grossly disproportionate, the issue was whether it was "irreducible". An irreducible life sentence might raise an issue under Article 3 of the Convention, but that Article would be satisfied where national law afforded the possibility of review, with a view to commutation, remission, terminal or conditional release of a prisoner. It was for the State to decide how a review mechanism operated, so long as the terms were sufficiently clear to the prisoner at the outset. 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 (such as punishment, deterrence, public protection or rehabilitation) or the sentence was irreducible *de facto* and *de jure*. In *R(Harkins)* the court had interpreted *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09 and 2 others, ECHR 2013 (extracts) as meaning that if at the outset a mandatory life sentence was grossly disproportionate or irreducible then the prisoner was not obliged to serve an indeterminate number of years before complaining that the sentence was not Article 3 compliant.

13. As for the likelihood that the applicant would receive a life sentence without parole, the parties agreed that the starting point for determining any sentence would be the US Sentencing Guidelines. There were various factors for a court to consider in determining whether to sentence within or below the sentencing range; the guidelines were therefore advisory only. The District Judge, having regard to the evidence before the court, noted that in 2017 48% of the 66,873 sentences handed out by the US courts were below the recommended range in the Sentencing Guidelines, and life sentences were imposed in only 0.3% of cases. Life sentences were rare in drug trafficking

cases, having been imposed in fewer than one third of drug trafficking cases in 2013 and as of January 2015 only 1.1% of federal sentenced offenders in the Federal Bureau of Prisons were serving *de facto* sentences of life imprisonment. The District Judge referred to the evidence of the Assistant United States Attorney, who stated that the applicant was unlikely to receive a life sentence on any count, and it was less likely that he would receive consecutive sentences. He was therefore likely to receive a sentence that provided for his release before his death. There would be a number of opportunities to seek leniency or a reduced sentence, for example by pleading guilty, and even if he were sentenced to life without parole US law provided for opportunities to seek a reduction in sentence. These included a statutory right of appeal, an application for executive clemency, and a request for compassionate release.

14. The applicant's expert, an experienced US lawyer, agreed that the applicant was likely to receive concurrent rather than consecutive sentences. However, he pointed out that according to a February 2015 report by the US Sentencing Commission, entitled "Life Sentences in the Federal System", there was usually a requirement that someone had died as a result of the crime before a life sentence was imposed. As there was an allegation that one of the applicant's co-conspirators died as a result of a fentanyl overdose, it was more likely that the prosecution would request a life sentence.

15. On the facts of the case at hand, the District Judge found that if the applicant were convicted, his sentencing level would be Level 43 in the US Sentencing Guidelines, which has a sentence range of life imprisonment. It was not possible to determine what sentence he would receive if convicted, although he was likely to receive concurrent rather than consecutive sentences, if convicted of more than one offence. The sentencing process gave discretion to the sentencing judge and the sentencing guidelines were not the only relevant factor. The applicant would also have the right to make representations to the judge. Nonetheless, given the alleged offences, including the fact that one of the applicant's co-conspirators had died from a fentanyl overdose, there was a real possibility that the applicant would receive a sentence of life imprisonment. This sentence would not be grossly disproportionate given the alleged offending and the US sentencing process. The District Judge did not take into account the possible reduction of sentence due to a guilty plea or provision of assistance or information to the US authorities.

16. The District Judge held that any sentence of life imprisonment would not be irreducible. The applicant could apply for a presidential pardon or for compassionate release. The system had been assessed in *Shaw v. USA* [2014] EWHC 4654 (Admin) and was sufficiently clear. Therefore, the applicant had failed to show that there was a real risk of a breach of his Convention rights due to his likely sentence if he were convicted.

17. On 25 February 2019 the District Judge sent the case to the Secretary of State for a decision to be taken on whether to order extradition.

18. On 23 April 2019 the Secretary of State ordered the applicant's extradition.

19. The applicant's appeal was heard by the High Court on 20 February 2020 (*Sanchez v. Government of the United States of America* [2020] EWHC 508). With regard to his reliance on *Trabelsi*, the High Court considered itself bound by the decision of the House of Lords in *R (Wellington) v. Secretary of State for the Home Department* [2009] 1 AC 335 (see paragraphs 26-34 below) to hold that to extradite a claimant to the US to face, if convicted, a life sentence without parole, would not breach Article 3 of the Convention. In *Wellington* (see paragraphs 26-34 below), the majority of the House of Lords had concluded that, in an extradition context, Article 3 applied in a modified form which took account of the desirability of arrangements for extradition. The sentence of life imprisonment without parole was not so grossly disproportionate so as to infringe Article 3 in the extradition context.

20. In any event, the High Court held that it would follow *R (Harkins)* (see paragraphs 35-47 below) and *Hafeez v. United States of America* [2020] EWHC 155 (Admin) (see paragraphs 48-56 below). It did not consider itself bound to follow *Trabelsi* which, in light of the reasoning in *R (Harkins)* and *Hafeez*, was an unexplained departure from the Court's approach in *Harkins and Edwards v. the United Kingdom*, nos. 9146/07 and 32650/07, 17 January 2012 (see paragraph 35 below). Like the High Court in *R (Harkins)* and *Hafeez*, it considered that following *Trabelsi* there had been no "clear and consistent" jurisprudence from the Court about the application of Article 3 to sentences of life imprisonment without parole in the extradition context.

21. The High Court was also satisfied that a life sentence would not be irreducible. In *Hafeez* (see paragraphs 48-56 below), the court had described two routes by which a prisoner could seek a reduction in sentence under the US system: compassionate release, pursuant to Title 18 of the US Code, and executive clemency.

22. The High Court also rejected the applicant's second ground of appeal, which concerned the conditions of pre-trial and post-conviction detention.

23. The applicant's appeal was therefore dismissed and the Court of Appeal declined to certify a point of law of general public importance.

II. RELEVANT LEGAL FRAMEWORK AND PRACTICE

A. The United Kingdom

1. Relevant legislation

24. Under section 87(1) of the Extradition Act 2003 ("the 2003 Act"), the appropriate judge, on considering a request for extradition, must decide

whether the requested person's extradition would be compatible with his or her Convention rights within the meaning of the Human Rights Act 1998 ("the 1998 Act"). Under section 87(2) of the 2003 Act, if the judge decides this question in the negative he or she must order the person's discharge. If the judge decides that question in the affirmative then, pursuant to section 87(3) of the 2003 Act, he or she must send the case to the Secretary of State for a decision on whether the person is to be extradited. According to section 103 of the 2003 Act the right of appeal against this decision is to the High Court.

25. Pursuant to Section 6(1) of the 1998 Act, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. A public authority, under section 6 (3)(a) of the 1998 Act, includes any court or tribunal. Furthermore, pursuant to section 7(1)(b) of the 1998 Act, a person who claims that a public authority has acted (or proposes to act) in a way which is incompatible with the Convention may rely on the Convention provisions in any legal proceedings.

2. Relevant case-law

(a) *R (Wellington) v. Secretary of State for the Home Department* [2008] UKHL 72

26. The US requested the extradition of Ralston Wellington from the United Kingdom to stand trial in Missouri on two counts of murder in the first degree. In his appeal against extradition, Mr Wellington argued that his surrender would violate Article 3 of the Convention, on the basis that there was a real risk that he would be subjected to inhuman and degrading treatment in the form of a sentence of life imprisonment without parole.

