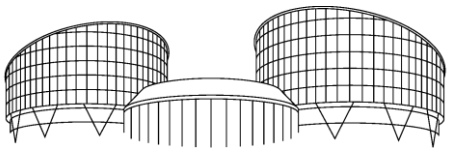

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF MURRAY v. THE NETHERLANDS

(Application no. 10511/10)

JUDGMENT

STRASBOURG

10 December 2013

THIS CASE WAS REFERRED TO THE GRAND CHAMBER WHICH DELIVERED JUDGMENT IN THE CASE ON 26/04/2016

This judgment may be subject to editorial revision.

In the case of Murray v. the Netherlands,

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

Josep Casadevall, *President,*
Alvina Gyulumyan,
Corneliu Bîrsan,
Ján Šikuta,
Nona Tsotsoria,
Kristina Pardalos,
Johannes Silvis, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 19 November 2013,

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

PROCEDURE

1. The case originated in an application (no. 10511/10) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Dutch national, Mr James Clifton Murray ("the applicant"), on 22 February 2010.

2. The applicant was represented by Ms C. Wendenburg, a lawyer practising in Maastricht. The Dutch Government ("the Government") were represented by their Deputy Agent, Ms L. Egmond, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that Articles 3, 5, 6 and 13 of the Convention had been violated as a result of his sentence to life imprisonment and continuing detention.

4. On 15 April 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1953. The applicant is officially detained in the Aruba Correctional Institution (*Korrektie Instituut Aruba,* hereafter 'the KIA'). As far as the Court is aware, however, the applicant is currently staying in a nursing home on Curaçao in view of health problems.

6. At the time relevant to the facts of the case the Kingdom of the Netherlands consisted of the Netherlands (the Realm in Europe), the Netherlands Antilles (consisting of Curaçao, Sint Maarten, Sint Eustatius, Bonaire and Saba) and Aruba, which became an independent "country" (*land*) within the Kingdom in 1986.

7. As of 10 October 2010, however, the Netherlands Antilles as such ceased to exist by virtue of the Kingdom Act of 7 September 2010 amending the Charter for the Kingdom of the Netherlands in connection with changes to the constitutional status of the island territories of the Netherlands Antilles (Kingdom Act amending the Charter in connection with the dismantling of the Netherlands Antilles – *Rijkswet van 7 september 2010 tot wijziging van het Statuut voor het Koninkrijk der Nederlanden in verband met de wijziging van de staatkundige hoedanigheid van de eilandgebieden van de Nederlandse Antillen (Rijkswet wijziging Statuut in verband met de opheffing van de Nederlandse Antillen)*).

8. At present the Kingdom of the Netherlands consists of four countries, i.e. the Netherlands (the Realm in Europe), Aruba, Curaçao and Sint Maarten. The remaining islands that made up the Netherlands Antilles have been incorporated into the Netherlands as special municipalities.

9. The countries of the Kingdom of the Netherlands have their own legal systems, which may differ from each other.

10. The head of state of the Kingdom of the Netherlands (the King) is represented by the Governor. Until 10 October 2010 both the Netherlands Antilles and Aruba had a Governor, whose duties are twofold: he or she represents and guards the general interests of the Kingdom and is head of the Government. As from 10 October 2010 Aruba, Curaçao and Sint Maarten have a Governor.

A. The applicant's conviction and following procedures

1. Events that occurred prior to the introduction of the application

11. On 31 October 1979 the First Instance Court (*Gerecht in Eerste Aanleg*) of the Netherlands Antilles found the applicant guilty of the murder of a 6-year old girl on the island of Curaçao.

12. The judgment of the First Instance Court included a psychiatric report that had been written at the request of the public prosecutor (*Officier van Justitie*). In the report, the psychiatrist concluded:

> "That the defendant suffers from a mental illness, in particular a very limited development of his mental faculties... Considering this, the defendant should be considered as having diminished criminal responsibility (*verminderd toerekeningsvatbaar*), but nevertheless should mainly be held criminally liable for his actions. It is noted in particular that the defendant cannot be considered as mentally insane before, during or after the commission of the crime... Even though the defendant is capable of committing a similar offence in the future, it is not necessary

