FOURTH SECTION

CASES OF HARKINS AND EDWARDS v. THE UNITED KINGDOM

(Application nos. 9146/07 and 32650/07)

JUDGMENT

STRASBOURG

17 January 2012

FINAL

09/07/2012

This judgment has become final under Article 44 § 2 (c) of the Convention. It may be subject to editorial revision.

In the cases of Harkins and Edwards v. the United Kingdom,
The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

LechGarlicki, *President,*
David ThórBjörgvinsson,
NicolasBratza,
PäiviHirvelä,
GeorgeNicolaou,
ZdravkaKalaydjieva,
Vincent A.De Gaetano, *judges,*

andLawrenceEarly,*Section Registrar,*
Having deliberated in private on 13 December 2011,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos.9146/07 and 32650/07 and) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The applications were lodged byMr Phillip Harkins ("the first applicant"),a British national who was born in 1978, andMr Joshua Daniel Edwards ("the second applicant"), a United States national born in 1987. The applications were lodged on 19 February 2007 and 1 August 2007 respectively.
2. Mr Harkins was represented by Ms Y. Aslam, a lawyer practising in Manchester with AGI Criminal Solicitors, assisted by Mr J. Jones, counsel.Mr Edwards was represented by Ms L. Rasool, a lawyer practising in London with Lewis Nedas & Co Solicitors, assisted by Mr M. Summers and Mr C. Harris, counsel. The United Kingdom Government ("the Government") were represented by their Agents, Ms E. Willmott, Ms H. Moynihan,and Ms Y. Ahmed of the Foreign and Commonwealth Office.
3. The Government of the United States of America has sought the extradition of each applicant. The applicants alleged that, if extradited from the United Kingdom, they would be at risk of the death penalty or of sentences of life imprisonment without parole, which were incompatible with Article 3 of the Convention.

4. Upon the lodging of each application, the President of the Chamber to which they had been allocated decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings not to extradite each applicant pending the Court's decision. The President also decided to give notice of each application to the Government and to grant each application priority under Rule 41 of the Rules of Court. It was decided to examine the merits of each application at the same time as its admissibility (Article 29 § 1 of the Convention).
5. The applicants and the Government each filed written observations (Rule 59 § 1).

THE FACTS

A. The first applicant: Mr Harkins

1. Proceedings in the United States

6. On 10 August 1999, in Jacksonville,Florida, Joshua Hayes was killed by a gunshot wound to the head in the course of a robbery.

The first applicant was subsequently arrested for the murder of Mr Hayes and,on 3 February 2000, was indicted for first degree murder and attempted robbery with a firearm. On 7 February 2000 the prosecution filed a notice that they intended to seek the death penalty for the charge of first degree murder; that notice was subsequently withdrawn.According to an affidavit filed in support of the United States' extradition request by Mr Charles Thomas Kimbrel, Assistant State Attorney (see paragraph 8 below), the prosecution case is based upon the testimony of a co-accused, Mr Terry Glover, who has since confessed and become a witness for the prosecution. His evidence is that he and the first applicant arranged for Mr Hayes to purchase marijuana from the first applicant. A meeting was arranged for delivery and payment. Mr Glover and the first applicant arrived at the meeting wearing masks. According to Mr Glover, the first applicant brandished a rifle and, when Mr Hayes refused to hand over the money, the first applicant shot him in the head. Mr Glover and the first applicant fled the scene, washed blood from their car at a carwash and threw the rifle in a river. The prosecution further relyon ballistics evidence, and other witnesses whom they

intend to call at trial to prove that the applicant planned the robbery and left his residence with a gun shortly before the robbery and killing.

The applicant maintains that initial police reports into Mr Hayes' murder record Mr Glover as stating that he, the first applicant, hit Mr Hayes in the head with the gun and the gun went off. The police reports also directly refer to the killing as one of "felony murder". (The Florida "felony murder rule" allows a defendant to be convicted of murder,even if there was no premeditation on his part, if he committed or was attempting to commit a serious felony offence (including armed robbery) at the time of the killing: see relevant Florida law at paragraph 51 below.) The applicant also maintains that the medical examiner's report on Mr Hayes' injuries demonstrates that the injuries are consistent with the gun going off accidentally.However, the first applicant denies being present at the fatal incident: he alleges that he only lent his car to one of those present, a Mr Randle, who went on to participate in the fatal robbery of Mr Hayes.

After he was indicted, the applicant was released on bail and ordered to appear before the court on 12 July 2002.

2. The first applicant's initial extradition proceedings in the United Kingdom

7. On 25 January 2003, the first applicant was arrested in the United Kingdom following a fatal car accident, for which he was subsequently sentenced to five years' imprisonment. An extradition request was made by the United States' Government on 7 March 2003. In an affidavit provided in support of the extradition request,Mr Charles Thomas Kimbrel, Assistant State Attorney, confirmed that the notice of intention to seek the death penalty had been withdrawn and that the prosecution sought a life sentence.

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

9. In a Diplomatic Note issued on 3 June 2005 the United States Embassy assured the United Kingdom Government that, based on an assurance the United States Department of Justice had received from the State Attorney of the State of Florida, the death penalty would not be sought or imposed on the first applicant.

10. On 1 June 2006 the Secretary of State refused the first applicant's representations and ordered his surrender. On the basis of the assurance from the United States Government, the Secretary of Stateconcluded that the death penalty would not be imposed on the first applicantand that extradition would not otherwise violate the first applicant's rights under the Convention.

11. The applicant sought judicial review of the Secretary of State's decision by the High Court. He argued inter alia that the assurance contained in the Diplomatic Note was inadequate because it had been issued by the United States Embassy whereas the prosecution would be conducted by the State of Floridaand only an assurance from the State Governor would suffice. He further argued that the trial court in Florida was enabled by the applicable criminal procedure to consider the imposition of the death penalty irrespective of whether or not it was sought by the prosecution.

12. A further affidavit was then submitted by the Florida Assistant State Attorney, Mr Mark J. Borello, who stated that, as a matter of long-standing practice, the trial court would not conduct a sentencing hearing to decide whether to impose the death penalty when the State Attorney did not seek the death penalty; even if it were to do so, the State Attorney would not present any evidence in support of the death penalty, meaning that there would be no basis upon which the trial court could find there were sufficient aggravating circumstances to warrant the death penalty. Mr Borello therefore stated that the first applicant would not be subjected to the death penalty if he were convicted of first degree felony murder.

13. On the basis of this affidavit, and on the further basis that the Diplomatic Note was clear and binding as a matter of international law, the High Court found there was no real risk of the death penalty and accordingly refused the application for judicial review. On the same date,14 February 2007, it also refused the first applicant's application for certification of a point of law and permission to appeal to the House of Lords.

14. On 1 March 2007, the applicant's solicitor informed the Secretary of State that an application had been made to the High Court for reconsideration of its decision. He relied on the affidavit sworn by an American attorney,which stated that the trial court could in fact impose the death penalty if sufficient aggravating features were found to exist in the first applicant's case. By way of an order dated 20 March 2007, Florida Circuit Judge Michael Weatherby, the trial judge in the first applicant's case, stated that no death penalty sentencing proceedings would be held and therefore the maximum sentence that could be imposed would be life in prison. It does not appear that the first applicant made an application to the High Court or that any such application was determined by that court.

15. On 19 February 2007 the first applicant lodged an application with this Court and, on 2 April 2007, the President of the Chamber to which the application was allocated decided to apply Rule 39 of the Rules of Court and to indicate to the Government of the United Kingdom that the applicant should not be extradited until further notice. It was also decided, under Rule 54 § 2(b), that notice of the application should be given to the Government of the United Kingdom and that the Government should be invited to submit written observations on the admissibility and merits of the case, including on whether any life sentence imposed on the first applicant would be compatible with Article 3 of the Convention.

3. Further proceedings in the United Kingdom

16. After the Government's observations had been received, the first applicant indicated that he had submitted fresh representations to the Secretary of State on the issue of the imposition of a life sentence.Those representations were made on 24 September 2008. Further submissions were made in the light of the House

of Lords' judgment in *Wellington v. the Secretary of State for the Home Department* (see paragraphs 34 –42 below) on 25 March 2009, 7 September 2009 and 28 October 2009. Proceedings before this Court were therefore adjourned while those representations were considered by the Secretary of State.

17. The Secretary of Staterefused the first applicant's representations on 9 March 2010, relying in particular on this Court's judgment in *Kafkaris v. Cyprus* [GC], no. 21906/04,12 February 2008 and the *Wellington* judgment, cited above. He noted that, on the basis of information provided by the first applicant and the United States' authorities, between 1980 and 1996 the Governor had commuted the sentences of forty-four defendants who had been convicted of first-degree murder. Although he was not constrained as to the factors he could take into account in granting clemency, the Governor took in account *inter alia* the nature of the offence and any history of mental instability. Moreover, the sentence of life imprisonment without parole had only been introduced in 1994. It was not unrealistic to assume that defendants who had received that sentence would be expected to serve more than fourteen to fifteen years before being considered for clemency and thus it was immaterial that the Governor had not granted clemency to anyone who had been given that sentence.

18. The Secretary of State also had regard to the first applicant's representations that Florida law allowed for the imposition of a mandatory sentence of life imprisonment without parole either for: (i) premeditated murder;or (ii)if the defendant committed or was attempting to commit a serious felony offence (including armed robbery) at the time the person was killed (the "felony murder rule"). Having regard to the circumstances of the crime of which the first applicant had been accused, the Secretary of State was not satisfied that a sentence of life imprisonment without parole, even as a result of the felony murder rule, was grossly disproportionate. This conclusion was not altered by the applicant's young age at the time of the offence, or the fact that he had submitted a psychiatric report, which showed he suffered from a severe personality disorder, with features of narcissistic and borderline personality disorders. Both these factors amounted to only limited mitigation. The Secretary of State was also satisfied that no separate issues arose under Articles 5 and 6 of the Convention in respect of life imprisonment without parole or the felony murder rule.

19. The first applicant sought judicial review of the Secretary of State's decision, arguing that mandatory life imprisonment without parole as a

consequence of the felony murder rule would be in violation of Article 3 of the Convention. The High Court dismissed that application on 14 April 2011 ([2011] EWHC 920 (Admin)).

20. Lord Justice Gross (with whom Mr Justice Davis agreed) considered it to be "wholly unreal" that the first applicant could be tried in England and Wales. He alsoapplied the approach taken by the House of Lords in *Wellington* and, on the evidence before the court, concluded that the only mechanism for release of the first applicant was by clemency or conditional release on compassionate medical grounds. However, the clemency procedure had been from time to time exercised, despite the first applicant's submission that it was subject to political pressure. The fact that no one convicted of first degree murder and sentenced to life imprisonment without parolehad been granted clemency did not mean that there was no prospect of clemency being granted in the future to someone thus sentenced. Lord Justice Gross accepted the Secretary of State's submission that,given that the sentence had only existed since 1994, it was unsurprising that no one sentenced to life imprisonment without parole had yet been granted clemency.

21. In respect of the felony murder rule, Lord Justice Gross found that the evidence showed that it was likely that, at trial,the prosecutionwould seek to argue that the first applicant's shooting of Mr Hayes was a premeditated killing. There was,however, also a realistic possibility that the first applicant could be convicted by way of the felony murder rule and the prosecution was not bound to put the matter higher. Lord Justice Gross observed, however, that:

> "[T]he only 'accident' involved is the accidental discharge of the loaded and cocked firearm. The killing would thus not have been premeditated but would have resulted from a serious and most dangerous assault, committed in the course of a robbery. Insofar as it is permissible to have regard to English Law (as furnishing no more than a frame of reference), the most likely outcome, on that factual assumption, would be a conviction for manslaughter. Moreover, it would involve a very grave case of manslaughter indeed...On the material before us, it is fanciful to contemplate a complete acquittal on the basis of (true) 'accident'."

He concluded:

"64.First and importantly, it is necessary to clarify the ambit of the argument before this Court. It is not contended on behalf of Mr. Harkins that the Florida felony murder rule is unconstitutional on the ground of arbitrariness or its potential application to a wide range of circumstances and in cases of (relatively) low culpability. [Counsel's] submission is instead confined to the contention that, on the facts of this case, the possible conviction of Mr. Harkins by way of the Florida felony murder [rule]means that his extradition would be incompatible with Art. 3. It follows that some of [counsel's] more graphic examples of the scope of application of the Florida felony murder rule (e.g., to a man sentenced to LWOP [life imprisonment without parole] after lending his car to friends to commit a burglary, in the course of which a woman was killed), can be put to one side. The Court is concerned with the facts of this case and no question arises of accessory liability, remote from the killing; Mr. Harkins' alleged role was plainly that of principal.