27. In giving judgment in the High Court ([2007] EWHC 1109 (Admin)), Lord Justice Laws found that there were "powerful arguments of penal philosophy" which suggested that a risk of a whole-life sentence without parole intrinsically violated Article 3 of the Convention since "the supposed inalienable value of the prisoner's life is reduced, merely, to his survival: to nothing more than his drawing breath and being kept, no doubt, confined in decent circumstances." However, and "not without misgivings", he considered that the relevant authorities, including those of this Court, suggested an irreducible life sentence would not always raise an Article 3 issue.

28. Mr Wellington's appeal from that judgment was heard by the House of Lords and dismissed on 10 December 2008. Relying on *Soering v. the United Kingdom* (7 July 1989, § 89, Series A no. 161), a majority of their Lordships (Lord Hoffmann, Baroness Hale and Lord Carswell) found that in the extradition context, a distinction had to be drawn between torture and lesser forms of ill-treatment. When there was a real risk of torture, the prohibition on extradition was absolute and left no room for a balancing exercise. However, insofar as Article 3 applied to inhuman and degrading

treatment and not to torture, it was applicable only in a relativist form to extradition cases.

29. For Lord Hoffmann, paragraph 89 of *Soering* made clear that:

> "...the desirability of extradition is a factor to be taken into account in deciding whether the punishment likely to be imposed in the receiving state attains the 'minimum level of severity' which would make it inhuman and degrading. Punishment which counts as inhuman and degrading in the domestic context will not necessarily be so regarded when the extradition factor has been taken into account."

30. He went on to state:

> "A relativist approach to the scope of article 3 seems to me essential if extradition is to continue to function. For example, the Court of Session has decided in *Napier v Scottish Ministers* (2005) SC 229 that in Scotland the practice of 'slopping out' (requiring a prisoner to use a chamber pot in his cell and empty it in the morning) may cause an infringement of article 3. Whether, even in a domestic context, this attains the necessary level of severity is a point on which I would wish to reserve my opinion. If, however, it were applied in the context of extradition, it would prevent anyone being extradited to many countries, poorer than Scotland, where people who are not in prison often have to make do without flush lavatories."

31. A minority of their Lordships (Lord Scott and Lord Brown) disagreed with these conclusions. They considered that the extradition context was irrelevant to the determination of whether a whole life sentence amounted to inhuman and degrading treatment. If no one could be expelled if he would then face the risk of torture, so too no one could be expelled if he would then face the risk of treatment or punishment which was properly to be characterised as inhuman or degrading. If a mandatory life sentence violated Article 3 in a domestic case, the risk of such a sentence would preclude extradition to another country.

32. However, despite these different views, none of the Law Lords found that the sentence likely to be imposed on Mr Wellington would be irreducible; having regard to the commutation powers of the Governor of Missouri, it would be just as reducible as the sentence at issue in *Kafkaris v. Cyprus* ([GC], no. 21906/04, ECHR 2008). All five Law Lords also noted that, in *Kafkaris*, the Court had only said that the imposition of an irreducible life sentence *might* raise an issue under Article 3. They found that the imposition of a whole life sentence would not constitute inhuman and degrading treatment in violation of Article 3 *per se*, unless it were grossly or clearly disproportionate. Lord Brown in particular noted:

> "Having puzzled long over this question, I have finally concluded that the majority of the Grand Chamber [in *Kafkaris*] would not regard even an irreducible life sentence—by which, as explained, I understand the majority to mean a mandatory life sentence to be served in full without there ever being proper consideration of the individual circumstances of the defendant's case—as violating article 3 unless and until the time comes when further imprisonment would no longer be justified on any ground—whether for reasons of punishment, deterrence or public protection. It is for that reason that the majority say only that article 3 may be engaged."

33. Lord Brown added that this test had not been met in Wellington's case, particularly when the facts of the murders for which he was accused, if committed in the United Kingdom, could have justified a whole life order.

34. Finally, Lord Hoffmann, Lord Scott, Baroness Hale and Lord Brown all expressed doubts about Lord Justice Laws' views on penal philosophy. In particular, Lord Scott rejected the view that an irreducible life sentence was inhuman and degrading because it denied a prisoner the possibility of atonement; once it was accepted that a whole life sentence could be a just punishment, atonement was achieved by the prisoner serving his sentence.

(b) *R(Harkins) v SSHD* [2014] EWHC 3609 (Admin)

35. Mr Harkins was facing extradition to Florida having been accused of killing a man during an attempted armed robbery. He faced a mandatory sentence of life imprisonment without the possibility of parole. In January 2012 the Chamber, in *Harkins and Edwards v. the United Kingdom* (nos. 9146/07 and 32650/07, 17 January 2012), found that the applicant's extradition would not breach his rights under Article 3; such a sentence would not be "grossly disproportionate" and Mr Harkins 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 this regard, he 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.

36. Mr Harkins subsequently made further representations to the Secretary of State, which were rejected on 29 January 2013. On 20 June 2013 he issued an application to judicially review the Secretary of State's decision. After the Grand Chamber's judgment in *Vinter and Others* (cited above) on 9 July 2013, he substituted his judicial review grounds with a submission that the Grand Chamber's judgment had radically changed the law on Article 3 so that his extradition, in circumstances where he faced a risk of a mandatory sentence of life imprisonment without the possibility of parole, would violate that Article. He sought to rely on expert evidence to the effect that there was virtually no prospect of release at all in cases where a life sentence without 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*.

37. 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* (cited above). After considering written submissions on the relevance of *Trabelsi*, the High Court held a further hearing on 29 October 2014.

38. On 7 November 2014 the High Court refused permission to re-open proceedings in the Article 3 claim. The court identified two principal issues, namely the basis on which proceedings could be re-opened and whether the Court's decisions in *Vinter and Others* and *Trabelsi,* cited above, had recast Convention law to such an extent that the applicant's extradition would result in a violation of Article 3.

39. In relation to the first issue, the High Court 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 has already been determined.

40. With respect to the second issue, the High Court decided that it was necessary to consider, *inter alia*, (i) whether *Vinter and Others* had changed the law on Article 3 in relation to mandatory sentences of life imprisonment without the possibility of parole in the domestic context; and (ii) the state of the law on Article 3 in the extradition context.

41. First, the High Court held that in *Vinter and Others* the Grand Chamber had not changed Convention law on Article 3 in the domestic context. In particular, it had not changed the position that life sentences could be imposed on adult offenders for very serious offences and, provided that the sentence was not, by itself, "grossly disproportionate", the relevant issue was whether it was "irreducible". In respect of "irreducible" sentences, the Grand Chamber had reiterated the position stated in *Kafkaris*, namely, that an "irreducible" life sentence only "may" raise an issue under Article 3; and, in determining whether a life sentence is "irreducible", Article 3 will be satisfied if national law afforded the possibility of review with a view to its commutation, remission, termination or the conditional release of the prisoner. The High Court accepted that in *Vinter and Others* the Grand Chamber had seemingly put the position more firmly when it stated that Article 3 "must be interpreted as requiring reducibility of the sentence" (*Vinter and Others*, cited above, § 119) and that where domestic law does not provide for review "a whole life sentence will not measure up to the standards of Article 3" (*Vinter and Others*, cited above, § 121). However, the Grand Chamber had decided that it was not for it to prescribe the form of such a review or whether it should be executive or judicial. Whilst the Grand Chamber had noted the "clear support" in international law for a dedicated reviewing mechanism guaranteeing a review after no more than twenty-five years, it did not make such a mechanism a requirement.

