HOUSE OF LORDS SESSION 2008–09
[2008] UKHL 72
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OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

R (on the application of Wellington) (FC) (Appellant) *v* Secretary of State for the Home Department (Respondent) (Criminal Appeal from Her Majesty's High Court of Justice)

Appellate Committee

Lord Hoffmann
Lord Scott of Foscote
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under Heywood

Counsel

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LORD HOFFMANN

My Lords,

1. The State of Missouri alleges that on 13 February 1997 the appellant Ralston Wellington committed two murders in Kansas City. According to the evidence submitted on behalf of the prosecutor, the appellant was a Jamaican drug dealer carrying on a substantial business in Jamaica, the United States and the United Kingdom. While he was staying with a woman in Kansas City, a member of her family took about US$70,000 from his room. The appellant made the woman drive him and two other Jamaicans to the house where the thief had been staying. They entered with guns firing, killed two of the occupants (one of them a pregnant young woman) and injured another. The victims do not appear to have been concerned in the theft and the money was afterwards returned by the thief.

2. The appellant is charged with murder in the first degree, defined in section 565.020 of the Revised Statutes of Missouri as knowingly causing the death of another person after deliberation upon the matter. The prescribed penalties are death or imprisonment for life without eligibility for probation or parole or release except by the act of the Governor.

3. On 29 January 2003 the appellant was arrested in London on a provisional warrant. The United States requested his extradition. The prosecutor in Missouri gave an undertaking that he would not seek the death penalty and after a hearing on 13 October 2003 the District Judge committed the appellant to await the decision of the Home Secretary as

to whether he should be extradited. Some time was then taken up with an unsuccessful challenge to the committal by judicial review, but on 13 June 2006 the Home Secretary notified the appellant that he had ordered his extradition. This decision was also challenged by an application for judicial review, which was dismissed by the Administrative Court (Laws LJ and Davis J) on 18 May 2007: [2007] EWHC 1109. The appellant appeals to your Lordships' House.

4. The sole ground of challenge is that, in ordering extradition, the Home Secretary, as a public authority, acted in a way which was incompatible with the appellant's Convention right under article 3 of the European Convention on Human Rights not to be "subjected to…inhuman or degrading…punishment." A sentence of life imprisonment without eligibility for parole is alleged to constitute such punishment. The order for extradition is therefore said to have contravened section 6(1) of the Human Rights Act 1998.

5. The appeal raises two issues. First, whether a sentence of imprisonment for life without eligibility for parole would, if imposed in the United Kingdom, constitute an inhuman or degrading punishment. Secondly, whether it makes a difference that the sentence will not be imposed by a United Kingdom authority but by the State of Missouri.

6. Before coming to the authorities in the United Kingdom and the European Court of Human Rights ("ECHR"), I shall consider the question in principle. In the Divisional Court, Laws LJ put forward a philosophical argument for treating life imprisonment without parole as inhuman or degrading (para 39(iv)):

> "The abolition of the death penalty has been lauded, and justified, in many ways; but it must have been founded at least on the premise that the life of every person, however depraved, has an inalienable value. The destruction of a life may be accepted in some special circumstances, such as self-defence or just war, but retributive punishment is never enough to justify it. Yet a prisoner's incarceration without hope of release is in many respects in like case to a sentence of death. He can never atone for his offence. However he may use his incarceration as time for amendment of life, his punishment is only exhausted by his last breath. Like the death sentence the whole-life tariff is *lex talionis*. But its notional or actual symmetry with the

> crime for which it is visited on the prisoner (the only virtue of the *lex talionis*) is a poor guarantee of proportionate punishment, for the whole-life tariff is arbitrary: it may be measured in days or decades according to how long the prisoner has to live. It is therefore liable to be disproportionate – the very vice which is condemned on article 3 grounds – unless, of course, the death penalty's logic applies: the crime is so heinous it can never be atoned for. But in that case 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. That is to pay lip service to the value of life; not to vouchsafe it."

7. This passage was quoted with apparent approval by Lord Bingham of Cornhill in *De Boucherville v State of Mauritius* [2008] UKPC 37 but in my respectful opinion the argument breaks down at the very first step. It is not the case that the abolition of the death penalty *must* have been founded upon the premise that the life of every person has such inalienable value that its forfeiture cannot be justified on the ground of retributive punishment. A perfectly respectable case for the abolition of the death penalty can be constructed without subscribing to the view that the lives of Streicher, Eichmann, Saddam Hussein or Myra Hindley had such inalienable value that their executions could not be morally justified. Opposition to the death penalty may be based upon the more pragmatic grounds that it is irreversible when justice has miscarried, that there is little evidence that its deterrent effect is greater than that of other forms of punishment and that the ghastly ceremony of execution is degrading to the participants and the society on whose behalf it is performed. For people who hold such views, who must include many opposed to the death penalty, the parallels between the death penalty and life imprisonment without parole, to which Laws LJ draws attention, are the very reasons why they think that in some cases the latter sentence is appropriate. The preservation of a whole life sentence for the extreme cases which would previously have attracted the death penalty is for such people part of the price of agreeing to its abolition. The Member States of the European Union are in principle democracies and the views of such people must be taken into account by the courts which are invited to extend the reach of article 3. As Lord Bingham of Cornhill said of the mandatory life sentence for murder in *R v Lichniak* [2003] 1 AC 903, 911-912:

> "the House must note that [the mandatory life sentence] represents the settled will of Parliament. Criticism…has

> been voiced in many expert and authoritative quarters over the years, and there have been numerous occasions on which Parliament could have amended it had it wished, but there has never been a majority of both Houses in favour of amendment. The fact that [the mandatory life sentence] represents the settled will of a democratic assembly is not a conclusive reason for upholding it, but a degree of deference is due to the judgment of a democratic assembly on how a particular social problem is best tackled."

8. I come then to the law. The leading European authority is now *Kafkaris v Cyprus* (Application No 21906/04) 12 February 2008, which concerned a mandatory life sentence for murder imposed in Cyprus. Only the President could order the release of such a prisoner, either by exercising the power of mercy under article 53(4) of the Constitution or by ordering release on licence under section 14 of the Prison Law 1996. The prisoner, who had been sentenced in 1989, complained in 2004 that his continued detention was in breach of his rights under, inter alia, article 3.

9. The majority judgment noted (in paragraph 97) that a life sentence was "not in itself prohibited by or incompatible with article 3" but that the imposition of an *irreducible* life sentence "may raise an issue" under article 3. On the question of what counted as an irreducible sentence, the court said (in paragraph 98):

> "where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy article 3…. The court has found this is the case…even when the possibility of parole for prisoners serving a life sentence is limited…It follows that a life sentence does not become 'irreducible' by the mere fact that in practice it may be served in full. It is enough for the purposes of article 3 that a life sentence is *de jure* and *de facto* reducible."

10. The court went on to say (in paragraph 99) that—

> "the existence of a system providing for consideration of the possibility of release is a factor to be taken into

> account when assessing the compatibility of a particular life sentence with article 3."

11. But the Court signalled that it would not inquire too closely into the way such a system worked:

> "it should be observed that a State's choice of a specific criminal justice system, including sentence review and release arrangements, is in principle outside the scope of the supervision the Court carries out at European level, provided that the system chosen does not contravene the principles set forth in the Convention."

12. The conclusion I draw from the Court's guarded statement that an irreducible sentence "may raise an issue" under article 3 and that the existence of a system for release was a "factor to be taken into account" in assessing the compatibility of a life sentence with article 3 is that an irreducible sentence will not necessarily infringe. On the particular facts of the case, an offence may justify an irreducible sentence. Furthermore, provided that the sentence is reducible, its imposition will not even raise an issue under article 3. And the bar for what counts as irreducible is set high. It must be shown that the national law does not afford a real possibility, de jure and de facto, of review with a view to commutation or release.

13. This very limited application of article 3 to life sentences is shown by the way the court applied the stated principles to the facts. It concluded that the possibility of Presidential pardon or release was sufficient to prevent the sentence from being irreducible, notwithstanding that the prospect for release was limited. The fact that the possibility of release existed de facto was shown by evidence that some prisoners had been released. It did not matter that Cyprus had no parole board system.

14. Having found that the sentence was not irreducible, the majority did not need to discuss the "issue" which would have arisen if it had been irreducible and said nothing more on the point.