65.Secondly, the scope of the debate in this case has now been clarified. Realistically, for reasons already canvassed, this case is concerned with the possibility that Mr. Harkins will be convicted by way of the Florida felony murder rule for conduct (at best for Mr. Harkins) akin to manslaughter in the course of an armed robbery in this jurisdiction. It is fanciful to contemplate Mr. Harkins being at risk of conviction for what was an 'accident' truly so called; on any realistic view, there was no such 'accident' here.

66.Thirdly, it is of course a matter for the sentencing policy of the State of Florida whether mandatory LWOP is an appropriate sentence for the crime committed in this case, if Mr. Harkins is convicted. Bearing in mind that this Court is not engaged in a comparative sentencing exercise, it is helpful to keep the following matters in mind when considering whether, seen through 'the prism of an application for extradition' (*Wellington*, supra, at [62]) the potential Florida sentence should be seen as clearly disproportionate:

i) As this Court is only concerned with the facts of this case, the mandatory nature of the sentence does not carry the significance which it might, had the Court been engaged in some wider review of the law in question.

ii)The (alleged) facts of the present case are shocking indeed. However analysed, should Mr. Harkins be convicted, he will have

committed a grave crime; even on the most favourable (realistic) view of the facts for Mr. Harkins, his culpability will be high. On the (alleged) facts of this case, a severe sentence would be a punishment fitting the crime.

iii)To the extent that it matters, it would be wrong to underestimate the likely sentence Mr. Harkins would face in this country, even were he convicted "only" of manslaughter rather than murder. It is probable that he would receive an indeterminate sentence of imprisonment for public protection ("IPP"), although the possibility of a life sentence cannot be excluded. In any event, so far as concerned the notional determinate element of an IPP or a determinate sentence if it stood alone, on the conduct alleged in the present case, Mr. Harkins could expect a significant sentence well into double figures.

67.Fourthly, against this background, I am unable to conclude that the imposition in the US of a sentence of LWOP on Mr. Harkins would be clearly disproportionate, although it would not be a sentence passed here. Given Mr. Harkins' (alleged) conduct, it would not be a sentence which 'shocked the conscience'. On any view, that the killing occurred in the course of an armed robbery is a most serious aggravating factor, made, if anything, yet more grave by the (alleged) fact that the loaded rifle had been cocked by Mr. Harkins before getting out of his car.

68.Fifthly, although I have carefully considered Mr. Harkins' age at the time of the incident (he was 20), I am not dissuaded by that factor from the conclusion to which I am otherwise minded to come.

69.Sixthly, on the evidence and as already discussed, the sentence of LWOP is not irreducible. The significance of this feature for the Art. 3 jurisprudence was highlighted above. However, even if, contrary to my conclusion, the sentence was irreducible, on the (alleged) facts of this case, I would not regard the imposition of an irreducible sentence of LWOP as clearly disproportionate and thus in violation of Art. 3 – whatever questions might arise at some point in the course of Mr. Harkins' detention.

70.Pulling the threads together, the case of Mr. Harkins does involve a young (alleged) offender, facing a mandatory sentence of LWOP. But, as the Court is solely concerned with the facts of this case, the mandatory nature of the sentence does not have the wider significance which might otherwise attach to it. Should he be convicted, Mr. Harkins will, on any (realistic) view, have committed a grave crime with high

culpability. The sentence of LWOP is manifestly severe and different from the sentence he would face in this jurisdiction – but it cannot be seen as clearly disproportionate. It is, moreover, not irreducible, though even if it was, the imposition of the sentence per se would not be incompatible with Art. 3."

22. The first applicant then applied to the High Court for a certificate of points of law of general public importance and for leave to appeal to the Supreme Court. On 14 June 2011, the High Court refused both applications.

B. The second applicant: Mr Edwards

23. On 24 October 2006, a grand jury in Washington County, Maryland returned an indictment against the second applicant on eleven counts, relating to the death of a Mr J. Rodriguez, the non-fatal shooting of a second man, Mr T. Perry, and assault of a third man, Mr S. Broadhead. The first count of the indictment is murder in the first degree of Mr Rodriguez. The second count is attempted murder in the second degree of Mr Perry. The third and fourth counts are alternatives to counts one and two, charging the applicant with murder in the second degree of Mr Rodriguez and attempted murder in the second degree of Mr Perry. Counts five to seven charge the applicant with assault in the first degree upon the three men. Counts eight to ten charge him with assault in the second degree upon the men and count eleven charges him with using a handgun in the commission of a crime of violence.

24. The allegations giving rise to these counts are that, on the evening of 23 July 2006,the second applicant, Mr Rodriguez, Mr Perry and Mr Broadhead were at the apartment of afriend. The second applicant began to argue with Rodriguez and Perry who had made fun of his small stature and feminine appearance. The second applicant left the apartment and later returned with three other men. Mr Broadhead told the police that, while he was restrained by one of the other men in the kitchen, the second applicant produced a handgunand went into the living room. Shots were then fired which left Mr Rodriguez dead and Mr Perry with a non-fatal gunshot wound to the head.

25. On 21 January 2007, the second applicant was arrested in the United Kingdom pursuant to a provisional warrant of arrest issued under section 73 of the Extradition Act 2003. In an affidavit of 14 March 2007, Mr Joseph S. Michael, an attorney of the Office of the State's Attorney for Washington County,Maryland, outlined the facts of the case and the charges against the applicant. On count one, he stated:

> "Although a defendant convicted of first degree murder may, under certain circumstances, be subject to the death penalty, none of those circumstances exist in this case. Consequently, the maximum penalty is life in prison."

26. On 19 March 2007, the United States Embassy in London issued Diplomatic Note No. 12, which requested the second applicant's extradition. The note specified that count one, first-degree murder, carried a maximum penalty of life imprisonment and that count two, attempted first-degree murder, also carried a maximum penalty of life imprisonment. Counts three and four each carried maximum penalties of thirty years' imprisonment. Counts five to seven carried maximum penalties of twenty-five years' imprisonment; counts eight to ten, ten years' imprisonment; and count eleven, twenty years' imprisonment.

27. On 23 March 2007, the Secretary of State certified that the extradition request was valid. In a decision given on 16 April 2007, the District Judge, sitting at the City of Westminster Magistrates' Court, ruled that the extradition could proceed. He heldthat,*inter alia*, the second applicant's extradition would not be incompatible with his rights under Article 3 of the Convention since the Maryland Criminal Code stated that it was for the State of Maryland to seek the death penalty and the extradition request clearly indicated that it would not do so. The District Judge accordingly sent the case to the Secretary of State for his decision as to whether the applicant should be extradited.

28. On 5 June 2007, the United States Embassy issued a further Diplomatic Note in respect of the second applicant,which assured the United Kingdom Government that the second applicant was not subject to the death penalty, the death penalty would not be sought or carried out against him upon his extradition to the United States, and that the Government of the United States has been assured of the same by the Deputy State Attorney of the State of Maryland.

29. On 27 June 2007, the Secretary of State ordered the second applicant's extradition. The second applicant appealed to the High Court,*inter alia*, on the ground that a sentence of life imprisonment without the possibility of parole amounted to inhuman or degrading treatment in violation of Article 3 of the Convention.

30. On 26 July 2007, in a second affidavit in support of the extradition, Mr Michael provided further details of the sentence for first-degree murder under Maryland law. He stated:

> "5. This particular case qualifies for a maximum penalty of life imprisonment under Maryland Ann. Criminal Law § 2-201(b). The Death Penalty does not apply.
>
> 6. The State has the option of filing a notice to the Defendant that it will seek a sentence of life without the possibility of parole, which entitles the sentencing court to consider a sentence of life without parole, but does not require that the sentencing court impose such a sentence.
>
> 7. Given the heinous nature of the instant case, which the State characterizes as a[n] 'execution style' homicide, which claimed one life, and seriously and permanently injured a second victim, the State anticipates that it will seek a sentence of life without the possibility of parole under Maryland Ann. Criminal Law §2-203 and §2-304(a)(1).
>
> 8. In the instant case, in the event that the State did in fact file its notice of intention to seek life without parole, the trial judge would be the sole sentencing authority, and would have the discretion to seek a sentence of:
>
> - life without the possibility of parole;
>
> - life with the possibility of parole;
>
> - life with the possibility of parole, with all but a certain number of years suspended, followed by up to five years of probation.
>
> 9. In the undersigned's experience, there is no way to accurately predict what sentence a defendant will face if convicted of first degree murder."

Mr Michael added that a person convicted of first-degree murder was entitled to a pre-sentencing investigation. This involved a report from the Department of Parole and Probation on the defendant and included information received from the victims. There was also the right to apply for review of the sentencing by the sentencing judge and thereafter review by three other judges of the circuit. Mr Michael also stated he was unprepared to offer an opinion on any mitigating factors which might affect the second applicant's sentence if convicted of first-degree murder. He continued:

> "In general terms, the Washington County Circuit Court [the county where the second applicant would be tried] has considered as mitigating factors several known attributes possessed by Mr Edwards: youth and lack of serious criminal history. The single biggest mitigating factor in

regard to whether a Defendant receives life without parole would be an acceptance of responsibility upon the part of a given defendant."

31. Before the High Court, the second applicant accepted that his ground of appeal based on Article 3 of the Convention was precluded by the House of Lords' ruling in *R. v. Lichniak* (see paragraph 67 below) and conceded that it had to be dismissed. On 27 July 2007, the High Court therefore dismissed the second applicant's appeal on this ground, allowing only his appeal that count ten of the indictment was not an extraditable offence. It also refused to certify a point of law of general public importance which ought to be considered by the House of Lords.

32. On 1 August 2007 the second applicant lodged an application with this Court and requested an interim measure to prevent his extradition. On 3 August 2007 the President of the Chamber to which this application was allocated decided to apply Rule 39 of the Rules of Court and indicate to the Government of the United Kingdom that the applicant should not be extradited until further notice.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW ON ARTICLE 3 AND EXTRADITION

A. Extradition arrangements between the United Kingdom and the United States

33. For each applicant, the applicable bilateral treaty on extradition was the 1972 UK – USA Extradition Treaty (now superseded by a 2003 treaty). Article IV of the 1972 treaty provided that extradition could be refused unless the requesting Party gave assurances satisfactory to the requested Party that the death penalty would not be carried out.

B. Relevant United Kingdom law on Article 3 and extradition: *R (Wellington) v. Secretary of State for the Home Department* [2008] UKHL 72

34. The United States requested the extradition of Ralston Wellington from the United Kingdom to stand trial in Missouri on two counts of murder in the first degree. In his appeal against extradition, Mr Wellington argued that his surrender would violate Article 3 of the Convention, on the basis that

there was a real risk that he would be subjected to inhuman and degrading treatment in the form of a sentence of life imprisonment without parole.

35. In giving judgment in the High Court ([2007] EWHC 1109(Admin)), Lord Justice Laws found that there were "powerful arguments of penal philosophy" which suggested that risk of a whole-life sentence without parole intrinsically violated Article 3 of the Convention. He observed:

> "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."

However, and "not without misgivings", he considered that the relevant authorities, including those of this Court, suggested an irreducible life sentence would not always raise an Article 3 issue.

36. Wellington's appeal from that judgment was heard by the House of Lords and dismissed on 10 December 2008. Central to the appeal was paragraph 89 of this Court's judgment in*Soering v. the United Kingdom*, 7 July 1989, § 89, Series A no. 161, where the Court stated that considerations in favour of extradition:

> ".. 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."

37. A majority of their Lordships,Lord Hoffmann, Baroness Hale and Lord Carswell, found that, on the basisof this paragraph, in the extradition context, a distinction had to be drawn between torture and lesser forms of ill-treatment. When there was a real risk of torture, the prohibition on extradition was absolute and left no room for a balancing exercise. However, insofar as Article 3 applied to inhuman and degrading treatment and not to torture,itwas applicable only in a relativist form to extradition cases.

38. Lord Hoffmann, giving the lead speech, considered the Court's judgment in the case of *Chahal v. the United Kingdom*, 15 November 1996, § 81,*Reports of Judgments and Decisions* 1996-V,in which the Court stated that:

> "It should not be inferred from the Court's remarks [at paragraph 89 of *Soering*] 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 (art. 3) is engaged."

Lord Hoffmann stated:

> "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."

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

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

He went on to state:

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

39. A minority of their Lordships,Lord Scott and Lord Brown,disagreed with these conclusions. They considered that the extradition context was irrelevant to the determination of whether a whole life sentence amounted to inhuman and degrading treatment. They found no basis in the text of Article 3 for such a distinction. Lord Brown also considered that the Court, in *Chahal* and again in*Saadi v. Italy* [GC], no. 37201/06,ECHR 2008-..., had departed from the previous, relativist approach to inhuman and degrading treatment that it had taken in *Soering*. He stated:

> "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)... 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.
>
> 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.'"

Therefore, for Lord Brown,if a mandatory life sentence violated Article 3 in a domestic case, the risk of such a sentence would preclude extradition to another country.

