CONCEPTIONS OF LIBERTY DEPRIVATION: THE RIGHT TO HOPE

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Does the European Court of Human Rights protect 'the right to hope' of life-sentenced prisoners?

(1) INTRODUCTION

Cases such as *Vinter v United Kingdom* (*Vinter*) and *Hutchinson v United Kingdom* (*Hutchinson*) discuss the providing life-sentenced prisoners with hope for release. This has become known colloquially as "the right to hope."[1] But what does it mean to protect this right? The following paper argue that protecting "the right to hope" depends on a practical (as opposed to theoretical) avenue through which to be grated release. After *Vinter* the "right to life" was practically protected by the European Convention on Human Rights (ECHR) but post *Hutchinson,* protection has been significantly weakened.[2] Specifically, the power of release granted to the Secretary of State by the "Lifer Manual" is too specific to provide protection for a "right to life." This leads to the conclusion that as it stands under *Hutchinson*, the ECHR only protects "the right to life" theoretically.[3] Ultimately, given the forthcoming definition of theoretical protection, under *Hutchinson* the ECHR does not protect a "right to hope" for life-sentenced prisoners.

The following paper is organized as follows: section two provides definitions for theoretical and practical protection. Section three discusses *Vinter* and the practical protections it gave for "right to hope." Section four discusses how *Hutchinson* has weakened these protections significantly. Section five raises an argument against my thesis, namely it askes about the cruelty of providing life-sentenced prisoners with hope. In section six, the paper concludes.

(2) DEFINITIONS

This paper's central argument relies on a difference between practical and theoretical protection. A theoretical protection comes about when a State does provide life-sentenced prisoners an avenue to release, but this avenue is nearly impossible to find or take. In a situation of theoretical protection, the hope of release is negligible. The UK Secretary of State's power to release prisoners as articulated in the "Lifer Manual" constitutes such a theoretical protection of the "right to hope." Arguments for why the Secretary of State's power cannot provide protection of a "right to hope" will be further articulated in sections three and four.

Practical protection means providing life-sentenced prisoners with a clearly defined and effective hope for release. Such a protection would mean two things: firstly, a life-sentence constitutes the social death of a prisoner in that there is no reason to be rehabilitated or work towards re-acclimation.[4] Practical protection provides an avenue to release with enough hope that there is reason for rehabilitation. Dzehtsiarou writes, "prisoner-centred penitentiary system should leave an inmate a chance to reintegrate into society."[5] Without providing practical protection to "the right to hope" the

[1] (Dzehtsiarou, 2015), 1
[2] (Dzehtsiarou, 2015), 2; (Graham, 2018), 2.
[3] The paper will later discuss how this is only true in the United Kingdom and not necessarily true for other ECHR States. However, the scope of this paper is the UK, and as such discusses the protection of a "right to life" in this context.
[4] (Dzehtsiarou, 2015), 2.
[5] Ibid.

social life of a life-sentenced prisoner ends and there is no reason for them or prison employees to work towards rehabilitation. Secondly, and most importantly, practical protection of "the right to hope" means not denying life-sentenced prisoners the absolute rights enshrined under Article 3 of the ECHR. Article 3 states, "no one shall be subjected to torture or to inhuman or degrading treatment or punishment".[6] It will be argued in section four, in line with *Vinter*, that denying a life-sentenced prisoner practical protection of "the right to hope" violates Article 3.