15. The caution of the majority did not satisfy Judge Bratza, who wrote in a concurring opinion that the time had come for the court

clearly to affirm that an irreducible life sentence was in principle inconsistent with article 3. But he agreed with the majority on the criteria for irreducibility and their application to the facts of the case.

16. In the United Kingdom, section 269(4) of the Criminal Justice Act 2003 gives a judge power to order that a prisoner shall be imprisoned for life without eligibility for parole. If such an order is made, he may be released only by order of the Secretary of State if she is satisfied that "exceptional circumstances exist which justify the prisoner's release on compassionate grounds": see section 30(1) of the Crime (Sentences) Act 1997. These provisions have clear parallels with the sentence of life imprisonment without parole and release only by order of the Governor in the statutes of Missouri.

17. In *R v Bieber* [2008] EWCA Crim 1601 the Court of Appeal considered whether a whole life sentence under section 269(4) of the 2003 Act was compatible with article 3. Lord Phillips of Worth Matravers CJ, who gave the judgment of the Court, said that the effect of the majority decision in *Kafkaris v Cyprus* was that an irreducible life sentence, if imposed to reflect the requirements of punishment and deterrence for a particularly heinous crime, was not in potential conflict with article 3.

18. In any case, the court considered that the existence of the Home Secretary's power of release under section 30 of the 1997 Act, even though used sparingly, meant that the whole life sentence was not in Strasbourg terms irreducible. It followed that a complaint under article 3 could not be made simply because such a sentence had been imposed, but should be made (if at all) when the prisoner contended that for one reason or another his further detention would be inhuman or degrading treatment.

19. In my respectful opinion, these conclusions are correct and reflect the decision of the majority of the ECHR in *Kafkaris v Cyprus*. It follows that the imposition of a whole life sentence under section 269(4) of the 2003 Act, would not ipso facto infringe article 3. There may come a time when the continued detention of the prisoner does so infringe, but that is a question which can only be adjudicated upon when it arises.

20. The next question is the application of this construction of article 3 to cases in which the whole life sentence is not imposed in the United

Kingdom but is likely to be imposed in a country to which the prisoner is extradited. The leading authority on this question is the decision of the ECHR in *Soering v United Kingdom* (1989) 11 EHRR 439. That case concerned a decision by the Home Secretary to extradite the applicant (a German citizen) to Virginia to face charges of capital murder, for which the penalty was death. The applicant did not submit that the death penalty was in itself a violation of article 3 (as the Court noted at paragraph 101, that would have been difficult to reconcile with the language of article 2(1)) but complained that the manner in which it was implemented in Virginia, namely, after long delays, was inhuman or degrading. The court accepted this submission. The Privy Council later reached a similar conclusion in *Pratt and Morgan v Attorney-General for Jamaica* [1994] 2 AC 1.

21. The United Kingdom nevertheless submitted that the Convention required it only to refrain from imposing inhuman or degrading punishments in the United Kingdom. It was not responsible for what happened in Virginia after the applicant's lawful extradition. The court accepted (in paragraph 86) that the engagement undertaken by a Contracting State was confined to securing Convention rights within its own jurisdiction and that it could not require a Contracting State, notwithstanding its extradition obligations, not to surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention:

> "Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention *and of Article 3 in particular*." (emphasis added)

22. I have emphasised the last few words of this passage because they make it clear that in cases of extradition, article 3 does not apply as if the extraditing State were simply responsible for any punishment likely to be inflicted in the receiving state. It applies only in a modified form which takes into account the desirability of arrangements for extradition. The form in which article 3 does apply must be gathered from the rest of the judgment and subsequent jurisprudence.

23. In paragraph 88 the court distinguished between torture and other "inhuman or degrading treatment". Torture attracted such abhorrence

that it would not be compatible with the values of the Convention for a Contracting State knowingly to surrender a fugitive to another State if there were substantial grounds for believing that he was in danger of being subjected to torture, "however heinous the crime allegedly committed". The position in relation to inhuman or degrading treatment is more complicated. What amounts to such treatment depends upon "all the circumstances of the case" paragraph 89. The court went on:

> "Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases."

24. The passage makes it 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.

25. The relevance of the desirability of extradition in deciding whether article 3 has been infringed is shown by the weight which the court attributed to the fact that Mr Soering, as a German citizen, could be tried in Germany. It said (at paragraph 110) that —

> "[T]he Court cannot overlook either the horrible nature of the murders with which Mr Soering is charged or the legitimate and beneficial role of extradition arrangements

> in combating crime. The purpose for which his removal to the United States was sought, in accordance with the Extradition Treaty between the United Kingdom and the United States, is undoubtedly a legitimate one. However, sending Mr Soering to be tried in his own country would remove the danger of a fugitive criminal going unpunished as well as the risk of intense and protracted suffering on death row. It is therefore a circumstance of relevance for the overall assessment under Article 3 in that it goes to the search for the requisite fair balance of interests and to the proportionality of the contested extradition decision in the particular case."

26. The inference I would draw from this passage is that if Mr Soering could not have been tried in Germany and the court had been left with the stark choice of extraditing him to Virginia or allowing him to escape justice altogether, it would not necessarily have decided that, in the context of extradition, the method of implementing the death penalty in Virginia made the punishment sufficiently severe to be inhuman or degrading treatment.

27. 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* (Lord Bonomy, 26 April 2004) 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.

28. Treating article 3 as applicable only in an attenuated form if the question arises in the context of extradition or other forms of removal to a foreign state is consistent with the ECHR's jurisprudence on the applicability of other Convention articles in a foreign context. These authorities were discussed at some length by the Lord Bingham of Cornhill in *R (Ullah) v Special Adjudicator* [2004] 2 A C 323 and led to his conclusion (at paragraph 24) that —

> "While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case."

29. For example, it is not sufficient that the fairness of the trial in the receiving state would not meet the requirements of article 6. There must be a risk of a "flagrant denial of justice". As the ECHR said in *Drozd and Janousek v France* (1992) 14 EHRR 745 at paragraph 110:

> "As the Convention does not require the Contracting Parties to impose its standards on third States or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Article 6 of the Convention. To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 would also thwart the current trend towards strengthening international co-operation in the administration of justice, a trend which is in principle in the interests of the persons concerned. The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice."

30. There is in my opinion nothing in the subsequent jurisprudence of the ECHR to qualify the principle laid down in *Soering* that torture is a contravention of article 3 whether the context is domestic or foreign but that such context may affect whether other punishment or treatment is regarded as sufficiently severe to contravene. In *Chahal v United Kingdom* (1996) 23 EHRR 413 the Court decided that nothing could justify deporting someone to a country where he faced a serious risk of suffering torture. It rejected the argument of the United Kingdom that even in such a case, deportation could be justified by interests of national security. But the case was not concerned with whether treatment or punishment less than torture, which might be regarded as inhuman or degrading in the United Kingdom, would necessarily engage article 3 on the ground that it was likely to be suffered in another country. It is true that the Court said in paragraph 81 that —

> "It should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition, as set out in paragraph 89 of the same judgment, that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged."

31. In the context of *Chahal*, I read this remark as affirming that there can be no room for a balancing of risk against reasons for expulsion when it comes to subjecting someone to the risk of torture. I do not however think that the Court was intending to depart from the relativist approach to what counted as inhuman and degrading treatment which was laid down in *Soering* and which is paralleled in the cases on other articles of the Convention in a foreign context. If such a radical departure from precedent had been intended, I am sure that the Court would have said so.

32. A similar relativist approach is taken by the Supreme Court of Canada. In *Smith v The Queen* [1987] 1 SCR 1045 it decided that a law which imposed a mandatory sentence of 7 years imprisonment for importing, for whatever reason, any quantity of prohibited drugs, was unconstitutional because it was inevitable that in some cases it would lead to a grossly disproportionate and therefore "cruel and unusual" punishment. On the other hand, in *United States v Burns* [2001] 1 SCR 283 and *Ferras v United States* [2006] 2 SCR 77 it was decided that only in extreme cases (something which "shocked the conscience" was the phrase used) would the potential sentence in the receiving country justify a refusal to extradite. A long mandatory sentence for drug dealing was not sufficient.

33. It is true that the provisions of the Canadian Charter of Rights which led to this distinction between domestic and extradition cases are different from those in the Convention. But the Canadian cases show the practical need to construe any human rights instrument in a way which does not make extradition dependent upon compliance by the receiving country with the full panoply of rights enjoyed in the extraditing country.

