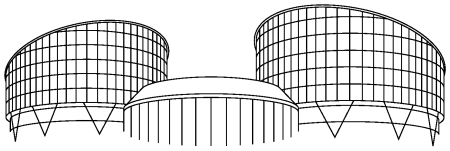

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FORMER FIFTH SECTION

CASE OF TRABELSI v. BELGIUM

(Application no. 140/10)

JUDGMENT

This version was rectified on 7 October 2014
under Rule 81 of the Rules of Court.

STRASBOURG

4 September 2014

FINAL

16/02/2015

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

In the case of Trabelsi v. Belgium,

The European Court of Human Rights (Former Fifth Section), sitting as a Chamber composed of:

Mark Villiger, *President,*
Ann Power-Forde,
Ganna Yudkivska,
André Potocki,
Paul Lemmens,
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 1 July 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 140/10) against the Kingdom of Belgium lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Tunisian national, Mr Nizar Trabelsi ("the applicant"), on 23 December 2009.

2. At the time when the application was lodged and when the present judgment was delivered, the applicant was represented by Mr M. Nève, a lawyer practising in Liège. During the proceedings he was also represented by other counsel, particularly, when the judgment was adopted on 1 July 2014, by Mr A. Château, a lawyer practising in Brussels.[1] The Belgian Government ("the Government") were represented by their Agent, Mr M. Tysebaert, Senior Adviser, Federal Judicial Department.

3. The applicant alleged, in particular, that his extradition to the United States of America exposed him to a risk of treatment contrary to Article 3 of the Convention. He also contended that the enforcement of the decision to extradite him had infringed his right of individual petition.

4. On 27 November 2012 the application was communicated to the Government.

[1] Rectified on 7 October 2014: the text was "On the date of adoption of the judgment, 1 July 2014, the applicant was represented by Mr A. Château, a lawyer practising in Brussels."

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1970 and is currently being held in Rappahannock Prison in Stafford, Virginia (United States).

A. Criminal and asylum proceedings

6. On 14 September 2001 an arrest warrant was issued against the applicant by an investigating judge of the Brussels Regional Court. A search of his home had led to the discovery of false passports, automatic weapons and ammunition, as well as chemical formulae that could be used for making explosives and a detailed plan of the United States Embassy in Paris.

7. Following a simultaneous search of a Brussels café, where the applicant had been a regular customer, drawing on information provided by another suspect, who had also been arrested, the police discovered 59 litres of acetone and 96 kilograms of sulphur powder. Under the arrest warrant which was subsequently issued, the applicant was accused of acts of criminal conspiracy, destruction by explosion, possession of combat weapons and belonging to a private militia.

8. The applicant admitted the offences as charged and was sentenced to ten years' imprisonment by the Brussels Regional Court on 30 September 2003 for attempting to blow up the Kleine-Brogel Belgian army base, forgery, and instigating a criminal conspiracy to attack persons and property. The court's judgment included the following finding:

> "[the defendant] attempted to commit one of the most serious crimes since Belgian independence; in spite of the lapse of time since his arrest, he has never shown any remorse, the danger which he poses has remained intact and his case presents no mitigating circumstances."

9. In a judgment of 9 June 2004 the Brussels Court of Appeal upheld the applicant's ten-year prison sentence for a range of offences, including:

> " - attempting to blow up the Kleine-Brogel Belgian army base, with the added circumstance that the perpetrator must have presumed that there were one or more persons present at the time of the explosion ...,
>
> - holding a position of command in a conspiracy formed to perpetrate serious crimes liable to life imprisonment and, in the present case, to carry out a terrorist attack ...,
>
> - receiving from a foreign organisation funds intended for conducting, in Belgium, an activity liable to jeopardise national security ...,
>
> - being in unlawful possession of a combat weapon ...,
>
> - setting up, and assisting or participating in, a private militia or other organisation of private individuals for the purpose of using force ..."

10. On 26 January 2005 the applicant was sentenced *in absentia* by a Tunisian military court to ten years' imprisonment for belonging to a terrorist organisation abroad in peacetime. On 29 June 2009 the Permanent Military Court in Tunis issued a warrant for the applicant to be brought before it, for which an application for enforcement was submitted to the Belgian authorities by diplomatic note of 10 September 2009.

11. The principal prison sentence imposed on the applicant in Belgium was completed on 13 September 2011. Two subsequent subsidiary prison sentences of six and three months respectively were imposed in 2007 and enforced immediately. The applicant completed these sentences on 23 June 2012.

12. On 25 August 2005, meanwhile, the applicant had submitted an asylum application in Belgium, which the Commissioner General for Refugees and Stateless Persons dismissed in a decision of 10 April 2009. This decision refused the applicant refugee status and subsidiary protection on the grounds that he had committed offences contrary to the aims and principles of the United Nations within the meaning of Article 1 f) c of the Geneva Convention. That decision was upheld by the Aliens Appeals Board in a judgment of 18 May 2009.

B. Extradition proceedings

1. Judicial stage of the validation of the US indictment

13. By a diplomatic note of 8 April 2008 the US authorities transmitted to the Belgian authorities a request for extradition of the applicant under the Extradition Agreement concluded between the Kingdom of Belgium and the United States of America on 27 April 1987. The reasons for the request were the indictment issued by the District Court of the District of Columbia (Washington D.C.) against the applicant on 16 November 2007, comprising the following charges:

> "A. Conspiracy to kill United States nationals outside of the United States, in violation of the following provisions: 18 U.S.C. § 2332 (b) (2) and 1111 (a)
>
> B. Conspiracy and attempt to use of weapons of mass destruction, in violation of the following provisions: 18 U.S.C. § 2332a and 2
>
> C. Conspiracy to provide material support and resources to a foreign terrorist organisation, in violation of the following provisions: 18 U.S.C. § 2339B
>
> D. Providing material support and resources to a foreign terrorist organisation, in violation of the following provisions: 18 U.S.C. § 2339B and 2."

14. The extradition request continued as follows:

> "A warrant for the arrest of Mr Nizar Trabelsi was issued on 16 November 2007 by order of ... judge ....
>
> The underlying facts of the charges indicate that in mid-2000 or earlier, while in Germany, and elsewhere in Europe, and in Afghanistan, Nizar TRABELSI knowingly

entered into an agreement with al Qaeda associates, including Osama bin Laden, to provide material support and resources, to unlawfully kill United States nationals in targeted facilities in Western Europe, and to use a large-scale explosive device (a weapon of mass destruction) to destroy property in Western Europe used by the United States and/or a department or agency of the United States."

15. According to the documents in support of the extradition request, notably the applicable extracts from criminal law (Title 18 of the United States Code, U.S.C.) transmitted by the US authorities, these offences carried the following penalties:

"A. 18 U.S.C. § 2332 (b) (2) and 1111 (a): a maximum term of life imprisonment, or a combined fine and prison sentence.

B. 18 U.S.C. § 2332a and 2: a maximum term of life imprisonment.

C. 18 U.S.C. § 2339B: a fine or a maximum term of 15 years imprisonment, or a combination of both.

D. 18 U.S.C. § 2339B and 2: a fine or a maximum term of 15 years imprisonment, or a combination of both."

16. On 4 June 2008 the Federal Attorney transmitted to the *chambre du conseil* of the Nivelles Regional Court a request for enforcement of the arrest warrant issued on 16 November 2007 against the applicant. In his request the Federal Attorney pointed out that the maximum sentences for the offences underlying the request for extradition were fifteen and ten years respectively.

17. By a diplomatic note of 12 November 2008 the US authorities made the following assurances concerning the applicant to the Belgian authorities:

"The Government of the United States assures the Government of Belgium that, pursuant to his extradition, Nizar Trabelsi will not be prosecuted before a military commission, as enabled by the Military Commissions Act of 2006. The Government of the United States further assures the Government of Belgium that upon extradition, Trabelsi will not be detained or incarcerated in any facility other than a civilian facility in the United States."

18. By an order of 19 November 2008, the *chambre du conseil* of the Nivelles Regional Court acceded to the Federal Attorney's request and declared the arrest warrant issued by the US District Court enforceable. However, the order added the following stipulation:

"It emerges from the examination of the documents enclosed with the arrest warrant issued for the purposes of extradition ... that the 'overt acts' listed by the US authorities in support of the first charge include several which correspond very precisely to the acts committed in Belgian territory which justify the [applicant's] conviction in Belgium.

...

Therefore, by virtue of the *ne bis in idem* principle, the arrest warrant issued for the purposes of extradition on 16 November 2007 by the competent judicial authority of the United States of America cannot be declared enforceable in respect of 'overt acts'

nos. 23, 24, 25, 26 set out in paragraph 10 of the first charge, which are deemed repeated in support of the other charges."

19. Having examined an appeal lodged by the applicant, the Indictments Division of the Brussels Court of Appeal delivered a judgment on 19 February 2009 upholding the aforementioned order and declared the warrant enforceable. Having noted that the extradition concerned acts (committed outside Belgium) other than those for which the applicant had been prosecuted and convicted in Belgium, the Court of Appeal argued that:

"There are no serious grounds for believing that the request for extradition was submitted for the purposes of prosecuting or punishing Trabelsi Nizar for considerations of race, religion, nationality or political opinion or that this individual's situation is liable to be worsened for any of these reasons.

...

Nor is there any serious reason to believe that if Trabelsi Nizar were to be extradited he would be subjected to a flagrant denial of justice, acts of torture or inhuman or degrading treatment; there is no reason to suppose that the United States of America will not meticulously comply with all the provisions, including Articles 7.2 and 7.3, of the Extradition Agreement concluded with Belgium, and every reason to believe that Trabelsi Nizar will be detained in a civilian facility and tried by the ordinary courts, in accordance with conventional procedure.

..."

20. On 24 April 2009 the applicant lodged an appeal on points of law against the judgment of the Court of Appeal. He relied on the risk of treatment incompatible with Article 3 of the Convention and the risk of a flagrant denial of justice. He contended that the Court of Appeal had not assessed the consequences of his extradition to the United States in the light of the general situation in that country or his own specific circumstances, and argued that the Court of Appeal should have adopted the same line of reasoning as the Court in the case of *Saadi v. Italy* [GC] (no. 37201/06, ECHR 2008). He also complained that the Court of Appeal had not addressed the potential problem under Article 3 of sentencing a person to an irreducible life sentence. Lastly, he complained of a violation of the *ne bis in idem* principle.

21. By a judgment of 24 June 2009 the Court of Cassation dismissed the applicant's appeal on points of law. It ruled that the Court of Appeal had provided adequate reasons and legal justification for its decision, considering

" - that the requesting State is currently conducting a thorough review of its anti-terrorist policy, stepping up its action against torture and inhuman and degrading treatment, and is on the verge of suspending the special courts and abolishing the unlimited detention without trial of persons captured in the context of international conflict;

- that under the terms of the formal guarantees provided in support of the extradition request, the appellant will be tried by an ordinary civilian court in accordance with the

normal procedure in force in the requesting State, enjoying all the rights and remedies available under the national judicial system;

- that the appellant is not liable to a life sentence for the offences for which his extradition has been requested and that the penalties which they carry can be commuted into other penalties with possibilities for release on parole;

- that because the evidence relied upon by the appellant lacks any specific aspect affecting his own personal situation, which would have made the risks he alleges more credible, it does not substantiate any serious concern that he could be exposed to a flagrant denial of justice or acts of torture or inhuman and degrading treatment.

..."