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

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

Lord Brown added that this test had not been met in Wellington's case, particularly when the facts of the murders for which he was accused, if

committed in the United Kingdom, could have justified a whole life order. However, Lord Brown considered that, in a more compelling case, such as the mercy killing of a terminally ill relative, this 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".

41. Finally, Lord Hoffmann, Lord Scott, Baroness Hale and Lord Brown all doubted Lord Justice Laws'view that life imprisonment without parole was *lex talionis*. Lord Hoffmann, Baroness Hale and Lord Brown did not accept his premise that the abolition of the death penalty had been founded on the idea that the life of every person had an inalienable value; there were other, more pragmatic reasons for abolition such as its irreversibility and lack of deterrent effect. Lord Scott rejected the view that an irreducible life sentence was inhuman and degrading because it denied a prisoner the possibility of atonement; once it was accepted that a whole life sentence could be a just punishment, atonement was achieved by the prisoner serving his sentence.

42. Wellington's application to this Court was struck out on 5 October 2010, the applicant having indicated his wish to withdraw it (*Wellington v. the United Kingdom* (dec.), no. 60682/08).

C. Relevant Canadian case-law on extradition and the Canadian Charter of Rights

43. Section 1 of the Canadian Charter of Rights provides that the Charter guarantees the rights and freedoms set out in it "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Section 7 provides:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Section 12 provides:

> "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

44. In *United States v. Burns* [2001] S.C.R. 283, Burns and another (the respondents) were to be extradited from Canada to the State of Washington to stand trial for murders allegedly committed when they were both eighteen. Before making the extradition order the Canadian Minister of Justice had not sought assurances that the death penalty would not be

imposed.The Supreme Court of Canada found that the remoteness between the extradition and the potential imposition of capital punishment meant the case was not appropriately considered under section 12 but under section 7. However, the values underlying section 12 could form part of the balancing process engaged under section 7. The extradition of the respondents would, if implemented, deprive them of their rights of liberty and security of person as guaranteed by section 7. The issue was whether such a deprivation was in accordance with the principles of fundamental justice. While extradition could only be refused if it "shocked the conscience" an extradition that violated the principles of fundamental justice would always do so. The court balanced the factors that favoured extradition against those that favoured seeking assurances that the death penalty would not be sought.The latter included the fact that a degree of leniency for youth was an accepted value in the administration of justice, even for young offenders over the age of eighteen.The court concluded that the objectives sought to be advanced by extradition without assurances would be as well served by extradition with assurances. The court held therefore that assurances were constitutionally required by section 7 in all but exceptional cases.

45. In *United States of America v. Ferras; United States of America v. Latty*, [2006] 2 SCR 77, the appellants were to be extradited to the United States to face charges of fraud (the *Ferras* case) or trafficking of cocaine (the *Latty* case). The appellants in the *Latty* case had argued that, if extradited and convicted they could receive sentences of ten years to life without parole and this would "shock the conscience". In dismissing the appeals, the Supreme Court affirmed the balancing approach laid down in *Burns* to determining whether potential sentences in a requesting state would "shock the conscience".The harsher sentences the appellants might receive if convicted in the United States were among the factors militating against their surrender but they had offered no evidence or case-law to back up their assertions that the possible sentences would shock the conscience of Canadians. The factors favouring extradition far outweighed those that did not.

D. Relevant international law on non-refoulement

1. The International Covenant on Civil and Political Rights

46. Article 7 of the ICCPR where relevant provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The Human Rights Committee's most recent general

comment on Article 7 (No. 20, of 10 March 1992) states the Committee's view that: "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement." (see also *Chitat Ng v. Canada*,CCPR/C/49/D/469/1991,7 January 1994; *A.J.R. v. Australia*, CCPR/C/60/D/692/1996, 11 August 1997).

2. The United Nations Convention Against Torture

47. Article 3 § 1 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT") provides:

> "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

48. Article 16 § 2 provides:

> "The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion."

3. The Council of Europe Guidelines on Human Rights and the fight against terrorism

49. The above guidelines (adopted by the Committee of Ministers on 11 July 2002) contain the following provisions on refoulement and extradition:

> "**XII. Asylum, return ('refoulement') and expulsion**
>
> ...
>
> 2. It is the duty of a State that has received a request for asylum to ensure that the possible return ("refoulement") of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment. The same applies to expulsion.
>
> **XIII. Extradition**
>
> 1. Extradition is an essential procedure for effective international co-operation in the fight against terrorism.
>
> ...

3. Extradition may not be granted when there is serious reason to believe that:

(i) the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment or punishment..."

4. The European Union Charter

50. Article 19 § 2 of the Charter of Fundamental Rights of the European Union provides:

"No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

III. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE ON LIFE SENTENCES

A. The applicants' possible sentences and gubernatorial pardons in Florida and Maryland

1. The law and practice of the State of Florida

a. Information provided by the United States authorities

51. In a letter dated 4 June 2007, the United States Department of Justice set out the law and practice of Florida as it applied to the first applicant. He was facing a first-degree murder charge which could be proved by establishing (i) a premeditated design to effect the death of the person killed; or (ii) that he committed, or was attempting to commit, a serious felony offence, including armed robbery, at the time the person was killed. The punishment upon conviction was the same: life imprisonment.

52. Article 4, section 8(a) of the Florida Constitution (replicated in Florida Statute section 940.01(1) gave the Governor, with the approval of two members of his cabinet ("the Board of Executive Clemency"), the power to grant pardons and commute punishments. There was no legal limitation on what the Governor could consider in granting pardon or commuting a sentence. However, in every case he would consider *inter alia* the nature of the offence and any history of mental instability, drug abuse, or alcohol abuse. The letter confirmed that, from 1980-2006, the Governor had commuted 133 sentences, of which forty-four were for first-degree murder. If a request was denied, another request could be made in five years or,

alternatively, the defendant could apply for waiver of the five-year period. A defendant could also apply for commutation if he or she became ill and could file a motion to have his sentence set aside on the ground that it amounted to cruel and unusual punishment. The letter accepted that, given the current status of the law, such a motion was unlikely to succeed.

b. Information provided by the first applicant

53. The first applicant provided the following provisions of Florida law on sentencing:

> "775.082(1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.
>
> Separate 921.141(1) proceedings on issue of penalty. —Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082.

54. He also provided an affidavit sworn by a Florida criminal defence attorney (and former Assistant State Attorney), Mr Oliver D. Barksdale. Mr Barksdale disagreed with the view of the current Assistant State Attorney Mr Borello that, if the prosecution did not present evidence in support of the death penalty, there was no basis upon which the trial court could find there were sufficient aggravating circumstances to warrant the death penalty (see Mr Borello's statement summarised paragraph 12 above). In Mr Barksdale's view, in the penalty phase of a trial there was no requirement that new evidence be present; the jury could be asked simply to rely on the evidence heard during the guilt phase of proceedings. There was no reason why a trial court could not convene a penalty phase and impose the death sentence, even if the prosecution did not seek it. The trial judge was not limited by any recommendation of the prosecution.

55. The first applicant also submitted an affidavit sworn by Professor Sandra Babcock, of Northwestern University School of Law. Her view was that the assurances provided by the United States Government and the Florida authorities made it unlikely that the first applicant faced a significant risk of being sentenced to death but some risk remained as the

assurances were not binding in Florida law. It was more likely that he would face a mandatory sentence of life imprisonment without the possibility of parole and executive clemency was the only avenue by which he could seek reduction in his sentence. The procedure for seeking such a reduction was subject to minimal procedural protections. Florida had never granted clemency to a defendant sentenced to life imprisonment without parole and rarely commuted sentences of those accused of first degree murder; after 1994, no one convicted of first degree murder had been granted a commutation. Although the granting of clemency required the approval of two cabinet members, it could be denied unilaterally by the Governor at any time. The Governor and cabinet were elected officials and would never risk political unpopularity by granting a commutation unless there were clear evidence of innocence. The first applicant's chances of receiving clemency were remote and it was virtually certain that he would spend the rest of his life in prison.

2. The law and practice of the State of Maryland

56. Further to the second affidavit of Mr Michael set out at paragraph 30 above, section 2-304 of the Maryland Criminal Code provides that where the State has given notice of its intention to seek a sentence of life imprisonment without the possibility of parole, the court shall conduct a sentencing hearing as soon as practicable after the defendant is found guilty of murder in the first degree to determine whether he shall be sentenced to imprisonment for life without the possibility of parole or to imprisonment for life. By section 2-101(b), a sentence of imprisonment for life without the possibility of parole means "imprisonment for the natural life of an inmate under the custody of a correctional facility". A person who receives such a sentence is not eligible for parole consideration and may not be granted parole at any time during the term of sentence (Maryland Code of Correctional Services Article 7-301(d)(3)(i)). The courts of Maryland have no role in determining whether such prisoners should be released on parole; that power is vested in the Governor of the State (Article 7-301(d)(3)(ii) and 7-601). He may pardon any individual convicted of a crime subject to any conditions he requires or remit any part of a sentence of imprisonment without the remission operating as a full pardon. An inmate who has been sentenced to life imprisonment (as opposed to a sentence of life imprisonment without the possibility of parole) is not eligible to be considered for parole until he has served fifteen years' imprisonment. If

eligible, he may only be paroled with the approval of the Governor (7-301(1) and (4)).

57. On 29 May 2008, the United States Department of Justice, having contacted the prosecutor in Maryland, provided the following information to the United Kingdom Government:

> "The prosecutor intends to seek a trial on all counts of the indictment pending against Mr Edwards if he is surrendered on all counts.
>
> Mr Edwards is convicted of two or more offenses, the prosecutor would, in all likelihood, ask the court to impose – and the court would, in all likelihood, impose – consecutive sentences.
>
> If Mr Edwards is convicted of an offense, it is unlikely that the court would place much significance on his age. It is likely, however, that the court would place some significance on the fact that, given his age, he has a relatively minor criminal record.
>
> ...
>
> If the court were to sentence Mr Edwards to life imprisonment without parole, the Governor of Maryland could commute the sentence or grant Mr Edwards a full pardon."

58. In a letter of 2 September 2008 to the second applicant's representatives, the Department of Public Safety and Correctional Services of Maryland provided the following information on the sentence of life imprisonment without the possibility of parole. The sentence is available for a number of non-homicide offences, including rape, child sex offences, kidnapping and, since 1975, for a fourth conviction of a crime of violence ("the repeat offender provision"). It has been available for homicide since 1987. Approximately 367 offenders from 1977 onwards have been sentenced to life imprisonment without the possibility of parole. A review of records dating back to 1985 indicated that there had been no releases into the community by a Governor's commutation of a sentence of life imprisonment without the possibility of parole. In 1995, there was one commutation of the sentence to one of life imprisonment. The second applicant maintains that, in that particular case, the person had been sentenced to life imprisonment without the possibility of parole under the repeat offender provision. He had applied unsuccessfully for parole after 30 years' imprisonment.

B. Eighth Amendment case-law on "grossly disproportionate" sentences

59. The Eighth Amendment to the Constitution provides,*inter alia*, that cruel and unusual punishments shall not be inflicted.It has been interpreted by the Supreme Court of the United States as prohibiting extreme sentences that are grossly disproportionate to the crime (*Graham v. Florida* 130 S. Ct. 2011, 2021 (2010)). There are two categories of cases addressing proportionality of sentences.
The first category is a case-by-case approach, where the court considers all the circumstances of the case to determine whether the sentence is excessive. This begins with a "threshold comparison" of the gravity of the offence and the harshness of the penalty. If this leads to an inference of gross disproportionality, the court compares the sentence in question with sentences for the same crime in the same jurisdiction and other jurisdictions. If that analysis confirms the initial inference of gross disproportionality, a violation of the Eighth Amendment is established.
In the second category of cases, the Supreme Court has invoked proportionality to adopt "categorical rules" prohibiting a particular punishment from being applied to certain crimes or certain classes of offenders.
60. Under the first category, the Supreme Court has struck down as grossly disproportionate a sentence of life imprisonment without parole imposed on a defendant with previous convictions for passing a worthless cheque (*Solem v. Helm* 463 US 277 (1983)). It has upheld the following sentences: life with the possibility of parole for obtaining money by false pretences (*Rummel v. Estelle* 445 US 263 (1980)); life imprisonment without parole for possessing a large quantity of cocaine (*Harmelin v. Michigan* 501 US 957 (1991)); twenty-five years to life for theft under a "three strikes" recidivist sentencing law (*Ewing v. California* 538 US 11 (2003)); forty years' imprisonment for distributing marijuana (*Hutto v. Davis* 454 US 370 (1982)).
61. Examples of cases considered under the second category include *Coker v. Georgia* 433 US 584 (1977) (prohibiting capital punishment for rape) and *Roper v. Simmons* 543 US 551 (2005) (prohibiting capital punishment for juveniles under eighteen). In *Graham*, cited above, the court held that the Eighth Amendment also prohibited the imposition of life imprisonment without parole on a juvenile offender who did not commit homicide. The court found that life imprisonment without parole was an especially harsh punishment for a juvenile and that the remote possibility of pardon or other

executive clemency did not mitigate the harshness of the sentence. Although a State was not required to guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime, it had to provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. The court also held that a sentence lacking in legitimate penological justification (such as retribution, deterrence, incapacitation and rehabilitation) was, by its nature, disproportionate. Such purposes could justify life without parole in other contexts, but not life without parole for juvenile non-homicide offenders.