34. Applying these principles to the present case, it is first necessary to decide whether the mandatory sentence for first degree murder in Missouri is irreducible as that term was explained by the ECHR in

Kafkaris v Cyprus (2008) 12 February 2008. The power of the Governor of Missouri to pardon a prisoner or to commute his sentence to one of imprisonment with the possibility of parole shows that it is reducible *de jure*. Is it reducible *de facto*? The evidence shows that the power has been sparingly used, in some cases for the benefit of battered women who killed after brutal treatment, in one case when the conviction was demonstrated to have been wrong, in another case in return for co-operation in another prosecution. It must be accepted that if the appellant is convicted of first degree murder in the circumstances alleged against him, his prospects of release would be poor. But the requirement that the sentence must be reducible *de facto* cannot mean that the prisoner in question must have a real prospect of release. Otherwise the more horrendous the crime, the stronger would be the claim not to be extradited. It must mean that the system for review and release must actually operate in practice and not be merely theoretical. By that standard, I think that the sentence in Missouri is just as much reducible as the sentence in *Kafkaris v Cyprus*. In both cases it depends upon the exercise of executive clemency without judicial control. Any prisoner is able to petition the Governor of Missouri and there is nothing to show that such petitions are not properly considered. The fact that the criteria which the Governor has apparently adopted for the exercise of his powers are rarely satisfied is not in my opinion sufficient to make the sentence irreducible.

35. However, even if the sentence is irreducible and might therefore contravene article 3 if imposed in the United Kingdom, there remains the question of whether it would contravene article 3 as interpreted in the context of extradition. In my opinion it would only do so if one would able to say that such a sentence was likely, on the facts of the case, to be clearly disproportionate. In a case of extradition we are not concerned, as the Canadian Supreme Court was in *Smith v The Queen* [1987] 1 SCR 1045, with the constitutionality of the law under which the mandatory sentence is imposed. In such a case, it is sufficient to invalidate the law that it would be bound in some cases to produce disproportionate sentences. In extradition, however, one is concerned with whether in *this case* the sentence would be grossly disproportionate. The fact that it might be grossly disproportionate in other cases is irrelevant.

36. In my opinion, on the facts of this case, it could not be said that a sentence of life without parole would be so grossly disproportionate to the offence as to meet the heightened standard for contravention of article 3 in its application to extradition cases. Unlike *Soering*, there is no other jurisdiction in which the appellant can be tried. If he is not

extradited to Missouri, he will be entitled to remain in this country as a fugitive from justice. The standard of what amounts to inhuman and degrading treatment for the purposes of article 3 must therefore be a high one. The offence which he is alleged to have committed is one for which an English judge might well impose a whole life sentence under section 269(4) of the 2003 Act. It is true that the English judge would do so as a matter of judicial discretion, whereas in Missouri the sentence is mandatory. And Miss Montgomery QC placed some stress on this difference in the course of her able argument for the appellant. But in my opinion it is irrelevant. The mandatory nature of the sentence would be very important if we were concerned with the validity of a domestic rule imposing such a sentence, such as *Reyes v The Queen* [2002] 2 AC 235 (mandatory death sentence), *R v Lichniak* [2003] 1 AC 903 (mandatory life sentence) or *Smith v The Queen* [1987] 1 SCR 1045 (mandatory minimum term). But we are not concerned with the validity of the Missouri law. The fact that a life sentence without parole is mandatory in Missouri is relevant only in enabling the English court to predict the punishment which the appellant will receive if he is convicted of first degree murder. The question then is whether such a sentence would be obviously disproportionate for the crime of which this appellant is accused. For the reasons I have given, I do not think that it would. On the other hand, if the facts were that a prisoner was charged with the kind of mercy killing postulated by my noble and learned friend Lord Brown of Eaton-under-Heywood, it might well be. In this case, however, I would dismiss the appeal.

LORD SCOTT OF FOSCOTE

My Lords,

37. I have had the advantage, in advance of writing this opinion, of reading the respective opinions on this appeal of my noble and learned friends, Lord Hoffmann, Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-under-Heywood. Each has reached the conclusion that this appeal should be dismissed. I have reached the same conclusion and for substantially the same reasons. There is, however, as Baroness Hale has observed, one point on which Lord Hoffmann and Lord Brown differ. The point is whether the test of what, for Article 3 purposes, constitutes "inhuman or degrading treatment or punishment" is the same test when what is being considered is the likely fate that an individual whose extradition is being sought will, if extradited, face in the requesting country as the test when what is being considered is what

constitutes inhuman or degrading treatment in a purely domestic context.

38. Lord Hoffmann has expressed the view that, in extradition cases, the fact that extradition is being sought in order that an individual should be tried for serious crimes alleged to have been committed by him in the requesting country, coupled with the fact that there is nowhere else that the individual could be tried for those crimes, and the importance of extradition in preventing fugitive offenders from evading justice and in preventing the establishment of safe havens where fugitives can shelter from the consequences of their crimes (see paras. 24 and 25 of Lord Hoffmann's opinion), justifies the adoption of a "relativist" approach to what constitutes Article 3 inhuman or degrading treatment. Under the relativist approach, suggested to have been sanctioned by the Strasbourg court in *Soering v United Kingdom* (1989) 11 EHRR 439 (see paras.88 and 89), treatment or punishment that would be categorised as inhuman or degrading, and consequently as being incompatible with Article 3 rights, if it were inflicted, or threatened to be inflicted, on an individual pursuant to a criminal sentence in this country would not necessarily be so categorised if it were treatment or punishment likely to be faced by the individual after his extradition to the requesting country and his trial and conviction there for the alleged crimes.

39. Lord Brown, on the other hand, has preferred an absolutist approach to what constitutes inhuman or degrading treatment. If the treatment or punishment likely to be faced by an individual if extradited to the requesting country and then tried, convicted and sentenced for the crimes in question would be inhuman or degrading for Article 3 purposes in a domestic context, the treatment or punishment would, in Lord Brown's opinion, count as inhuman or degrading in a foreign context, whether as a likely consequence of extradition, or of removal from the United Kingdom on refusal of immigration consent or for any other otherwise lawful reason.

40. My Lords, my respectful preference is for Lord Brown's approach. As Baroness Hale points out (para.3 of her opinion), the right under Article 3 not to be subjected to torture or to inhuman or degrading treatment is an absolute right which cannot be balanced against other considerations. That this is so was confirmed by the Strasbourg court in *Chahal v United Kingdom* (1996) 23 EHRR 413 and again in *Saadi v Italy* (2008 – unreported). It is accepted that the absolute nature of the Article 3 bar on torture would bar extradition to a country where the extradited person would face torture and that that which would

constitute torture for Article 3 purposes in Europe would constitute torture for those purposes everywhere. But it is suggested that treatment or punishment that might for Article 3 purposes be inhuman or degrading in Europe would not necessarily need to be so categorised if it were treatment or punishment likely to be faced in the requesting country by a person faced with extradition to that country for crimes committed there. But, if that is so, how can it be said that Article 3 rights not to be subjected to inhuman or degrading treatment are absolute rights? If, in an extradition context they can be "relativist" rights, why should they not also be "relativist" rights in other contexts where the public interest were equally engaged and would be advanced by the removal to his home country of the individual in question? This might often be so in immigration or deportation cases.

41. The paradox created by categorising Article 3 rights not to be subjected to inhuman or degrading treatment or punishment as absolute and at the same time authorising or applying a "relativist" approach to the interpretation of those rights in an extradition context could, it seems to me, be resolved in two alternative ways. One way would be to distinguish between treatment that constituted "torture" for Article 3 purposes and treatment or punishment that was merely "inhuman or degrading", the former being absolutely prohibited by Article 3, the latter, too, being prohibited absolutely in a domestic context but not necessarily preventing removal to his home country of a person likely in that country to face such treatment or punishment. The problem with this approach to Article 3 is that the language of the Article provides no basis at all for distinguishing between that which would qualify as sufficiently inhuman or degrading, and therefore prohibited by Article 3, in an extradition context and that which would be prohibited by Article 3 in a domestic context but could be overlooked in an extradition context, or for distinguishing between treatment that would be sufficiently inhuman or degrading to bar removal to a foreign country in an immigration context but insufficiently in order to bar removal to that country in an extradition context. It seems to me that the standard of treatment or punishment apt to attract the adjectives "inhuman or degrading" for Article 3 purposes ought to be a constant. I do not see how otherwise the Article 3 prohibition regarding such treatment or punishment can be regarded as an absolute one. This, I think, and respectfully agree with, is Lord Brown's point.