42. Furthermore, the High Court understood paragraph 122 of *Vinter and Others* to mean that if a sentence was grossly disproportionate or had no mechanism for review, a prisoner could challenge it under Article 3 from the outset of his imprisonment. *Harkins and Edwards* was not inconsistent with that conclusion because it had only set out the point in time at which the actual violation would occur, namely once continued imprisonment could no longer be justified on any legitimate penological grounds.

43. Finally, the High Court decided that the requirement for a "review" or "mechanism" and for the prisoner to know at the outset of his sentence what he must do to be considered for release and under what conditions, and when the review might be sought, was not revolutionary. It was inherent in the notion of reducibility and implicit in the Grand Chamber's decision in *Kafkaris*. Furthermore, it had done nothing more than invert the statement in *Harkins and Edwards* that an Article 3 issue would only arise when it could be shown that there was no longer a penological justification for imprisonment and the sentence was irreducible *de facto* and *de jure*, since logically the requirement must be that a prisoner should know that he has to satisfy the relevant authority doing the review that his continued imprisonment can no longer be justified on penological grounds. The precise details of how he was to do this and the terms of the detailed criteria were for the individual State to decide, so long as those terms were sufficiently clear from the outset.

44. Secondly, on the issue of extradition, the High Court observed that *Harkins and Edwards* was, at least prior to *Trabelsi*, the leading case. In *Harkins and Edwards* the Court had departed from *Soering* to the extent that it had decided that the reason for expulsion could not be weighed against the risk of ill-treatment when considering whether expulsion would violate Article 3. The Court had also clarified that in extradition cases no distinction could easily be drawn between torture and other forms of ill-treatment. The Court had therefore rejected the House of Lords' approach in *Wellington*. However, it had accepted a "relativist" approach to the extent that treatment that might violate Article 3 in a domestic context might not reach the minimum level of severity to do so in the extradition context. The tests of "gross disproportionality" and "reducibility" therefore remained as for the domestic context, subject to two important qualifications: Convention standards could not be imposed on non-Contracting States, and as there were legitimate differences of approach to sentencing in different States, there was no absolute standard on whether a sentence was contrary to Article 3 or not.

45. The High Court then considered *Trabelsi* (cited above). It noted that the Court had re-affirmed that an irreducible life sentence only "may" raise an issue under Article 3. Furthermore, it had reiterated the finding in *Kafkaris* (cited above) that a "possibility of review" was sufficient for compliance with Article 3. The Court had therefore set out no new principles in relation to Article 3 and extradition.

46. In applying the relevant principles, the Court in *Trabelsi* had decided that the US authorities' assurances on the possibility of sentence reduction were not sufficiently precise. The High Court considered that such a conclusion was contrary to all the Court's previous statements about extradition and Article 3 and was difficult to reconcile with the Grand Chamber's conclusion in *Vinter and Others* that it should not prescribe the form of review.

47. Consequently, the High Court decided that the Court's decision did not develop the principles set out in *Vinter and Others*, except insofar as it purported to lift and apply them to extradition. Although it appeared that the Court itself considered *Vinter and Others* to have further developed the principles established in *Kafkaris*, the High Court declined to agree.

(c) *Hafeez v United States* [2020] 1 WLR

48. Mr Hafeez was facing extradition to the US. He argued that his extradition would breach his rights under Article 3 of the Convention because there was a real risk that he would be sentenced to life imprisonment without the possibility of parole.

49. The judge considered the possibility that the applicant might be sentenced to life imprisonment without parole. Mr Hafeez had relied on *Trabelsi* (cited above); however, the judge rejected his Article 3 challenge on this ground as he found that if he was sentenced to life imprisonment he would be able to make an application for compassionate release if there were "extraordinary and compelling circumstances" warranting a reduction in his sentence. In doing so, he indicated that

> "Having considered the detailed submissions made, I am satisfied that when a life sentence is imposed, the provisions of Article 3 will be satisfied in a domestic context if:
>
> (i) It is *de jure* and *de facto* reducible (see *Kafkaris v. Cyprus*, no. 21906/04),
>
> (ii) The relevant 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' (per *Vinter* aforesaid) and
>
> (iii) There is a prospect of release and a possibility of review which exist from the imposition of the sentence (see *Murray* above)."

50. On 11 January 2019 the District Judge, being satisfied that all of the procedural requirements were met, and that none of the statutory bars to extradition applied, sent the case to the Secretary of State for a decision to be taken on whether to order extradition.

51. Mr Hafeez's appeal was heard by the High Court in December 2019 and judgment was handed down on 31 January 2020. With regard to his reliance on *Trabelsi*, the court declined to consider whether the evidence established that there was a real risk the applicant, if convicted, would receive a sentence of life imprisonment. It did note that this outcome was "by no means certain", and pointed out that the US Government had provided evidence from the US Sentencing Commission which indicated that life sentences were rare in the federal system.

52. The court accepted that if Mr Hafeez did receive a life sentence, there would be no provision for parole. He would therefore only have two routes to obtain a reduction or commutation of his sentence: an application for compassionate release; or a petition for Executive Clemency. For the former,

the applicant would have to show that "extraordinary and compelling reasons" existed which would warrant a reduction of his sentence. The Sentencing Commission had identified four scenarios which would fulfil the definition of "extraordinary and compelling": terminal illness; the prisoner was over 65 and experiencing a serious deterioration in his health due to the ageing process; and a change in family circumstances leading to the prisoner becoming the only available caregiver for a child or spouse. The final scenario was left undefined save that it was expressly stated that rehabilitation was not by itself an "extraordinary and compelling reason". Rehabilitation could, however, be a relevant factor even though it could not by itself serve to reduce the sentence.

53. Executive Clemency, on the other hand, was described as an "extraordinary remedy" and evidence indicated that judicial review of a clemency decision was "very rare" and "certainly not routine".

54. The court then addressed the Court's case-law on the issue of life sentences without parole. It noted that in *R(Harkins) v. Secretary of State for the Home Department (No. 2)* [2015] 1 WLR 2975 the Divisional Court had declined to follow *Trabelsi* (cited above) since it considered that in that case the Court had ignored the basic principle set out in *Kafkaris* and *Vinter and Others*; namely, that a State's choice of a specific criminal justice system, including sentence review and release arrangements, was in principle outside the scope of the Court's supervision, provided that the chosen system did not contravene the principles set out in the Convention. Secondly, in *R(Harkins)* the Divisional Court had indicated that even if detailed consideration of the review scheme in the US had been appropriate, on this issue the judgment in *Trabelsi* had been "wholly unreasoned". The High Court agreed with this analysis. It therefore found that *Trabelsi* was not of assistance since:

> "insofar as it purports to reach a concluded view on the compatibility of life imprisonment without parole in the United States, it does so without any proper reasoning. Insofar as it departs from the established ECHR jurisprudence on the application of Article 3 in relation to removal to a non-contracting State, we prefer the rationale as set out in *Harkins [and Edwards] v. UK*."

55. It further rejected Mr Hafeez's submission that any review scheme had to permit release purely by reason of the prisoner's rehabilitative efforts.

56. In light of this assessment, the court held that there would be no risk of a violation of Article 3 of the Convention on account of the possibility that Mr Hafeez would be sentenced to life imprisonment since any prisoner so sentenced would have two routes to seek a reduction of that sentence: compassionate release and Executive Clemency. His appeal was therefore dismissed.