C. Relevant international and comparative law on life sentences and "grossly disproportionate" sentences

62. The relevant texts of the Council of Europe, the European Union and other international legal texts on the imposition and review of sentences of life imprisonment, including the obligations of Council of Europe member States when extraditing individuals to States where they may face such sentences, are set out in*Kafkaris*, cited above, at §§ 68-76. Additional materials before the Court in the present cases (and those materials in *Kafkaris* that are expressly relied on by the parties) may be summarised as follows.

1. Council of Europe texts

63. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") prepared a report on "Actual/Real Life Sentences" dated 27 June 2007 (CPT (2007) 55). The report reviewed various Council of Europe texts on life sentences, including recommendations (2003) 22 and 23, and stated in terms that: (a) the principle of making conditional release available is relevant to all prisoners, "even to life prisoners"; and (b) that all Council of Europe member States had provision for compassionate release but that this "special form of release" was distinct from conditional release.
It noted the view that discretionary release from imprisonment, as with its imposition, was a matter for the courts and not the executive, a view which had led to proposed changes in the procedures for reviewing life imprisonment in Denmark,Finland and Sweden. The report also quoted with approval the CPT's report on its 2007 visit to Hungary in which it stated:

> "[A]s regards "actual lifers", the CPT has serious reservations about the very concept according to which such prisoners, once they are

> sentenced, are considered once and for all as a permanent threat to the community and are deprived of any hope to be granted conditional release".

The report's conclusion included recommendations that: no category of prisoners should be "stamped" as likely to spend their natural life in prison; no denial of release should ever be final; and not even recalled prisoners should be deprived of hope of release.

2. The International Criminal Court

64. Article 77 of the Rome Statute of the International Criminal Court allows for the imposition of a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. Such a sentence must be reviewed after twenty-five years to determine whether it should be reduced (Article 110).

3. The European Union

65. Article 5(2) of Council Framework Decision of 13 June 2002 on the European arrest warrant provides:

> "if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure..."

4. Life sentences in the Contracting States

66. In his comparative study entitled "Outlawing Irreducible Life Sentences: Europe on the Brink?",23: 1 *FederalSentencing Reporter* Vol 23, No 1 (October 2010), Professor Van Zyl Smit concluded that the majority of European countries do not have irreducible life sentences, and some, including Portugal, Norway and Spain, do not have life sentences at all.In Austria,Belgium,CzechRepublic,Estonia,Germany,Lithuania,Luxembourg,Poland,Romania,Russia,Slovakia,Slovenia,Switzerland and Turkey,prisoners sentenced to life imprisonment have fixed periods after which release is

considered.In France three such prisoners have no minimum period but it appears they can be considered for release after 30 years. InSwitzerland there are provisions for indeterminate sentences for dangerous offenders where release can only follow new scientific evidence that the prisoner was not dangerous, although the provisions have not been used.The study concludes that only the Netherlands and England and Waleshave irreducible life sentences.

5. The United Kingdom

67. *R. v. Lichniak* and *R. v. Pyrah* [2003] 1 AC 903, the House of Lords considered the compatibility of a mandatory life sentence as imposed in England and Wales with Articles 3 and 5 of the Convention. It found that, in its operation, a mandatory life sentence was not incompatible with either Article.
Such a sentence was partly punitive, partly preventative. The punitive element was represented by the tariff term, imposed as punishment for the serious crime which the convicted murderer had committed. The preventative element was represented by the power to continue to detain the convicted murderer in prison unless and until the Parole Board, an independent body, considered it safe to release him, and also by the power to recall to prison a convicted murderer who had been released if it was judged necessary to recall him for the protection of the public (Lord Bingham of Cornhill at § 8 of the judgment).
The House of Lords therefore held firstly, that the appellant's complaints were not of sufficient gravity to engage Article 3 of the Convention and secondly, that the life sentence was not arbitrary or otherwise contrary to Article 5 § 1 of the Convention. Lord Bingham added:

> "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."

68. In *R. v. Secretary of State for the Home Department, ex parte Hindley* [2001] 1 AC 410, HL and *R. v. Anderson* [2003] 1 AC 837, HL, the House of Lordsfound that, under the tariff system then in operation, there was "no reason, in principle, why a crime or crimes, if sufficiently heinous should

not be regarded as deserving lifelong incarceration for purposes of pure punishment" (per Lord Steyn at pp. 416H). Lord Steyn also observed: "there is nothing logically inconsistent with the concept of a tariff by saying that there are cases were the crimes are so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution and deterrence" (p. 417H).

69. Under the present statutory framework in England and Wales,Chapter 7 of the Criminal Justice Act 2003, a trial judge can impose a whole life term or order on a defendant convicted of murder.Such a defendant is not eligible for parole and can only be released by the Secretary of State. In *R v. Bieber* [2009] 1 WLR 223 the Court of Appeal considered that such whole life terms were compatiblewith Article 3 of the Convention.

It found that a whole life order did not contravene Article 3 of the Convention because of the possibility of compassionate release by the Secretary of State. It also found that the imposition of an irreducible life sentence would not itself constitute a violation of Article 3 but rather that a potential violation would only occur once the offender had been detained beyond the period that could be justified on the ground of punishment and deterrence.The court stated:

> "45. While under English law the offence of murder attracts a mandatory life sentence, this is not normally an irreducible sentence. The judge specifies the minimum term to be served by way of punishment and deterrence before the offender's release on licence can be considered. Where a whole life term is specified this is because the judge considers that the offence is so serious that, for purposes of punishment and deterrence, the offender must remain in prison for the rest of his days. For the reasons that we have given, we do not consider that the Strasbourg court has ruled that an irreducible life sentence, deliberately imposed by a judge in such circumstances, will result in detention that violates article 3. Nor do we consider that it will do so.
>
> 46. It may be that the approach of the Strasbourg court will change. There seems to be a tide in Europe that is setting against the imposition of very lengthy terms of imprisonment that are irreducible. Thus it may become necessary to consider whether whole life terms imposed in this jurisdiction are, in fact irreducible.
>
> ...
>
> Under the regime that predated the 2003 Act it was the practice of the Secretary of State to review the position of prisoners serving a whole

> life tariff after they had served 25 years with a view to reducing the tariff in exceptional circumstances, such as where the prisoner had made exceptional progress whilst in custody. No suggestion was then made that the imposition of a whole life tariff infringed article 3.
>
> ...
>
> Under the current regime the Secretary of State has a limited power to release a life prisoner under section 30 of the Crime (Sentences) Act 1997.
>
> ...
>
> At present it is the practice of the Secretary of State to use this power sparingly, in circumstances where, for instance, a prisoner is suffering from a terminal illness or is bedridden or similarly incapacitated. If, however, the position is reached where the continued imprisonment of a prisoner is held to amount to inhuman or degrading treatment, we can see no reason why, having particular regard to the requirement to comply with the Convention, the Secretary of State should not use his statutory power to release the prisoner.
>
> 49. For these reasons, applying the approach of the Strasbourg court in *Kafkaris v Cyprus* 12 February 2008, we do not consider that a whole life term should be considered as a sentence that is irreducible. Any article 3 challenge where a whole life term has been imposed should therefore be made, not at the time of the imposition of the sentence, but at the stage when the prisoner contends that, having regard to all the material circumstances, including the time that he has served and the progress made in prison, any further detention will constitute degrading or inhuman treatment."

6. Germany

70. Article 1 of the Basic Law of the Federal Republic of Germany provides that human dignity shall be inviolable. Article 2(2) provides:

> "Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law."

The compatibility of a mandatory sentence of life imprisonment for murder with these provisions was considered by the Federal Constitutional Court in the *Life Imprisonment* case of 21 June 1977, 45 BVerfGE 187 (an English

translation of extracts of the judgment, with commentary, can be found in D.P. Kommers,*The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd ed.), Duke University Press, Durham and London, 1997 at pp. 306-313).

The court found that the State could not turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth. Respect for human dignity and the rule of law meant the humane enforcement of life imprisonment was possible only when the prisoner was given "a concrete and realistically attainable chance" to regain his freedom at some later point in time.

The court underlined that prisons also had a duty to strive towards the re-socialisation of prisoners, to preserve their ability to cope with life and to counteract the negative effects of incarceration and the destructive changes in personality that accompanied imprisonment. It recognised, however, that, for a criminal who remained a threat to society, the goal of rehabilitation might never be fulfilled; in that case, it was the particular personal circumstances of the criminal which might rule out successful rehabilitation rather than the sentence of life imprisonment itself. The court also found that, subject to these conclusions, life imprisonment for murder was not a senseless or disproportionate punishment.

71. In the later *War Criminal* case 72 BVerfGE 105 (1986), where the petitioner was eighty-six years of age and had served twenty years of a life sentence imposed for sending fifty people to the gas chambers, the court considered that the gravity of a person's crime could weigh upon whether he or she could be required to serve his or her life sentence.However, a judicial balancing of these factors should not place too heavy an emphasis on the gravity of the crime as opposed to the personality, state of mind, and age of the person. In that case, any subsequent review of the petitioner's request for release would be required to weigh more heavily than before the petitioner's personality, age and prison record.

72. In its decision of 16 January 2010, BVerfG, 2 BvR 2299/09, theFederal Constitutional Court considered an extradition case where the offender faced "aggravated life imprisonment until death" (*erschwerte lebenslängliche Freiheitsstrafe bis zum Tod*) in Turkey. The German government had sought assurances that he would be considered for release and had received the reply that the President of Turkey had the power to remit sentences on grounds of chronic illness, disability, or old age. The court refused to allow extradition, finding that this power of release offered only a vague hope of release and was thus insufficient. Notwithstanding the need to respect foreign legal orders, if someone had no practical prospect of

release such a sentence would be cruel and degrading (*grausam und erniedrigend*) and would infringe the requirements of human dignity provided for in Article 1.

7. Canada

73. As stated at paragraph 43 above, section 12 of the Canadian Charter protects against cruel or unusual treatment or punishment. The Supreme Court of Canada has found that a grossly disproportionate sentence will amount to cruel and unusual treatment or punishment (see,*inter alia*,*R v. Smith (Edward Dewey)*[1987] 1 SCR 1045). In *R v. Luxton*[1990] 2 S.C.R. 711, the court considered that, for first degree murder, a mandatory minimum sentence of life imprisonment without eligibility for parole for twenty-five years was not grossly disproportionate. Similarly, in *R v. Latimer* 2001 1 SCR 3, for second degree murder, a mandatory minimum sentence of life imprisonment without eligibility for parole for ten years was not grossly disproportionate. The court observed that gross disproportionality would only be found on "rare and unique occasions" and that the test for determining this issue was "very properly stringent and demanding".

8. South Africa

74. In *Dodo v. the State*(CCT 1/01) [2001] ZACC 16, the South African Constitutional Court considered whether a statutory provision which required a life sentence for certain offences including murder, was compatible with the constitutional principle of the separation of powers, the accused's constitutional right to a public trial and the constitutional prohibition on cruel, inhuman or degrading treatment or punishment. The court found none of these constitutionals provisions was infringed, since the statute allowed a court to pass a lesser sentence if there were substantial and compelling circumstances. The court did, however, observe that the concept of proportionality went to the heart of the inquiry as to whether punishment was cruel, inhuman or degrading.

75. In *Niemand v. The State* (CCT 28/00)[2001] ZACC 11, the court found an indeterminate sentence imposed pursuant to a declaration that the defendant was a "habitual criminal" to be grossly disproportionate because it could amount to life imprisonment for a non-violent offender. The court "read in" a maximum sentence of fifteen years to the relevant statute.

9. Other jurisdictions

76. In *Reyes v. the Queen* [2002] UKPC 11 the Judicial Committee of the Privy Council considered that a mandatory death penalty for murder by shooting was incompatible with section 7 of the Constitution of Belize, which prohibits torture and ill-treatment in identical terms to Article 3 of the Convention. Lord Bingham observed that 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 was to treat him as no human being should be treated. The relevant law was not saved by the powers of pardon and commutation vested by the Constitution in the Governor-General, assisted by an Advisory Council; in Lord Bingham's words "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".