42. The other way of resolving the paradox would be to adopt a uniformly strict approach to what constitutes "inhuman or degrading treatment or punishment" for Article 3 purposes. It must, in my respectful opinion, be borne in mind that Article 3 was prescribing a

minimum standard of acceptable treatment or punishment below which the signatory nations could be expected not to sink but not as high a standard as that which many of those nations might think it right to require for every individual within their jurisdiction, and therefore entitled, even if only temporarily, to their protection. Article 3 was prescribing a minimum standard, not a norm. It must be open to individual states to decide for themselves what, if any, higher standard they would set for themselves. Lord Hoffmann referred (para 27 of his opinion) to a decision of the Court of Session which ruled that in prisons in Scotland the practice of "slopping out" was, or might be, an infringement of Article 3. This decision illustrates very well the point I am trying to make. It would, of course, be unexceptionable for the courts of Scotland, or the courts of any other jurisdiction, or their prison authorities to rule that the practice of slopping-out was unacceptable and should cease. But to give that ruling as an interpretation of an Article 3 obligation would, in my opinion, undermine the absolute nature of the obligation in question. It would be unthinkable to rule that in no circumstances could slopping-out in a prison, or comparable institution, be tolerated. Whatever view one might have about the objectionable quality of slopping-out, that view could not, in my opinion, be carried forward into an acceptable interpretation of an absolute obligation in Article 3.

43. The present case concerns a mandatory sentence of life imprisonment without the possibility of parole. It appears that, under the law of the State of Missouri, the Governor of the State has a statutory discretion, not reviewable by the courts, to authorise the release of a prisoner serving such a sentence. The power has been exercised sparingly and there is no reason to suppose that it would ever be exercised in the appellant's favour if he were to be convicted of the murders of which he is charged. It may be that the life sentence without parole would not, under Strasbourg jurisprudence, be regarded as an "irreducible" life sentence. There would be at least the possibility of a discretionary release. But that possibility might, in the appellant's case, be highly remote and I think it necessary to consider whether an irreducible life sentence should be regarded, *per se*, as constituting "inhuman or degrading treatment or punishment" for Article 3 purposes.

44. In my opinion, it should not. It is accepted that imprisonment as such is not "inhuman or degrading" for Article 3 purposes. The conditions of imprisonment in a particular prison or in the prison system of a particular country may be so, but that is not alleged of Missouri prisons in the present case. Nor is it suggested that a sentence of full life imprisonment without possibility of parole may not be a proper

punishment, compatible with Article 3, for crimes of a particularly wicked character. So why should the prospect, or likelihood, that such a sentence may be passed on the appellant in the present case, in the event of his trial and conviction in a Missouri State court, be regarded as incompatible with Article 3?

45. A number of answers have been suggested on behalf of the appellant. First, there is the mandatory nature of the sentence. The judge, in the event of a conviction, will have no sentencing discretion. But the appellant will have been convicted of two pre-meditated, drug-related, revenge killings and the attempted killing of a third person which are by any standard heinous crimes that might well attract a whole life tariff on a conviction in this country. The mandatory nature of the sentence does not, in my opinion, having regard to the charges faced by the appellant in this case, thereby bring the sentence into the "inhuman and degrading" category. The mandatory nature of an irreducible full life sentence would, I think, do so if the sentence were to appear so grossly disproportionate to the circumstances of the crime as to offend ordinary notions of fairness and justice. Not so here.

46. It has been suggested, also, that an irreducible life sentence is "inhuman and degrading" for Article 3 purposes because it denies the prisoner the possibility of atonement and redemption. Once, however, it is accepted that a full life tariff may be a just punishment, merited by the heinous quality of the crime or crimes for which the sentence has been, or may be, imposed, reliance on the denial of possibilities of atonement or redemption seem to me to miss the point of the sentence. If a whole life sentence of imprisonment without parole is a just punishment for the crime, the prisoner atones by serving his sentence. Redemption, a matter between him and his Maker, may well be achieved during the currency of the sentence, but I do not follow why it is said to require a reduction of the length of the just punishment sentence. The possibility, or probability, that he serve the full life term merited by his crimes cannot, in my opinion, justify describing the sentence as disproportionate unless a full life term is *per se* disproportionate, which, it is agreed, is not the case.

47. A full life term of imprisonment without parole would not, I believe, have been regarded as a *per se* inhuman and degrading sentence in the 1950s when the Convention was signed, nor in 1998 when the United Kingdom enacted the Act that incorporated Article 3 into the domestic law of this country. If such a sentence would not have been so regarded in 1998, there is no justification, in my opinion, for so

regarding it now. I would, therefore, uphold the judgments of the courts below and, in agreement with Lord Brown, dismiss this appeal on that ground.

BARONESS HALE OF RICHMOND

My Lords,

48. I agree that this appeal should be dismissed, for the reasons given by my noble and learned friend Lord Hoffmann. As my noble and learned friend Lord Brown of Eaton under Heywood disagrees with him on one point, I must explain my reason for preferring Lord Hoffmann's view.

49. In short, the European Court of Human Rights has not yet said, either in *Kafkouris v Cyprus* (Application No 21906/04) 12 February 2008, or in any other case, that all irreducible life sentences are inhuman and degrading treatment within the meaning of article 3. There may come a time when it will do so and we shall then have to have regard to that view. In the meantime, it has simply said that such sentences "may raise an issue" under article 3. Reducible life sentences, on the other hand, do not. In my view, however, even if the sentence faced by the appellant were to be regarded as irreducible, it would not in his case amount to inhuman or degrading treatment within the meaning of article 3.

50. I agree, of course, that if there is substantial ground for believing that a person who is to be expelled from this country faces a real risk of being subjected to torture or to inhuman or degrading treatment in the country to which he is to be expelled, then his right not to be subjected to such treatment is absolute. It cannot be balanced against other considerations, including the real risk which he poses to the country from which he is to be expelled: see *Chahal v United Kingdom* (1996) 23 EHRR 413 and *Saadi v Italy* (Application No 37201/06) 28 February 2008. But the particular context of the case is important in assessing whether the treatment which he faces is indeed to be regarded as inhuman or degrading. It is worth repeating what was said in *Soering v United Kingdom* (1989) 11 EHRR 439, at para 89:

> "What amounts to inhuman and degrading treatment or punishment depends upon all the circumstances of the case. . . As movement around the world becomes easier and crime takes on a large international dimension, it is increasingly in the interest of all nation ns that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundation of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the noti0ons of inhuman and degrading treatment or punishment in extradition cases."

51. There is nothing in either *Chahal* or *Saadi* which casts doubt upon the relevance of these considerations in assessing the severity of the treatment or punishment faced by the person to be extradited. The references in *Saadi*, paras 127 and 138, to the irrelevance of the victim's conduct refer to the absolute nature of the prohibition once it has been determined that there is a real risk of treatment contrary to article 3. They do not cast doubt on the oft-repeated statements that the assessment of the minimum level of severity is relative: see *Saadi* itself, at para 134. Thus, for example, in *Soering* the Court went on, at para 100, to repeat some well known general considerations:

> "As is established in the Court's case law, ill-treatment, including punishment, must attain a minimum level of severity if it is to fall within the scope of article 3. The assessment of this minimum is, in the nature of things, relative; it depends upon all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim. . . .
>
> In order for punishment or treatment associated with it to be 'inhuman' or 'degrading', the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment."

Indeed, if the concept of proportionality in sentencing is relevant to the assessment of severity, then the conduct of which the prospective victim has been found guilty may be central to the assessment of whether the punishment is inhuman or degrading.

52. As already seen, the Court has not stated that even an irreducible life sentence is automatically an illegitimate form of punishment. Assuming for the moment that the appellant is convicted, the circumstances in which he will be sentenced to life imprisonment without possibility of parole are these. A particularly cold blooded and premeditated murder by shooting took place. The murderer chose to commit this crime in a State where the only possible penalties were death or life imprisonment without the possibility of parole. That was the punishment prescribed by the law of the place where he chose to commit these murders for the crime which he chose to commit. He fled to a country which has an extradition treaty with the United States of America. That is the only place where he can be tried for these offences. It is not for us to impose our views of the proper tariff for any particular offence upon another country. Our only legitimate concern is that they should not impose the death penalty and that what they do impose does not cross the high threshold of inhuman or degrading punishment for the offence in question. There is nothing to suggest that the conditions in Missouri prisons are inhuman or degrading. Hence I have difficulty in seeing how a punishment which was prescribed by the law of the State where the crime was committed, and which falls within the range of legitimate punishments for that offence, can be considered inhuman or degrading. That view is strengthened if, as in this case, the offence was one which might have attracted the same penalty if committed here.