22. In a letter of 11 November 2009 sent to the Belgian authorities at the behest of the Federal Attorney responsible for the extradition request, the US Department of Justice supplied the following additional information:

"The statutory maximum sentence for a conviction of each of the first two of these offenses is life imprisonment and the statutory maximum sentence for the latter two offenses is 15 years. In addition, the United States Sentencing Guidelines, which are the voluntary guidelines that judges may choose to follow in sentencing defendants, call for a life sentence for each of the first two of these offenses.

A life sentence is not mandatory and the court has the discretion to issue a sentence less than life. In issuing a sentence, the court may consider the gravity of the offense and whether any lives were lost or property was damaged. In this instance, Trabelsi did not succeed in carrying out his plans to kill United States nationals and to use weapons of mass destruction. Thus, the court in issuing a sentence, in its discretion, may consider that Trabelsi was not successful in carrying out his plans. The court also may consider any mitigating factors, such as whether the defendant acknowledges responsibility for his actions.

If the court, in its discretion, sentences Trabelsi to a punishment of less than life, i.e. a term of years, Trabelsi's sentence could be reduced by up to 15% for good behaviour while incarcerated. This type of sentence reduction is only possible, however, if the original sentence is to a term of years, however long, rather than a life sentence. Therefore, if Trabelsi were sentenced to a term of 20, 30, or even 50 years, then he could be eligible for a sentence reduction of up to 15% of his original sentence based on his good behaviour while incarcerated. If, however, Trabelsi is sentenced to life, he would not be eligible for any reduction in his sentence.

Finally, Trabelsi can apply for a Presidential pardon or sentence commutation. (A pardon would eliminate the conviction; a commutation would be an adjustment to the sentence.) However, this is only a theoretical possibility in Trabelsi's case. We are not aware of any terrorism defendant ever having successfully applied for a Presidential pardon or sentence commutation."

2. Judicial and administrative phase of the response to the extradition request

a) Opinion of the Indictments Division

23. Once the US indictment was declared operative, the proceedings relating to the response to the extradition request were commenced.

24. On 4 February 2010 the Federal Attorney forwarded his written opinion to the Brussels Court of Appeal inviting it, in the light of the Court's case-law, particularly *Kafkaris v. Cyprus* [GC] (no. 21906/04, ECHR 2008), to issue a positive opinion on the applicant's extradition. He pointed out that in the case of the first two charges, the applicant was liable to a life sentence, while in the case of the other two charges he was liable to a fifteen-year prison sentence.

25. In a letter of 29 March 2010 to the Federal Department of Justice the applicant took note of the fact that at the hearing on 24 March 2010 the Federal Attorney had acknowledged a mistake in his observations in the enforcement request proceedings concerning the sentence to which the applicant might be liable following his extradition to the United States (see paragraph 16 above).

26. On 10 June 2010 the Indictments Division of the Court of Appeal issued a favourable opinion on the applicant's extradition, specifying a number of conditions:

> " - extradition may only be granted:
>
> i. on condition that the death penalty is not imposed on N. Trabelsi or, if the United States cannot guarantee this condition, on condition that the death penalty is not enforced;
>
> ii. on condition that any life sentence is accompanied by the possibility of commutation of sentence, even if the conviction is based on terrorist acts;
>
> - in the event of a request for N. Trabelsi's re-extradition to a third country, such as Tunisia, the United States must request the agreement of Belgium should Tunisia send the US Government any future request for extradition after N. Trabelsi has been handed over to them.
>
> If the US fails to accept these conditions the extradition must be refused."

b) Ministerial decree granting extradition

27. By a diplomatic note of 10 August 2010 the US authorities confirmed that the applicant was not liable to the death penalty and assured the Belgian authorities that he would not be extradited to any third country without the agreement of the Belgian Government. The US authorities reiterated that the maximum life prison sentence was not mandatory and that even if all the constituent elements of the criminal offences in question were secured and proved, the court had the discretion to impose a lighter sentence. The note specified that US legislation provided for several means of reducing life sentences:

> "Regarding the question of commutation of a life sentence, the United States wishes to make it clear, in the first instance, that if Trabelsi were convicted, a life sentence is not mandatory; the court has the discretion to impose a sentence less than life. Also, a defendant has a statutory right to appeal the conviction and sentence, including a life sentence, both directly, and collaterally through a habeas corpus petition. In addition, there are certain statutory bases for reduction of an already-imposed sentence,

including where the defendant has provided substantial assistance in the investigation or prosecution of a third party (Federal Rule of Criminal Procedure 35(b) and Title 18 United States Code, Section 3582(c)(1)(B)), or for compelling humanitarian reasons such as the terminal illness of the prisoner (Title 18, United States Code, Section 3582(c)(lXA)(i)).

In addition to these measures, the defendant may request that his sentence be reduced as an exercise of executive clemency by the President of the United States. The President's power under Article H, Section 2, of the U.S. Constitution, "to grant reprieves and pardons" includes the authority to commute (reduce) a sentence of imprisonment, including a life sentence. There are established regulations and procedures governing the application process for executive clemency, and the Office of the Pardon Attorney has been established in the Department of Justice to review all applications for executive clemency and prepare recommendations for the President on those applications. The U.S. Constitution gives the President absolute discretion to grant executive clemency to a defendant. We note that while such discretion has been exercised sparingly, such relief has, on occasion, been granted for serious offenses implicating national security. For example, in 1999, President Clinton commuted the sentences of 13 members of the FALN, a violent Puerto Rican nationalist organization responsible for numerous bombings in the 1970s and early 1980s, who had been convicted of conspiracy to commit armed robbery, bomb making, sedition and other offenses."

28. On 23 November 2011 the Minister for Justice adopted a ministerial decree granting the applicant's extradition to the US Government. Having noted that the applicant would in no case be liable to the death penalty, the decree examined each of the other guarantees provided.

29. On the matter of possible life imprisonment, the ministerial decree read as follows:

"Under US Federal criminal law the maximum penalty laid down in respect of the charges – the offences under A and B – precludes early release and release on parole. Life sentences as provided for in these two provisions of the US Criminal Code are therefore, from the legal and factual angles, in principle served for the whole of the person's life.

...

In diplomatic note no. 21 of 10 August 2010 from the United States Embassy, the US authorities provided a guarantee that (even) if an irreducible life sentence were handed down it would be possible to obtain a pardon from the US President. This right is set out in Article 2, II of the US Constitution. Furthermore, Presidential pardons have in fact been granted on several occasions in the past, including the recent past, to persons sentenced by the US courts, particularly at the Federal level.

...

Even if we view it in its historical context, the FALN case shows that in cases likely to fall under the current legislation on terrorism in force since 11 September 2001, which cases must objectively be seen as much more serious than those of which the person sought is suspected and which are therefore liable to lead to severer penalties, Presidential pardons can indeed be granted.

Even though some individuals have since 2001 been given irreducible life sentences ... for terrorism or acts linked to terrorism, such cases cannot be compared to the Trabelsi case in terms of their content. All those who have been sentenced to life

imprisonment in the US without early release or release on parole were charged, prosecuted and finally convicted for active involvement in terrorist attacks which had caused deaths and/or injuries and considerable material damage, for example the attacks on the US Embassies in Nairobi, Kenya, and Dar-es-Salaam (Tanzania) on 7 August 1998. ...

Those offences were manifestly incomparable in extent and nature with those attributed to the person whose extradition has been requested.

In the aforementioned cases persons, sometimes enormous numbers of people, in addition to US nationals, suffered substantial physical and material damage. The person sought in the present case, however, is being prosecuted for having planned and prepared a terrorist attack which was never carried out. He did not succeed, in cooperation with others, in causing human injuries or even material damage.

It is therefore manifestly plausible that the offences as charged are not such that the maximum applicable sentence laid down in the US Criminal Code, that is to say an irreducible life sentence, could be called for or imposed.

A recent survey by the Human Rights First NGO shows that of the 214 persons prosecuted since 11 September 2001 for terrorist offences linked to al-Qaeda or other Islamist groups or for offences connected with such terrorist offences, 195 have been convicted. Each case involved prosecutions or convictions instigated by Federal attorneys and courts. 151 of the convicted persons were sentenced to imprisonment, while twenty were released on licence or given prison terms corresponding to the period of custody already served. The average length of prison sentences handed down was 8.4 years. Only 11 of those convicted were sentenced to life imprisonment. The report also points out that the proceedings complied with the right to a fair trial ("Human Rights First, In pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts – 2009 Update and Recent Developments", 2009, 68 pp.).

The statistics show that, objectively, the risk of being sentenced to life imprisonment without parole in cases of prosecution for terrorist offences is considerably lower than is commonly thought."

30. In connection with the applicant's possible re-extradition to Tunisia, the ministerial decree continued as follows:

"By diplomatic note no. 21 of 10 August 2010 from the US Embassy the US authorities clearly indicated that if the Tunisian authorities applied to the United States for extradition, it would be turned down.

...

Given the decision to refuse extradition to the Tunisian Republic, in view of the fact that re-extradition necessitates the agreement of the State which authorised the initial extradition, no re-extradition to the Tunisian Republic is possible.

Since the Belgian authority refused extradition to the Tunisian Republic, if Tunisia were to transmit to the US a request for extradition in the future the US would also refuse it, and no extradition by the United States to the Tunisian Republic is possible."

31. Lastly, the ministerial decision analysed the application of the *ne bis in idem* principle as follows:

"Under the Agreement (the Extradition Agreement of 27 April 1987), Belgium and the United States of America ... have mutually undertaken to refuse extradition if the person sought has been acquitted in the requested State or has been convicted in the

same State for the same offence as that for which extradition is being requested. Ratification ... incorporated this agreement into the Belgian and US legal systems.

In other words it is not the acts but the legal classification of the acts, namely the offences, which must be identical.

...

The facts forming the basis of the offences in question correspond to 'overt acts' which individually or together function as factual elements supporting the charges. The double jeopardy principle does not exclude the possibility of using or not using these elements.

In the present case the offences for which the person sought was finally convicted by the Brussels Court of Appeal on 9 June 2004 do not correspond to the offences listed in charges A to D in the arrest warrant forming the basis for the US extradition request. The constituent elements of the respective US and Belgian offences, their scope and the place(s) and time(s) of their commission do not match up.

...

Under US Federal criminal law an 'overt act' is a (factual) element, an act, a behaviour or a transaction which in itself may not necessarily be classified as an offence...

An 'overt act' is merely a piece of supporting evidence which in itself or in conjunction with other overt acts may help constitute the offence or offences for which the person is being prosecuted, that is to say conspiracy, for instance to kill US nationals (see charge A). ...

Although each of 'overt acts' nos. 24, 25 and 26 could be classified as an offence, these acts nonetheless do not constitute offences for which the extradition has been requested."

32. Article 2 of the decree stated that "extradition will take place after the person sought has complied with the requirements of the Belgian courts".

33. On the same day, under another ministerial decree, the Minister for Justice refused the Tunisian authorities' request for the applicant's extradition (see paragraph 10 above).

c) Application for judicial review before the *Conseil d'Etat*

34. On 6 February 2012, relying on violations of Article 3 of the Convention and Article 4 of Protocol No. 7, the applicant lodged an application with the *Conseil d'Etat* for judicial review of the ministerial decree granting his extradition to the United States of America.

35. At the *Conseil d'Etat* hearing on 19 September 2013 the applicant relied on the Court's judgment in *Vinter and Others v. United Kingdom* [GC] (nos. 66069/09, 130/10 and 3896/10, 9 July 2013). He deduced from this judgment that the Court had now adopted a position requiring preventive review of whether a life prison sentence was reducible or not before the prisoner began his sentence, and therefore that the distinction drawn in the *Babar Ahmad and Others v. United Kingdom* judgment, (nos.