B. The United States of America

1. Sentencing principles

57. The core sentencing principles under US law are found in Title 18, United States Code ("U.S.C."), § 3553(a):

> "(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for—
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
>
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
>
> (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
>
> (5) any pertinent policy statement—
>
> (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense."

2. Executive clemency

58. The basis for commutation of sentence pursuant to Executive Clemency is found in Article 2(II) of the US Constitution, which empowers the President to "grant reprieves and pardons for offences against the United States, except in cases of Impeachment". Guidance published by the US Department of Justice reads as follows:

> "Commutation of sentence is an extraordinary remedy. Appropriate grounds for considering commutation have traditionally included disparity or undue severity of sentence, critical illness or old age and meritorious service rendered to the Government by the petitioner e.g. cooperation with investigative or prosecutive efforts that has not been adequately rewarded by other official action. A combination of these and/or other equitable factors (such as demonstrated rehabilitation whilst in custody or exigent circumstances unforeseen by the court at the time of sentencing) may also provide a basis for recommending commutation in the context of a particular case."

3. Compassionate release

59. Pursuant to Title 18, U.S.C., § 3582(c)(1)(A), courts are authorised to reduce a defendant's term of imprisonment based on "extraordinary and compelling reasons." When considering any motion under Title 18, U.S.C., § 3582(c)(1)(A) (commonly referred to as "compassionate release" motions), the court must find, after considering the factors set forth in § 3553(a), that "extraordinary and compelling reasons" warrant such a reduction and that any reduction "is consistent with applicable policy statements issued by the Sentencing Commission."

60. Before December 2018, courts were authorised to consider motions under Title 18, U.S.C., § 3582(c)(1)(A) only if they were filed by the Director of the Bureau of Prisons. In December 2018, Congress amended that portion of § 3582 to authorise courts to also consider motions filed by offenders, in certain circumstances. Section 603 of The First Step Act 2018 amended Title 18, U.S.C., § 3582(c)(1)(A) to authorise "defendants" to file a motion for compassionate release "after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier."

61. According to a policy statement issued by the US Sentencing Commission, extraordinary and compelling reasons exist under any of the circumstances set forth below:

(i) The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory).

(ii) The defendant is suffering from a serious physical or medical condition, suffering from a serious functional or cognitive impairment, or experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes his ability to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(iii) The defendant (a) is at least 65 years old; (b) is experiencing a serious deterioration in physical or mental health because of the aging process; and (c) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(iv) The death or incapacitation of the caregiver of the defendant's minor child or minor children.

(v) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(vi) There exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described above.

62. Pursuant to Title 28, U.S.C., § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement.

4. Statistical information concerning the imposition of life sentences in the Federal System

(a) Report by the US Sentencing Commission, entitled "Life Sentences in the Federal System" (February 2015)

63. This report by the US Sentencing Commission provided, insofar as relevant:

> "Life imprisonment sentences are rare in the federal criminal justice system. Virtually all offenders convicted of a federal crime are released from prison eventually and return to society or, in the case of illegal aliens, are deported to their country of origin. Yet in fiscal year 2013 federal judges imposed a sentence of life imprisonment without parole on 153 offenders. Another 168 offenders received a sentence of a specific term of years that was so long it had the practical effect of being a life sentence. Although together these offenders represent only 0.4 percent of all offenders sentenced that year, this type of sentence sets them apart from the rest of the offender population.
>
> ...
>
> The United States Sentencing Commission promulgates federal sentencing guidelines that provide advisory 'sentencing ranges' which judges are required to consider when imposing a sentence in federal felony cases. The guidelines take into account both offense behavior and offender characteristics to provide a recommended range of imprisonment, probation, or some combination of confinement and probation.
>
> ...
>
> The drug trafficking guidelines specifically provide for a sentence of life imprisonment for drug trafficking offenses, but only where death or serious bodily

injury resulted from the use of the drug and the defendant had been convicted previously of a drug trafficking offense. In some other drug trafficking cases, such as those involving very large quantities of drugs and where the offender has significant prior criminal history, the sentencing range can include life imprisonment, although only as the sanction at the top of the range.

...

Life imprisonment sentences were imposed in a variety of types of cases in fiscal year 2013, but were most common in drug trafficking, firearms, murder, and extortion and racketeering cases. In virtually all of these cases, one or more persons died as a result of the criminal enterprise.

Offenses for Which a Life Imprisonment Sentence Was Imposed

The most common offense type for which a life imprisonment sentence was imposed in fiscal year 2013 was drug trafficking (64 cases). These cases accounted for 41.8 percent of all life imprisonment sentences that year. Even so, a life sentence is rare in drug trafficking cases, having been imposed in less than one-third of one percent of all drug trafficking cases that year.

...

As discussed above, the sentencing guidelines call for a life imprisonment sentence in drug trafficking offenses when death or serious bodily injury resulted from the use of the drug and when the offender had one or more prior convictions for drug trafficking. But a life imprisonment sentence can also be imposed in other drug trafficking cases in which large quantities of drugs are involved, or where the court applies other sentence enhancement provisions relating to drug trafficking. Crack cocaine was the drug most often involved in those drug trafficking cases in which a life imprisonment sentence was imposed. That drug was the primary drug in 34.4 percent of all life imprisonment sentence drug trafficking cases, while methamphetamine accounted for 29.7 percent and powder cocaine accounted for 21.9 percent."

(b) Letter from the US Department of Justice dated 23 November 2020

64. In this letter, which was provided to the Government of the United Kingdom for the purpose of the present proceedings, the US Attorney provided the following information:

- The applicant would not face a life sentence if acquitted, or if he resolved the case against him prior to verdict through an agreed disposition to a term of years.
- If convicted his sentence would be determined by the US District Court and would be appealable to the Court of Appeals for the Eleventh Circuit.
- The District Court has already imposed sentences on four of the applicant's co-conspirators, none of whom received a life sentence. Rather, their sentences ranged from seven years' to twenty years' imprisonment. The two who received the highest sentences (V-P and H-H) were charged with the same drug importation and conspiracy charges as the applicant, and were also convicted of additional charges which the applicant does not face, including money

laundering. Before pleading guilty, both faced a recommended sentence of life imprisonment.

- Prior to conviction, the applicant would have several opportunities to seek leniency or a reduced sentence. In particular, he could seek to reach an agreement with the prosecution, for example by entering into a plea arrangement.
- If the applicant were to plead guilty or be convicted at trial, the judge would have a broad discretion to determine the appropriate sentence after a fact-finding process in which he would have the opportunity to offer evidence. A probation officer employed by the US courts would conduct an independent investigation and prepare a report containing information about the applicant's offences, criminal history and background information, as well as a calculation of the recommended sentencing range under the US Sentencing Guidelines, and the applicant and his attorneys could participate in this process and would have the right to object to information and conclusions in the report. After the report was completed he would be able to present evidence to the judge regarding any mitigating factors that might justify a sentence below the range recommended by the Sentencing Guidelines.
- Furthermore, the sentencing judge (who would be the same judge who sentenced the applicant's co-conspirators) would be required to consider the factors set out in Title 18, U.S.C., § 3553(a) (see paragraph 57 above), including the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.
- According to the US Sentencing Commission's Interactive Sourcebook, approximately 44% of 6,365 sentences in 2019 in the Eleventh Circuit of the Court of Appeals (the jurisdiction which includes the District in which the applicant has been charged) were below the range recommended in the US Sentencing Guidelines. In the Northern District of Georgia, where the applicant has been charged, in 2019 approximately 65% of 507 sentences were below the range recommended by the US Sentencing Guidelines.
- According to a 2015 report by the US Sentencing Commission, life sentences in the Federal system were rare, accounting for only 0.4% of all offenders sentenced in 2013. In the same report the US Sentencing Commission found that only 1.1% of federal sentenced offenders in the custody of the US Bureau of Prisons were serving a *de facto* life sentence (which included extremely long specific terms of imprisonment that were for all practical purposes a life sentence).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION: THE RISK OF A LIFE SENTENCE WITHOUT PAROLE

65. The applicant complained that his extradition to the United States of America ("US") would be in breach of Article 3 of the Convention due to the risk of receiving a whole life sentence without the possibility for parole.