53. I do understand the philosophical position, that each human being should be regarded as capable of redemption here on earth as well as hereafter. To those who hold this view, the denial of the possibility of redeeming oneself in this life by repentance and reform may seem inhuman. I myself was brought up in that tradition. But, as Lord Hoffmann has pointed out, this is not the only tenable view of the matter. There are many people, in and outside prison, who would draw a very sharp distinction between life and death, however restricted that life might be. There are many justifications for subjecting a wrongdoer to a life in prison. It is not for us to impose a particular philosophy of punishment upon other countries.

54. I too, therefore, would dismiss this appeal.

LORD CARSWELL

My Lords,

55. The central issue in this appeal is whether the extradition of a person alleged to have committed an offence for which the mandatory penalty is a sentence of imprisonment for life without eligibility for parole would be in breach of article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). Determination of this issue involves two questions: the first is whether the extradition of an alleged offender to a state where he would face such a sentence would *ipso facto* constitute inhuman or degrading treatment, and the second is whether the possibility of executive release is sufficient to prevent the extradition from being in breach of article 3.

56. The context is important. A request for extradition has come from the State of Missouri, which has its own system of laws and levels of criminal punishment, and it is not for another state to be too ready to condemn that system without sufficiently strong reason. It is claimed on behalf of the appellant that the obligations of the United Kingdom under the Convention, as enshrined in the Human Rights Act 1998, furnish such a reason. Obviously one cannot approach the issue of extradition to a state which is not a party to the Convention as if its provisions applied there with full force. The way in which such obligations are brought to bear, in consequence of such decisions of the European Court of Human Rights ("ECtHR") as *Soering v United Kingdom* (1989) 11 EHRR 439 and *Chahal v United Kingsom* (1996) 23 EHRR 413, resembles the operation of equity on the conscience of a defendant. If the requested state extradites an alleged offender to another state which is not bound by the Convention, where he may face treatment amounting to torture or inhuman or degrading treatment, the extradition may constitute a breach of article 3 on the part of the requested state. The equation is not, however, complete. The ECtHR said in *Soering* at paragraph 86 of its judgment:

> "… [T]he Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting

> State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. Indeed, as the UK Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of Article 3 in particular."

When considering the issue the courts of this jurisdiction therefore have to take into account and effect a proper balance between two imperatives, the importance of facilitating extradition and the prohibition against extraditing an alleged offender to face treatment which could be classed as inhuman or degrading.

57. I accordingly agree with the reasons given by my noble and learned friend Lord Hoffmann in paragraph 22 to 32 of his opinion for concluding that the desirability of extradition is a factor to be taken into account in deciding whether the punishment likely to be imposed in the requesting state attains the minimum level of severity which would make it inhuman or degrading. In particular I would underline the importance of facilitating extradition, as appears from paragraph 89 of the judgment of the ECtHR in *Soering*:

> "… [I]nherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases."

58. As my noble and learned friend Baroness Hale of Richmond points out in paragraph 51 of her opinion, the cases concerned with the expulsion of persons alleged to be dangerous terrorists do not cast doubt upon the relevance of these considerations in assessing the severity of the treatment or punishment of the person to be extradited. It has been held in *Chahal* and in *Saadi v Italy* (2008, Application no 37201/06) that the risks to the expelling state if such a person is not deported cannot be weighed against the risk of his ill-treatment in the receiving state: *Saadi*, para 138. If it is established that that ill-treatment would amount to torture or inhuman or degrading treatment, the prohibition is absolute: *ibid*, para 127. The passage which I have quoted from the judgment in *Soering* demonstrates that in extradition cases considerations founded upon the importance of extradition may legitimately be taken into account in determining whether the alleged offender's treatment would attain the minimum level of severity which would constitute inhuman or degrading treatment, an assessment which is relative: *Saadi*, para 134.

59. Counsel for the appellant relied upon a formidable battery of statements from judicial and other sources to the effect that to sentence an offender to whole life imprisonment without possibility of parole would be in breach of article 3 of the Convention. In 1976 the Committee of Ministers of the Council of Europe adopted Resolution 76(2) on the Treatment of Long-term Prisoners. The sub-committee which drafted the resolution stated, at para 76:

> "... [I]t is inhuman to imprison a person for life without any hope of release. A crime prevention policy which accepts keeping a prisoner for life even if he is no longer a danger to society would be compatible neither with modern principles on the treatment of prisoners during the execution of their sentence nor with the idea of the reintegration of offenders into society. Nobody should be deprived of the chance of possible release. Just how far this chance can be realised must depend on the individual prognosis."

This statement was referred to with approval by the Grand Chamber of the ECtHR in *Kafkaris v Cyprus* (2008, Application No 21906/04), para 101. The implication appears clearly from paragraph 98 of the Court's judgment in that case that such imprisonment if irreducible would, when put into effect in a Convention state, constitute a breach of article 3; cf also *Nivette v France* (2001, Application No 44190/98, where it was said to "raise an issue" under article 3, *Einhorn v France* (2001,

Application No 71555/01) and *Leger v France* (2006, Application No 19324/02). In his separate opinion in *Kafkaris* Judge Sir Nicolas Bratza went further, when he expressed the view:

> "I consider that the time has come when the Court should clearly affirm that the imposition of an irreducible life sentence, even on an adult offender, is in principle inconsistent with Article 3 of the Convention."

In the domestic context Lord Bingham of Cornhill in *R v Lichniak* [2002] UKHL 47, [2003] 1 AC 903, 909, para 8 stated it as his opinion, without dissent from any of the other members of an enlarged Appellate Committee:

> "If the House had concluded that on imposition of a mandatory life sentence for murder the convicted murderer forfeited his liberty to the state for the rest of his days, to remain in custody until (if ever) the Home Secretary concluded that the public interest would be better served by his release than by his continued detention, I would have little doubt that such a sentence would be found to violate articles 3 and 5 of the European Convention on Human Rights … as being arbitrary and disproportionate."

Cf also in the Privy Council *de Boucherville v The State of Mauritius* [2008] UKPC 37.

60. One cannot readily discount these statements of opinion or the high authority which is their source, but it is in my view important to bear in mind the extradition context and seek to attain the necessary balance to which I have referred. It is also important to have regard to the facts and circumstances of the individual case with which one is dealing, the approach constantly adopted by the ECtHR in determining applications before it. The sanction of irreducible life imprisonment is reserved in Missouri for those convicted of murder in the first degree, that is to say, knowingly causing the death of another person after deliberation upon the matter (Revised Statutes of Missouri, section 565.020). It was argued on behalf of the appellant that the mandatory nature of the sanction, applicable to all cases of first degree murder whatever the underlying facts, is arbitrary and indefensible, since it fails

to take any account of the possible variations in heinousness of such murders. There may be some cases of first-degree murder, as my noble and learned friend Lord Brown of Eaton-under-Heywood points out in paragraph 88 of his opinion, in which it might be said on the facts that life imprisonment without parole is inhuman. But it must be recognised that premeditated murder is a grave and heinous crime, which the Missouri legislature regards as so serious as to merit either the death penalty or whole life imprisonment without parole. The facts which the prosecution allege can be proved against the appellant in the present case, that he deliberately set out to assassinate three people, two of whom died, while the third was very seriously injured, would constitute a crime of the most grave and heinous kind. I therefore, in agreement with Lord Hoffmann, would not regard the imposition of a whole life sentence as *ipso facto* in breach of article 3 in every case. I think it possible that the continued detention of a prisoner may in the circumstances which have arisen at some time in the future infringe article 3, but that cannot be determined at the charging or sentencing stage.