24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012) depending on whether the person subject to extradition had been convicted or not was no longer relevant.

36. In a judgment of 23 September 2013 the *Conseil d'Etat* dismissed the application for judicial review. As to the complaint under Article 3 of the Convention and the risk of an irreducible life sentence, the *Conseil d'Etat* reasoned as follows:

> "Even supposing that the applicant is sentenced by the US courts to life imprisonment, it should be noted that in its *Vinter and Others v. United Kingdom* judgment of 9 July 2013 [the Court] ruled that: 'a life sentence does not become irreducible by the mere fact that in practice it may be served in full', that 'no issue arises under Article 3 if a life sentence is *de jure* and *de facto* reducible ...' and that 'where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3'.
>
> In the present case, as in that of *Babar Ahmad and Others v. United Kingdom* which led to [the Court's judgment] of 10 April 2012, the applicant has not been sentenced by a US court to life imprisonment, and has still less begun serving such a sentence.
>
> As in the aforementioned case, therefore, the applicant does not show that in the event of a life sentence, the question will arise whether there is any legitimate penological justification for continuing his imprisonment.
>
> Moreover, in his most recent submissions the applicant acknowledges that a possible life sentence imposed on him would be reducible *de jure*. US law allows him either to request a review or apply for a Presidential pardon or commutation of sentence, and the applicant does not contend that this power of executive clemency or sentence commutation is accompanied by restrictions comparable to those in issue in the [Court's] aforementioned judgment of 9 July 2013.
>
> Although the applicant challenges the assertion that such a sentence is reducible *de facto*, the explanations provided to the opposing party by the US authorities do show that the US President has already used his power to commute sentences. Therefore, the legal remedy available to the applicant in the event of a life prison sentence is not excluded in practice.
>
> Furthermore, the applicant's contention that since the 11 September 2001 terrorist attack it has been inconceivable for the US President to grant a pardon to or commute the sentence of a person convicted of terrorism has not been substantiated by any reliable information, nor can it be in view of the relatively short period of time, as compared with a life sentence, which has elapsed since the said attack and any criminal sentences subsequently imposed.
>
> As in *Babar Ahmad* ..., therefore, it has not been established that the US authorities would, when appropriate, refuse to implement the available sentence-reducing mechanisms where there was no legitimate penological justification for continuing the applicant's imprisonment.
>
> Any possible life sentence imposed on the applicant would therefore also be reducible *de facto*.
>
> Consequently, it is unnecessary to determine whether the opposing party was wrong to consider that the applicant would not necessarily be sentenced to life imprisonment,

because, even if he were sentenced to such a prison term, this penalty would not constitute a breach of Article 3 [of the Convention]".

37. As to the complaint under Article 5 of the Extradition Agreement between the Kingdom of Belgium and the United States of America, Article 4 of Protocol No. 7 to the Convention and Article 14 § 7 of the International Covenant on Civil and Political Rights, the *Conseil d'Etat* held that:

"The US authorities request the applicant's extradition on four charges, namely:

1) Conspiracy to kill United States nationals outside of the United States;

2) Conspiracy and attempt to use of weapons of mass destruction;

3) Conspiracy to provide material support and resources to a foreign terrorist organisation;

4) Providing material support and resources to a foreign terrorist organisation, in violation of the following provisions.

Again according to the US authorities, in order to commit these offences as charged the applicant and four accomplices carried out a series of 'overt acts', including those for which extradition is being granted to the US authorities presented as follows: [a list of 28 charges follows].

In Belgium the charges ('in the Brussels judicial district and, on related charges, elsewhere in the Kingdom') against the applicant are as follows: [a list of 13 charges follows].

Comparing all the 'overt acts' for which extradition has been granted to the US authorities with all the Belgian charges valid 'in the Brussels judicial district and ... elsewhere in the Kingdom', it will be noted that the former have no territorial link with the Kingdom of Belgium, constituting a set of acts which serve as the constituent elements of the four charges presented by the US authorities.

It emerges from the case file that the applicant is wanted by the US authorities for a number of offences in respect of which he has not been 'found guilty, convicted or acquitted in the requested State' and that the 'overt acts' constitute so many elements to be used by the US judicial authorities to establish whether the applicant is guilty or innocent of the four charges brought against him."

C. Indication of an interim measure and following stages in the proceedings before the Court

38. On 6 December 2011, the date of notification of the ministerial decrees relating to the requests for extradition (see paragraphs 28 and 33), the applicant lodged a request with the Court for the indication of an interim measure pursuant to Rule 39 of the Rules of Court with a view to suspending his extradition.

39. On the same day the Court acceded to the applicant's request and decided to indicate to the Government, in the interests of the parties and of the proper conduct of proceedings before it, that it should not extradite the applicant to the United States of America.

40. On 20 December 2011, arguing that the interim measure had been indicated prematurely because the applicant had not yet been placed in custody pending extradition and that such a measure would create a situation detrimental to the proper administration of justice, the Belgian Government requested that the measure be lifted.

41. On 11 January 2012, the Court, having re-examined the application in the light of the information supplied by the parties, decided, on the basis of the said information, to refuse to lift the interim measure.

42. On 21 May 2012 the Government submitted a second request for the lifting of the interim measure.

43. In reply, the Court pointed out, in a letter of 25 May 2012, that the request to lift the measure and the application would be re-examined once the judgment delivered on 10 April 2012 by the Court in *Babar Ahmad and Others v. United Kingdom*, cited above, had become final.

44. In a letter of 25 June 2012 the Court informed the parties that the examination of the request to lift the interim measure had been postponed indefinitely in view of the request for referral to the Grand Chamber of the cases *Vinter and Others v. United Kingdom* (no. 66069/09) and *Harkins and Edwards v. United Kingdom* (nos. 9146/07 and 32650/07).

45. On 3 August 2012 the Court informed the parties that it had been decided to refer the aforementioned *Vinter* case to the Grand Chamber and that the question of the request to lift the interim measure would be re-examined when a decision had been taken on the request for referral of the aforementioned case of *Babar Ahmad and Others* to the Grand Chamber.

46. The application was communicated to the respondent Government on 27 November 2012.

47. In their observations on the admissibility and merits of the application the Government requested, for the third time, the immediate lifting of the interim measure.

48. In a letter of 7 January 2013 the Court replied that the Government would be informed in due course of the decision taken by the Court on the interim measure.

49. On 15 January 2013 it was decided to maintain the interim measure for the duration of the proceedings before the Court.

50. In a letter of 18 June 2013 in reply to a fourth request from the Government to lift the interim measure, the Court stated that the interim measure had been maintained and would be applied until the end of the proceedings before it.

51. On 10 July 2013 the Court informed the parties that examination of the case had been adjourned in view of the imminent delivery of the judgment of the *Conseil d'Etat* and of the Grand Chamber judgment in *Vinter and Others* [GC] (nos. 66069/09, 130/10 and 3896/10, 9 July 2013).

52. In reply to a question from the Government on the deadline for dealing with the case, the Court informed them on 25 September 2013 that

the examination of the case would begin at the end of October or the beginning of November.

53. On 18 October 2013 the Court informed the parties that the chamber constituted to examine the case was intending to relinquish the case to the Grand Chamber under Article 30 of the Convention.

54. By letter of 31 October 2013 the applicant expressed his agreement to such relinquishment. The Government, on the other hand, indicated, by letter of 8 November 2013, that they opposed relinquishment.

D. Detention pending extradition

55. On 24 June 2012, having served the sentences imposed on him (see paragraph 11 above), the applicant was taken into custody pending extradition in pursuance of section 3 of the Extradition Act of 15 March 1874.

56. On 7 June 2012 the applicant lodged a first application for release with the Nivelles Regional Court. By an order of 12 June 2012 the *chambre du conseil* dismissed the application. The order was upheld by the Indictments Division of the Brussels Court of Appeal on 28 June 2012.

57. Subsequently, having meanwhile been transferred first to Bruges Prison and then to Hasselt Prison, the applicant lodged a second application for release on 13 August 2012 with the Hasselt Regional Court. On 24 August 2012 the *chambre du conseil* allowed his application. On appeal from the public prosecutor, by judgment of 6 September 2012, the Indictments Division of Antwerp Court of Appeal set aside this decision and dismissed the application.

58. On 3 December 2012 the applicant lodged a third application for release. By an order of 14 December 2012 the *chambre du conseil* of the Hasselt Regional Court declared the application unfounded. The applicant appealed to the Indictments Division of Antwerp Court of Appeal, which upheld the aforementioned decision by judgment of 10 January 2013.

59. In January 2013, having meanwhile been transferred to Mons Prison, the applicant lodged a fourth application for release, which was declared unfounded by the *chambre du conseil* of the Mons Regional Court on 4 February 2013, and then by the Indictments Division of the Mons Court of Appeal on 21 February 2013.

60. On 23 August 2013, having meanwhile been transferred to Ittre Prison, the applicant lodged a fifth application for release. This application was dismissed by the *chambre du conseil* of Nivelles Regional Court on 28 August 2013 and then by the Indictments Division of the Brussels Court of Appeal on 12 September 2013.

61. Meanwhile, on 5 September 2013, the applicant had left Ittre Prison for Bruges Prison, having obtained a date for his wedding to a Belgian national with whom he had had two children.

E. The applicant's extradition

62. On 3 October 2013 the applicant was informed that he was being transferred from Bruges Prison to Ittre Prison. In fact he was being taken to Melsbroek military airport, where Federal Bureau of Investigation (FBI) agents were waiting for him. At 11.30 a.m. he was extradited to the United States.

63. The Minister for Justice issued a public statement announcing the applicant's departure at 1.30 p.m.

64. At 3 p.m. the applicant's lawyer made a highly urgent *ex parte* application to the President of Brussels Regional Court. The decision, which was given at 6.30 p.m., stated that the Belgian State was required to comply with the interim measure indicated by the Court, and ordered "prohibition or suspension of the applicant's extradition, as far as this might be possible", on pain of a fine of EUR 5,000 (five thousand euros). The Court has not been informed of any appeal against this order.

F. The applicant's detention in the United States

65. In the United States the applicant was immediately placed in custody. On 7 October 2013, assisted by an officially appointed lawyer, he was brought before the District Court of the District of Columbia to hear the charges against him.

66. The applicant is currently being held in the Rappahannock regional prison in Stafford (Virginia). On 1 November 2013 a letter from the prison administration to the Belgian authorities stated that the applicant was subject to the same conditions of detention as all other prisoners.

67. According to an email sent on 6 November 2013 by the applicant's US lawyer to his representative before the Court, the applicant was allowed to have postal contact with the outside world, but all correspondence would be translated and read in advance by the US Government. He was also allowed to have telephone contact with some members of his family provided that an interpreter was available. Close relatives could visit him subject to obtaining a US entry visa.

68. The applicant was visited by his lawyer, who, in an email sent to a member of his family on 7 December 2013, said that he had been placed in an isolated cell. She expressed concern about his mental state.

II. RELEVANT DOMESTIC LAW

A. Belgian legislation on extradition

69. Under Belgian law, extradition proceedings are governed by the Extradition Act of 15 March 1874, the provisions of which, as far as they apply to the present case, may be summarised as follows.

70. Under section 1, extradition is only possible between Belgium and foreign States under a treaty concluded on a mutual basis.

71. The Belgian Act makes extradition subject to several conditions regarding the offence for which extradition is being requested:

Section 2

"... where the crime or offence giving rise to the application for extradition has been committed outside the territory of the requesting party, the Government may only hand over the prosecuted or convicted foreigner, on a reciprocal basis, if Belgian legislation authorises the prosecution of the same offences committed outside the Belgian Kingdom."

