

Life sentence penalty and extradition under article 3 of the ECHR: A leading case of the European Court of Human Rights

Mario Antinucci

Abstract

Life sentence penalty covers a diverse range of practices, from the most severe form of life imprisonment without parole, in which a person is sentenced to die in prison so long as their sentence stands, to more indeterminate sentences in which at the time of sentencing it is not clear how long the sentenced person will spend in prison. Dealing with the question whether the extradition of a person to a foreign state where is accused of a crime for which a sentence of life imprisonment can be imposed can potentially violate article 3 of the European Convention on Human Rights.

What all these sentences have in common, however, is that at the time the sentence is passed, a person is liable to be detained for the rest of his or her natural life. We all know “*The United Nations Standard Minimum Rules*” and relevant international instruments on the rehabilitation of imprisonment, but at the moment more than 73 States in the world retain life imprisonment as a penalty for offences committed while under the age of 18. General perspective of criminal justice reform in Latin America should take into a right account the meaning of life - imprisonment penalty under article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment.

www.dx.doi.org/10.21113/iir.v7i1.288

Key words: Life sentences and extradition; Article 3 of ECHR; The UN standard minimum rules; Rehabilitation of imprisonment; Case law and leading sentence; The right to hope;

1. The point of Law

In case law of *Vinter and Others v. the United Kingdom*¹ the compliant claim alleged violation of article 3 of the European Convention of Human Rights.

Before the Grand Chamber, the applicants maintained their complaints that their whole life orders were incompatible with Article 3 of the Convention, which provides as follows: "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*"²

2. Introduction

Since the abolition of the death penalty in England and Wales, the sentence for murder has been a mandatory sentence of life imprisonment. Currently, when such a sentence is imposed, the trial judge is required to set a minimum term of imprisonment, which must be served for the purposes of punishment and retribution, taking into account the seriousness of the offence. The principles which guide the trial judge's assessment of the appropriate minimum term are set out in schedule 21 to the Criminal Justice Act 2003. Once the minimum term has been served, the prisoner may apply to the Parole Board for release on licence. Exceptionally, however, "a whole life order" may be imposed by the trial judge instead of a minimum term if, applying the principles set out in schedule 21, he or she considers that the seriousness of the offence is exceptionally high.

This case concerns three applicants who, having been convicted of murder in separate criminal proceedings in England and Wales, are currently serving mandatory sentences of life imprisonment. All three applicants have been given whole life orders: in the first applicant's case this order was made by the trial judge under the current sentencing

¹ECHR, *Vinter and Others v. the United Kingdom*, judgment (Grand Chamber) of 9 July 2013.

² M. ANTINUCCI, *Internal and international corruption*, in *Iliria International Review*, 2015 - 1, Prishtine (Albania).

provisions; in the case of the second and third applicants, who were convicted and sentenced prior to the entry into force of the 2003 Act, the orders were made by the High Court. All three applicants maintain that these whole life orders, as they apply to their cases, are incompatible *inter alia* with Articles 3 and 5 § 4 of the Convention³.

2. Extradition of terrorism suspects

On the 4th of September 2014, the European Court of Human Rights handed down its judgment in the case of *Trabelsi v. Belgium*⁴. Ending a decade-long debate the Court ruled that Belgium's extradition of terrorist suspect Nizar Trabelsi to the United States is a violation of art.3 of the European Convention of Human Rights (ECHR). In the Court's view, the prospect of receiving a life sentence without parole constituted prohibited inhuman treatment. This case is built on earlier cases on extradition to non-Convention Parties and raises contentious questions regarding the scope of art.3 ECHR and the balance between the fight against terrorism and human rights.

In spite of *Trabelsi* having already been extradited, in the merits phase the Court was still to rule on the compatibility of the extradition with art. 3 ECHR in light of the potential life sentence. This was the first time the Court was called on to pronounce itself on this legal question. That being said, in two earlier cases, the Court had addressed the permissibility of whole-life sentences *outside* an extradition context. In *Kafkaris v. Cyprus*⁵, the Court held that such sentences are prohibited by art. 3 where it could be shown that the sentence is grossly disproportionate to the crime committed, that the applicant's continued imprisonment could no longer be justified on legitimate penological grounds or that the sentence was *de facto* (in practice) or *de jure* (by law) irreducible (*Kafkaris v. Cyprus*).