66. Article 3 of the Convention reads as follows:

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

67. The Government contested that argument.

A. Admissibility

68. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

69. The applicant invited the Court to follow its approach in *Trabelsi v. Belgium* (no. 140/10, ECHR 2014 (extracts)). In his view, *Trabelsi* was a logical and clear continuation of the principles established by the Court in *Vinter and Others v. the United Kingdom* ([GC], nos. 66069/09 and 2 others, ECHR 2013 (extracts)) and not, as the High Court judge suggested, an "unexplained departure" from *Harkins and Edwards v. the United Kingdom* (nos. 9146/07 and 32650/07, 17 January 2012). In *Harkins and Edwards* the Court indicated that no Article 3 breach occurred at the point of sentencing. This approach was modified in *Vinter and Others,* which made it clear that the type of review had to be known at the point of sentencing. In all subsequent cases, including *Trabelsi*, the Court has followed *Vinter and Others*.

70. The applicant argued that this was not tantamount to the extraterritorial application of the Convention. In the extradition context, the obligation remained with the Contracting State and did not impose an obligation on the non-Contracting State. In this regard, the signing of an extradition treaty did not negate the need to prevent a breach of Article 3 of the Convention.

71. On the facts of the case at hand, the applicant submitted that he faced a real risk of a life sentence in the US. The District Judge had found as a matter of fact that he was "likely" to receive a life sentence, and the High Court Judge did not disagree with her on this point. According to the US Sentencing Guidelines he fell within level 43, which had a range of life imprisonment. The applicant's expert acknowledged that life sentences were rare in the federal system. However, according to the February 2015 report by the US Sentencing Commission, entitled "Life Sentences in the Federal System", the most recent analysis of federal sentencing available, the most common cases in which life sentences were imposed were drug trafficking cases (over 40% of federal life sentences). In addition, judges had generally been far more likely to follow the Sentencing Guidelines when imposing a life sentence than other punishments. A study found that 81% of the time when a life sentence was imposed, the Sentencing Guidelines had called for a life sentence. For persons sentenced for a federal crime, judges followed the Sentencing Guidelines 54% of the time.

72. The applicant acknowledged that two of his co-accused (V-P and H-H) had been convicted and had not received sentences of life imprisonment. However, in his view this was not an indicator that the applicant would not receive a life sentence. V-P and H-H pleaded guilty to a count which fell within sentencing level 43. Although the applicant acknowledged that their base offence levels were similar to his, the count to which they pleaded guilty did not contain an allegation that their illegal conduct led to anyone's death. V-P was sentenced on the basis that he helped run a warehouse in the US through which drugs were transported. The most serious charge against him was money-laundering. H-H was also charged with money laundering and there was nothing in the indictment to suggest that he was involved in the supply of drugs. In contrast, the applicant was charged with the supply of drugs and was believed to be one of the joint heads of a criminal organisation.

73. Finally, the applicant submitted that the US federal system did not comply with the criteria set out in *Vinter and Others*. This issue had been addressed by the Court in *Trabelsi* (cited above, §§79-83 and 136-139).

(b) The Government

74. The Government invited the Court to continue to follow those cases in which it had decided that extradition to the US would be consistent with Article 3 of the Convention notwithstanding the possibility that the courts might impose a discretionary sentence of life imprisonment, and to continue to apply the principle that treatment which might violate Article 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 Article 3 in an expulsion or extradition case. In other words, the Court should decide the case by reference to the principles set out in *Harkins and Edwards* rather than

Vinter and Others, which was decided in the domestic context and should not be applied in extradition cases. Given that the Court in such cases would be required to assess the conformity of US legislation with Article 3 of the Convention, any other outcome would result in the Court departing from its long-held approach that the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States. It would be undesirable for the Court to have to appraise the justice system of States which are not signatories to the Convention and are not parties to the proceedings before it.

75. The Government further argued that if extradition to the US were to violate Article 3 of the Convention in all cases where life imprisonment without parole was an available sentence, the Court would provide effective immunity to dangerous transnational criminals and undermine international efforts to combat drug trafficking and other particularly serious criminal activity, and thereby create a safe haven for those charged with the most serious offences. In addition, it would strike at the heart of extradition arrangements negotiated between friendly States which share a respect for democracy, justice and due process, by either preventing or delaying co-operation. It would also create a system of asymmetrical remedies; in the domestic context, a finding that a life sentence is incompatible with Article 3 does not lead to immediate release; in the extradition context, on the other hand, it would mean that no criminal proceedings could take place at all.

76. Contrary to the applicant's submissions, the Government pointed out that the District Judge did not find that he was "likely" to receive a life sentence. The District Judge recorded the information provided by the US Department of Justice, namely that the applicant was unlikely to receive a life sentence on any count; that it was even less likely that he would receive consecutive sentences; and that he was therefore likely to receive a sentence that provided for his release before his death. Although the applicable sentencing level under the US Sentencing Guidelines would be level 43, that did not mean that such a sentence would be imposed. The sentencing judge retained a discretion and that discretion was exercised in practice. As the District Judge observed, in 2017, 48% of the 66,783 sentences imposed by the US courts were below the recommended range in the US Sentencing Guidelines, and life sentences were imposed in only 0.3% of cases. Life sentences in drug trafficking cases were rare. Furthermore, in the Northern District of Georgia, where the applicant was charged, approximately 65% of sentences were below the range of imprisonment recommended by the US Sentencing Guidelines. Two of the applicant's co-accused (V-P and H-H) had also faced a recommended sentence of life imprisonment under the Sentencing Guidelines and were instead sentenced to seventeen and twenty years' imprisonment respectively. This was the case notwithstanding the fact that they also faced additional charges, including a money laundering conspiracy, which the applicant did not face. The applicant, if he either

pleaded guilty or was convicted after a trial, would be sentenced by the same judge who would be required to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" (see the sentencing principles set out in paragraph 57 above).

77. The Government further argued that, even if considered by reference to the higher standards applicable to the sentencing and release regimes in Contracting States, a sentence of life imprisonment within the US federal legal framework was not an "irreducible" life sentence within the meaning of the Convention jurisprudence. Indeed, since *Trabelsi* was decided the position in relation to release in the federal system had changed in prisoners' favour with the passage of the First Step Act, which strengthened the compassionate release mechanism by providing the power of judicial review.

2. The Court's assessment

(a) General principles concerning sentences of life without parole in the domestic context

78. Article 3 of the Convention, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. It makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation (see *Ireland v. the United Kingdom*, 18 January 1978, § 163, Series A no. 25; *Chahal v. the United Kingdom*, 15 November 1996, § 79, *Reports of Judgments and Decisions* 1996-V; *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 59, ECHR 2001-XI; and *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 335, ECHR 2005-III).