Section 2bis

"Extradition may not be granted if there are serious reasons to believe that the application was submitted for the purpose of persecuting or punishing a person on considerations of race, religion, nationality or political opinions, or if the situation of such person is liable to be worsened for any one of those reasons.

Nor can extradition be granted if there are serious risks that if the person were extradited he would be subjected to a flagrant denial of justice, acts of torture or inhuman and/or degrading treatment in the requesting State.

Where the offence for which extradition has been requested is punishable by the death penalty in the requesting State, the Government shall allow extradition only if the requesting State provides formal guarantees that the death penalty will not be enforced."

72. In accordance with section 3(2), the application must be accompanied, in cases such as the present one, by an arrest warrant or any other equivalent document issued by the competent foreign authority, provided that these documents include a precise indication of the offence for which they have been issued and that they have been declared enforceable by the *chambre du conseil* of the regional court of the foreigner's place of residence in Belgium or of the place where he is to be found. Investigatory proceedings before the *chambre du conseil* are not open to the public.

73. The decision is open to appeal before the Indictments Division of the Court of Appeal, where the investigatory proceedings are also not open to the public. Subsequently, an appeal on points of law lies against the judgment of the Indictments Division.

74. Pursuant to section 3(4), once the foreigner has been detained under the arrest warrant as declared enforceable, the Government take cognisance of the opinion of the Indictments Division of the competent court of appeal.

The latter must verify that all the statutory and Treaty conditions for extradition are fulfilled. The hearing is, in principle, open to the public. The public prosecutor and the foreigner are heard, the latter having been duly summoned to appear and provided with the case file ten days before the hearing. The opinion of the Indictments Division is not made public, and at this stage neither the foreigner nor his lawyer has access to it.

75. The opinion is then transmitted to the Minister for Justice. Since the opinion is not a judgment it is not open to an appeal on points of law before the Court of Cassation. Nor is it liable to an application for judicial review before the *Conseil d'Etat*.

76. The Minister for Justice decides whether or not to hand over the foreigner to the requesting State. A non-suspensive application for judicial review of the ministerial decision lies to the *Conseil d'Etat*.

B. The extradition agreement between Belgium and the United States

77. A treaty on extradition between Belgium and the United States was signed in Brussels on 27 April 1987. This bilateral agreement was amended and updated, pursuant to the 25 June 2003 agreement between the European Union and the United States of America on extradition, under a bilateral "instrument" of 16 December 2004.

78. The relevant provisions of the 27 April 1987 agreement as amended are as follows:

Article 2 - Extraditable Offenses

"1. An offense shall be an extraditable offense if it is punishable under the laws in both Contracting States by deprivation of liberty for a maximum period of more than one year or by a more severe penalty.

2. If extradition is requested for the execution of a sentence, the sentence originally imposed must have been deprivation of liberty for a period of at least one year or a more severe penalty.

3. The following shall also be an extraditable offense:

(a) an attempt to commit one of the offenses described in paragraph 1 or the participation as co-author or accomplice of a person who commits or attempts to commit such an offense; or

(b) an association formed to commit any of the offenses described in paragraph 1 under the laws of Belgium, or a conspiracy to commit any such offenses as provided by the laws in the United States.

4. In determining whether an offense is an extraditable offense, the Contracting States:

(a) shall consider only the essential elements of the offense punishable under the laws of both states; and

(b) shall not consider as an essential element of an offense punishable in the United States an element such as interstate transportation or use of the mails or of other facilities affecting interstate or foreign commerce, since such an element is for the purpose of establishing jurisdiction in a United States federal court;

(c) shall disregard that the respective laws do not place the offense within the same category of offenses or describe the offense by the same terminology.

5. If extradition has been granted for an extraditable offense or for the execution of a sentence, it shall also be granted for:

(a) any other offense specified in the request even if the latter offense is punishable by less than one year's deprivation of liberty, and

(b) the execution of any other penalty, including a fine, specified in the request for extradition even if the severity of the penalty does not fulfill the requirement of the minimum punishment imposed by paragraph 2, provided that all other requirements for extradition are met.

6. Extradition shall not be granted if prosecution of the offense or execution of the penalty has been barred by lapse of time under the laws of the Requested State. However, acts constituting an interruption or a suspension of the time-bar in the Requesting State shall be taken into consideration insofar as possible."

Article 5 – Prior Prosecution

"1. Extradition shall not be granted when the person sought has been found guilty, convicted or acquitted in the Requested State for the offense for which extradition is requested.

2. Extradition shall not be precluded by the fact that the authorities in the Requested State have decided not to prosecute the person sought for the acts for which extradition is requested, or to discontinue any criminal proceedings which have been instituted against the person sought for those acts."

Article 6 – Humanitarian Considerations

"1. If an offense for which extradition is requested is punishable by death in the Requesting State, and if in respect of such offense the death penalty is not provided for by the Requested State or is not normally carried out by it, extradition may be refused, unless the Requesting State gives such assurances as the Requested State considers sufficient that the death penalty will not be carried out.

2. Notwithstanding the provisions of the present Treaty, the executive authority of the Requested State may refuse extradition for humanitarian reasons pursuant to its domestic law."

C. Possibilities of reducing life sentences under US law

79. The possibilities of sentence reduction mentioned in the diplomatic note sent by the US authorities to their Belgian counterparts on 10 August 2010 (see paragraph 27 above) are set out in the following provisions:

Federal Rules of Criminal Procedure

Rule 35. Correcting or Reducing a Sentence

"...

(b) Reducing a Sentence for Substantial Assistance.

(1) In General. Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.

(2) Later Motion. Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(3) Evaluating Substantial Assistance. In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's pre-sentence assistance.

(4) Below Statutory Minimum. When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

(c) 'Sentencing' Defined. As used in this rule, "sentencing" means the oral announcement of the sentence."

United States Code, Title 18 - Crimes and Criminal Procedure

§ 3582. Imposition of a sentence of imprisonment

"...

(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT

The court may not modify a term of imprisonment once it has been imposed except that

(1) in any case

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that

(i) extraordinary and compelling reasons warrant such a reduction; or (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g); and that such a

reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure;

...”

80. The aforementioned Article 3582 (c)(1)(A) is relied upon by the Federal Bureau of Prisons in cases of particularly exceptional or pressing circumstances which could not reasonably have been foreseen by the court at the time of determination of sentence. It is primarily a case of sentence reduction on humanitarian grounds.

81. Furthermore, Article 2 (II) of the US Constitution empowers the President to commute or reduce a sentence or grant a pardon in cases of conviction for a Federal offence.

82. The Constitution does not restrict the President’s power to grant or refuse executive clemency, but the Pardon Attorney operating with the Department of Justice prepares a recommendation to the President for every application for a pardon, and is required to consider the applications in accordance with the guidelines set out in Title 28 of the Code of Federal Regulations. This Code states that persons requesting a pardon or sentence commutation must wait five years after their conviction to be eligible for a pardon. They must fill out and sign an application form, which must be addressed to the President and submitted to the Pardon Attorney. Applicants must state their reasons for requesting a pardon and provide detailed information, and also references. On receipt of the application the Pardon Attorney must carry out an investigation and decide whether the application for a pardon should be accepted by the President.

83. The President’s decision is final and not open to appeal. The prisoner must wait a minimum of two years from the date of the refusal before submitting a fresh application.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION IN RELATION TO THE APPLICANT’S EXTRADITION

844. According to the applicant, the Belgian authorities’ decision to hand him over to the United States was in breach of Article 3 of the Convention, which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. Admissibility

85. In their additional observations on Article 34 of the Convention as submitted to the Court on 8 November 2013, the Government raised an objection as to inadmissibility based on non-exhaustion of domestic remedies. They contended that the application had been manifestly premature because it had been lodged on 23 December 2009, before completion of the administrative phase of the response to the request for extradition. According to the Government, the applicant should have lodged his application on completion of this phase, that is to say after the dismissal of his application to the *Conseil d'Etat* for judicial review of the ministerial decree on his extradition.

86. The applicant submitted that the application had been lodged within six months of the 24 June 2009 judgment of the Court of Cassation, which had closed the judicial phase of enforcement of the US arrest warrant. At that stage in the extradition procedure the decision was a final one from which no appeal lay. The phase referred to by the Government was separate from the judicial enforcement proceedings, being an administrative phase which was open to appeal before the *Conseil d'Etat* and which, in the present case, ended with the *Conseil d'Etat* judgment of 23 September 2013.

87. The Court reiterates that it is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It should not take on the role of Contracting States, whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is based on the assumption – reflected in Article 13 of the Convention, with which it has close affinity – that there is an effective remedy available in respect of the alleged violation. The rule is therefore an indispensable part of the functioning of this system of protection (see *Vučković and Others v. Serbia* [GC], no. 17153/11, § 69, 25 March 2014).

88. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system, and those who wish to invoke the supervisory jurisdiction of the Court as regards complaints against a State are thus obliged to use first the remedies provided by the national legal system. It should be emphasised that the Court is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of

domestic jurisdictions (see *Vučković and Others*, cited above, § 70, and the references cited therein).

89. The Court also reiterates that the assessment of an applicant's obligation to exhaust domestic remedies is normally carried out with reference to the date on which the application was lodged with it (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)).

90. In the instant case the Court notes that in his application bringing the case before the Court, the applicant complained of the judgment delivered on 24 June 2009 by the Court of Cassation dismissing his appeal against the judgment of the Court of Appeal allowing judicial enforcement of the arrest warrant issued against him by the US courts. This was a final decision in that it was not open to appeal.

91. The Court agrees that the situation is peculiar in that, during the judicial enforcement phase, the judicial courts do not decide on the extradition itself, which is a matter for the executive under the supervision of the *Conseil d'Etat*. This does not, however, mean that the decisions taken during the judicial enforcement phase cannot give rise to complaints under the Convention. Thus the applicant argued before the Court of Cassation that the enforcement of the arrest warrant which the USA had issued against him was problematical from the angle of Article 3 of the Convention (see paragraph 20 above). The applicant subsequently presented the same arguments to the Court.

92. The Court considers these factors sufficient to conclude that the application was not premature and that the objection as to non-exhaustion of the domestic remedies should be rejected. As a subsidiary consideration, it notes that in any case the final stages of the two phases of the extradition proceedings have meanwhile been completed before the Court decision on the admissibility of the application.

93. Moreover, the Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 a) of the Convention and is not inadmissible on any other grounds. It should therefore be declared admissible.

B. Merits

1. The parties' submissions

a) The applicant

94. The applicant complained that his extradition to the United States of America exposed him to treatment incompatible with Article 3 of the Convention. He contended that offences A and B, on the basis of which his extradition had been granted, carried a maximum life prison sentence which was irreducible *de facto*, and that if he were convicted he would have no prospect of ever being released.

95. The applicant deduced the *de facto* irreducibility of the life sentence from the factual data set out in the diplomatic notes of 11 November 2009 and 10 August 2010. He pointed out that the US authorities had referred to only one instance of sentence commutation in connection with serious offences relating to national security, and stated that they had no knowledge of any Presidential pardon or sentence commutation in cases of conviction for a terrorist offence such as those of which the applicant was accused. In this connection, the example of President Clinton's executive clemency in 1999 was not relevant. This example should be seen in its context, which had nothing in common with the situation since the launch, after 11 September 2001, of a veritable war on so-called "Islam-inspired" terrorism; this was the context in which the applicant was being prosecuted.