> to commit him to a regular mental hospital (*krankzinnigengesticht*), instead he should be placed in a custodial clinic for psychopaths (*psychopatenasiel*) to undergo a rather lengthy treatment under very strict surveillance. In Curaçao there is only the choice between prison and the national (regular) mental hospital (*Landspsychiatrisch Ziekenhuis*). Taking into consideration that the risk of recidivism is for the time being very high also when a treatment would possibly start immediately and that, consequently, intensive surveillance is of primordial importance (which surveillance is impossible in the national mental hospital) and the fact that the defendant is not to be considered as criminally insane within the meaning of the law, admission to the national mental hospital is wholly contra-indicated. The sole option remaining is that he must undergo his punishment in prison (transfer to a custodial clinic in the Netherlands is impossible on account of the defendant's limited intelligence and insufficient ability to express himself verbally). It is strongly advised that, where possible in the prison setting, an attempt should be made to attain a stronger personality structure in the defendant in order to avoid recidivism in the future."

13. The First Instance Court considered that it did not appear from the report that the applicant's condition would never improve. Accordingly, it sentenced him to 20 years' imprisonment.

14. Both the applicant and the Public Prosecution Service (*Openbaar Ministerie*) submitted an appeal against the judgment of the First Instance Court.

15. On 11 March 1980 the Joint Court of Justice (*Gemeenschappelijk Hof van Justitie*) of the Netherlands Antilles quashed the judgment of the First Instance Court. It convicted the applicant of murder, finding it proven that he had deliberately and with premeditation taken the life of the 6-year old girl. It held that he had conceived the intention and taken the decision to kill her after calm consideration and quiet deliberation, and in order to execute that intention, had stabbed her repeatedly with a knife, as a result of which violent acts she had died. The applicant had killed the child, who was the niece of an ex-girlfriend, in revenge for the latter's ending of the relationship. The Joint Court of Justice further accepted the findings of the psychiatric report and added:

> "Considering that − however regrettable − there is no possibility in the Netherlands Antilles for the imposition of a TBS order (*terbeschikkingstelling met bevel tot verpleging van overheidswege*) for confinement in a custodial clinic which would be the most appropriate measure in this case; that placement in a custodial clinic in the Netherlands in similar cases has in the past proved impracticable – as is known to the court *ex officio* – and is in the present case moreover considered impossible by the psychiatrist due to the [applicant's] limited intelligence and insufficient ability to express himself verbally; ..."

16. In the determination of the applicant's sentence, the Joint Court of Justice concluded that, in view of the findings in the report of the psychiatrist, the risks of recidivism were so significant that the protection of public safety should prevail as being the most important interest to protect. For this reason the Joint Court of Justice held that public safety could only be adequately protected by preventing the applicant's return to society. It therefore sentenced him to life imprisonment.

17. The applicant was subsequently placed in the state prison Koraal Specht on Curaçao (later: Bon Futuro Prison; now: Sentro di Detenshon i Korekshon Korsou) where there was no separate regime for detainees requiring mental treatment.

18. On 25 November 1980 the Supreme Court (*Hoge Raad*) dismissed the applicant's appeal in cassation against the judgment of the Joint Court of Justice.

19. On 24 November 1981 the applicant filed a request for revision with the Joint Court of Justice which was refused on 6 April 1982.

20. The applicant has submitted at least thirteen requests for a pardon (*gratieverzoek*). On 26 April 1982 the applicant submitted his first such request with the Governor of the Netherlands Antilles. The request was refused on 9 August 1982 on the ground that there were no reasons to grant a pardon.

21. The applicant's first thirteen years in prison were marked by incidents: fights, extortion, drug abuse, etc., some of which led to periods in isolation.

22. Around the year 2000 the applicant was transferred, upon his request, to the KIA on Aruba. At the same time the responsibility for the execution of the applicant's sentence was transferred from the authorities of the Netherlands Antilles to those of Aruba. By agreement of 1 December 1999 the Minister of Justice of Curaçao however made the transfer conditional, by stipulating that any measure (e.g. pardon, reduction of sentence, temporary leave) that would involve the applicant leaving prison was dependent on the consent of the Curaçao Public Prosecution Service.

23. On 30 January 2002 a request for a pardon by the applicant was refused by the Governor of the Netherlands Antilles on the ground that there were no reasons justifying a pardon.