(3) VINTER AND *OTHERS V UNITED KINGDOM*

Before *Vinter*, ECHR case law held that if there was hope for release, in any legal way shape or form, life-sentenced prisoners could not depend on Article 3.[7] For example, in *Kafkaris v Cyprus* the court held that a life sentence accompanied by a whole life order did not violate Article 3 if there was sufficient hope for release at some point.[8] Sufficient hope was never satisfyingly articulated. *Vinter* changed this. The decision mandated the legal avenues to release for life-sentenced prisoners be both clearly articulated and meet five criteria. Firstly, there must exist a sentence review mechanism.[9] Secondly, that "review must meet a certain standard; [thirdly], the conditions of that review must be clear and knowable to the prisoner; [fourthly], the review mechanism must be in place from the imposition of the sentence; and [finally], the conditions must be clear and knowable from the imposition of the sentence."[10] The decision reiterated that any sentence must be "defacto and de jure reducible,"[11] must allow the "possibility of review," [12] and "the prospect of release."[13] The court did ultimately hold that in the case of Mr. Vinter, Mr. Bamber, and Mr. Moore, "imprisonment for life with release possible only in the event of terminal illness or serious incapacitation" provided "no violation" of Article 3.[14] But, it concluded that, "the uncertain and ambiguous relationship between the various sources of the applicable domestic law prevents the applicants' life sentences, "at the present time", from being regarded as reducible in law and in practice for the purposes of Article 3."[15] The decision found that the avenue to release through the Secretary of State did not properly meet the five criteria cited above and therefore,[16] the UK must "choose the means whereby they will fulfil their international treaty obligation under Article 46 of the Convention to "abide by" the Grand Chamber's judgment in the present case."[17]

Vinter demands the sort of practical protection defined in section two. It demands clarity and practicality. In practice, *Vinter* expanded Article 3 and Human Rights protection more generally.[18] For example, in *Khoroshenko v Russia,* the court ruled that not allowing visitation rights during the first ten years of a sentence violated the convention on the grounds of "a right to hope" and therefore "a right

[6] ECHR Article 3.
[7] (Graham, 2018), 2.
[8] Ibid; *Kafkaris* (2009) 49 E.H.R.R. 35 at [98].
[9] (Graham, 2018) 2-4.
[10] Ibid, 3
[11] *Vinter* (2016) 63 E.H.R.R. 1 at [107].
[12] *Vinter* (2016) 63 E.H.R.R. 1 at [119]-[121].
[13] *Vinter* (2016) 63 E.H.R.R. 1 at [108].
[14] ECtHR information, "Note on the Court's case-law" No. 148
[15] *Vinter* [2013] 63 E.H.R.R. 1 at [21].
[16] *Vinter* [2013] 63 E.H.R.R. 1 at [20].
[17] *Vinter* [2013] 63 E.H.R.R. 1 at [21].
[18](Graham, 2018), 2.

to rehabilitation."[19] *Vinter* signaled a liberalizing of criminal punishment— the death penalty was no longer replaced with a life sentence.[20] There was hope of release regardless of how serious the sentence.

(4) Hutchinson

Vinter was overturned by *Hutchinson* proceeding a chamber judgment in the same case. *Hutchinson* changed the precedent by arguing that recent clarification of the point at which a prisoner can appeal the Secretary of State was enough to meet the expectations of Article 3.[21] However, this small clarification did not meet the standard set in *Vinter*. Specifically, the clarification did not allow the UK legal system to mee the five criteria *Vinter* demanded. Surprisingly in *Hutchinson*, the court still held that there needs to be more than a semblance of hope for life-sentences to meet the ECHR standard.[22] Yet, protections of "the right to hope" were significantly weakened. Dzehtsiarou argues convincingly that this overturn was based on poor legal work and thin legal foundation.[23] He sees the decision creating two problems for the protection of human rights:

1. It will be a *sui generis* standard for the UK and create a double standard for other EU States since they will still be governed by *Vinter*.[24]

The complicated legality of the case holds specific rules for the UK. In *Vinter* the decision held that the power of the Secretary of State was not clear or broad enough to meet the demands of Article 3. *Hutchinson* holds that the slight changes in clarity surrounding when in a sentence a prisoner can petition the Secretary of State constitutes enough to meet the demands of Article 3.[25] However, this is based on UK legal system so the specifics cannot be more generally applied.

2. *Hutchinson* will "justify a broader margin of appreciation for the Contracting Parties in this area and as a result it will cause loosening of the standards that were developed in the recent case-law of the Court."[26]

The decision in *Hutchinson* set a new standard of clarity and go back on progress made in post *Vinter* case law.