96. The applicant also considered that the sources used by the Government to demonstrate the contrary should be treated with caution. The Government had failed to point out that at the time of publication of the studies cited, the Human Rights First NGO had been headed by an individual who had since taken up office in the US executive. The applicant also questioned the quality of the information supplied. He found it very strange that the problem of the conditions of detention of persons prosecuted for terrorism should be completely disregarded despite the fact that this issue had been central to the Court's concerns in the aforementioned case of *Babar Ahmad and Others*. In fact, the *CagePrisoners* NGO, which supported Muslim prisoners held by the US on terrorism charges, had conducted an investigation which showed that such prisoners suffered very strict conditions of detention and a policy of discrimination in prison, were tortured in order to extract confessions, and were sentenced to disproportionate and unfair terms of imprisonment, and so on.

97. The applicant provided a different interpretation of the statistics cited by the Government. He pointed out that the average sentence length of 8.4 years excluded life sentences and took no account of the period of detention served by sentenced persons who were either released at the time of trial or placed on probation. Nor did these studies cover persons who had been arrested during the reference period but had not yet been tried. Furthermore, the US Department of Justice produced different figures: of the 403 persons already tried between 11 September 2001 and 18 March 2010, thirty-one had not yet been convicted, twelve had been given life sentences and five had been sentenced to sixty or more years' imprisonment. The applicant cited the case of Richard Reid, whose name had been mentioned on several occasions in the criminal file which had led to the applicant's conviction in Belgium, as well as during the extradition proceedings. Richard Reid had been sentenced in 2003 to life imprisonment on the same charge B as the applicant, for planning to destroy an aircraft during flight by means of explosives hidden in his shoes.

98. The applicant contended that his case was incomparable to that of the applicants in the aforementioned case of *Babar Ahmad and Others* because he had already been sentenced by the Belgian courts to the maximum penalty applicable in Belgium at the time of the facts charged and that he had not benefited from any mitigating circumstances.

99. Lastly the applicant argued that his only "hope of being released" lay in the prospects for the success, which were *de facto* non-existent "post-9/11", of a request for a Presidential pardon or sentence commutation. This possibility, which lay in the hands of the executive without judicial supervision, not only bore no resemblance to a guarantee but was also totally non-juridical. It was subject to changing public opinion and was based on no predefined minimum criteria. It was therefore diametrically opposed to the requirements of coherency and foreseeability established in the aforementioned *Vinter and Others* judgment.

b) The Government

100. As a preliminary point, the Government argued that in line with the Court's approach in the aforementioned cases of *Harkins and Edwards* and *Babar Ahmad and Others*, the life-sentence issue had to be analysed against the background of an extradition, and it had to borne in mind that the applicant's extradition had been requested solely for the purposes of prosecution before the US courts and that there was no certainty that the applicant would be found guilty of the charges against him.

101. Regard should also be had to the fact that even if the constituent elements of the offences set out in charges A and B (see paragraph 13 above), for which the applicant was liable to life imprisonment (see paragraph 15 above) were all present, the US authorities had provided assurances that such a sentence was discretionary and that the court dealing with the case was not obliged to impose the maximum penalty provided for by law. Furthermore, were a life sentence to be imposed, there were direct and indirect legal remedies against the conviction and the sentence, a possibility of requesting review of the conviction and means of reducing sentence. All this was in addition to the assurance provided by the US authorities that the applicant would be tried in the ordinary courts, that he would only be held in a civilian prison and that he was in no way exposed to the death penalty.

102. The Government submitted that there was no reason to doubt the assurances provided. Belgium had been bound by an extradition treaty with the United States since 1901 and had never experienced any cases of non-compliance by the United States with the obligations deriving from the diplomatic safeguards given.

103. At all events, according to the Government, any real risk of the applicant being subsequently sentenced to the maximum penalty laid down for the offences set out in charges A and B was limited, as attested by the

data set out in the Human Rights First reports backed up by the statistics provided by the US Department of Justice on convictions for acts of terrorism (paragraph 29 above). Those publications showed clearly that all the cases of life sentences concerned much more serious offences than those with which the applicant had been charged. The example of Richard Reid cited by the applicant (see paragraph 97 above) fell into the same category because Reid had been arrested while he was engaged in carrying out his plan. In other cases individuals suspected of offences such as those set out in charges A and/or B applicable to the applicant had not been sentenced to the maximum penalty provided for by US law.

104. As to whether the life sentence to which the applicant was liable for the offences set out in charges A and B passed the "test" set by the Court in the aforementioned case of *Kafkaris* and was reducible *de jure* and *de facto*, the Government invited the Court to adopt the same reasoning as in the aforementioned cases of *Babar Ahmad and Others* and *Harkins and Edwards*.

105. Assuming that the question of proportionality was relevant in the present case despite the fact that the applicant's extradition had only been requested for the purpose of his prosecution, it should first of all be pointed out that in view of the gravity of the charges against him the penalties which he risked incurring were not manifestly disproportionate. The only question arising was therefore whether, notwithstanding the fact that he was liable to a life sentence, he could be regarded as having any prospect of being released.

106. The first fact to be noted, one which had been acknowledged by the applicant before the *Conseil d'Etat*, was that in view of the legal possibilities of obtaining a commutation of sentence or a Presidential pardon in the United States as described in the diplomatic note of 10 August 2010, life sentences were reducible *de jure*.

107. Secondly, it was established that sentence reductions and Presidential pardons had indeed been granted on several occasions and that life sentences were also reducible *de facto*. The Government provided supporting statistics on the pardons and sentence reductions which had been granted since 1990, consultable on the US website of the Department of Justice. They submitted that all US Presidents had hitherto used their right to commute sentences and/or grant pardons. President George Bush had done so in 2008 in the case of a person who had been sentenced to life imprisonment without parole for drug trafficking. These measures had also been implemented for persons convicted of offences against national security, as in the case of the FALN members cited by the US authorities in their diplomatic note of 10 August 2010.

108. No other conclusion could be drawn from the fact that there had been no sentence reductions or Presidential pardons for individuals sentenced to life imprisonment for al-Qaeda-linked acts of terrorism. The

same reasoning should be used as in *Iorgov v. Bulgaria (no. 2)* (no. 36295/02, 2 September 2010): since the sentences imposed by the US authorities for such acts had all been recent, the persons thus sentenced could not yet have requested a Presidential pardon. They were not eligible for such a measure until they had served part of their prison sentences. The lack of pardons for such offences could not therefore support the conclusion that the pardon system did not work. Supposing that he was convicted, when he had served part of his sentence the applicant could, at the appropriate time and in accordance with the provisions of US law, apply for a Presidential pardon or a sentence commutation. Several factors, or changes in the situation, might militate in favour of or against such a measure, and it was impossible at the current stage to speculate whether or when the applicant could be released.

109. The Government also contended that the US system met the requirements specified by the Court in its aforementioned *Vinter and Others* judgment, which, they stressed, had concerned mandatory life sentences, and not discretionary ones as in the present case. A Presidential pardon was a known measure which was therefore foreseeable under the legislation, and an appropriate measure which was broad enough to provide certain legal prospects of release to prisoners serving whole-life sentences. That having been said, it was also important to note that the US system was different from that of the United Kingdom. Unlike in the UK, a person convicted in the United States could apply for a pardon or a commutation of his sentence at any time. The duration or nature of the sentence was irrelevant. A convicted person could submit an unlimited number of applications. The procedure required prior assessment by the Pardon Attorney, who operated within the Department of Justice, and who provided a non-binding opinion to the President taking account of the circumstances of the offence and the applicant's character.

2. The Court's assessment

110. The alleged violation consisted in having exposed the applicant, by extraditing him to the United States, to the risk of an irreducible life sentence without parole, in breach of the requirements of Article 3 of the Convention.

111. The Court will begin its examination of the matter before it with a number of general considerations on the state of its case-law on Article 3, dealing first of all with life sentences and then going on to the removal of aliens from the national territory. It will subsequently address the issue of the application of the principles on life sentences to the specific situation of the applicant, who has been extradited.

a) Principles applicable to life imprisonment

112. It is well-established in the Court's case-law that the imposition of a sentence of life imprisonment on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention (see *Kafkaris*, cited above, § 97, and references cited therein), provided that it is not grossly disproportionate (see *Vinter and Others*, cited above, §§ 88 and 89). The Court has, however, held that the imposition of an irreducible life sentence on an adult may raise an issue under Article 3 (see *Kafkaris*, cited above, § 97).

113. This latter principle gives rise to two further ones. First of all, Article 3 does not prevent life prison sentences from being, in practice, served in their entirety. What Article 3 does prohibit is that a life sentence should be irreducible *de jure* and *de facto*. Secondly, in determining whether a life sentence in a given case can be regarded as irreducible, the Court seeks to ascertain whether a life prisoner can be said to have any prospect of release. Where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3 (see *Kafkaris*, cited above, § 98, and references cited therein).

114. Until recently the Court had held that the sole possibility of adjustment of a life sentence was sufficient to fulfil the requirements of Article 3. It had thus ruled that the possibility of early release, even where such a decision was only at the discretion of the Head of State (see *Kafkaris*, cited above, § 103) or the hope of Presidential clemency in the form of either a pardon or a commutation of sentence (see *Iorgov v. Bulgaria (no. 2)*, no. 36295/02, §§ 51 to 60, 2 September 2010) was sufficient to establish such a possibility.

115. In *Vinter and Others*, cited above, the Court re-examined the problem of how to determine whether, in a given case, a life sentence could be regarded as reducible. It considered this issue in the light of the prevention and rehabilitation aims of the penalty (§§ 112 to 118). With reference to a principle already set out in the *Kafkaris* judgment, the Court pointed out that if a life sentence was to be regarded as reducible, it should be subject to a review which allowed the domestic authorities to consider whether any changes in the life prisoner were so significant, and such progress towards rehabilitation had been made in the course of the sentence, as to mean that continued detention could no longer be justified on legitimate penological grounds (§ 119). Furthermore, the Court explained for the first time that a whole-life prisoner was entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence would take place or could be sought. Consequently, where domestic law did not provide any mechanism or possibility for review of a whole-life sentence, the incompatibility with Article 3 on this ground already arose at the moment of

the imposition of the whole-life sentence and not at a later stage of incarceration (§ 122).

b) Principles applicable to removal of aliens

116. Under well-established case-law, protection against the treatment prohibited under Article 3 is absolute, and as a result the extradition of a person by a Contracting State can raise problems under this provision and therefore engage the responsibility of the State in question under the Convention, where there are serious grounds to believe that if the person is extradited to the requesting country he would run the real risk of being subjected to treatment contrary to Article 3 (see *Soering v. United Kingdom*, 7 July 1989, § 88, Series A no. 161). The fact that the ill-treatment is inflicted by a non-Convention State is beside the point (see *Saadi*, cited above, § 138). In such cases Article 3 implies an obligation not to remove the person in question to the said country, even if it is a non-Convention State. The Court draws no distinction in terms of the legal basis for removal; it adopts the same approach in cases of both expulsion and extradition (see *Harkins and Edwards*, cited above, § 120, and *Babar Ahmad and Others*, cited above, § 168).

117. Moreover, the Court reiterates that it is acutely conscious of the difficulties faced by States in protecting their populations against terrorist violence, which constitutes, in itself, a grave threat to human rights. It is therefore careful not to underestimate the extent of the danger represented by terrorism and the threat it poses to society (see *Othman (Abu Qatada) v. United Kingdom*, no. 8139/09, § 183, ECHR 2012, and the references cited therein). It considers it legitimate, in the face of such a threat, for Contracting States to take a firm stand against those who contribute to terrorist acts (*ibid*). Lastly, the Court does not lose sight of the fundamental aim of extradition, which is to prevent fugitive offenders from evading justice, nor the beneficial purpose which it pursues for all States in a context where crime is taking on a larger international dimension (see *Soering*, cited above, § 86).