61. It is necessary then to take account of two further factors, first, the element of relativity arising from the fact that we are dealing with the case in the context of extradition and, secondly, the possibility of future release by executive action. The ECtHR said in *Kafkaris* at paragraph 98 that a whole life sentence must be *de jure* and *de facto* reducible, but that that was sufficient. It was contended on the appellant's behalf that the possibility of release is so exiguous in the present case that it can be dismissed as a *de facto* possibility. It is true to say that it has until now been exercised extremely rarely in cases concerning adult male prisoners. But the possibility exists *de jure*, and so long as the machinery is in place, unless it is shown to be a mere fiction or a dead letter, I should be reluctant to dismiss it as having no application. It may well be that in a changing climate of opinion it may be exercised with greater frequency in the future – and in the nature of things it would ordinarily be a very long time in a case such as the present before the question of possible parole might arise, by which time the practice may have undergone a change.

62. In the light of the strong authority to which I have referred, I should readily accept the proposition that whole-life imprisonment without possibility of parole may constitute a breach of article 3 of the Convention. If, however, one takes into account several factors, the heinousness of the crime in question, the possibility of future release through executive clemency and the context of extradition, the particular case may not involve a breach of article 3. This is in my view such a

case. The offence alleged by the requesting state to have been committed by the appellant is high on the scale of heinousness. Executive release remains a possibility in theory, although an exiguous one on present practice. It has all to be seen through the prism of an application for extradition. I have therefore come to the conclusion that to extradite the appellant would not be in breach of the Convention. I would accordingly dismiss the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

63. Mandatory death sentences violate article 3 of the European Convention on Human Rights. They constitute inhuman and degrading punishment. Of that there is no doubt. As the Privy Council said in *Reyes v The Queen* [2002] 2 AC 235, 256:

> "To deny the offender the opportunity, before sentence is passed, to seek to persuade the Court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which section 7 [a provision in the Belize Constitution materially identical to article 3] exists to protect." (para 43 of the Board's opinion given by Lord Bingham of Cornhill).

Earlier (at para 34) Lord Bingham had cited from Stewart J's judgment for the plurality in the Supreme Court of the United States in *Woodson v North Carolina* (1976) 428 US 280, 304:

> "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offence excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offence not as

> uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."

The fact that the Constitution of Belize conferred on the Governor-General the prerogative of mercy and required him to exercise it on the advice of an independent body of high standing did not save the mandatory death sentence from its constitutional invalidity: "I[t] is clear that such a non-judicial body cannot decide what is the appropriate measure of punishment to be visited on a defendant for the crime he has committed." (para 47 of Lord Bingham's opinion).

64. Discretionary death sentences, on the other hand, are not in themselves contrary to article 3. As the European Court of Human Rights expressly stated in *Soering v United Kingdom* (1989) 11 EHRR 439, 474 at para 103: "Article 3 cannot be interpreted as generally prohibiting the death penalty" (although the Court held that extradition to Virginia to face protracted suffering on death row *would* breach article 3). Indeed, when quashing a mandatory death sentence, the Privy Council itself not infrequently remits the case to the local court for consideration of whether to pass a discretionary death sentence.

65. Your Lordships, however, are concerned here not with mandatory death sentences but rather with mandatory life sentences. Are these too nowadays to be regarded as violating article 3? And, if so, does article 3 necessarily preclude member states from extraditing those who would be likely to receive such a sentence on return? These are the issues now before the House.

66. It is not, of course, suggested that *all* mandatory life sentences (like all mandatory death sentences) amount to inhuman and degrading punishment. Far from it. Such a sentence remains, of course, the prescribed penalty for murder in this country. And, indeed, Ms Montgomery QC for the appellant concedes that in a few rare cases of exceptional gravity whole life terms can justifiably be fixed as the appropriate penal tariff. What *is* contended, however, is that life sentences which are both mandatory and irreducible are contrary to article 3 and, it is submitted, such being the fate in all probability awaiting this appellant were he to be tried and convicted in Missouri, he cannot be extradited and must instead, therefore, be freed. The appellant's core submission, as I understand it, is that a mandatory, irreducible whole life term is inhuman and degrading punishment in just

the same way as a mandatory death sentence: it denies the defendant the opportunity to plead in mitigation the particular circumstances of his case, treating him as one of an undifferentiated group rather than as an individual and thereby denying him his basic humanity. The fact that in the particular circumstances of his case the defendant might very well have been sentenced, entirely justifiably, to a whole life term is, submits Ms Montgomery, nothing to the point—just as it is nothing to the point that a defendant subject to a mandatory death sentence might justifiably have received (and might yet receive) a discretionary sentence of death.

67. It is important to understand the relevance to this argument of the impugned sentence being not merely mandatory but also irreducible. The fact that the sentence is mandatory means that, when imposed, just as in the case of a mandatory death sentence, no consideration will have been given to the defendant's personal circumstances or the particular circumstances in which he committed the crime. If, literally, his life sentence is also irreducible—if there is simply no realistic prospect of his ever being released irrespective of the particular circumstances of his case—then, the argument runs, he is to all intents and purposes in the same position as someone subjected to a mandatory death sentence. True, he lives rather than dies. But he lives in the certain knowledge that only death will free him from his imprisonment. And this fate will have been dictated simply by virtue of his having committed a specified type of crime, without any further reference to the individual facts of his case. Take this very case. On extradition to Missouri the appellant is likely to be convicted on two counts of first degree murder (premeditated killing) and sentenced to mandatory life imprisonment without the possibility of parole. It is highly unlikely that he will ever be released. His personal circumstances—including the fact that he may expect to live a further 40 or 50 years beyond the date of his arrest (in 2003, some six years after the alleged killings, at the age of 29)—may never be considered. He will thereby have been denied his basic human right to be treated as an individual. His expected punishment must accordingly be regarded as inhuman and degrading. This essentially is the appellant's argument.

68. Before turning to the Strasbourg jurisprudence it is necessary to take brief note of two domestic cases touching on the point on which the appellant seeks to rely: *R v Lichniak* [2003] 1 AC 903 in the House of Lords and *de Boucherville v The State of Mauritius* [2008] UKPC 37 in the Privy Council. In *Lichniak* the House of Lords rejected a challenge under articles 3 and 5 of the Convention to the UK's imposition of mandatory life sentences for murder, holding essentially that such

sentences in the UK are saved by the tariff system. The appellant, however, seeks to rely on a dictum in Lord Bingham's speech at para 8:

> "If the House had concluded that on imposition of a mandatory life sentence for murder the convicted murderer forfeited his liberty to the state for the rest of his days, to remain in custody until (if ever) the Home Secretary concluded that the public interest would be better served by his release than by his continued detention, I would have little doubt that such a sentence would be found to violate articles 3 and 5 of the European Convention on Human Rights. . .as being arbitrary and disproportionate."

69. In *de Boucherville* the Privy Council was concerned with a mandatory life sentence (deemed to have been imposed in place of a mandatory death sentence), challenged as being incompatible with both section 7 (equivalent to article 3) and section 10 (equivalent to article 6) of the Constitution of Mauritius. Giving the Board's judgment, Lord Bingham first (para 19), in response to the State's argument that mandatory life sentences are of their nature distinct from mandatory death sentences, cited the above passage from *Lichniak* and said that "[t]he same reasoning applies in the present case." Later (para 23), in the light of the Grand Chamber's judgment in *Kafkaris v Cyprus* (Application No. 21906/04, 12 February 2008), Lord Bingham concluded that, if the sentence passed on the appellant "condemned him to penal servitude for the rest of his days", it would be "manifestly disproportionate and arbitrary and so contrary to section 10", it being "unnecessary to decide whether there may also have been a violation of section 7 in the Constitution".

70. It is to *Kafkaris*, then, that I must next turn, Strasbourg's latest, although perhaps not last, word on the subject. Premeditated murder in Cyprus carries with it a mandatory sentence of life imprisonment. No judicial body thereafter considers the case. In determining whether such a sentence is to be regarded as "irreducible" the Court was concerned principally with article 53 (4) of the Cyprus Constitution which confers on the President a discretion to remit, suspend or commute a life sentence provided that the Attorney-General agrees. The majority of the Grand Chamber found that such life sentences "are both *de jure* and *de facto* reducible", concluding (at para 107):

> "It is true that a life sentence such as the one imposed on and served by the applicant without a minimum term necessarily entails anxiety and uncertainty related to prison life but these are inherent in the nature of the sentence imposed and, considering the prospects for release under the current system, do not warrant a conclusion of inhuman and degrading treatment under article 3."

Earlier, at para 97, the majority reaffirmed previous Strasbourg case-law holding that "the imposition of an irreducible life sentence on an adult may raise an issue under article 3".