79. In *Kafkaris v. Cyprus* ([GC], no. 21906/04, ECHR 2008) a mandatory life sentence had been imposed on the applicant after he was convicted in Cyprus on three counts of pre-meditated murder. The Court acknowledged that the imposition of a sentence of life imprisonment on an adult offender was not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention (see *Kafkaris*, cited above, § 97, together with the cases cited therein). At the same time, it recognised that the imposition of an irreducible life sentence on an adult might raise an issue under Article 3 of the Convention (see *Kafkaris*, cited above, § 97, together with the cases cited therein). For the Court, the principal question to be determined was whether a life prisoner could be said to have any prospect of release. It was enough for the purposes of Article 3 that a life sentence was *de jure* and *de facto* reducible (see *Kafkaris*, cited above, § 98). It therefore ruled that the possibility of early release, even where such a decision was at the discretion of the Head of State, was sufficient to establish such a possibility (see *Kafkaris*, cited above, § 103). In *Iorgov v. Bulgaria* (*no. 2)*

(no. 36295/02, §§ 51-60, 2 September 2010) the Court subsequently confirmed that the hope of Presidential clemency in the form of either a pardon or a commutation of sentence was sufficient to establish a prospect of release.

80. In *Vinter and Others v. the United Kingdom* ([GC], nos. 66069/09 and 2 others, ECHR 2013 (extracts)) the Grand Chamber revisited the issue. The applicants in that case were also serving life prisoners, having already received "whole life orders" following their conviction in the United Kingdom for murder, and they challenged the compatibility of those whole life orders with Article 3 of the Convention. The Court stated that a sentence of imprisonment would violate Article 3 of the Convention if it was "grossly disproportionate" (see *Vinter and Others*, cited above, § 102), or if – as it had found in *Kafkaris* – it was an irreducible life sentence (see *Vinter and Others*, cited above, § 107).

81. In respect of the latter, the Court, having regard to the prevention and rehabilitation aims of the penalty, shifted the emphasis from "reducibility" *per se* (see *Kafkaris*, cited above, § 98) to the existence of a review mechanism focused on the prisoner`s rehabilitation (see *Vinter and Others*, cited above, § 109, et seq.). With regard to the question of how to determine whether, in a given case, a life sentence could be regarded as reducible, the Court established the following principles (see *Vinter and Others*, cited above, §§ 119-122):

> "119. For the foregoing reasons, the Court considers 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 allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.
>
> 120. However, the Court would emphasise that, having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing (...), it is not its task to prescribe the form (executive or judicial) which that review should take. For the same reason, it is not for the Court to determine when that review should take place. This being said, the Court would also observe that the comparative and international law materials before it show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter (...).
>
> 121. It follows from this conclusion that, where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention.
>
> 122. Although the requisite review is a prospective event necessarily subsequent to the passing of the sentence, a whole life prisoner should not be obliged to wait and serve an indeterminate number of years of his sentence before he can raise the complaint that the legal conditions attaching to his sentence fail to comply with the requirements of Article 3 in this regard. This would be contrary both to legal certainty and to the general principles on victim status within the meaning of that term in Article 34 of the

> Convention. Furthermore, in cases where the sentence, on imposition, is irreducible under domestic law, it would be capricious to expect the prisoner to work towards his own rehabilitation without knowing whether, at an unspecified, future date, a mechanism might be introduced which would allow him, on the basis of that rehabilitation, to be considered for release. A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration."

82. In the case of *Murray v. the Netherlands* ([GC], no. 10511/10, § 100, 26 April 2016) the Court further developed the safeguards required in the domestic context to ensure the effectiveness of the review mechanism. In particular, it noted that the prisoner's right to a review must entail an actual assessment of the relevant information and it must be surrounded by sufficient procedural guarantees. To the extent necessary for the prisoner to know what he or she must do to be considered for release and under what conditions, reasons might have to be provided, and this should be safeguarded by access to judicial review. Finally, in assessing whether the life sentence is reducible *de facto* statistical information on prior use of the review mechanism might be relevant.

(b) General principles concerning sentences of life without parole in the extradition context

83. In the case of an extradition, a Contracting State finds itself under an obligation to cooperate in international criminal matters. However, that obligation is subject to the same State's obligation to respect the absolute nature of the prohibition under Article 3 of the Convention (see *Khasanov and Rakhmanov v. Russia* [GC], nos. 28492/15 and 49975/15, § 94, 29 April 2022).

84. The Court has repeatedly stated that as torture and inhuman and degrading treatment and punishment are prohibited in absolute terms, the extradition of a person by a Contracting State can raise problems under Article 3 of the Convention and therefore engage the responsibility of the sending State where there are serious grounds to believe that that person would run a real risk of being subjected to such ill-treatment in the requesting country (see *Soering v. the United Kingdom*, 7 July 1989, § 88, Series A no. 161; see also *López Elorza v. Spain*, no. 30614/15, § 102, 12 December 2017).

85. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the destination country (see *F.G. v. Sweden* [GC], no. 43611/11, § 120, 23 March 2016 and *Saadi v. Italy* [GC], no. 37201/06, § 130, ECHR 2008). In doing so, it must inevitably assess the situation in the requesting country in terms of the

requirements of Article 3. This does not, however, involve making the Convention an instrument governing the actions of States not Parties to it or requiring Contracting States to impose standards on such States (see *Soering*, cited above, § 86 and *López Elorza*, cited above, § 104). In so far as any liability under the Convention is or may be incurred, it is incurred by the extraditing Contracting State by reason of its having taken action which has the direct consequence of exposing an individual to proscribed ill-treatment (see *Soering*, cited above, § 91; *Saadi*, cited above, § 126; and *López Elorza*, cited above, § 104).

86. The prospect that an individual may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill-treatment that the person may be subjected to on return, and cannot therefore be balanced against it, given the absolute nature of Article 3 (see *Saadi*, cited above, §§ 137-139).

87. Regarding the burden of proof, it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. Where such evidence has been adduced, it is for the Government to dispel any doubts raised by it (see, for example, *F.G. v. Sweden*, cited above, § 120 and *Saadi*, cited above, § 129).

88. If the applicant is still in the Contracting State, the material point in time for the assessment must be that of the Court's consideration of the case. A full and *ex nunc* evaluation is required where it is necessary to take into account information that has come to light after the final decision by the domestic authorities was taken (see *F.G. v. Sweden*, cited above, § 115).

89. In cases where the alleged risk in the requesting country was the possible imposition of a sentence of imprisonment of life without parole, the Court, prior to *Vinter and Others* (cited above), held that an Article 3 issue would arise only when it could be shown either that the applicant was at a real risk of receiving a grossly disproportionate sentence in the requesting State, or that, if a time came when his or her continued imprisonment could no longer be justified on any legitimate penological grounds, the life sentence would be irreducible *de facto* and *de jure* (see *Harkins and Edwards*, cited above, §§ 134 and 137-138). Thus, the risk of serving a life sentence that had lost any penological justification had to be shown by the applicant at the moment of the impugned extradition, it being understood that the point at which the applicant's continued incarceration would no longer serve any purpose may never arise (*ibid*, § 140).