24. On 31 May 2004 the warden of the Aruba Correctional Institution forwarded a letter from the applicant to the Minister of Justice of Aruba requesting the Governor of Aruba to contact the Governor of the Netherlands Antilles concerning a possible pardon. The applicant's request did, however, not have the desired effect.

25. Separately, the applicant addressed a number of requests for pardon to the Procurator General (*Procureur-Generaal*) of Aruba, who informed the applicant by letters of 9 June 2000, 26 October 2004, 14 March 2005 and 18 July 2007 respectively that only the authorities of the Netherlands Antilles were entitled to enact changes in the execution of his sentence.

26. On 1 March 2006 a request for a pardon by the applicant was refused by the Governor of the Netherlands Antilles on the ground that there were no reasons justifying a pardon.

27. In response to the applicant's requests for a pardon, the Minister of Justice of Aruba, by letter of 16 January 2008, informed him that his requests did not present any facts or circumstances which, had they been

available to the Joint Court of Justice when it passed its judgment, would have altered the outcome of the proceedings against him, nor were there facts that could lead to the conclusion that the continuing execution of his sentence had lost its purpose.

2. Events that occurred after the introduction of the application

28. In anticipation of the periodic review of life sentences to be introduced in the Curaçao Criminal Code (*Wetboek van Strafrecht*), the Procurator General, in a letter of 9 September 2011, requested a psychiatric examination of the applicant.

29. On 7 October 2011 psychologist J.S.M. stated as follows:

> "... the results of the test show that [the applicant] is suffering from symptoms of depression. He pents up his emotions and anger and hides them from those around him. ... [The applicant] has little trust in other people. In his opinion people use and abuse each other in order to achieve their goals. That is why he is very distrustful of the people he encounters and displays antisocial behavior. ... He is extremely sensitive to criticism and rejection."

30. On 26 March 2012 the Aruban Foundation for Probation and the Protection of Juveniles (*Stichting Reclassering en Jeugdbescherming*) issued a report, in which it was noted that the applicant could live with his mother on Aruba and could work in an upholstery shop. The person who drew up the report found it difficult to estimate the risk of recidivism, but considered that with appropriate support following release his prospects of successfully integrating in society were good.

31. On request of the Joint Court of Justice three reports were issued.

32. On 25 May 2012 the KIA issued a report, which included the following:

> "He is a calm, quiet man of 59 who has never been given a disciplinary punishment during his detention. ... He carries out his duties adequately and to the satisfaction of prison staff. In principle he works alone, but is occasionally willing to train other inmates in upholstery work. ... He is always polite and respectful towards prison staff; none of them have complaints about him. He rarely has any contact with the social worker and if he does, he always asks the same questions. It is as if he forgets matters which have already been discussed."

33. In his report of 21 July 2012 psychiatrist M.V. concluded the following:

> "The personality test showed that the subject has an antisocial personality disorder with mild psychopathic features. There are also signs of narcissistic features. The character structure is rigid, but is not strongly displayed, perhaps because of his age. The risk that he will reoffend or get into trouble in some other way upon return to society is considered to be present (moderate risk in comparison with the forensic population). ... In general the subject can be described as having an antisocial personality whose more unpleasant manifestations have been mitigated. ... It is reasonably certain that his personality will not change. Personality is formed up to age 35, after which only small changes take place. The examination shows that the

> subject's personality profile is fairly rigid. He will therefore always be a fairly unpleasant person in his relations with others and will always have difficulty in establishing and maintaining social contacts. Given his personality, I estimate the chances of successful integration in society to be small."

34. In his report of 17 August 2012, psychiatrist G.E.M. concluded the following:

> "The subject is, however, suffering from a severe antisocial personality disorder, characterised by a highly undifferentiated, fairly primitive emotional awareness, an underdeveloped conscience, rudimentary social skills, a lack of empathy. ... Although the subject displayed problematic and aggressive behaviour during the first few years of his detention, even including an attempt at poisoning, he has practically been a model prisoner over the last few years. ... This change in behaviour is largely attributable to the structure provided by the prison setting and the fact that he is much older now (almost 60) and is likely to become more and more moderate as the years go by. ... [A]s to the risk of recidivism: I am in two minds. Whereas the subject is almost a model prisoner, his character traits have not in essence changed. He continues to be a person with a serious disability. It remains in doubt how he will react and to what extent he can survive once the structure offered by the prison is no longer in place."