118. However, none of these factors have any effect on the absolute nature of Article 3. As the Court has affirmed on several occasions, this rule brooks no exception. The principle has therefore had to be reaffirmed on many occasions since *Chahal v. the United Kingdom* (15 November 1996, §§ 80 et 81, *Reports of Judgments and Decisions* 1996-V), to the effect that it is not possible to make the activities of the individual in question, however undesirable or dangerous, a material consideration or to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of the State is engaged under Article 3 (see *Saadi*, cited above, § 138; see also *Daoudi v. France*, no. 19576/08, § 64, 3 December 2009, and *M. S. v. Belgium*, no. 50012/08, §§ 126 and 127, 31 January 2012).

119. In order to establish such responsibility, the Court must inevitably assess the situation in the requesting country in terms of the requirements of Article 3. This does not, however, involve making the Convention an instrument governing the actions of States not Parties to it or requiring Contracting States to impose standards on such States (see *Soering*, cited above, § 86, and *Al-Skeini and Others v. United Kingdom* [GC], no. 55721/07, § 141, ECHR 2011). In so far as any liability under the Convention is or may be incurred, it is incurred by the extraditing Contracting State by reason of its having taken action which has the direct consequence of exposing an individual to proscribed ill-treatment (see *Soering*, cited above, § 91; *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I; and *Saadi*, cited above, § 126).

120. If the extradition is likely to have consequences in the requesting country which are incompatible with Article 3 of the Convention, the Contracting State must not extradite. It is a matter of ensuring the effectiveness of the safeguard provided by Article 3 in view of the serious and irreparable nature of the alleged suffering risked (see *Soering*, cited above, § 90).

c) Application of the principles to the present case

121. The Court notes that the applicant has been extradited to the United States, where he is being prosecuted on charges relating to al-Qaeda-inspired acts of terrorism, and that if he is found guilty and convicted of some of these offences he is liable to a maximum discretionary whole-life prison sentence. The sentence is discretionary in that the judge can impose a lighter penalty, with the option of imposing a fixed-term sentence.

122. The question to be addressed by the Court is whether, in view of the risk incurred, the applicant's extradition was in violation of Article 3 of the Convention. The Court has several times in the past dealt with the issue of the risk of a whole-life sentence. In every case it has attempted to determine, on the basis of the diplomatic assurances provided by the requesting country, whether the extradition of the persons concerned did indeed expose them to such a risk, and if so, whether the life sentence could be reduced so that they had a hope of being released (see, among other authorities, *Nivette v. France* (dec.), no. 44190/98, ECHR 2001-VII; *Einhorn v. France* (dec.), no. 71555/01, ECHR 2001−XI; *Salem v. Portugal* (dec.), no. 26844/04, 9 May 2006; *Olaechea Cahuas v. Spain*, no. 24668/03, ECHR 2006-X; and *Schuchter v. Italy,* (dec.), no. 68476/10, 11 October 2011).

123. This issue arose once again in the cases of *Harkins and Edwards* and *Babar Ahmad and Others*, cited above. Most of the applicants in these cases had been threatened with extradition from the United Kingdom to the United States, where they faced prosecution for offences relating to al-

Qaeda-inspired acts of terrorism and, in the event of conviction, were liable to mandatory or discretionary life sentences.

124. Drawing on its case-law on life imprisonment in the domestic system as set out in its *Kafkaris* judgment (see paragraphs 112 to 114 above), the Court held that, in the absence of gross disproportionality, a discretionary life sentence without parole would only raise an issue under Article 3 where it could be shown that the applicant's continued imprisonment could no longer be justified on any legitimate penological grounds, and that the sentence was irreducible *de facto* and *de jure* (see *Harkins and Edwards*, cited above, § 135, and *Babar Ahmad and Others*, cited above, §§ 241 and 242).

125. The Court subsequently held that the applicants, who had not been convicted, still less begun serving any sentence imposed as a result of such conviction, had not shown that in the event of extradition their incarceration in the United States would not serve any legitimate penological purpose. It deemed it still less certain that if that point were ever reached, the US authorities would refuse to avail themselves of the available mechanisms to reduce their sentences (see *Harkins and Edwards*, cited above, §§ 140 and 142, and *Babar Ahmad and Others*, cited above, §§ 130, 131 and 243). The Court concluded that the risk of imposition of life sentences was no obstacle to the applicants' extradition.

126. In the present case the Court notes that before his extradition the applicant had been in a situation very similar to that of the applicants in the case of *Babar Ahmad and Others*.

127. In line with the approach adopted in that case, the Court considers that in view of the gravity of the terrorist offences with which the applicant is charged and the fact that the sentence can only be imposed after the trial court has taken into consideration all relevant mitigating and aggravating factors, a discretionary life sentence would not be grossly disproportionate (see *Babar Ahmad and Others*, cited above, § 243).

128. The respondent Government essentially argued that in order to determine the conformity of this sentence with Article 3 of the Convention in the context of extradition, the "test" which the Court applied in the cases of *Harkins and Edwards* and *Babar Ahmad and Others* must also apply here and that there was no justification in the instant case for discarding this "test" on the basis of the more recent case-law established by the *Vinter and Others* judgment.

129. According to the Government, regard must be had to the fact that the applicant was extradited for the sole purpose of prosecution, that he has not yet been convicted and that it is therefore impossible to determine, before conviction, whether the point at which his incarceration would no longer serve any penological purpose would ever come, or to speculate on the manner in which, at that particular moment, the US authorities would implement the available mechanisms. In the Government's view, the fact

that the Court held in *Vinter and Others* (§ 122) that the starting time for determining conformity with Article 3 of the Convention was the date of imposition of the life sentence was irrelevant to the present case because the applicant has not yet been convicted.

130. The Court considers that it must reject this argument because it in effect obviates the preventive aim of Article 3 of the Convention in matters of removal of aliens, which is to prevent the persons concerned from actually suffering a penalty or treatment of a level of severity proscribed by this provision. The Court reiterates that Article 3 requires Contracting States to prevent the infliction of such treatment or the implementation of such a penalty (see paragraph 120 above). Furthermore, the Court holds, as it has done in all extradition cases since *Soering*, that it must assess the risk incurred by the applicant under Article 3 *ex ante* – that is to say, in the present case, before his possible conviction in the United States – and not *ex post facto*, as suggested by the Government.

131. The Court's task is to ensure that the applicant's extradition was compatible with Article 3 and therefore to consider whether the discretionary life sentence to which the applicant is liable fulfils the criteria which it has established in its case-law on this matter (see paragraphs 112 to 115 above).

132. In this connection, the Government affirmed that the US system fulfilled both the requirements set out by the Court in its *Kafkaris* judgment and the new criteria laid down by the Court in *Vinter and Others*. They submitted that the life sentence which the applicant risked incurring was reducible *de jure* because he would be able, under the US Constitution, to apply for a Presidential pardon or a commutation of sentence. He could submit such an application at any time after the conviction has become final, and as many times as he wished. His request would be considered by the Pardon Attorney, who would issue a non-binding opinion to the President. The grounds on which the applicant could obtain a pardon were, in the Government's view, sufficiently broad, and in any case broader than those used in the United Kingdom, as assessed in the *Vinter and Others* judgment. The discretionary life sentence was also reducible *de facto*. The Government referred to the diplomatic assurances and statistics provided by the US authorities showing that all the US Presidents had used their powers of pardon and/or commutation of sentence and that they had previously granted such facilities to persons sentenced to life imprisonment or imprisoned for offences relating to national security.

133. The applicant submitted that his only "hope of release" lay in the prospects of success, which were *de facto* non-existent in the aftermath of the 11 September 2001 terrorist attacks, of an application for a Presidential pardon or commutation of sentence. This possibility, which was completely at the discretion of the executive, was no guarantee and was based on no predefined criterion. That being the case, the discretionary life sentence

which he might incur could not be considered reducible *de jure* and *de facto* within the meaning of the Court's *Vinter and Others* judgment.

134. The Court understands the US legal provisions referred to in the diplomatic note of 10 August 2010 provided by the US authorities as not providing for possible release on parole in the event of a life sentence, whether mandatory or discretionary, but infers that there are several possibilities for reducing such a sentence. The sentence can be reduced on the basis of substantial cooperation on the part of the prisoner in the investigation of his case and the prosecution of one or more third persons. It can also be reduced for compelling humanitarian reasons. Furthermore, prisoners may apply for commutation of their sentence or for a Presidential pardon under the US Constitution (see paragraphs 27 and 79 to 83 above).

135. The Court further notes that despite the express requirement stipulated on 10 June 2010 by the Indictments Division of the Brussels Court of Appeal in its opinion on the applicant's extradition (see paragraph 26 above), the US authorities have at no point provided an assurance that the applicant would be spared a life sentence or that, should such a sentence be imposed, it would be accompanied by a reduction or commutation of sentence (see, by contrast, *Olaechea Cahuas*, cited above, § 43, and *Rushing v. Netherlands* (dec.), no. 3325/10, § 26, 27 November 2012). It therefore does not have to ascertain, in this case, whether the assurances provided by the requesting authorities are sufficient, in terms of their content, to guarantee that the applicant is protected against the risk of a penalty incompatible with Article 3 of the Convention. It considers that in any case the US authorities' explanations concerning sentencing and their references to the applicable provisions of US legislation on sentence reduction and Presidential pardons are very general and vague and cannot be deemed sufficiently precise (see *Othman (Abu Qatada)*, cited above, § 189).

136. The Court now comes to the central issue in the present case, which involves establishing whether, over and above the assurances provided, the provisions of US legislation governing the possibilities for reduction of life sentences and Presidential pardons fulfil the criteria which it has laid down for assessing the reducibility of a life sentence and its conformity with Article 3 of the Convention.

137. No lengthy disquisitions are required to answer this question: the Court needs simply note that while the said provisions point to the existence of a "prospect of release" within the meaning of the *Kafkaris* judgment – even if doubts might be expressed as to the reality of such a prospect in practice – none of the procedures provided for amounts to a review mechanism requiring the national authorities to ascertain, on the basis of objective, pre-established criteria of which the prisoner had precise cognisance at the time of imposition of the life sentence, whether, while serving his sentence, the prisoner has changed and progressed to such an

extent that continued detention can no longer be justified on legitimate penological grounds (see paragraph 115 above).

138. Under these conditions, the Court considers that the life sentence liable to be imposed on the applicant cannot be described as reducible for the purposes of Article 3 of the Convention within the meaning of the *Vinter and Others* judgment. By exposing the applicant to the risk of treatment contrary to this provision the Government engaged the respondent State's responsibility under the Convention.

139. The Court accordingly concludes that the applicant's extradition to the United States of America amounted to a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

140. The applicant complained that his extradition to the United States had been in breach of the interim measure indicated by the Court in accordance with Rule 39 of its Rules of Court, and that the extradition had therefore amounted to a violation of his right of individual petition. He relied on Article 34 of the Convention, which reads as follows:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

Rule 39 of the Rules of Court provides as follows:

> "1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.
>
> 2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers.
>
> 3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated."