71. Judge Bratza agreed with the majority that a life sentence in Cyprus is not "irreducible" because there is a "real and tangible" prospect of the prisoner's release. He thought, however, that the time had come for the Court to rule "that the imposition of an irreducible life sentence, even on an adult offender, is in principle inconsistent with article 3 of the Convention." On this latter point a further five members of the Court agreed with Judge Bratza. But they disagreed with both him and the majority as to whether a mandatory life sentence in Cyprus should be characterised as irreducible. They thought it should and would themselves have found the sentence to constitute inhuman and degrading treatment.

72. To my mind it is apparent that widely differing views are held by the judges in Strasbourg as to whether mandatory life sentences (and perhaps even discretionary life sentences), are compatible with article 3. The judgment of the majority appears to consider life sentences as a category and to ask whether generically they are "*de jure* and *de facto* reducible", only regarding them as irreducible if the law precludes all possibility of release or the facts demonstrate that virtually no one ever is released. And even if the sentence is to be regarded as irreducible, the majority appear to conclude no more than that it then *may* raise an issue under article 3 (not that it should be held "in principle inconsistent with article 3").

73. The minority on the other hand seem to regard all whole life sentences as intrinsically inhuman and, because the prospect of release for life sentence prisoners in Cyprus is "in practice extremely limited," and there was in the case before them "manifestly [no] genuine

possibility of release," they did not regard the sentence as *de facto* reducible and would on that ground have found it to violate article 3.

74. Although *Kafkaris* was, of course, a "domestic" case within the dichotomy established by the House in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, a number of "foreign" cases were referred to as supporting the Court's conclusion that irreducible life sentences "may raise an issue under article 3". In the present context it is worth mentioning two of these. *Nivette v France* (Application No 44190/98, Judgment 3 July 2001) concerned the applicant's proposed extradition from France to California on a murder charge. Assurances having been obtained that he would not be sentenced to death or to life imprisonment without possibility of parole, the Court concluded that "the danger of the applicant's being sentenced to life imprisonment without any possibility of early release" being averted, his extradition could not expose him to a serious risk of article 3 ill-treatment or punishment.

75. *Einhorn v France* (Application No 71555/01, Judgment 16 October 2001) was a similar application, refused a few months later. The proposed extradition there was to Pennsylvania and in this instance it was ruled inadmissible because under Pennsylvanian law the Governor could commute a life sentence so as to allow the offender's release on parole. At paragraph 27 of the judgment, however, the Court observed:

> ". . . the Court does not rule out the possibility that the imposition of an irreducible life sentence may raise an issue under article 3 of the Convention. . . . Consequently, it is likewise not to be excluded that the extradition of an individual to a State in which he runs the risk of being sentenced to life imprisonment without any possibility of early release may raise an issue under article 3 of the Convention."

Before leaving this area of the Strasbourg case law, I would note just one other decision (curiously not mentioned in *Kafkaris*): *Léger v France* (Application No 19324/02, judgment 11 April 2006) where the applicant had been sentenced to life imprisonment with no minimum term fixed and released only after 41 years. In rejecting his article 3 complaint the Court said:

> "90 [I]n the case of adults the Court has not ruled out the possibility that in special circumstances an irreducible life sentence might also raise an issue under the Convention where there is no hope of entitlement to a measure such as parole"
>
> 92 [A]fter he had spent 15 years in prison, he had the opportunity to apply for release on licence at regular intervals and had the benefit of procedural safeguards. In those circumstances, the Court considers that the applicant cannot maintain that he was deprived of all hope of obtaining an adjustment of his sentence, which was not irreducible *de jure* or *de facto*. It concludes that his continued detention as such, long though it was, did not constitute inhuman or degrading treatment."

76. In the light of this case law it seems to me that essentially four questions arise:

(1) In what circumstances will a life sentence in fact be found "*de jure* and *de facto* irreducible"?
(2) In what circumstances will an irreducible life sentence be found to violate article 3?
(3) When a life sentence *is* so found, at what point does it violate article 3? Is it when the sentence is passed or is it rather when the prisoner has served a longer term than could properly be justified?
(4) What (if any) relevance attaches to the fact that the above questions arise in the context of a "foreign", as opposed to a "domestic", case?

Q1 In what circumstances will a life sentence be found irreducible?

77. As Lord Phillips of Worth Matravers CJ observed in giving the judgment of the Court of Appeal (Criminal Division) in *R v Bieber* [2008] EWCA Crim 1601 (para 44), the test for deciding whether a life sentence is reducible "does not emerge with any degree of clarity from *Kafkaris*". He noted, however, the Government of Cyprus's statement that, in exercising the discretionary power to release life sentence prisoners, the President took into account:

> "the nature of the offence, the amount of time a prisoner had already served and any exceptional or compassionate grounds for early release. In this connection, the Government noted that an expression of genuine remorse on the part of a lifer would be an important consideration though not decisive. The President further determined whether the continued detention of the prisoner was necessary for the purposes of retribution and deterrence or for protecting the public from risk of serious harm."

It is apparent from this that in exercising his discretion the President has regard to essentially the same considerations as under UK domestic law (i) determine the penal tariff, (ii) determine in the post-tariff period (assuming no whole life penal tariff has been fixed) whether the prisoner can safely be released, and (iii) determine whether exceptional circumstances exist justifying the prisoner's release on compassionate grounds. Under our domestic law, of course, both the tariff period and the question of release in the post-tariff period are decided upon by judicial bodies—respectively the trial judge (or, on appeal, the Court of Appeal) and the Parole Board. Only the question of release on compassionate grounds is decided by the Secretary of State—under section 30 of the Crimes (Sentences) Act 1997. That all these questions are (or at any rate were at the time under consideration in *Kafkaris*) decided in Cyprus by the executive necessarily to my mind involved violations of article 5(4) (and probably also article 6 since tariff fixing is part of the sentencing process)—see, for example, *Stafford v United Kingdom* (2002) 35 EHRR 32. But, as Judge Bratza noted, the article 5(4) complaint in *Kafkaris* was lodged too late.

78. What I deduce from all this is that in reality the Strasbourg Court does not consider the question of irreducibility as a matter wholly distinct from the question whether some body (judicial or not) will one day take account of the individual circumstances of the prisoner's case. The potential vice of a mandatory life sentence is that no one may ever consider the defendant's individual circumstances with a view to deciding whether in fact he should remain in prison forever. Providing that at some point during the sentence this *will* be properly considered, then the sentence is not to be regarded as irreducible. It will, if appropriate, be reduced when the individual facts come to be considered. The majority of the Grand Chamber in *Kafkaris* found this to be so with regard to mandatory life sentences generally in Cyprus. In *Bieber* the Court of Appeal found it to be so with regard to life sentence prisoners subject to whole life tariffs in the UK. In so holding the Court of Appeal relied heavily on the Secretary of State's power of

compassionate release under section 30 of the 1997 Act. Given, however, that this power is used only sparingly (where, for example, the prisoner is suffering from a terminal illness or is bedridden or similarly incapacitated), to my mind the altogether more important factor compelling the conclusion that such sentences are not to be regarded as irreducible (or at any rate not objectionably so) is that, when originally the whole life term was fixed, the prisoner's individual circumstances (including naturally the circumstances of his particular offending) *will* have been considered and will have been thought by the judge (or the Court of Appeal) to merit that degree of punishment, draconian though undoubtedly it is.

79. As to whether the present appellant's sentence must be regarded as irreducible I find it hard to say. The position in Missouri *de jure* would appear to be substantially indistinguishable from that in Cyprus (considered in *Kafkaris*) and that in Pennsylvania (considered in *Einhorn*). Yet on the facts it appears that infinitely few adult males convicted in Missouri of first degree murder ever get released, leading one to fear that their individual circumstances may never properly be considered.

Q2 In what circumstances will an irreducible life sentence be found to violate article 3?

80. I raise this question only because the majority of the Grand Chamber in *Kafkaris*—consistently, as I have endeavoured to show, with earlier Strasbourg case-law—specifically concluded only that an irreducible life sentence *may raise an issue* under article 3, not that in principle it will violate article 3.

81. Having puzzled long over this question, I have finally concluded that the majority of the Grand Chamber 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.

Q3 When a sentence violates article 3, at what point does it do so?