35. On 21 September 2012 the Joint Court of Justice, having submitted the applicant's life imprisonment sentence to a periodic review pursuant to Article 1:30 of the Curaçao Criminal Code which had entered into force on 15 November 2011 (see paragraph 42 below), decided that the applicant's custodial sentence still served a reasonable purpose after 33 years. It took into account the experts' conclusions that the applicant was suffering from an antisocial personality disorder; the applicant's attitude during the hearing, which showed that he was not capable of accounting for the seriousness and absurdity of the murder and how he could have committed it; and the position of the surviving relatives.

B. The applicant's detention conditions

36. Due to extreme weather conditions in late 2010 and early 2011, rainwater had found its way into a number of cells in the KIA.

37. 152 prisoners of the KIA (amongst whom the applicant) requested the First Instance Court of Aruba in summary proceedings (*kort geding*) to order the country of Aruba *inter alia* to take measures to prevent rainwater and glaring sunlight from entering their cells and to forbid the country to accommodate more than two prisoners in one cell of 3 x 3 m.

38. On 2 February 2011 the First Instance Court of Aruba partly allowed the requests and ordered the country of Aruba to take measures, before 1 April 2011, in order to keep the cells free from inflowing rainwater without reducing the ventilation. It equally forbade Aruba to place more than two prisoners in a cell of 3 x 3 m after one month of the judgment being issued.

39. On 19 April 2011 the Joint Court of Justice quashed the judgment of the First Instance Court and ordered Aruba to prevent rainwater from flowing into the cells within six months from the judgment being served.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Power to grant a pardon to persons detained on Curaçao

40. Until 10 October 2010 the power to grant a pardon was regulated by article 16 § 1 of the Constitutional Rules of the Netherlands Antilles (*Staatsregeling van de Nederlandse Antillen*), which stipulated:

> "The Governor may, having consulted the court which handed down the judgment, grant a pardon to any person convicted and sentenced by judgment of the courts."

41. As of 10 October 2010 Article 93 of the Curaçao Constitution provides as follows:

> "Pardons will be granted by country decree after the court which handed down the judgment has been consulted, taking into account provisions to be laid down by or pursuant to country ordinance."

Such country decree is issued by the Governor.

B. Periodic review of life imprisonment sentences

42. As of 15 November 2011 periodic reviews of life imprisonment sentences are required on Curaçao. Article 1:30 of the Curaçao Criminal Code provides:

> "1. Any convicted person sentenced to life imprisonment will be released on parole after the deprivation of liberty has lasted at least twenty years if in the opinion of the [Joint] Court [of Justice] further unconditional execution no longer serves any reasonable purpose.
>
> 2. The [Joint] Court [of Justice] will in any event take into account the position of any victim or surviving close relatives and the risk of recidivism.
>
> 3. If the [Joint] Court [of Justice] decides not to release the person in question, it will review the situation again after five years and if necessary every five years thereafter.
>
> ...
>
> 7. No legal remedy lies against the decision of the Joint Court of Justice."

III. COUNCIL OF EUROPE DOCUMENT

The 2nd General Report of the CPT

43. The following extracts are taken from the Report to the authorities of the Kingdom of the Netherlands on the visits carried out to the Kingdom in Europe, Aruba, and the Netherlands Antilles by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") (CPT/Inf (2008) 2). These visits were carried out on Aruba from 4 to 7 June 2007 and on the Netherlands Antilles from 7 to 13 June 2007.

"PART II: VISIT TO ARUBA

... **C. Aruba Correctional Institute – KIA**

2. Ill-treatment

62. The delegation received numerous allegations of inter-prisoner violence, during which prison officers were said to have remained passive when they should have intervened; in some of these cases, such an attitude allegedly exacerbated the situation. On other occasions involving incidents of inter-prisoner violence, there were allegedly no prison officers present or even close at hand.