For these reasons, while *Hutchinson* holds the ECHR does not, protect, practically speaking, "the right to life" even if there is theoretical protection of the right. Returning to the demands of *Vinter* and the court's suggestions for providing frameworks of release to life-sentenced prisoners seems the best way to move towards enshrined practical protection of the "right to hope."

COUNTER ARGUMENTS

There are arguments against my view, namely that a clear and effective avenues to release needs to be articulated for life-sentenced prisoners to have the "right to hope" and for that right to be protected. One of the strongest arguments against my view is this: is providing a "right to life" cruel? The chances a prisoner is released from a life-sentence are extremely low (barring the surfacing of new evidence). Are we providing them with false hope? And is providing that false hope inhumane and does it violate Article 3 of the ECHR?

This is a rather complex argument the specifics of which are beyond my legal knowledge and the scope of this paper. There does seem to be a cruelty in providing an almost negligible hope of

[19] (Dzehtsiarou 2017), 7; *Khoroshenko v Russia* [2015] at [104] and [5]; The legal connection between a "right to hope" and "the right to rehabilitation" will not be argued here since it is beyond the scope of this paper.
[20] (Dzehtsiarou, 2015), 2.
[21] (Graham, 2018), 1.
[22] (Dzehtsiarou, 2017), 3.
[23] Ibid, 2.
[24] Ibid, 3
[25] Ibid, 3; *Hutchinson v United Kingdom* (App No.57592/08), judgment of 17 January 2017 (Grand Chamber) at [22].
[26] (Dzehtsiarou, 2017), 7.

release for the sake of transparency. I think the question becomes, is Article 3 better met by proving hope through the means articulated in *Vinter* or *Hutchinson*. It seems to me far curler to provide avenues which are hard to find, difficult to navigate, and subject to wildly specific circumstances then articulating clearly how a prisoner can appeal their sentence. But both *Vinter* and *Hutchinson* seem more in line with Article 3 than denying a prisoner hope altogether. This is because denying a prisoner hope a) rips them of their right to rehabilitation and b) in the occurrence of false conviction allow them fewer chances to argue their case.

(5) Conclusion

Based on my definitions of practical and theoretical protection and my argument in favor of practical protection, I conclude that the ECHR does not protect the "right to hope." Confusingly, it did protect that right under *Vinter*, however after the *Hutchinson* decision, protection of the "right to hope" was greatly diminished and no longer practical. A simple clarification about the time during a sentence a prisoner can appeal the Secretary of State does not provide enough clarity. Furthermore, those five criteria set in *Vinter* remain unmet. Given this, the "right to hope" has been greatly diminished and the ECHR has failed to properly protect life-sentenced prisoner's rights under Article 3.

SOURCE CITED

Dzehtsiarou K, 'Hutchinson V UK: The Right to Hope (Revisited)...' (*ECHR BLOG*, 10 February 2015) <https://www.echrblog.com/2015/02/hutchinson-v-uk-right-to-hope-revisited.html> accessed 22 May 2024

Dzehtsiarou K, 'Guest Post on Grand Chamber Judgment in Hutchinson' (*ECHR BLOG*, 19 January 2017) <https://www.echrblog.com/2017/01/guest-post-on-grand-chamber-judgment-in.html> accessed 1 May 2024

Graham L, 'From Vinter to Hutchinson and Back Again? The Story of Life Imprisonment Cases in the European Court of Human Rights' (2018) 3 EHRLR 258

CASES

Hutchinson v United Kingdom (57592/08) 43 B.H.R.C. 667; [2017] 1 WLUK 173 (ECHR (Grand Chamber))

Vinter v United Kingdom (66069/09) (2016) 63 E.H.R.R. 1; [2013] 7 WLUK 244 (ECHR (Grand Chamber))

Khoroshenko v Russia (41418/04) (2015) (ECHR (Grand Chamber))

Kafkaris v Cyprus (2009) 49 E.H.R.R. (ECHR (Grand Chamber))

LEGISLATION

European Convention on Human Rights, Article 3