The Court confirmed these principles in *Vinter and Others v UK* and added that 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 takes place or could be sought (*Vinter and Others v. UK*).

³ M. ANTINUCCI, *La libertà dell'estraddando nel regime cautelare d'urgenza*, in *Giur. it.*, 2013, 3.

⁴ ECHR, **Trabelsi v. Belgium**, judgment (Grand Chamber) of 4 of September.

⁵ ECHR, *Kafkaris v. Cyprus*, (Grand Chamber) of 12 of february 2008.

3. Council of Europe texts

A report on “Actual/Real Life Sentences”, prepared by a member of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“CPT”), reviewed various Council of Europe texts on life sentences, including recommendations (2003) 22 and 23, and stated in terms that:

- (a) the principle of making conditional release available is relevant to all prisoners, “even to life prisoners”;
- (b) that all Council of Europe member States had provision for compassionate release but that this “special form of release” was distinct from conditional release.

The CPT considers therefore that it is inhuman to imprison someone for life without any real hope of release. The Committee strongly urges authorities to re-examine the concept of detention "for life" accordingly.”⁶

4. International criminal law

Article 77 of the Rome Statute of the International Criminal Court allows for the imposition of a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. Article 110 provides that when a person has served twenty-five years of a sentence of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time⁷. For example in the case *Harkins and Edwards v. the United Kingdom*⁸ both applicants faced extradition from the United Kingdom to the United States where, they alleged, they risked the death penalty or life imprisonment without parole. The US authorities provided assurances that the death penalty would not be

⁶ A. GAITO, *Mandato d'arresto europeo ed estradizione*, in *Procedura penale*, Torino, 2012, 920. ID., *La vigenza del principio di specialità (a proposito del mandato d'arresto europeo ed estradizione)*, in *Giur. It.*, 2004, 7.

⁷ For a general perspective, M. ANTINUCCI, *The new Public Procurement Code within international relations and anti-corruption policies*, *Vestnik of Saint-Petersburg University*. Series 14 Law, Issue n. 3, 2016.

⁸ECHR, *Harkins and Edwards v. the United Kingdom*, judgement (Grand Chambre) of 17.01.2012.

applied in their cases and that the maximum sentence they risked was life imprisonment. Regarding the risk of life imprisonment without parole, the Court held that there would be no violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention if one or the other applicant was extradited to the United States, finding that neither applicant had demonstrated that there would be a real risk of treatment reaching the Article 3 threshold as a result of his sentence. In the first applicant's case, the Court was not persuaded that it would be grossly disproportionate for him to be given a mandatory life sentence in the United States. He had been over 18 at the time of his alleged crime, had not been diagnosed with a psychiatric disorder, and the killing had been part of an armed robbery attempt – an aggravating factor. Further, he had not yet been convicted, and – even if he were convicted and given a mandatory life sentence – keeping him in prison might continue to be justified throughout his life time. And if that were not the case, the Governor of Florida and the Florida Board of Executive Clemency could, in principle, decide to reduce his sentence. As regards the second applicant, he faced – at most – a discretionary life sentence without parole. Given that it could only be imposed after consideration by the trial judge of all relevant factors and only if he were convicted for a pre-meditated murder, the Court concluded that such a sentence would not be grossly disproportionate.

5. Life sentences in the Contracting States

On the basis of the comparative materials before the Court, following practices in the Contracting States may be observed.

First, there are currently nine countries where life imprisonment does not exist: Andorra, Bosnia and Herzegovina, Croatia, Montenegro, Norway, Portugal, San Marino, Serbia and Spain. The maximum term of imprisonment in these countries ranges from twenty-one years in Norway to forty-five years in Bosnia and Herzegovina. In Croatia in a case of cumulative offences, a fifty-year sentence can be imposed. Second, in the majority of countries where a sentence of life imprisonment may be imposed, there exists a dedicated mechanism for reviewing the sentence after the prisoner has served a certain minimum period fixed by law. Such a mechanism, integrated within the law and practice on sentencing, is foreseen in the law of thirty-two countries: Albania (25 years), Armenia (20), Austria (15), Azerbaijan (25), Belgium (15 with an extension to 19 or 23