A. The parties' submissions

141. The applicant submitted that his extradition in contravention of the interim measure indicated by the Court had been decided without any regard to legal considerations and had stemmed from a deliberate political decision based on fallacious reasons. The Government provided no evidence to substantiate the applicant's so-called dangerousness; moreover, the

applicant had not been the subject of any investigation consequent upon any attempted escape or acts of proselytising; on the contrary, all the opinions of the governors of the prisons in which the applicant had been held mentioned his irreproachable behaviour. The only reason for the Belgian Government's action had been a political determination to hand the applicant over to the US authorities as quickly as possible and to avoid a Court judgment finding a violation of Article 3 in the event of extradition. This determination had in fact long been in evidence, as could be seen by the repeated requests for the lifting of the interim measure while the appeal pending before the *Conseil d'Etat* was not of suspensive effect *vis-à-vis* the decision to extradite. In so doing the Government had irreversibly infringed the applicant's right of individual petition, as he now found it legally impossible, because of his extradition, and materially impossible, because of his solitary confinement in a prison virtually cut off from the outside world, to usefully pursue his application to the Court.

142. The Government first of all pointed out that according to the Court's case-law, particularly the *Mamatkulov and Askarov* judgment (cited above, § 108), the purpose of an interim measure was to facilitate the exercise of the right of individual petition secured under Article 34 of the Convention, and therefore to preserve the subject of the application when the Court considered that there was a risk of the applicant suffering irreparable damage. In the instant case, however, the Court should have deduced from the inadmissible nature of the request (see paragraph 39 above) that the interim measure lacked any real justification.

143. Secondly, the Government expounded the reasons for which it had extradited the applicant on 3 October 2013. The extradition had been decided in the wake of the judgment delivered by the *Conseil d'Etat* on 23 September 2013 explaining in detail, and with full knowledge of the Court's case-law, why the applicant's complaints of a violation of the Convention were unfounded. Both the Minister and the *Conseil d'Etat* had been assured, by virtue of the guarantees provided by the US authorities, that the applicant would not be exposed to treatment contrary to Article 3 of the Convention. Furthermore, the applicant had posed a threat to law and order in Belgium because of his proselytising in prison, his contacts with extremist jihadist circles and his attempts to escape, and the longer he remained in prison the more likely it had become that the investigating judicial bodies would order his release. The Government had not wished to run the risk of being unable to honour its commitment to hand over the applicant to the United States because he had escaped or been released.

B. The Court's assessment

144. The Court recently reiterated, in the case of *Savriddin Dzhurayev v. Russia*, no. 71386/10, §§ 211 to 213, ECHR 2013 (extracts), the crucial

importance of and the vital role played by interim measures under the Convention system. The Court now refers to this judgment.

145. Considering the present case in the light of these principles, the Court reiterates that on 6 December 2011 it acceded to the applicant's request to apply Rule 39 of the Rules of Court, and indicated that in the interests of the parties and the smooth running of the proceedings before it, the Belgian Government should not extradite the applicant to the United States. It also reiterates that it thrice refused to accede to the Government's request to lift the interim measure and explained on several occasions – the last time being on 18 June 2013 – that the said measure had been indicated until the conclusion of the proceedings before it. The Government had therefore been fully aware of the scope of the measure.

146. On 3 October 2013 Belgium nevertheless extradited the applicant to the United States (see paragraph 62 above).

147. The Government suggested that the interim measure had been unjustified because it was "premature" and that the Court should have reviewed its justification after an assessment of admissibility.

148. The Court observes that it indicated to the Belgian Government that it should stay the extradition on the day of notification of the ministerial decree granting the applicant's extradition (see paragraph 39 above). Although at that time the applicant could have brought an application for judicial review of this decree before the *Conseil d'Etat*, such action lacked any suspensive effect *vis-à-vis* extradition and therefore did not fulfil the Court's requirements in terms of effectiveness under Article 13 of the Convention (see, *mutatis mutandis*, *Čonka v. Belgium*, no. 51564/99, § 83, ECHR 2002-I; *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 200, ECHR 2012; and *De Souza Ribeiro v. France* [GC], no. 22689/07, § 82, ECHR 2012). Thus, in accordance with case-law, the fact that this remedy had not been exhausted was immaterial.

149. The Government acknowledged that the Belgian authorities had acted in breach of the interim measure indicated by the Court. They considered, however, that this attitude had been justified in that it had been ascertained that the applicant would not be exposed to treatment contrary to the Convention and because the utmost had to be done to ensure his handover to the US authorities owing to the risk of his escape or a judicial decision to release him. The proceedings before the Court had jeopardised Belgium's commitments to the United States, and extending them had increased the risk of the applicant evading the Belgian authorities.

150. The Court notes that the respondent State deliberately and irreversibly lowered the level of protection of the rights set out in Article 3 of the Convention which the applicant had endeavoured to uphold by lodging his application with the Court. The extradition has, at the very least, rendered any finding of a violation of the Convention otiose, as the applicant has been removed to a country which is not a Party to that

instrument, where he alleged that he would be exposed to treatment contrary to the Convention.

151. The Court considers that none of the arguments put forward by the Belgian Government justified its non-compliance with the interim measure. Although the Government have never concealed from the Court their awkward position *vis-à-vis* the US authorities and their wish to have the interim measure lifted, at no point did they mention any possible attempts to explain the situation to those authorities or to find an alternative to the applicant's detention whereby the Belgian authorities could still keep him under surveillance. Furthermore, knowing that the Court had examined all the arguments advanced by the Government's with a view to persuading it to terminate the measure, including the diplomatic assurances provided by the US authorities, and had rejected them, it was not for the Belgian State, in the wake of the judgment of the *Conseil d'Etat*, to substitute its own appraisal for the Court's assessment of these assurances and the merits of the application and decide to override the interim measure indicated by the Court.

152. The Court also reiterates that the effective exercise of the right of petition requires it to be able, throughout the proceedings before it, to examine the application in accordance with its usual procedure.

153. The fact is that in the instant case the applicant is being held in solitary confinement in a prison in the United States, and, as ascertained by his lawyer, is enjoying very little contact with the outside world (see paragraphs 64 to 67 above). He does not seem to have been able to have direct contact with his representative before the Court. These factors are enough for the Court to consider that the Government's actions have made it more difficult for the applicant to exercise his right of petition and that the exercise of the rights secured under Article 34 of the Convention have therefore been impeded (see, *mutatis mutandis*, *Shtukaturov v. Russia*, no. 44009/05, § 147, 27 March 2008, and *Toumi v. Italy*, no. 25716/09, § 76, 5 April 2011).

154. In the light of the information in its possession, the Court concludes that by deliberately failing to comply with the interim measure indicated in pursuance of Rule 39 of the Rules of Court, the respondent State failed to honour the obligations incumbent on it under Article 34 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

A. Other complaint of a violation of Article 3

155. The applicant alleged in substance that his conditions of detention in Belgium had constituted treatment contrary to Article 3 of the Convention. He complained of the constant transfers from one prison to another, the conditions under which the transfers had taken place and the

special security measures applied to him during his incarceration. He backed up this complaint with several reports drawn up by psychiatrists pointing to the negative effects of such a situation on his mental health.

156. The Government pointed out that the applicant had not brought any judicial action complaining of his conditions of detention and the transfers.

157. In the absence of any proceedings before the domestic courts concerning this complaint, the Court considers that it must be dismissed for non-exhaustion of domestic remedies.

158. Consequently, this part of the application is inadmissible within the meaning of Article 35 § 1 of the Convention and must be dismissed in accordance with Article 35 § 4.

B. Complaint of a violation of Article 6 § 1 of the Convention

159. The applicant submitted that he had not had the benefit of a fair trial or the safeguards which should accompany criminal proceedings during the judicial procedure for enforcement of the US arrest warrant. He relied on Article 6 § 1 of the Convention, which provides that:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

160. The Court reiterates that extradition proceedings do not involve determining an applicant's civil rights and obligations and do not relate to the merits of any criminal charge against him or her within the meaning of Article 6 § 1 of the Convention (see *Raf v. Spain* (dec.), no. 53652/00, 21 November 2000; *Peñafiel Salgado v. Spain* (dec.), no. 65964/01, 16 April 2002; *Sardinas Albo v. Italy* (dec.), no. 56271/00, ECHR 2004-I; *Cipriani v. Italy* (dec.), no. 22142/07, 30 March 2010; and *Schuchter*, decision cited above). Therefore Article 6 § 1 of the Convention is inapplicable to the impugned extradition proceedings.

161. Consequently, this part of the application is incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 35 § 3 a), and must be dismissed in pursuance of Article 35 § 4.

C. Complaint of a violation of Article 4 of Protocol No. 7

162. In his initial application, the applicant alleged in substance that his extradition violated Article 4 of Protocol No. 7, which reads as follows:

> "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention."

Protocol No. 7 came into force in respect of Belgium on 1 July 2012.

163. The applicant invited the Court to find that the arrest warrant issued on 16 November 2007 by the District Court of the District of Columbia could not have been declared enforceable without violating the *ne bis in idem* principle. He submitted that an analysis of the criminal file and the decisions given disclosed that all the "overt acts" listed by the US authorities in support of the first charge and repeated in support of the other charges had been mentioned and/or detailed during the investigation conducted in Belgium.

164. Even supposing that this part of the application is compatible *ratione temporis* with the Convention, the Court reiterates its case-law to the effect that Article 4 of Protocol No. 7 does not secure the *ne bis in idem* principle in respect of prosecutions and convictions in different States (see, among other authorities, *Gestra v. Italy* (dec.), no. 21072/92, 16 January 1995; *Amrollahi v. Denmark* (dec.), no. 56811/00, 28 June 2001; *Da Luz Domingues Ferreira v. Belgium* (dec.), no. 50049/99, 6 July 2006; and *Sarria v. Poland* (dec.), no. 45618/09, 18 December 2012).

165. At all events, the ministerial decree granting the applicant's extradition explained that US law drew a clear distinction between the actual offences for which extradition was requested and "overt acts", which were mere factors presented in support of the charges (see paragraph 31 above). The *Conseil d'Etat* noted that comparison of all the "overt acts" with the Belgian charges showed that "the former have no territorial link with the Kingdom of Belgium, constituting a set of acts which serve as the constituent elements of the four charges presented by the US authorities" (see paragraph 37 above). The Court sees nothing arbitrary or unreasonable in these interpretations and conclusions.

166. Consequently, this part of the application is incompatible *ratione materiae* with the provisions of the Convention, or is at least manifestly ill-founded within the meaning of Article 35 § 3 a), and must be dismissed in pursuance of Article 35 § 4.

D. Complaint of a violation of Article 8 of the Convention

167. Lastly, the applicant complained that his extradition to the US constituted an interference with his private and family life in Belgium, in breach of Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

168. The Court notes that the applicant's extradition raises no issues regarding the criterion that interference must be in accordance with the law and pursue a legitimate aim.

169. As to the necessity of the measure, the Court reiterates that it is only in exceptional circumstances that an applicant's private or family life in a Contracting State can outweigh the legitimate aim pursued by his or her extradition (see *King v. the United Kingdom* (dec.), no. 9742/07, § 29, 26 January 2010, and *Babar Ahmad and Others*, cited above, § 252).

170. In the present case the applicant submitted that he had been separated from his partner, who lived in Belgium and whom he wished to marry. In the Court's view, that does not constitute an exceptional circumstance preventing the applicant's extradition. Despite the great geographical distance between Belgium and the United States and the resultant limitation on contacts between the applicant and his partner should he be convicted and remain in prison, the Court must take into account the gravity of the offences for which the applicant is being prosecuted in the United States. It considers that the public interest in extraditing the applicant may be seen as weighing more heavily in terms of all the interests involved. For this reason, and in view of Belgium's interest in honouring its commitments to the United States – without prejudice to its obligation to comply with the other provisions of the Convention, particularly Articles 3 and 34 – the Court considers that the applicant's extradition was not in breach of Article 8 of the Convention.