77. In *deBoucherville v. the State of Mauritius* [2008] UKPC 70 the appellant had been sentenced to death. With the abolition of the death penalty in Mauritius, his sentence was commuted to a mandatory life sentence. The Privy Council considered the Court's judgment in *Kafkaris*, cited above, and found that the safeguards available in Cyprus to prevent Kafkaris from being without hope of release were not available in Mauritius. The Mauritian Supreme Court had interpreted such a sentence as condemning de Boucherville to penal servitude for the rest of his life and the provisions of the relevant legislation on parole and remission did not apply. This meant the sentence was manifestly disproportionate and arbitrary and so contrary to section 10 of the Mauritian Constitution (provisions to secure protection of law, including the right to a fair trial). It had also been argued by the appellant that the mandatory nature of the sentence violated section 7 of the Constitution (the prohibition of torture, inhuman or degrading punishment or other such treatment). In light of its conclusion on section 10, the Committee considered it unnecessary to decide that question or to consider the relevance of the possibility of release under section 75 (the presidential prerogative of mercy).It did, however, find that the safeguards available in Cyprus (in the form of the Attorney-General's powers to recommend release and the President's powers to commute sentences or decree release) were not available in Mauritius. It also acknowledged the appellant's argument that, as with the mandatory sentence of death it had considered in *Reyes*, a mandatory sentence of life imprisonment did not allow for consideration of the facts of the case. The Privy Council also considered any differences between mandatory sentences

of death and life imprisonment could be exaggerated and, to this end, quoted with approval the dicta of Lord Justice Laws in *Wellington* and Lord Bingham in *Lichniak* (at paragraphs 35 and 67 above).

78. In *State v. Philibert* [2007] SCJ 274, the Supreme Court of Mauritius held that a mandatory sentence of 45 years' imprisonment for murder amounted to inhuman or degrading treatment in violation of section 7 on the grounds that it was disproportionate.

79. In *State v. Tcoeib* [1997] 1 LRC 90 the Namibian Supreme Court considered the imposition of a discretionary life sentence to be compatible with section 8 of the country's constitution (subsection (c) of which is identical to Article 3 of the Convention).Chief Justice Mahomed, for the unanimous court, found the relevant statutory release scheme to be sufficient but observed that if release depended on the "capricious exercise" of the discretion of the prison or executive authorities, the hope of release would be "too faint and much too unpredictable" for the prisoner to retain the dignity required by section 8. It was also observed that life imprisonment could amount to cruel, inhuman or degrading treatment if it was grossly disproportionate to the severity of the offence.The High Court of Namibia found mandatory minimum sentences for robbery and possession of firearms to be grossly disproportionate in *State v. Vries* 1997 4 LRC 1 and *State v Likuwa* [2000] 1 LRC 600.

80. In *Lau Cheong v. Hong Kong Special Administrative Region* [2002] HKCFA 18, the Hong Kong Court of Final Appeal rejected a challenge to the mandatory life sentence for murder. It found that the possibility of regular review of the sentence by an independent board meant it was neither arbitrary nor grossly disproportionate and thus it did not amount to cruel, inhuman or degrading punishment.

81. Section 9 of the New Zealand Bill of Rights Act 1990 also protects against disproportionately severe treatment or punishment.

THE LAW

I. JOINDER OF THE APPLICATIONS

82. Given their similar factual and legal background, the Court decides that the two applications should be joined pursuant to Rule 42 § 1 of the Rules of Court.

II. THE ALLEGED RISK OF THE DEATH PENALTY

A. The first applicant

83. The first applicant complained that there was a real risk that he would be subjected to the death penalty in Florida. The assurance contained in the Diplomatic Note was an undertaking given by the United Statesfederal government. However,he would not be tried in federal courts but in Florida. The undertakings given by the Assistant State Attorneys and Judge Weatherby were insufficient as they did not have the power to give them and,moreover, Judge Weatherby's undertaking would not be binding on any subsequent trial judge. The undertakings were also*ultra vires* and unenforceable. The Florida statute was mandatory: once a defendant was convicted of a capital felony, the trial court had to conduct a sentencing hearing to decide whether the death penalty should be imposed (see section 921.141 of the Florida Statute, at paragraph53above). He further relied on the evidence of Mr Barksdale that the prosecution's decision not to seek the death penalty did not preclude the trial court from imposing it (see paragraph 54 above).
84. The Government submitted that there was no real risk of the applicant being sentenced to death in Florida. They relied on the original affidavit in support of the extradition request, the Diplomatic Note of 3 June 2005, the order of Judge Weatherby and the further affidavit of Mr Borello. The assurances given therein could be relied upon.
85. The Court recalls its finding in *Ahmad and others v. the United Kingdom* (dec.), nos. 24027/07, 11949/08 and 36742/08, § 105,6 July 2010that, in extradition matters, Diplomatic Notes are a standard means for the requesting State to provide any assurances which the requested State considers necessary for its consent to extradition. In*Ahmad and others*, the Court also recognised that, in international relations, Diplomatic Notes carry a presumption of good faith and that, in extradition cases, it was appropriate that that presumption be applied to a requesting State which has a long history of respect for democracy, human rights and the rule of law, and which has longstanding extradition arrangements with Contracting States.The Court also recalls the particular importance it has previously attached to prosecutorial assurances in respect of the death penalty (*Nivette v. France* (dec.), no. 44190/08, 14 December 2000).
86. For these reasons,the Court considers that the assurances provided by the Government of the United States, the prosecution in Florida and Judge Weatherby are clear and unequivocal.They must be accorded the same

presumption of good faith as was given to the similar assurances provided in the *Ahmad and others* case. The Court is satisfied that, despite the applicant's submissions as to their status in Florida law, the assurances provided by the Assistant State Attorneys, Mr Kimbrel and Mr Borello,make clear that the prosecution will not seek the death penalty. Moreover, whatever Mr Barksdale's views as to the ability of a trial court to impose the death penalty even when it is not sought by the prosecution,the Court finds that Judge Weatherby's order makes it clear that there is no risk of any death penalty sentencing phase being conducted in this case, still less that any sentencing case will result in the imposition of the death penalty. Consequently, the Court finds that the assurances provided by the Florida authorities, when taken with the assurance contained in the Diplomatic Note, are sufficient to remove any risk that the first applicant would be sentenced to death if extradited and convicted as charged. Accordingly, the Court finds that this complaint must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3(a) and 4 of the Convention.

B. The second applicant

87. Although it did not form part of the second applicant's original complaints before the Court, given the importance of the issue, the Court considered it necessary to obtain the parties' submissions on whether, in the event of the second applicant's conviction, the trial court in Maryland could impose the death penalty on its own motion.

88. In their submissions, the Government recalled that the prosecuting attorney in Maryland, Mr Michael, had provided an affidavit stating the maximum applicable sentence was life imprisonment without the possibility of parole (see paragraph 30 above). The Diplomatic Note of 5 June 2007 was binding as a matter of international law and had been provided in good faith. The Government's understanding of the Maryland Criminal Code was that the death sentence could only be imposed if the State gave written notice of its intention to seek it and the State did not intend to do so.

89. The second applicant stated that his understanding was the same. His real concern on the issue of the death penalty had been that the facts of the case did not display any of the "aggravating features" necessary for the death penalty.However,there was no guarantee that further pre-trial enquiries would not reveal such evidence, leading the State to then seek the death penalty. Those concerns had prompted him to make written representations to the Secretary of State, which, in turn, had prompted the Diplomatic Note of 5 June 2007. He understood the Diplomatic Note to be

an assurance that the death penalty would not be sought or imposed in any circumstances whatsoever. Moreover, he understood that the United Kingdom Government construed the note in the same way; that the United Kingdom Government would regard the seeking or imposition of the death penalty in any circumstances or upon the court's own motion as a breach of that assurance; and that they would use all conceivable means at their disposal to prevent such a breach. On that basis, he made no complaint in respect of the death penalty.

90. In their further submissions, the Government confirmed that they would consider it a breach of the diplomatic assurance contained in the note if the trial court sought or imposed the death penalty.

91. The Court takes note of the parties' positions, their understanding of the Maryland Criminal Code, the clear and unequivocal nature of the Diplomatic Note furnished by the United States' Government and, most importantly, the assurance given by Mr Michael in his affidavit not to file notice of intention to seek the death penalty. Since it has no reason to doubt Mr Michael's assurance, which would appear to preclude the trial court from imposing the death penalty on its own motion, the Court is satisfied that there would be no risk of the death penalty being imposed. Accordingly,the Court finds that this complaint must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3(a) and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION ARISING FROM THE IMPOSITION OF LIFE IMPRISONMENT WITHOUT PAROLE

92. Each applicant complained that his extradition would expose him to a real risk of a sentence of life imprisonment without the possibility of parole in breach of Article 3 of the Convention, which provides as follows:

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

A. The parties' submissions

1. The applicants

a. The first applicant

93. The first applicant submitted that the House of Lords had erred in *Wellington*. The Court's rulings in *Chahal v. the United Kingdom*, 15 November 1996,*Reports of Judgments and Decisions* 1996-V and *Saadi v. Italy* [GC], no. 37201/06,ECHR 2008-... meant there was no possibility of balancing Article 3 rights with other considerations which arose in extradition cases. It was inappropriate for the Court to consider the Canadian case of *Burns* and *Ferris*, as the Government had urged (see paragraph 105 below); those cases had been about the qualified right in the Canadian Charter on fundamental justice, not the Charter's prohibition on cruel and unusual treatment or punishment.

94. It was also relevant to his case that, as a United Kingdom national, he could be tried in England and Wales for a murder alleged to have been committed abroad. The High Court had been wrong to consider this possibility as "wholly unreal" (see paragraph 20 above); it was no less real than the possibility of Soering being tried in Germany. There was, therefore, no need to follow the relativist approach laid down in *Wellington*, which had arisen because of the impossibility of trying Wellington in the England and Wales.

95. The first applicant relied on the fact that he faced a mandatory life sentence, which removed any judicial discretion in sentencing. This was even more arbitrary in his case given that he could be convicted under the felony murder rule, even if it were found that Mr Hayes had been killed accidentally.Contrary to the High Court's view, it was not "fanciful" that the first applicant was at risk of conviction on the basis of a true accident (see paragraph 65 of its judgment, quoted at paragraph21 above).In fact, it appeared from some of Mr Glover's statements to the police and prosecution that his evidence at trial would be that the gun had gone off accidentally.This was supported by the police and medical reports on the murder (see paragraph 6 above). The first applicant also submitted that, because of the breadth of the felony murder rule, he could also be convicted on the basis that he had lent his car to one of the men who had participated in the robbery of Mr Hayes (see also paragraph 6 above).

96. The facts of the case also meant that were other avenues of prosecution, such as for second-degree murder, third-degree murder or manslaughter.This underlined that a mandatory sentence of life

imprisonment without parole was grossly disproportionate, harsh and unfair. This was even more so in his case given that, according to a psychiatrist who examined him, the first applicant was very immature and suffering from a severe personality disorder. The first applicant submitted a copy of the psychiatrist's report, which concluded that he demonstrated features of Histrionic and Dependent personality disorder together with features of Narcissistic and Borderline personality disorder. This would make him less able to cope with a long period of imprisonment, particularly when systematic bullying and sexual abuse in American prisons were common public knowledge. He also had no previous convictions for violent or drug-related offences. He thus had substantial mitigation available to himbut, because of the mandatory nature of the life sentence, he could not put it before the sentencing court.

97. The first applicant also submitted that the facts of the offence were not ones which would result in a mandatory whole life sentence in any ContractingState or even in the vast majority of the States within the United States.It was also of some relevance that the felony murder rule had been abolished in England and Wales by the Homicide Act 1957.Moreover, even if his offence could be categorised as murder in English law, under present sentencing practices, he would not be eligible for a whole life sentence: there were no aggravating factors which made such a sentence possible and it was, in any event, prohibited for offenders under twenty-one years of age.

98. The first applicant also relied on the fact that the felony murder rule had been found by the Supreme Court of Canada to be contrary to section 7 of the Canadian Charter in *R. v. Martineau* [1990] 2 SCR 633 (which prohibits imprisonment except in accordance with the fundamental principles of justice, see paragraph 43 above). The Supreme Court found that the stigma of a murder conviction required that only those who had subjective foresight of death be convicted of and punished for that crime. It was clear from *Martineau* that the Supreme Court had taken the view that the felony murder rule had no place in a democratic society.

99. The first applicant further submitted that a further violation of Article 3 would arise because his sentence in Florida would be irreducible: Professor Babcock's evidence showed that his chances of obtaining commutation from the Governor were remote (see paragraph55 above).

b. The second applicant

100. The second applicant considered that, if convicted, his sentence would ultimately be a matter for the trial judge but the prosecution's intention to seek such a sentence and its availability meant there was a real risk of its

imposition. That sentence constituted, of itself,inhuman and degrading punishment in violation of Article 3. He relied on the Privy Council's observation in *de Boucherville*(see paragraph 77above) that such a sentence was anathema to the principle that life was of inalienable value.