82. The answer I have just suggested to Q2 obviously answers this question also. Article 3 is violated only when the prisoner's further imprisonment can no longer be justified. In this I agree entirely with the view expressed by Lord Phillips in *Bieber* at para 43:

> "Can the imposition of an irreducible life sentence itself constitute a violation of article 3, or will the potential violation only occur once the offender has been detained beyond the period that can be justified on the ground of punishment and deterrence? In other words, is it the sentence or the consequent detention that is capable of violating article 3? We believe it is the latter. We think that this is implicit from the passage of the judgment [in *Kafkaris* at para 107, cited at para 70 above]. As we have recorded it was the detention itself that the applicant in *Kafkaris* contended amounted to a violation of article 3."

In my judgment it cannot be contended that the mere passing of a mandatory life sentence, even in circumstances where no satisfactory laws or procedures exist for thereafter reviewing the case on an individual basis to determine the actual period to be served, violates article 3.

83. Despite what was suggested in *de Boucherville*, there are surely real differences of principle between mandatory life sentences and mandatory death sentences. As, indeed, was said by Stuart J in *Woodson v North Carolina* 428 US 280, 305 shortly after the passage cited by Lord Bingham in *Reyes* (see para 63 above):

> "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

Similarly I find myself in respectful agreement with what Lord Hoffmann says at paragraph 7 of his opinion. It is perhaps worth noting in addition that it was not until 2003—after the House of Lords in *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 (following the Strasbourg Court's decision in *Stafford*) declared the UK's previous legislation incompatible with the Convention—that in mandatory life sentence cases the Secretary of State ceased to have the last word both in fixing the tariff—part of the sentencing exercise and thus part of the trial process requiring determination by an independent and impartial tribunal under article 6(1)—and also as to when the prisoner can safely be released back into the community—a decision required by article 5(4) to be taken by "a court" and now made by the Parole Board itself (rather than as previously in the discretion of the Home Secretary following the Board's recommendation). Yet no one suggests that pre-2003 mandatory life sentences passed here constituted inhuman or degrading treatment or punishment and, indeed, the actual decision in *Lichniak* is surely inconsistent with any such view.

84. I would therefore reject the appellant's argument as to it being no more relevant in a mandatory life sentence case that the defendant might well justifiably have been sentenced to a discretionary whole life term than that in a mandatory death sentence case the defendant might justifiably have been subjected to a discretionary death sentence. It hardly needs pointing out that mandatory death sentences are not only intrinsically more shocking but also by their very nature afford an altogether shorter time within which they can be corrected (and, of course, the longer the time spent on death row, the more inhuman the sentence on that ground also).

Q4 What is the relevance of this being a "foreign" case?

85. In and insofar as Lord Hoffmann would hold that where, as here, it is obviously desirable that the appellant be extradited and tried for his alleged crimes rather than be able to invoke article 3 to secure safe haven here, the threshold of what amounts to inhuman and degrading treatment or punishment is heightened, I would respectfully disagree. Rather it seems to me that the Strasbourg Court in *Chahal v United Kingdom* (1996) 23 EHRR 413 (a decision strongly reaffirmed by the Grand Chamber's recent unanimous judgment in *Saadi v Italy* (Application No 37201/96, 28 February 2008)) was indeed departing from what Lord Hoffmann at para 31 calls

> "the relativist approach to what counted as inhuman and degrading treatment which was laid down in *Soering* and which is paralleled in the cases on other articles of the Convention in a foreign context."

86. There is, I conclude, no room in the Strasbourg jurisprudence for a concept such as the risk of a flagrant violation of article 3's absolute prohibition against inhuman or degrading treatment or punishment (akin to that of the risk of a "flagrant denial of justice"). By the same token that no one can be expelled if he would then face the risk of torture, so too no one can be expelled if he would then face the risk of treatment or punishment which is properly to be characterised as inhuman or degrading. That, of course, is not to say that, assuming for example "slopping out" is degrading treatment in Scotland, so too it must necessarily be regarded in all countries (see para 27 of Lord Hoffmann's opinion); or that leaving asylum-seekers totally destitute would necessarily constitute article 3 ill-treatment in, say, a poor (warm) country as the House held it to be here in *R (Limbuela) v Secretary of State for the Home Department* [2006] AC 396—where we pointed out that the motivation for any particular treatment (whether, for example, it was intended to humiliate or debase) may well be relevant to whether it is inhuman or degrading; or, indeed, that a particular punishment (or the particular conditions in which any term of imprisonment would be served) that might be regarded as inhuman or degrading in a Convention state is necessarily to be so regarded in a state not party to the Convention—the Strasbourg Court has repeatedly said that the Convention does not "purport to be a means of requiring the contracting states to impose Convention standards on other states" (*Soering*, para 86) and article 3 does not bar removal to non-Convention states (whether by way of extradition or simply for the purposes of immigration control) merely because they choose to impose higher levels or harsher measures of criminal punishment.

87. Nor is it to say that a risk of article 3 ill-treatment, the necessary pre-condition of an article 3 bar upon extradition, will readily be established. On the contrary, as the Grand Chamber reaffirmed in *Saadi* at para 142:

> "[T]he Court has frequently indicated that it applies rigorous criteria and exercises close scrutiny when assessing the existence of a real risk of ill-treatment . . . in the event of a person being removed from the territory of the respondent State by extradition, expulsion or any other

> measure pursuing that aim. Although assessment of that risk is to some degree speculative, the Court has always been very cautious, examining carefully the material placed before it in the light of the requisite standard of proof . . . before . . . finding that the enforcement of removal from the territory would be contrary to article 3 of the Convention. As a result, since adopting the *Chahal* judgment it has only rarely reached such a conclusion."

Whilst, however, I readily accept that there is a good deal of flexibility in the concept of inhuman and degrading treatment and punishment with many factors in play in determining whether it attains the minimum standard required and whether the risk of such ill-treatment is satisfied, I cannot accept that the expelling state's desire to extradite the person concerned (legitimate though clearly it is) can itself properly be one such factor.

88. How, then, do these principles apply in the present context? If a mandatory life sentence would properly be regarded as violating article 3 in a domestic case, so too, in my view, would the risk of it preclude expulsion of the defendant from this country in a foreign case. And this, indeed, appears to follow from the passage in the Court's judgment in *Einhorn* cited at para 75 above. But how can that assist the appellant in the present case given, as I would hold, that there could be no question of the mandatory life sentence anticipated here constituting inhuman or degrading punishment until (if ever) the time came when his further detention in prison would be incapable of justification on any ground? The position could hardly be more different from that which would arise had the defendant, say, after years of loving care for a progressively ill wife, deliberately then smothered her to end all further suffering. Were that to be the defendant's position and yet he still be facing on return to Missouri a mandatory life sentence without possibility of parole and realistically no prospect of release at any time (i.e. a real risk of imprisonment continued beyond any justifiable period) the Court might well judge the risk of ill-treatment to be sufficiently real, clear and imminent to conclude that extradition must indeed be barred on article 3 grounds.

89. Recognising the difficulty in contending on the particular facts of this case that the appellant, if convicted, will *ever* be able to suggest that he could no longer properly be detained as punishment—the circumstances of these killings being such that, had they occurred here, could well have justified the imposition of "a whole life order" pursuant

to section 269 (4) of, and schedule 24(1) to the Criminal Justice Act 2003—Ms Montgomery submits that, on any view of Missouri law, the determination of the actual length of the appellant's detention in prison will involve procedures which, in the UK or any other Council of Europe state, would themselves clearly breach article 5(4) (and probably article 6 also) of the Convention. With this I agree. What, however, I cannot accept is that on *this* account (ie putting article 3 aside) the appellant is likewise immune from extradition. Who knows what developments may occur in Missouri in the years to come which may soften that State's approach to life imprisonment or introduce a greater element of judicial control? That consideration apart, moreover, I for my part would hold that altogether more flagrant and fundamental putative violations of articles 5 or 6 than are contemplated here would need to be established before extradition (or, indeed, expulsion from the UK for any other reason) were to be found barred on these grounds. As the ECtHR said in *Saadi*, a real risk of article 3 ill-treatment is "only rarely" established. Never yet has the Court held extradition to be barred by reference to any other article. I cannot believe that it would do so here.

90. The Divisional Court's decision was arrived at before the judgments respectively of the ECtHR in *Kafkaris* and in *Saadi*, of the Privy Council in *de Boucherville* and of the Court of Appeal in *Bieber*. Clearly each of these has in certain ways altered the legal landscape in which the present case falls to be decided. In my opinion, however, the Divisional Court nevertheless came to the correct conclusion. I too would dismiss this appeal.