3. Conditions of detention

a. material conditions

64. ... Each cell measured less than 9m² - not counting the partly partitioned sanitary annexe consisting of a shower, toilet and washbasin - and was occupied by up to three persons. As in the rest of the prison, each cell was closed off (on the doorway side) by floor-to-ceiling bars, offering virtually no privacy. The cells were furnished with triple bunk beds and good-quality bedding and in-cell artificial lighting was good. The openings in the concrete structure provided sufficient natural light to the section, but insufficient ventilation (and no possibility to see outside the building).

b. regime

69. Two prisoners were serving life sentences at the time of the visit, and 26 inmates were serving long sentences of 10 to 22 years duration. Yet such prisoners, who formed over 12% of the sentenced prisoners, did not appear to benefit from a richer regime than the rather meagre one on offer to all prisoners; nor did they benefit from adequate psychological support.

...**The CPT recommends that the Aruban authorities develop a policy vis-à-vis life-sentenced and other long-term prisoners.**

f. psychiatric and psychological care

79. In principle, a psychiatrist attended KIA once a month; however, the delegation noted that he had not visited for several months. The lack of provision of psychiatric care was essentially a budgetary issue.

... A psychiatric and forensic observation and assistance centre (FOBA) within the prison, with a capacity to hold 10 prisoners, had recently been established. However, due to a shortage of staff, both medical and custodial, the FOBA had not been brought

into service. In theory, prisoners could receive acute psychiatric treatment at the PAAZ Unit at Oduber Hospital, but resort to hospitalisation was very infrequent.

...

PART 3 VISIT TO THE NETHERLANDS ANTILLES

...

3. Material conditions

45. Moreover, the phenomenon of inter-prisoner violence had increased. The number of lesions recorded annually during detention (i.e. not on admission) appeared to have doubled since 2002. Further, the delegation received allegations of inter-prisoner sexual violence, most incidents of which were not reported. ...

46. The CPT has grave concerns about the levels of violence at Bon Futuro Prison, an establishment which was clearly dangerous and unsafe for both prisoners and staff.

...

6. Health care services

...

b. psychiatric and psychological care at Bon Futuro Prison

60. A psychiatrist attended Bon Futuro Prison (apart from FOBA, see paragraph 59) on a half-time basis. However, prisoners did not benefit from psychological care (one psychologist attended only the FOBA unit). In the CPT's view, an establishment of the size of Bon Futuro Prison should be able to rely on the services of at least one full-time psychologist. **The CPT recommends that a full-time psychologist be recruited as soon as possible for Bon Futuro Prison**.

61. The forensic psychiatric support unit (or FOBA) at Bon Futuro Prison was developed in order to cater for certain problematic prisoners in the absence of more appropriate hospital surroundings."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION – THE LIFE SENTENCE

44. The applicant complained that the life sentence violated Article 3 of the Convention, which reads as follows:

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

45. The Government contested that argument.

A. Admissibility

46. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

47. The applicant argued that the imposition on him of the life sentence was in violation of Article 3, as there was no possibility of a review. Therefore he had no hope of release, either *de facto* or *de jure*. The possibility to have a pardon granted by the Governor was inadequate and ineffective.

48. The Government firstly submitted that a life sentence on Curaçao was *de jure* and *de facto* reducible. The applicant had the option, from the moment that the life sentence was imposed on him, of seeking a pardon. Moreover, on 15 November 2011 the periodic review of life sentences was introduced on Curaçao in article 1:30 of the Criminal Code, which provision also applied to the applicant, even though he was imprisoned on Aruba. The review of the applicant's continuing detention had taken place in 2012 and the Joint Court of Justice had found that his life sentence continued to serve a reasonable purpose.

49. The Court reiterates that it is well-established case-law that a State's choice of a specific criminal justice system, including sentence review and release arrangements, is in principle outside the scope of the supervision the Court carries out at the European level, provided that the system does not contravene the principles set forth in the Convention (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 99, ECHR 2008).

50. In addition, issues relating to just and proportionate punishment are the subject of rational debate and civilised disagreement (see *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, § 105, ECHR 2013 (extracts)). Accordingly, Contracting States must be allowed a margin of appreciation in deciding on the appropriate length of prison sentences for particular crimes. As the Court has stated, it is not its role to decide what is the appropriate term of detention applicable to a particular offence or to pronounce on the appropriate length of detention or other sentence which should be served by a person after conviction by a competent court (see *V. v. the United Kingdom* [GC], no. 24888/94, § 118, ECHR 1999-IX, and *Sawoniuk v. the United Kingdom* (dec.), no. 63716/00, ECHR 2001-VI).