101. Contrary to the Government's submission (see below), it was of no relevance to the question of reducibility that any sentence imposed by the trial court was subject to review on appeal, since an appeal had to be lodged within thirty days of sentencing. On the question of reducibility he accepted, in the light of *Kafkaris*, that the existence of the Governor of Maryland's discretion to commute a sentence amounted to a theoretical or *de jure* possibility of release. He did, however, note that the Governor's decision was attended by none of the procedural safeguards of a judicial decision. It was unreasoned and not guided by any discernible criteria.It was not available as of right and was not susceptible to review.

102. There was, in any event, no *de facto* possibility of release. The information provided by the Department of Public Safety and Correctional Services (see paragraph58above) showed that of 367 offenders serving sentences of life imprisonment without the possibility of parole, only one person (a repeat offender) had had his sentence commuted but had not been released and no one convicted of first-degree murder had ever been granted a commutation of any kind. The second applicant's case was therefore distinguishable from *Kafkaris*. It was also distinguishable from *Einhorn*, § 20, cited above, where the Governor of Pennsylvania had, in the eight-year period from 1987-1994, issued 302 releases and 26 commutations of life-sentenced prisoners. It was also to be distinguished from the position in England and Wales, considered in *Bieber*(see paragraph 69above), where the Court of Appeal had taken account of the fact that the Secretary of State had used his power to release life prisoners "sparingly". The complete lack of hope of release in his case was borne out by the prosecution's intention, in the event of conviction, to seek consecutive sentences for the offences for which he was charged.

103. Even if a life sentence where there was*de facto* possibility of release did not violate Article 3*per se*,the applicant submitted that, because of his young age, such a sentence would violate Article 3 in his case.

He was nineteen at the time of the offences and had no serious criminal record, but the United States' authorities had confirmed that the Maryland courts would be unlikely to attach much weight to these factors. There was adifference between the imposition of such a sentence on someone of that age and an older person. The time in prison would be longer but, more importantly, the prospects of a young man maturing and reforming whilst in

prison were greater, as was the likelihood that the offences were attributable to immaturity. He relied in particular on the Court's observations in *Hussain v. the United Kingdom* and *Prem Singh v. the United Kingdom*, judgments of 21 February 1996,*Reports* 1996-I that detaining young persons for the rest of their lives might give rise to questions under Article 3 of the Convention (*Hussain* at paragraph 53; *Prem Singh* at paragraph 61).
In common with the first applicant, he considered it to be of some relevance that, in England and Wales, whole life orders were not permitted for offenders under twenty-years of age.
The second applicant further relied on Article 37(a) of the United Nations Convention on the Rights of the Child, which prohibits the imposition of life imprisonment without the possibility of parole for offences committed by persons below eighteen years of age, as evidence of a clear statement by the international community that, in the context of such sentences, the youth of the offender was of paramount importance.
104. Finally, and in common with the first applicant, the second applicant argued that the majority of the House of Lords in *Wellington* had erred in its relativist approach to Article 3 in the extradition context and that the Canadian cases were irrelevant to the issues before the Court.

2. The Government

a. General considerations

105. The Government relied on the reasoning of the House of Lords in *Wellington* and the Canadian Supreme Court in *Burns* and *Ferris*(see paragraphs 34–42 and44 and 45above). On the basis of those cases, the Government submitted that, in the extradition context, a distinction had to be drawn between torture and other forms of ill-treatment. A real risk of torture in the receiving State should be an absolute bar on extradition. However, for all other forms of ill-treatment, it was legitimate to consider the policy objectives pursued by extradition in determining whether the ill-treatment reached the minimum level of severity required by Article 3. This was the appropriate means of resolving the tension that existed between the Court's judgments in *Soering*, on the one hand, and *Chahal* and *Saadi*, on the other. Article 3 could not be interpreted as meaning that any form of ill-treatment in a non-Contracting State would be sufficient to prevent extradition.
106. The Government further relied on the Court's rulings in *Kafkaris* and *Léger v. France* (striking out) [GC],no. 19324/02,30 March 2009and the United Kingdom courts' rulings in *Wellington* and *Bieber* (see paragraphs

34–42 and 69above). In particular, they submitted that, in *Wellington*,the House of Lords had been correct to find that, while an irreducible life sentence *might* raise an issue under Article 3, it would not violate Article 3 at the time of its imposition unless it was grossly or clearly disproportionate.
107. Drawing on the views of the House of Lords in *Wellington*, the Government further submitted that, unless a life sentence was grossly or clearly disproportionate, Article 3 would only be violated by an irreducible life sentence if the prisoner's further imprisonment could no longer be justified for the purposes of punishment and deterrence. No court could determine at the outset of the sentence when that point would be reached and, in a particular case, it might never be reached at all. Therefore, in the extradition context, unless a life sentence was grossly or clearly disproportionate, its compatibility with Article 3 could not be determined in advance of extradition. Neither applicants' likely sentence was grossly or clearly disproportionate and each of their sentences was reducible, as required by *Kafkaris*.

b. The first applicant's case

108. In the first applicant's case, the Government stated that there was no possibility of prosecution in the United Kingdom and the case bore no resemblance to *Soering*, cited above, where the German Government had actively sought to prosecute the applicant.
109. The Governmentrecalled that the High Court had accepted that, upon extradition to Florida,there was a realistic possibility of prosecutionunder the felony murder rule. It was not the Government's position that the case against the applicant was one of premeditated killing. It had been accepted by the Government in the High Court proceedings that the case against the first applicant might be put on the basis that he killed Mr Hayes in the course of the robbery without the prosecution having to prove that the first applicant intended to kill Mr Hayes. It was not accepted by the Government that the fact that it was open to the prosecution to put the case on this basis demonstrated that the killing was accidental or that the first applicant did not intend to kill Mr Hayes.
110. In this connection, the Government recalled that there was evidence that the first applicant planned to rob Mr Hayes at gunpoint and carried an already loaded and cocked weapon for that purpose (see the affidavit of Mr Kimbrel at paragraphs 6 and 7 above). Consequently, the Government did not accept the first applicant's contention that the prosecution's case against him was that the gun which killed Mr Hayes went off accidentally. Nor did the Government accept that deliberate violence inflicted in the

course of a robbery with a loaded and cocked weapon could properly be characterised as accidental killing or that such conduct would not amount to murder in English law. Even for an offender aged under twenty-one, murder with a firearm or in the course of a robbery could attract a minimum sentence of thirty years' imprisonment in England and Wales. The first applicant could not derive any assistance from the Supreme Court of Canada's ruling in *Martineau*.The Supreme Court had accepted that a different approach was required in extradition cases and the ruling had not been universally accepted; for example, it had not been followedby the Privy Council in *Khan v. Trinidad and Tobago* [2003] UKPC 79.
In any event, these were matters for the jury in any Florida trial and it was clear that conviction under the felony murder rule was reserved only for those offenders who killed in the course of the gravest of offences.Finally, there was also no evidence that the prosecution intended to prosecute the first applicant on the basis that he had lent his car to one of the men who had participated in the robbery: the case against the applicant was that he had shot Mr Hayes in the course of the robbery.
111. The first applicant's age was not significant. He was just weeks short of his twenty-first birthday when the killing took place. There was no suggestion that he lacked mental capacity. His own psychiatrist's report appeared to indicate that, prior to the killing,the first applicant had been living a violent, criminal lifestyle. The psychiatric report had also stopped short of diagnosing him with a psychiatric disorder such as Narcissistic or Borderline Personality Disorder.
112. On the evidence provided by the United States' authorities, there was a well-developed system for the granting of executive clemency in Florida and clear practice of commutations. Professor Babcock's evidence did not support the conclusion that there was no prospect of the Governor granting clemency in first degree murder cases in the future. Life imprisonment without parole had only been introduced in Florida sixteen years ago (in 1994) and it was realistic to assume that many of those who had received that sentence would be expected to serve sentences well in excess of that period before being considered for commutation.
113. For these reasons, the Government submitted that the first applicant's sentence was reducible and, even if it were not reducible, it was not grossly or clearly disproportionate.

c. The second applicant's case

114. In the second applicant's case, the Government did not accept that he faced a real risk of a sentence of life imprisonment without the possibility of

parole. All three possible sentences for homicide (the death penalty, life imprisonment without the possibility of parole and life imprisonment) had been imposed in Maryland and, over the past 31 years, 11 individuals per year had been sentenced to life imprisonment without the possibility of parole, which suggested such a sentence was not necessarily typical and by no means mandatory or inevitable.The court in Maryland would not be bound to impose that sentence and, while the prosecutor Mr Michael could not estimate how likely it was that such a sentence would be imposed, he had made it clear that youth and no prior history of serious offending were generally regarded as mitigating factors (see paragraph 30 above). The United States Department of Justice had confirmed this position in its letter of 29 May 2008 (see paragraph 57 above).

115. If such a sentence were to be imposed it would reducible, given the powers of commutation and pardon of the Governor of Maryland. In Maryland life sentences without the possibility of parole for homicide were relatively recent. It was reasonable to assume that those subject to such a sentence since 1987 had been convicted of murders which would have attracted very substantial sentences if life sentences with the possibility of parole had been imposed instead. It was not surprising, therefore, that no one had been released so far and this did not preclude the possibility of future releases. The relatively few commutations could also be explained by the right of defendants sentenced to life imprisonment without parole in Maryland to have their sentences reviewed by a three-judge panel on appeal. This appellate review was a form of reducibility contemplated by the Court in *Kafkaris*.

116. The Government further submitted that the second applicant had been accused of a brutal 'execution' style murder of one victim and the attempted murder of another. He was not under eighteen at the time of the offences nor was he suffering from any mental impairment. The UN Convention on the Rights of the Child was therefore irrelevant and only demonstrative of an international consensus against life imprisonment without parole for those under the age of eighteen. The imposition of a sentence of life imprisonment without parole would not be grossly disproportionate in his case.

117. Finally, and contrary to the second applicant's submissions (see paragraph 100 above), the Mauritian case of *de Boucherville* was of limited assistance. De Boucherville had been sentenced to death and had his sentence commuted to a mandatory life sentence. He was seventy-eight years of age at the time of his appeal, had spent ten years on death row and then served a further twelve years of his life sentence. The Privy Council

had decided the appeal on the basis of the right to a fair trial rather than on the Mauritian Constitution's prohibition on ill-treatment.

B. Admissibility

118. The Court notes that the neither complaint is manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. It further notes that neither complaint is inadmissible on any other grounds. Each complaint must therefore be declared admissible.

C. Merits

1. General considerations

a. Article 3 in the extra-territorial context

119. The Court begins by observing that the House of Lords in *Wellington* has identified a tension between *Soering* and *Chahal*, both cited above, which calls for clarification of the proper approach to Article 3 in extradition cases. It also observes that the conclusions of the majority of the House of Lords in that case depended on three distinctions which, in their judgment, were to be found in this Court's case-law. The first was between extradition cases and other cases of removal from the territory of a ContractingState; the second was between torture and other forms of ill-treatment proscribed by Article 3; and the third was between the assessment of the minimum level of severity required in the domestic context and the same assessment in the extra-territorial context. It is appropriate to consider each distinction in turn.

120. For the first distinction, the Court considers that the question whether there is a real risk of treatment contrary to Article 3 in another State cannot depend on the legal basis for removal to that State. The Court's own case-law has shown that, in practice, there may be little difference between extradition and other removals. For example, extradition requests may be withdrawn and the ContractingState may nonetheless decide to proceed with removal from its territory (see *Muminov v. Russia*, no. 42502/06,§ 14, 11 December 2008). Equally, a State may decide to remove someone who faces criminal proceedings (or has already been convicted) in another State in the absence of an extradition request (see, for example,*Saadi v. Italy*, cited above,and *Bader and Kanbor v. Sweden*, no. 13284/04, ECHR 2005-XI). Finally, there may be cases where someone has fled a

State because he or she fears the implementation of a particular sentence that has already been passed upon him or her and is to be returned to that State, not under any extradition arrangement, but as a failed asylum seeker (see *D. and Others v. Turkey*, no. 24245/03, 22 June 2006). The Court considers that it would not be appropriate for one test to be applied to each of these three cases but a different test to be applied to a case in which an extradition request is made and complied with.

121. For the second distinction, between torture and other forms of ill-treatment, it is true that some support for this distinction and, in turn, the approach taken by the majority of the House of Lords in *Wellington*, can be found in the *Soering* judgment. The Court must therefore examine whether that approach has been borne out in its subsequent case-law.