171. Consequently, this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 a) of the Convention and must be dismissed in accordance with Article 35 § 4.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

172. Article 41 of the Convention provides as follows:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

173. The applicant claimed EUR 1,000,000 in respect of the damage which he had suffered owing to his extradition in breach of the Convention. He stated that this sum covered both pecuniary and non-pecuniary damage. Where pecuniary damage was concerned, he explained that since he was incarcerated in the United States he needed substantial financial resources in order to pay for the services of a legal team capable of defending him.

174. The Government considered this amount grossly excessive, observing that care had to be taken, in the applicant's case, to ensure that any major compensatory sums did not lead to financing the international terrorism in which he was still involved owing to his numerous contacts with radical Islamist movements.

175. In the absence of evidence enabling it to assess whether the alleged pecuniary damage has been proved and to calculate the sums claimed to compensate for such damage, the Court dismisses the applicant's claims in this respect.

176. On the other hand the Court considers that the applicant has suffered non-pecuniary damage owing to his extradition to the United States. Ruling on an equitable basis in accordance with Article 41 of the Convention, it awards him EUR 60,000 in respect of non-pecuniary damage.

B. Costs and expenses

177. The applicant also claimed reimbursement of the costs and expenses incurred for his defence before the Belgian courts and before the Court to a total of EUR 51,350. A first bill of costs mentions a sum of EUR 23,900 for the proceedings before the domestic courts and EUR 7,400 for the applicant's defence before the Court, calculated on the basis of an hourly rate of EUR 100. The amounts awarded in respect of legal assistance, that is to say a total of EUR 9,550, must be deducted from those sums. The remaining costs were incurred by mailing and typing expenses. A second bill of costs was drawn up for the domestic proceedings conducted on the occasion of the applicant's extradition and the continuation of proceedings before the Court, to a total of EUR 15,990.

178. According to the Court's well-established case-law, an applicant is entitled to reimbursement of costs and expenses under Article 41 only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Furthermore, they are only recoverable to the extent that they relate to the violation found (see, *mutatis mutandis, M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 418, ECHR 2011, and *Creangă v. Romania* [GC], no. 29226/03, § 130, 23 February 2012). In this connection the Court reiterates that the applicant's claims were only partially successful before it.

179. Making its own estimate on the basis of the information available, the Court considers it reasonable to award the applicant EUR 30,000 to cover all costs and expenses.

C. Default interest

180. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible in respect of the complaint under Article 3 of the Convention concerning the applicant's extradition, and inadmissible for the remainder;

2. *Holds* that the applicant's extradition to the United States violated Article 3 of the Convention;

3. *Holds* that the respondent State has failed in its obligations under Article 34 of the Convention;

4. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 60,000 (sixty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 30,000 (thirty thousand euros), plus any tax that may be chargeable, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 4 September 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Mark Villiger
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Ms Yudkivska is annexed to this judgment.

M.V.
C.W.

CONCURRING OPINION OF JUDGE YUDKIVSKA

I voted with the majority for a finding of violation of Article 3, albeit with serious hesitations. The reasoning in the judgment appears to me rather elusive.

The present case marks a welcomed departure from *Babar Ahmad and Others v. the United Kingdom*, and I am pleased to note that the Court's previous position to the effect that "treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case"[1] is not followed in these particular circumstances. There is a risk, of course, that in view of the remarkable expansion of the scope of Article 3 and evolving standards of humanity, it becomes harder to set up any clear test under which respect to human dignity would entail ban on extradition or expulsion.

But the case also represents a development of the *Vinter and Others* judgment. Although the consequences of *Vinter* for extradition cases were quite clear –suspects are extraditable only if the envisaged life sentence is, in principle, reducible in the requesting State – in my view the Court has missed the opportunity to define clearly the scope of the Court's review for such cases. It was particularly necessary in the present case, since it concerned an extradition to the United States, in respect of which the Court found in *Babar Ahmad* that "save for cases involving the death penalty, [the Court] 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"[2].

The applicant in the present case was not yet convicted (unlike the applicants in *Vinter and Others*). Thus, it appears inevitable that in the extradition context the *Vinter* requirement that a "whole life prisoner is entitled to know, *at the outset of his sentence*, what he must do to be considered for release..." evolves into a requirement that a *potential* whole life prisoner is entitled to know that the whole life term is reducible already *as of the moment of facing charges*. This represents too remote and abstract assessment of a potential "irreducible life sentence" which may be imposed if (1) the charges against the applicant are proved during the trial (for the moment he is presumed innocent), if (2) he is really sentenced to life imprisonment, and if (3) in some twenty-five or thirty years the legal situation and penal policy in the United States of America have not changed and/or if (4) the future President refuses to pardon him.

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[1] *Babar Ahmad and Others v. the United Kingdom*, nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, § 177, 10 April 2012.
[2] *Ibid*., § 179.

Nevertheless, given the irreversibility of extradition one can agree that the whole-life term in the applicant's case is a "foreseeable consequence in the requesting country".

At all events the *Vinter* case goes no further than "the right to hope", as my colleague Judge Power-Forde so elegantly put in her separate opinion. I am not at all convinced that in the present case there is no such a "right to hope".

The Court has said that incompatibility with Article 3 arises where domestic law does not provide for *any* mechanism or possibility for review of a whole-life sentence. It is not the Court's task to prescribe the form (executive or judicial) which that review should take (see *Vinter*, paragraphs 120 and 122).

In paragraph 137 of the present judgment the majority considers that "none of the procedures provided for amounts to a review mechanism requiring the national authorities to ascertain, on the basis of objective, pre-established criteria" whether the applicant would be entitled to a reduction of sentence.

This is a procedural requirement which can hardly be deemed to comply with the Court's position that the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States[1].

This Court has often addressed the matter of the procedures which a member State must introduce in order to satisfy the Convention. We are not in a position, however, to suggest any procedure for a non-member State. All procedural obligations under the Convention remain tools to secure its effective implementation in the national legal systems and real protection of the Convention rights under the domestic law of the States bound by the Convention.

For instance, in *Eskinazi and Chelouche v. Turkey* (dec.)[2] regarding the obligation of the Turkish authorities to return a child to her father in Israel, the Court held as follows: "The Convention does not require the Contracting Parties to impose its standards on third States or territories, and to require Turkey to review under the Convention all aspects of the Israeli proceedings would thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned, and would risk turning international instruments into a dead letter, to the detriment of the persons they protect".

Although the case concerned a rather different issue, the message of the Court was clear enough: in an extra-territorial context the Convention is not aimed to guarantee any special *procedure* in the receiving State: the Court's

[1] See *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 141, 7 July 2011.

[2] no. 14600/05, ECHR 2005-XIII (extracts).

sole task is to ensure that the person concerned will not be subjected to treatment contrary to the Convention requirements.

It also, perhaps, worth mentioning, that the *Vinter* judgment stresses a great value of rehabilitation which enables the prisoners' social reintegration into the society. This position derives from the European consensus on penal policy, which, as the Court has stated, places the emphasis "now on the rehabilitative aim of imprisonment", as confirmed by the significant number of sources cited. While the same could, to a more or lesser extent, be true for other parts of the world as well[1], we cannot impose on the rest of the world the evolution of European standards and the European concept of reintegration as the key aim of incarceration.

Nevertheless, what remains important in the context of the present case is that, according to *Vinter*, Article 3 must be interpreted as requiring sentence reducibility, in the sense of *any* kind of review which allows the domestic authorities to consider whether or not continued detention is still justified.

In my view, the Presidential power to grant pardons (part 1, Section II of Article 2 of the US Constitution, see paragraphs 81-82) seems sufficient to satisfy the "right to hope" requirement. It follows from the explanations provided by the US authorities that the President of the United States of America has already exercised his power to commute sentences, including those related to terrorist attacks in the 1970s and 1980s. Nothing suggests that this remedy will never be open to the applicant.

The applicant argues (see paragraph 133), and it follows from the US authorities' letter of 11 November 2009 (see paragraph 22), that since the attacks of 11 September 2001 no Presidential pardon has been granted to persons convicted of terrorism. If it is so, it can be obviously explained by the relatively short period of time which has elapsed since the attacks and consequent criminal convictions. There is no obligation under the Convention to review life sentences already in ten years after one is sentenced.

Moreover, reducibility of life sentences is not only a European standard but also a dominant international trend in penal policy. The United States is no exception. The USA National Report released by The Sentencing Project in 2009 "calls for the elimination of sentences of life without parole, and restoring discretion to parole boards to determine suitability for release. The report also recommends that individuals serving parole-eligible life sentences be properly prepared for re-entry back into the community"2. Any further changes to the current system of whole life terms will most likely follow this line in the nearest future.

The majority has nonetheless noted that "the US authorities have at no point provided an assurance that the applicant would be spared a life

[1] See, for instance, *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011.
[2] http://www.sentencingproject.org/detail/news.cfm?news_id=754&id=167

sentence or that, should such a sentence be imposed, it would be accompanied by a reduction or communtation of sentence" (see paragraph 135). As was pointed out in *Othman (Abu Qatada) v. the United Kingdom*[1], the Court has an obligation to examine whether diplomatic assurances provide a sufficient guarantee that the applicant will be protected against the risk of ill-treatment, and the Court will assess the quality of assurances given with regard, *inter alia*, to "whether the assurances are specific or are general and vague". However, in a standard situation the Court deals with assurances concerning immediate or proximate in time actions required from a receiving State: not to sentence the applicant to the death penalty; to bring him or her promptly before a judge; and to guarantee access to independent legal advice and medical examination. Thus, for instance, in *Klein v. Russia*[2], where there were serious grounds to believe that the applicant would be ill-treated on his arrival to Colombia, the Court found assurances by the Colombian Ministry of Foreign Affairs that "Mr Klein shall not be subjected to capital punishment or tortures, inhuman or degrading treatment or punishment" to be rather vague and imprecise.

In cases like the present one, being examined in the light of the *Vinter* requirements, the risk of ill-treatment derives not from concrete facts such as torture during the applicant's interrogation or denial of access to a lawyer, but from the mere idea that his life sentence might appear irreducible to him at the time of sentencing, thus depriving him of a "right to hope" inherent in human dignity. Therefore, the only necessary and sufficient assurance is a clear statement that a mechanism geared to reconsidering, with the passage of time, the justifiability of continued detention does exist in the receiving State *de jure* and *de facto*, and can be, in principle, tried by the applicant in future. Of course, no concrete assurances that if the applicant is sentenced to life imprisonment in some twenty-five years the President will consider the possibility of pardoning him – no such assurances would look realistically effective. No one can predict what will happen in twenty-five or thirty years, what kind of legislation and policy will exist, so the State authorities cannot be expected to provide any "specific" guarantee for such a distant future. This is why I disagree with the majority view that the explanations provided by the relevant authorities are "very general and vague"; I find them to be adequate in the circumstances of the present case.

Nevertheless, the regrettable uncertainty which transpires from the letter of 11 November 2009 that a Presidential pardon remains "only a theoretical possibility in Trabelsi's case" could undoubtedly lead the applicant to believe that if a life sentence is imposed there is no mechanism to permit him in future to be considered for release. This unfortunate passage in the

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[1] No. 8139/09, ECHR 2012 (extracts).

[2] No. 24268/08, 1 April 2010.

specific context of this case compelled me to vote in favour of a finding of a violation of Article 3 of the Convention.