90. In *Vinter and Others* (cited above) the Court, in relation to whole life orders in the domestic context, held that the penological justification for a life sentence had to be subject to review after the passage of a certain period of time (see paragraphs 80-81 above). Subsequently, in *Trabelsi* (cited above, § 137), the Court applied the *Vinter and Others* criteria to the extradition

context, and found that the applicant's extradition would violate Article 3 of the Convention because none of the procedures provided for in the requesting State amounted to a review mechanism requiring the national authorities to ascertain, on the basis of objective, pre-established criteria of which the prisoner had precise cognisance at the time of imposition of the life sentence, whether, while serving his sentence, he had changed and progressed to such an extent that continued detention could no longer be justified on legitimate penological grounds.

91. However, *Vinter and Others* was not an extradition case. This distinction is important.

92. Within the domestic context, the applicant's legal position, having already been convicted and sentenced, is known. Moreover, the domestic system of review of the sentence is likewise known, both to the domestic authorities and the Court. In the extradition context, on the other hand, in a case such as the present where the applicant has not yet been convicted, a complex risk assessment is called for, a tentative prognosis that will inevitably be characterised by a very different level of uncertainty when compared to the domestic context. This calls – as a matter of principle, but also out of practical concerns – for caution in applying the principles flowing from *Vinter and Others*, which were intended to apply within the domestic context, to their fullest extent in the extradition context.

93. In this connection, the Court would first observe that the principles set down in *Vinter and Others* embrace both the substantive obligation on Contracting States to ensure that a life sentence does not over time become a penalty incompatible with Article 3, and also related procedural safeguards (see, among others, *Murray*, cited above, §§ 99-104), which are not ends in themselves but serve in their observance by Contracting States to avoid a breach of the prohibition of inhuman and degrading punishment. Regarding the substantive obligation, the Court reiterates that exposing an individual to a real risk of inhuman and degrading treatment or punishment would be contrary to the spirit and purpose of Article 3. On the other hand, the procedural safeguards would appear to be better suited to a purely domestic context and consequently do not arise in relation to an individual whose extradition has been requested by a third State, as this would be an over-extensive interpretation of the responsibility of a Contracting State in such a context. It follows that Contracting States are not to be held responsible under the Convention for deficiencies in the system of a third state when measured against the full *Vinter and Others* standard. The Court also recognises that to require a Contracting State to scrutinise the relevant law and practice of a third State with a view to assessing its degree of compliance with these procedural safeguards may prove unduly difficult for domestic authorities deciding on extradition requests.

94. Moreover, the Court points out that in the domestic context, in the event of a finding of a violation of Article 3 of the Convention, the applicant

would remain in detention pending the application or introduction of a Convention-compliant review mechanism which could – but would not necessarily – lead to his release earlier than initially intended. Thus, the legitimate penological purposes of incarceration would not be undermined. In contrast, in the extradition context the effect of finding a violation of Article 3 would be that a person against whom serious charges have been brought would never stand trial, unless he or she could be prosecuted in the requested State, or the requesting State could provide the assurances necessary to facilitate extradition. Allowing such a person to escape with impunity is an outcome which would be difficult to reconcile with society's general interest in ensuring that justice is done in criminal cases (see *López Elorza*, cited above, § 111). It would also be difficult to reconcile with the interest of Contracting States in complying with their international treaty obligations (see *Khasanov and Rakhmanov*, cited above, § 94), which aim to prevent the creation of safe havens for those charged with the most serious criminal offences.

95. Therefore, while the principles set out in *Vinter and Others* must be applied in domestic cases, an adapted approach is called for in the extradition context. First of all, a preliminary question has to be asked: namely, whether the applicant has adduced evidence capable of proving that there are substantial grounds for believing that, in the event of conviction, there is a real risk of a sentence of life imprisonment without parole. In this regard, it is for the applicant to demonstrate that such a penalty would be imposed (see *López Elorza*, cited above, § 107 and *Findikoglu v. Germany* (dec.), no. 20672/15, § 37, 7 June 2016). Such a risk will more readily be established if the applicant faces a mandatory sentence of life imprisonment.

96. If it is established under the first limb of the inquiry that the applicant runs a real risk of a sentence of life imprisonment (see paragraph 95 above), then the second limb of the inquiry, having regard to the principles set out in *Vinter and Others*, will focus on the substantive guarantee which is the essence of the *Vinter and Others* case-law and is readily transposable from the domestic to the extradition context; that is, it must be ascertained by the relevant authorities of the sending State prior to authorising extradition that there exists in the requesting state a mechanism of sentence review which allows the competent authorities there to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds (see *Vinter and Others*, cited above, §119). As for the procedural safeguards afforded to serving "whole life prisoners" (see *Vinter and Others*, cited above, §§ 120-122), as stated above, the availability of these in the legal system of the requesting State is not a prerequisite for compliance by the sending Contracting State with Article 3.

97. It follows that in an extradition case the question is not whether, at the time of the prisoner's extradition, sentences of life imprisonment in the requesting country are compatible with Article 3 of the Convention, by reference to all of the standards which apply to serving life prisoners in the Contracting States. Instead, the adapted approach comprises two stages: at the first stage it must be established whether the applicant has adduced evidence capable of proving that there are substantial grounds for believing that, if extradited, and in the event of his conviction, there is a real risk that, a sentence of life imprisonment without parole would be imposed on him (see paragraph 87 above). At the second stage it must be ascertained whether, as from the moment of sentencing, there is a review mechanism in place allowing the domestic authorities to consider the prisoner's progress towards rehabilitation or any other ground for release based on his or her behaviour or other relevant personal circumstances.

98. In *Trabelsi* the Court did not address, as a preliminary step, the question of whether there existed a real risk that the applicant would be sentenced to life without parole. It also examined, at the moment of extradition, whether the *Vinter and Other* criteria were satisfied in their entirety. For these reasons, the Court considers that *Trabelsi* should be overruled.

99. The Court would emphasise that the prohibition of Article 3 ill-treatment remains absolute. In this regard, it does not consider that any distinction can be drawn between the minimum level of severity required to meet the Article 3 threshold in the domestic context and the minimum level required in the extra-territorial context (compare *Harkins and Edwards*, cited above, §§ 124-131). Furthermore, nothing in the preceding paragraphs undermines the now well-established position that the extradition of a person by a Contracting State will raise problems under Article 3 of the Convention where there are serious grounds to believe that he would run a real risk of being subjected to treatment contrary to Article 3 in the requesting State (see *Soering*, cited above, § 88; see also *López Elorza*, cited above, § 102).

(c) Application of the aforementioned principles to the facts of the present case

100. The applicant has not sought to argue that, in the event of his conviction of the offences charged, a sentence of life imprisonment would be "grossly disproportionate". Rather, he contends only that a sentence of life imprisonment would violate Article 3 of the Convention as it would be irreducible *de facto* and *de jure*. Therefore, in light of the foregoing, it falls to the Court in the present case to determine whether the applicant has adduced evidence capable of proving that there are substantial grounds for believing that, if he were to be extradited, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *López Elorza*, cited above, § 107, together with references therein). As he has not yet been convicted and the offences with which he has been charged do not carry a

mandatory sentence of life imprisonment, he must first demonstrate that, in the event of his conviction, there exists a real risk that a sentence of life imprisonment without parole would be imposed without due consideration of all the relevant mitigating and aggravating factors (see *López Elorza*, cited above, § 107 and *Findikoglu*, cited above, § 37). If he has done so, it must then be ascertained whether there exists a mechanism for review of the sentence which would allow the authorities of the requesting State to consider his progress towards rehabilitation or any other ground for release based on his behaviour or other relevant personal circumstances.