122. It is correct that the Court has always distinguished between torture on the one hand and inhuman or degrading punishment on the other (see, for instance,*Ireland v. the United Kingdom*, 18 January 1978, § 167, Series A no. 25; *Selmouni v. France* [GC], no. 25803/94,§§ 95-106,ECHR 1999-V). However, the Court considers that this distinction is more easily drawn in the domestic context where, in examining complaints made under Article 3, the Court is called upon to evaluate or characterise acts which have already taken place. Where, as in the extra-territorial context, a prospective assessment is required, it is not always possible to determine whether the ill-treatment which may ensue in the receiving State will be sufficiently severe to qualify as torture. Moreover, the distinction between torture and other forms of ill-treatment can be more easily drawn in cases where the risk of the ill-treatment stems from factors which do not engage either directly or indirectly the responsibility of the public authorities of the receiving State (see, for example,*D. v. the United Kingdom*, 2 May 1997,*Reports of Judgments and Decisions* 1997-III,where the Court found that the proposed removal of a terminally ill man to St Kitts would be inhuman treatment and thus in violation of Article 3).

123. For this reason, whenever the Court has found that a proposed removal would be in violation of Article 3 because of a real risk of ill-treatment which would be intentionally inflicted in the receiving State, it has normally refrained from considering whether the ill-treatment in question should be characterised as torture or inhuman or degrading treatment or punishment. For example, in *Chahal* the Court did not distinguish between the various forms of ill-treatment proscribed by Article 3: at paragraph 79 of its judgment the Court stated that the "Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment". In paragraph 80 the Court went on to state that:

> "The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion ..."

Similar passages can be found, for example, in *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I and *Saadi v. Italy* [GC], no. 37201/06, § 125,ECHR 2008-... where, in reaffirming this test, no distinction was made between torture and other forms of ill-treatment.

124. The Court now turns to whether a distinction can be drawn between the assessment of the minimum level of severity required in the domestic context and the same assessment in the extra-territorial context. The Court recalls its statement in *Chahal*, cited above, § 81 that it was not to be inferred from paragraph 89 of *Soering* that there was any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 was engaged. It also recalls that this statement was reaffirmed in *Saadi v. Italy*, cited above, § 138,where the Court rejected the argument advanced by the United Kingdom Government that the risk of ill-treatment if a person is returned should be balanced against the danger he or she posed. In *Saadi* the Court also found that the concepts of risk and dangerousness did not lend themselves to a balancing test because they were "notions that [could] only be assessed independently of each other" (ibid. § 139). The Court finds that the same approach must be taken to the assessment of whether the minimum level of severity has been met for the purposes of Article 3: this too can only be assessed independently of the reasons for removal or extradition.

125. The Court considers that its case-law since *Soering* confirms this approach. Even in extradition cases, such as where there has been an Article 3 complaint concerning the risk of life imprisonment without parole, the Court has focused on whether that risk was a real one, or whether it was alleviated by diplomatic and prosecutorial assurances given by the requesting State (see *Olaechea Cahuas v. Spain*, no. 24668/03, §§ 43 and 44,10 August 2006; *Youb Saoudi v. Spain* (dec.), no. 22871/06, 18 September 2006; *Salem v. Portugal* (dec.), no. 26844/04, 9 May 2006; and*Nivette v. France* (dec.), no. 44190/98, ECHR 2001-VII). In those cases, the Court did not seek to determine whether the Article 3 threshold has been met with reference to the factors set out in paragraph 89 of the *Soering*

judgment. By the same token, in cases where such assurances have not been given or have been found to be inadequate, the Court has not had recourse to the extradition context to determine whether there would be a violation of Article 3 if the surrender were to take place (see, for example,*Soldatenko v. Ukraine*, no. 2440/07,§§ 66-75, 23 October 2008). Indeed in the twenty-two years since the *Soering* judgment, in an Article 3 case the Court has never undertaken an examination of the proportionality of a proposed extradition or other form of removal from a ContractingState. To this extent, the Court must be taken to have departed from the approach contemplated by paragraphs 89 and 110 of the *Soering* judgment.

126. Finally, the Court considers that, in interpreting Article 3, limited assistance can be derived from the approach taken by the Canadian Supreme Court in *Burns* and *Ferras*(see paragraphs44 and 45above). As the applicants have observed, those cases were about the provision of the Canadian Charter on fundamental justice and not the Charter's prohibition of cruel or unusual treatment or punishment. Furthermore, the Charter system expressly provides for a balancing test in respect of both of those rights, which mirrors that found in Articles 8-11 of the Convention but not Article 3 (see section 1 of the Charter at paragraph 43 above).

127. Instead, the Court considers that greater interpretative assistance can be derived from the approach which the Human Rights Committee has taken to the prohibition on torture and ill-treatment contained in Article 7 of the ICCPR. The Committee's General Comment No. 20 (see paragraph46above) makes clear that Article 7 prevents refoulement both when there is a real risk of torture and when there is a real risk of other forms of ill-treatment. Further, recent confirmation for the approach taken by the Court and by the Human Rights Committee can be found in Article 19 of the Charter on Fundamental Rights of the European Union, which provides that no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment (see paragraph 50above). The wording of Article 19 makes clear that it applies without consideration of the extradition context and without distinction between torture and other forms of ill-treatment. In this respect, Article 19 of the Charter is fully consistent with the interpretation of Article 3 which the Court has set out above. It is also consistent with the Council of Europe Guidelines on human rights and the fight against terrorism, quoted at paragraph49 above. Finally, the Court's interpretation of Article 3, the Human Rights Committee's interpretation of Article 7 of the ICCPR, and

the text of Article 19 of the Charter are in accordance with Articles 3 and 16 § 2 of the United Nations Convention Against Torture, particularly when the latter Article provides that the provisions of the Convention are "without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion" (see paragraph47and 48 above).

128. The Court therefore concludes that the *Chahal* ruling (as reaffirmed in *Saadi*) should be regarded as applying equally to extradition and other types of removal from the territory of a ContractingState and should apply without distinction between the various forms of ill-treatment which are proscribed by Article 3.

129. However, in reaching this conclusion, the Court would underline that it agrees with Lord Brown's observation in *Wellington* that the absolute nature of Article 3 does not mean that any form of ill-treatment will act as a bar to removal from a ContractingState. As Lord Brown observed, this Court has repeatedly stated that the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States (see, as a recent authority,*Al-Skeini and Others v. the United Kingdom*[GC],no. 55721/07, § 141, 7 July 2011). This being so,treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case. For example, a Contracting State's negligence in providing appropriate medical care within its jurisdiction has, on occasion, led the Court to find a violation of Article 3 but such violations have not been so readily established in the extra-territorial context (compare the denial of prompt and appropriate medical treatment for HIV/AIDS in *Aleksanyan v. Russia*, no. 46468/06, §§ 145–158, 22 December 2008 with *N.v. the United Kingdom* [GC], no. 26565/05, 27 May 2008).

130. Equally, in the context of ill-treatment of prisoners, the following factors, among others, have been decisive in the Court's conclusion that there has been a violation of Article 3:

- the presence of premeditation (*Ireland v. the United Kingdom*,cited above, § 167);
- that the measure may have been calculated to break the applicant's resistance or will (ibid, § 167; *Ilaşcu and Others v. Moldova and Russia*[GC], no. 48787/99, § 446, ECHR 2004-VII);
- an intention to debase or humiliate an applicant, or, if there was no such intention, the fact that the measure was implemented in a manner which nonetheless caused feelings of fear, anguish or inferiority

(*Jalloh v. Germany* [GC], no. 54810/00, § 82,ECHR 2006-IX; *Peers v. Greece*, no. 28524/95, § 75, ECHR 2001-III);
- the absence of any specific justification for the measure imposed (*Van der Ven v. the Netherlands*,no. 50901/99, §§ 61-62, ECHR 2003-II; *Iwańczuk v. Poland*, no. 25196/94, § 58, 15 November 2001);
- the arbitrary punitive nature of the measure (see *Yankov*, cited above, § 117);
- the length of time for which the measure was imposed(*Ireland v. the United Kingdom*, cited above, § 92); and
- the fact that there has been a degree of distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention (*Mathew v. the Netherlands*,no. 24919/03, §§ 197-205, ECHR 2005-IX).
The Court would observe that all of these elements depend closely upon the facts of the case and so will not be readily established prospectively in an extradition or expulsion context.
131. Finally, the Court reiterates that, as was observed by Lord Brown, it has been very cautious in finding that removal from the territory of a ContractingStatewould be contrary to Article 3 of the Convention. It has only rarely reached such a conclusion since adopting the *Chahal* judgment (see *Saadi*, cited above § 142). The Court would further add that, save for cases involving the death penalty, it has even more rarely found that there would be a violation of Article 3 if an applicant were to be removed to a State which had a long history of respect for democracy, human rights and the rule of law.

b. Life sentences

132. The Court takes note of the parties' submissions as to whether the applicants' likely sentences are irreducible within the meaning of that term used in *Kafkaris*. However, given the views expressed by the House of Lords in *Wellington*and the Court of Appeal in *Bieber* in respect of *Kafkaris* (summarised at paragraphs 34–42 and 69 above), the Court considers it necessary to consider first whether, in the context of removal to another State, a grossly disproportionate sentence would violate Article 3 and second, at what point in the course of a life or other very long sentence an Article 3 issue might arise.
133. For the first issue, the Court observes that all five Law Lords in *Wellington* found that, in a sufficiently exceptional case, an extradition would be in violation of Article 3 if the applicant faced a grossly disproportionate sentence in the receiving State. The Government, in their submissions to the Court, accepted that proposition.

Support for this proposition can also be found in the comparative materials before the Court. Those materials demonstrate that "gross disproportionality" is a widely accepted and applied test for determining when a sentence will amount to inhuman or degrading punishment, or equivalent constitutional norms (see the Eighth Amendment case-law summarised at paragraphs 59–61 above, the judgments of the Supreme Court of Canada at paragraph 73 above, and the further comparative materials set out at paragraphs 76– 81 above).

Consequently, the Court is prepared to accept that while, in principle,matters of appropriate sentencing largely fall outside the scope of Convention (*Léger*, cited above, § 72), a grossly disproportionate sentence could amount to ill-treatment contrary to Article 3 at the moment of its imposition. However, the Court also considers that the comparative materials set out above demonstrate that "gross disproportionality" is a strict test and, as the Supreme Court of Canada observed in *Latimer* (see paragraph 73 above),it will only be on "rare and unique occasions" that the test will be met.

134. The Court also accepts that, in a removal case, a violation would arise if the applicant were able to demonstrate that he or she was at a real risk of receiving a grossly disproportionate sentence in the receiving State. However, as the Court has recalled at paragraph 129 above, the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States.Due regard must be had for the fact that sentencing practices vary greatly between States and that there will often be legitimate and reasonable differences between States as to the length of sentences which are imposed, even for similar offences. The Court therefore considers that it will only be in very exceptional cases that an applicant will be able to demonstrate that the sentence he or she would face in a non-Contracting State would be grossly disproportionate and thus contrary to Article 3.

135. The Court now turns to the second issue raised by the Court of Appeal and House of Lords. It considers that, subject to the general requirement that a sentence should not be grossly disproportionate, for life sentences it is necessary to distinguish between three types of sentence: (i) a life sentence with eligibility for release after a minimum period has been served; (ii) a discretionary sentence of life imprisonment without the possibility of parole; and (iii) a mandatory sentence of life imprisonment without the possibility of parole.

136. The first sentence is clearly reducible and no issue can therefore arise under Article 3.

137. For the second, a discretionary sentence of life imprisonment without the possibility of parole, the Court observes that normally such sentences are imposed for offences of the utmost severity, such as murder or manslaughter. In any legal system, such offences, if they do not attract a life sentence, will normally attract a substantial sentence of imprisonment, perhaps of several decades. Therefore, any defendant who is convicted of such an offence must expect to serve a significant number of years in prison before he can realistically have any hope of release, irrespective of whether he is given a life sentence or a determinate sentence. It follows, therefore, that, if a discretionary life sentence is imposed by a court after due consideration of all relevant mitigating and aggravating factors, an Article 3 issue cannot arise at the moment when it is imposed. Instead, the Court agrees with the Court of Appeal in *Bieber* and the House of Lords in *Wellington* that an Article 3 issue will only arise when it can be shown: (i) that the applicant's continued imprisonment can no longer be justified on any legitimate penological grounds (such as punishment, deterrence, public protection or rehabilitation); and (ii) as the Grand Chamber stated in *Kafkaris*, cited above, the sentence is irreducible *de facto* and *de iure*.

138. For the third sentence, a mandatory sentence of life imprisonment without the possibility of parole, the Court considers that greater scrutiny is required. The vice of any mandatory sentence is that it deprives the defendant of any possibility to put any mitigating factors or special circumstances before the sentencing court (see, for instance,*Reyes* and *deBoucherville* at paragraphs 76 and 77 above). This is especially true in the case of a mandatory sentence of life imprisonment without the possibility of parole, a sentence which, in effect, condemns a defendant to spend the rest of his days in prison, irrespective of his level of culpability and irrespective of whether the sentencing court considers the sentence to be justified.