years for recidivists), Bulgaria (20), Cyprus (12), Czech Republic (20), Denmark (12), Estonia (30), Finland (12), France (normally 18 but 30 years for certain murders), Georgia (25), Germany (15), Greece (20), Hungary (20 unless the court orders otherwise), Ireland (an initial review by the Parole Board after 7 years except for certain types of murders), Italy⁹ (26), Latvia (25), Liechtenstein (15), Luxembourg (15), Moldova (30), Monaco (15), Poland (25), Romania (20), Russia (25), Slovakia (25), Slovenia (25), Sweden (10), Switzerland (15 years reducible to 10 years), the former Yugoslav Republic of Macedonia (15), and Turkey (24 years, 30 for aggravated life imprisonment and 36 for aggregate sentences of aggravated life imprisonment). In respect of the United Kingdom, the Court notes that, in Scotland, when passing a life sentence, a judge is required to set a minimum term, notwithstanding the likelihood that such a period will exceed the remainder of the prisoner's natural life: see the Convention Rights (Compliance) (Scotland) Act 2001. Third, there are five countries which make no provision for parole for life prisoners: Iceland, Lithuania, Malta, the Netherlands and Ukraine. These countries do, however, allow life prisoners to apply for commutation of life sentences by means of ministerial, presidential or royal pardon. In Iceland, although it is still available as a sentence, life imprisonment has never been imposed.

6. General conclusion in respect of life sentences

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. 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

⁹ M. ANTINUCCI, *The principles of patrimony due process of law: the punitive confiscation and the protection of third parties misrelated to the crime*, in *Iliria International Review*, 2015 - 2, Prishtine (Albania).

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.

That 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 Convention¹⁰.

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.

7. Concurring opinion of Judge Power-Forde

“I voted with the majority in this case and wish to add the following. I understand and share many of the views expressed by Judge Villiger in his partly dissenting opinion. However, what tipped the balance for me in voting with the majority was the Court’s confirmation, in this judgment, that Article 3 encompasses what might be described as “*the right to hope*”. It

¹⁰ G. RANALDI, *Il procedimento di estradizione passiva*, Torino, 2012. ID., *La clausola di specialità dell'extradizione tra presupposto del processo e condizione del procedere*, in *Giur. It.*, 2004, 1145

goes no further than that. The judgment recognises, implicitly, that hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading”.

8. Conclusion

Overall, it appears that the legal world may have been too quick to laud the arrival of the “right to hope.” We are still some way from gaining certainty in this area, which was, ironically, the very complaint of the Grand Chamber in *Vinter*.

List of References

- ANTINUCCI, M., (2017), The new Public Procurement Code within international relations and anti-corruption policies, Vestnik of Saint-Petersburg University. Series 14 Law, Issue n. 1.
- ANTINUCCI, M., (2016), Code des marchés publics, l'éthique environnementale minimale, lutte contre la corruption, Illiryus, Issue n. 2, Tirana.
- ANTINUCCI, M., (2016B), The internationalization of business and prevention of financial crimes, Pisa, 181.
- ANTINUCCI, M., (2015), Internal and international corruption, Iliria International Review, Vol 5, No 1, Prishtine.
- ANTINUCCI, M., (2013), La libertà dell'estraddando nel regime cautelare d'urgenza, in Giur. it., 3.
- ANTINUCCI, M., (2013B), Spirito europeo e obiter dictum della Cassazione in tema di tutela della libertà dell'estraddando, in Giur., It., 10.
- DE AMICIS, A., (2009), Il principio del "ne bis in idem" europeo nell'interpretazione della Corte di Giustizia, in Cass. Pen., 2009, 3162.

- DI MARTINO, A., (2007), Criminalità organizzata e reato transnazionale, diritto penale nazionale: l'attuazione in Italia della c.d. Convenzione di Palermo, in *Dir. Pen. e Proc.*, 2007, 1, 11.
- GAITO, A., (2012), Mandato d'arresto europeo ed estradizione, in *Procedura penale*, Torino, 2012, 920.
- GAITO, A., (2004), La vigenza del principio di specialità (a proposito del mandato d'arresto europeo ed estradizione), in *Giur. It.*, 2004, 7.
- RANALDI, G., (2012), Il procedimento di estradizione passiva, Torino, 2012.
- RANALDI, G., (2004), La clausola di specialità dell'extradizione tra presupposto del processo e condizione del procedere, in *Giur. It.*, 2004, 1145.