101. In answering the first question the Court takes as its starting point the assessment carried out by the national courts. While the Court's assessment is *ex nunc*, the extradition having not yet taken place (see *F.G. v. Sweden*, cited above, § 115), the national courts had the opportunity to conduct a detailed assessment of the evidence in proceedings to which the US was a party (see paragraphs 10-23 above). The District Judge, having regard to the evidence submitted by the Government, noted that life sentences were rare in drug trafficking cases, having been imposed in only 0.3% of all cases in 2013, and in fewer than one third of drug trafficking cases that same year. The District Judge referred to the evidence of the Assistant United States Attorney, who stated that the applicant was unlikely to receive a life sentence on any count, and it was less likely that he would receive consecutive sentences. He was therefore likely to receive a sentence that provided for his release before his death (see paragraph 13 above). On the other hand, the applicant's expert, apparently relying on the February 2015 report by the US Sentencing Commission, entitled "Life Sentences in the Federal System", had contended that before a life sentence was imposed there was usually a requirement that someone had died as a result of the crime (see paragraph 14 above).

102. Having considered the evidence, the District Judge found that if the applicant were convicted, his sentencing level would be Level 43 in the US Sentencing Guidelines, which had a sentence range of life imprisonment. She accepted that there was a "real possibility" he would receive a sentence of life imprisonment, since one of his co-conspirators had died from a fentanyl overdose (see paragraph 15 above). However, while she found that he was likely to receive concurrent rather than consecutive sentences if convicted of more than one offence, in her view it was not possible to determine what sentence he would receive if convicted.

103. For the purposes of the "real risk" assessment, which is the first stage of the two-stage test applied by the Court, the findings of the District Judge are inconclusive, although she clearly did not, as the applicant suggests, find that it was "likely" that he would be sentenced to life imprisonment (see paragraph 71 above). However that may be, it is necessary to examine the evidence submitted to the Court on this issue.

104. In this regard, the Court notes that the February 2015 report of the US Sentencing Commission, entitled "Life Sentences in the Federal System" (see paragraph 63 above), states that life sentences were imposed in less than one-third of one percent of all drug trafficking cases in 2013. Moreover, in its letter of 23 November 2020 (see paragraph 64 above), the US Department of Justice referred to the US Sentencing Commission's Interactive Sourcebook. According to the Interactive Sourcebook, in 2019, in the Northern District of Georgia, where the applicant has been charged, approximately 65% of 507 sentences were below the range recommended by the US Sentencing Guidelines.

105. According to the February 2015 report, the drug trafficking guidelines specifically provide for a sentence of life imprisonment for drug trafficking offences where death or serious bodily injury resulted from the use of the drug and the defendant had been convicted previously of a drug trafficking offence. Although one of the applicant's co-conspirators died from a fentanyl overdose, the evidence before the Court suggests that the applicant has no prior convictions (see paragraph 9 above).

106. A sentence of life imprisonment can also be imposed in other drug trafficking cases in which large quantities of drugs are involved, or where the court applies other sentence enhancement provisions relating to drug trafficking (see paragraph 63 above). The charges against the applicant are undoubtedly serious (see paragraph 8 above), and the US Department of Justice has indicated its belief that he was the joint head of a Mexico-based drug trafficking operation who supervised the work of US-based distributors (see paragraph 7 above). However, the US Department of Justice has provided information about four of the applicant's co-conspirators, whose sentences ranged from seven years' to twenty years' imprisonment. The two who received the highest sentences (V-P and H-H) had been charged with the same drug importation and conspiracy charges as the applicant, and were also convicted of additional charges which the applicant did not face, including money laundering. Both V-P and H-H had faced a recommended sentence of life imprisonment. According to the US Department of Justice, if the applicant pleaded guilty or was convicted at trial, he would be sentenced by the same judge who sentenced his four co-conspirators. That judge would be required to consider the factors set out in Title 18, U.S.C., § 3553(a) (see paragraph 57 above), including the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

107. In *López Elorza* the Court considered relevant the fact that the applicant's co-conspirators had received sentences lower than those set out in the US Sentencing Guidelines, especially given that the applicant would be sentenced by the same judge, who would be required to consider the need to avoid unwarranted disparities (see *López Elorza*, cited above, §§ 115-116; see also *Findikoglu*, cited above, § 38). In the present case, however, the

applicant has argued that his situation is not comparable to that of his co-conspirators (compare *López Elorza*, cited above, § 116). According to the applicant (see paragraph 72 above), although both V-P and H-H had similar base offence levels to his, they were sentenced after having pleaded guilty to a count which did not contain an allegation that their illegal conduct led to anyone's death. Moreover, unlike the applicant, they were not believed to be one of the joint heads of a criminal organisation.

108. The Court would accept that the applicant's co-conspirators were perhaps not in an entirely comparable position to him, even though they had similar base offence levels. They do not appear to have been suspected of being at the head of any criminal organisation and, perhaps more importantly, they would have been entitled to a reduction in sentence on account of their guilty pleas. That being said, in the proceedings before the Grand Chamber the applicant has not adduced evidence of any defendants with similar records to himself who were found guilty of similar conduct and were sentenced to life imprisonment without parole. Furthermore, while the Court cannot base its assessment on the likely sentence the applicant would receive if he were to plead guilty, it nevertheless recognises that there are many factors that contribute to the imposition of a sentence and, prior to extradition, it is impossible to address every conceivable permutation that could occur or every possible scenario that might arise (see *López Elorza*, cited above, § 118). As the Court noted in *Findikoglu*, the length of the applicant's prison sentence might be affected by pre-trial factors, such as agreeing to cooperate with the US Government (see *Findikoglu*, cited above, § 39). Moreover, if the applicant were to plead guilty or be convicted at trial, the judge would have a broad discretion to determine the appropriate sentence after a fact-finding process in which the applicant would have the opportunity to offer evidence regarding any mitigating factors that might justify a sentence below the range recommended by the Sentencing Guidelines. The sentencing judge would be required to have regard to the sentences given to the co-conspirators, even if their situation was not identical to that of the applicant. Finally, the applicant would have the right to appeal against any sentence imposed (see paragraph 64 above).

109. Having regard to all of the aforementioned factors, the applicant cannot be said to have adduced evidence capable of showing that his extradition to the US would expose him to a real risk of treatment reaching the Article 3 threshold. That being so, it is unnecessary for the Court to proceed in this case to the second stage of the analysis (see paragraph 97 above).

110. The foregoing considerations are sufficient to enable the Court to conclude that if the applicant were to be extradited there would be no violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION: CONDITIONS OF DETENTION AND THE COVID-19 PANDEMIC

111. The applicant initially complained that his extradition to the US would also be in breach of Article 3 of the Convention due to the pre-trial and post-conviction conditions of detention in the US, and the risk he would face in detention having regard to the Covid-19 pandemic. However, in his submissions to the Chamber he confirmed that he no longer wished to pursue these complaints. They may therefore be struck out pursuant to section 37 §1(a) of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 3 of the Convention concerning the risk of a life sentence without parole admissible;

2. *Holds* that the applicant's extradition to the United States would not be in violation of Article 3 of the Convention; and

3. *Decides* to strike out the complaint under Article 3 of the Convention concerning the conditions of detention and the risk the applicant would face in detention having regard to the Covid 19 pandemic.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 3 November 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Johan Callewaert Deputy to the Registrar	Robert Spano President