However, in the Court's view,these considerations do not mean that a mandatory sentence of life imprisonment without the possibility of parole is *per se* incompatible with the Convention,although the trend in Europe is clearly against such sentences (see, for example,the comparative study summarised at paragraph 66 above). Instead, these considerations mean that such a sentence is much more likely to be grossly disproportionate than any of the other types of life sentence, especially if it requires the sentencing court to disregard mitigating factors which are generally understood as indicating a significantly lower level of culpability on the part of the defendant, such as youth or severe mental health problems (see, for instance,*Hussain v. the United Kingdom* and *Prem Singh v. the United Kingdom*, judgments of 21 February 1996,*Reports* 1996-I at paragraphs 53

and 61 respectively and the Canadian case of *Burns*, at paragraph 93, quoted at paragraph44above).
The Court concludes therefore that, in the absence of any such gross disproportionality, an Article 3 issue will arise for a mandatory sentence of life imprisonment without the possibility of parole in the same way as for a discretionary life sentence, that is when it can be shown: (i) that the applicant's continued imprisonment can no longer be justified on any legitimate penological grounds; and (ii) that the sentence is irreducible *de facto* and *de iure* (*Kafkaris*, cited above).

2. The present cases

a. The first applicant

139. In the first applicant's case, the Court notes that he faces a mandatory sentence of life imprisonment without parole, which, as it has indicated, requires greater scrutiny than other forms of life sentence. However,the Court is not persuaded that such a sentence would be grossly disproportionate in his case. Although he was twenty years of age at the time of the alleged offence, he was not a minor. Article 37(a) of the United Nations Convention on the Rights of the Child demonstrates an international consensus against the imposition of life imprisonment without parole on a young defendant who is under the age of eighteen. It would support the view that a sentence imposed on such a defendant would be grossly disproportionate. However, the Court is not persuaded that Article 37(a) demonstrates an international consensus against the imposition of life imprisonment without parole on a young defendant who is over the age of eighteen.Equally, although the applicant has provided a psychiatrist's report showing him to be suffering from mental health problems, as the Government have observed, that report stops short of diagnosing the applicant with a psychiatric disorder. Therefore, while the Court accepts that the applicant has some mitigating factors, it is not persuaded that the applicant possesses mitigating factors which would indicate a significantly lower level of culpability on his part.
The Court accepts that the sentence which the first applicant faces would be unlikely to be passed for a similar offence committed in the United Kingdom, particularly when there is no felony murder rule in England and Wales. The Court also notes that the Supreme Court of Canada,in *Martineau*, has found that the rule is contrary to the fundamental principles of justice. Therefore, the Court would not exclude that asentence imposed after conviction under the felony murder rule could, in a sufficiently

exceptional case, amount to a grossly disproportionate sentence. This would be particularly so if the sentencewas one of mandatory life imprisonment without parolebut the facts of the case involved a killing in respect of which there was no real culpability on the part of the defendant.
However, as Lord Justice Gross observed, the Court must be concerned with the facts of the case (paragraph 66(i) of the High Court judgment quoted at paragraph 21 above). As he went on to observe,it is fanciful to contemplate the first applicant being at risk of conviction for what was an "accident"; on any realistic view there was no such accident. The Court shares Lord Justice Gross' view that the fact that the killing took place in the course of an armed robbery is a most serious aggravating factor. This is made yet graver by the fact that, for the gun to have gone off at all,the first applicant would have had to have loaded and cocked the gun before getting out of his car to rob Mr Hayes.Therefore, even allowing for the fact that he may be convicted without the prosecution being required to prove premeditation,the Court does not find that the first applicant's likely sentence would be grossly disproportionate. The Court would add that this conclusion is not altered by the applicant's alternative submission that, although he denies being present at the scene, he could conceivably be convicted under the felony murder rule because he lent his car to one of the men who participated in the robbery of Mr Hayes. There is no evidential basis for this submission: at all times the prosecution's case has been that it was the applicant who had shot Mr Hayes.
140. Second, as the Court has stated, an Article 3 issue will only arise when it can be shown: (i) that the first applicant's continued incarceration no longer serves any legitimate penological purpose; and (ii) his sentence is irreducible *de facto* and *de iure*. The first applicant has not yet been convicted, still less begun serving his sentence (cf. *Kafkaris* and *Léger*, cited above, and *Iorgov v. Bulgaria (no. 2)*, no. 36295/02, 2 September 2010). The Court therefore considers that he has not shown that, upon extradition, his incarceration in the United States would not serve any legitimate penological purpose. Indeed, if he is convicted and given a mandatory life sentence, it may well be that, as the Government have submitted, the point at which his continued incarceration would no longer serve any purpose may never arise. It is still less certain that, if that point were ever reached, the Governor of Floridaand the Board of Executive Clemency would refuse to avail themselves of their power to commute the applicant's sentence (see paragraph 52 above and*Kafkaris*, cited above, § 98).

Accordingly, the Court does not find that the first applicant has demonstrated that there would be a real risk of treatment reaching the Article 3 threshold as a result of his sentence if he were extradited to the United States.The Court therefore finds that there would be no violation of Article 3 in his case in the event of his extradition.

b. The second applicant

141. The second applicant faces, at most, a discretionary sentence of life imprisonment without parole. Given that this sentence will only be imposed after consideration by the trial judge of all relevant aggravating and mitigating factors, and that it could only be imposed after the applicant's conviction for a premeditated murder in which one othermanwas shot in the head and injured, the Court is unable to find that the sentence would be grossly disproportionate.

142. Moreover, for the reasons it has given in respect of the first applicant, the Court considers that the second applicant has not shown that incarceration in the United States would not serve any legitimate penological purpose, still less that, should that moment arrive, the Governor of Maryland would refuseto avail himself of the mechanisms which are available to him to reduce a sentence of life imprisonment without parole (commutation and eventual release on parole: see paragraphs 56–58 above and *Kafkaris*, cited above, § 98). Therefore, he too has failed to demonstrate that there would be a real risk of treatment reaching the Article 3 threshold as a result of his sentence if he were extradited to the United States.The Court therefore finds that there would be no violation of Article 3 in his case in the event of his extradition.

IV. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

143. The second applicant submitted that, if the Court did not examine his complaint relating to his sentence under Article 3, then, alternatively, that issue could be examined under Article 5.

Article 5 guarantees the right to liberty and security. In particular, Articles 5 §§ 1 (a) and 4 provide:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

144. The Court considers that,even assuming that this submissionis intended to raise a separate issue from the complaint made under Article 3, it has been determined by its recent admissibility decision in *Kafkaris v. Cyprus (no. 2)* (dec.), no. 9644/09, 21 June 2011. That application was introduced by Mr Kafkaris following the Grand Chamber's judgment in his case. He complained *inter alia* that, under Article 5 § 4, he was entitled to a further review of his detention, arguing that his original conviction by the Limassol Assize Court was not sufficient for the purposes of that provision. He submitted that he had already served the punitive period of his sentence and, relying on *Stafford v. the United Kingdom* [GC],no. 46295/99,ECHR 2002-IV, argued that new issues affecting the lawfulness of his detention had arisen. These included the Grand Chamber's finding of a violation of Article 7, the Attorney-General's subsequent refusal to recommend a presidential pardon and the fact that, in *habeas corpus* proceedings, the Supreme Court had failed to consider factors such as his degree of dangerousness and rehabilitation.

145. The Court rejected that complaint as manifestly ill-founded. The Court found that the Assize Court had made it quite plain that the applicant had been sentenced to life imprisonment for the remainder of his life. It was clear, therefore, that the determination of the need for the sentence imposed on the applicant did not depend on any elements that were likely to change in time (unlike in *Stafford*, cited above, § 87). The "new issues" relied upon by the applicant could not be regarded as elements which rendered the reasons initially warranting detention obsolete or as new factors capable of affecting the lawfulness of his detention. Nor could it be said that the applicant's sentence was divided into a punitive period and a security period as he claimed. Accordingly, the Court considered that the review of the lawfulness of the applicant's detention required under Article 5 § 4 had been incorporated in the conviction pronounced by the courts, no further review therefore being required.

146. The Court considers the complaint made in the present cases to be indistinguishable from the complaint made in *Kafkaris (no. 2)*. It is clear from the provisions of Maryland law which are before the Court that any

sentence of life imprisonment without parole would be imposed to meet the requirements of punishment and deterrence. Such a sentence would therefore be different from the life sentence considered in *Stafford*, which the Court found was divided into a tariff period (imposed for the purposes of punishment) and the remainder of the sentence, when continued detention was determined by considerations of risk and dangerousness (paragraphs 79 and 80 of the judgment). Consequently, as in *Kafkaris (no. 2)*, the Court is satisfied that, if convicted and sentenced to life imprisonment without parole, the lawfulness of thesecond applicant's detention required under Article 5 § 4 wouldbe incorporated in the sentence imposed by the trial, and no further review would be required by Article 5 § 4. Accordingly,this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. RULE 39 OF THE RULES OF COURT

147. The Court recalls that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if referral of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

148. It considers that the indications made to the Government under Rule 39 of the Rules of Court (see above § 4) must continue in force until the present judgment becomes final or until the Panel of the Grand Chamber of the Court accepts any request by one or both of the parties to refer the case to the Grand Chamber under Article 43 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;

2. *Declares* the Article 3 complaints of both applicants relating to life imprisonment without parole admissible;

3. *Declares* the remainder of the applicants' complaints inadmissible;

4. *Holds*that Mr Harkins'extradition to the United Stateswouldnot be in violation of Article 3 of the Convention;

5. *Holds*that Mr Edwards'extradition to the United Stateswould notbe in violation of Article 3 of the Convention;

6. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings that the applicants should not be extradited until further notice.

Done in English, and notified in writing on 17 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) concurring opinion of Judge Garlicki;
(b) concurring opinion of Judge Kalaydjieva.

L.G.
T.L.E.

CONCURRING OPINION OF JUDGE GARLICKI

I agree with the finding of no violation. I agree that, in view of the pardoning powers of the State Governors, the *Kafkaris* test has been satisfied in both cases (see paragraphs 140 and 142).

At the same time, however, I am not ready to support those parts of the reasoning that, by reproducing the position adopted by the majority in *Vinter and Others v. the United Kingdom* (nos. 66069/09 and 130/10 and 3896/10), may suggest that, in some circumstances, an irreducible life imprisonment may not be incompatible with Article 3 of the Convention (see the joint partly dissenting opinion of Judges Garlicki, David ThórBjörgvinsson and Nicolaouin *Vinter and Others*).

CONCURRING OPINION OF JUDGE KALAYDJIEVA

I have voted with the majority and I adhere to the final conclusions of my esteemed colleagues that the applicants' extradition would not expose them to a real risk of treatment contrary to Article 3 in view of the prospect of their facing life sentences. The Court has already had occasion to express the view that such punishment is not *per se* incompatible with the prohibition of inhuman and degrading treatment or punishment.

I agree with the conclusion that an Article 3 issue will arise when it can be shown that a "*continued incarceration no longer serves any legitimate penological purpose*" (§140). Indeed, a reasonable assessment of this factor may only be carried out after a substantial period of imprisonment has elapsed and on the basis of the overall correctional and punitive effect of the sustained regime and conditions of imprisonment, which in certain circumstances may have a debasing effect on an individual.

However, in cases of extradition to a non-memberState of the Council of Europe, a *post factum* assessment will clearly come too late to prevent potential treatment in violation of Article 3. In this regard there is little to distinguish the means used for establishing the risk of exposure to treatment contrary to Article 3 in the present cases, including matters relating to the burden of proof, from cases of removal to countries outside the Council of Europe for other purposes – such as expulsion in furtherance of domestic immigration policy. In addition to the information provided by the parties, the Court could have availed itself of the abundant independent sources of information on the objective risks attached to the prison regime and its accompanying conditions and the extent to which a punishment consisting of life imprisonment without eligibility to parole is designed and enforced so as to serve a legitimate penological purpose.

I have serious doubts as to whether the assessment of the risk of "gross disproportionality" (§ 139) between the acts allegedly committed and the sentence which may be imposed on the applicants falls to be considered by this Court. I am not convinced that such consideration would assist the development of its views on the important issue of the compatibility of life imprisonment with Article 3. A closer look at the views of different other jurisdictions on this matter (see §§ 62 – 81) may raise questions as to whether their conclusions on this point might have been different at least as concerns the first applicant, who was under 20 years of age at the time of committing the offence and feared the imposition of a mandatory life sentence regardless of whether or not he had had the intention to kill. It seems to me that instead of the long-needed clarification of the Court's case-law on the compatibility of irreducible life imprisonment with the requirements of Article 3 of the Convention, the application of the "gross disproportionality" criterion may lead to confusion as regards the appropriateness of States' criminal policy.