51. For the same reasons, Contracting States must also remain free to impose life sentences on adult offenders for especially serious crimes such as murder: the imposition of such a sentence on an adult offender is not in

itself prohibited by or incompatible with Article 3 or any other Article of the Convention (see, *inter alia*, among many authorities, *Kotälla v. the Netherlands*, no. 7994/77, Commission decision of 6 May 1978, Decisions and Reports (DR) 14, p. 238; *Bamber v. the United Kingdom*, no. 13183/87, Commission decision of 14 December 1988, DR 59, p. 235; *Sawoniuk*, cited above; and *Kafkaris*, cited above, § 97). This is particularly so when such a sentence is not mandatory but is imposed by an independent judge after he or she has considered all of the mitigating and aggravating factors which are present in any given case.

52. At the same time, however, the Court has also held that the imposition of an irreducible life sentence on an adult may raise an issue under Article 3 (see, *inter alia*, *Nivette v. France* (dec.), no. 44190/98, ECHR 2001-VII; *Einhorn v. France* (dec.), no. 71555/01, ECHR 2001-XI; *Stanford v. the United Kingdom* (dec.), no. 73299/01, 12 December 2002; *Wynne v. the United Kingdom* (dec.), no. 67385/01, 22 May 2003; and *Kafkaris*, cited above, § 97). There are two particular but related aspects of this principle that the Court considers necessary to emphasise and to reaffirm.

53. First, a life sentence does not become irreducible by the mere fact that in practice it may be served in full. No issue arises under Article 3 if a life sentence is *de jure* and *de facto* reducible (see *Kafkaris*, cited above, § 98).

54. In this respect, the Court emphasises that no Article 3 issue could arise if, for instance, a life prisoner had the right under domestic law to be considered for release but was refused on the ground that he or she continued to pose a danger to society. This is because States have a duty under the Convention to take measures for the protection of the public from violent crime and the Convention does not prohibit States from subjecting a person convicted of a serious crime to an indeterminate sentence allowing for the offender's continued detention where necessary for the protection of the public (see, *mutatis mutandis*, *V. v. the United Kingdom*, cited above, § 98). Indeed, preventing a criminal from re-offending is one of the "essential functions" of a prison sentence (see *Mastromatteo v. Italy* [GC], no. 37703/97, § 72, ECHR 2002-VIII; *Maiorano and Others v. Italy*, no. 28634/06, § 108, 15 December 2009; and, *mutatis mutandis*, *Choreftakis and Choreftaki v. Greece*, no. 46846/08, § 45, 17 January 2012). This is particularly so for those convicted of murder or other serious offences against the person. The mere fact that such prisoners may have already served a long period of imprisonment does not weaken the State's positive obligation to protect the public; States may fulfil that obligation by continuing to detain such life sentenced prisoners for as long as they remain dangerous (see, for instance, *Maiorano and Others*, cited above).

55. Second, in determining whether a life sentence in a given case can be regarded as irreducible, the Court has sought 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).

56. The Court has recently held in *Vinter and Others* (cited above, § 119-122) that, for a life sentence to remain compatible with Article 3, there must be both a prospect of release and a possibility of review.

57. The Court notes that in the present case, the possibility of review of a life sentence was introduced in the Curaçao Criminal Code in November 2011, stipulating that any person sentenced to life imprisonment will be released on parole after he has served at least twenty years of his sentence, if in the opinion of the Joint Court of Justice a custodial sentence no longer serves any reasonable purpose. This review mechanism meets the criteria as set out in *Vinter and Others* (cited above, § 119-122). Moreover, it appears that a review as prescribed by this provision was subsequently carried out in the case of the applicant, involving the drawing up of a number of expert reports on *inter alia* the applicant's psychiatric condition, his personality and behaviour, and the risk of recidivism, which review culminated in the decision of the Joint Court of Justice that the applicant should not be released on parole (see paragraphs 29-35 above).

58. The Court observes that although the possibility of a legal review of a life sentence did not exist on Curaçao at the moment the applicant lodged his application in Strasbourg on 22 February 2010, such review mechanism has in the meantime been introduced. Considering that the applicant lodged his application only recently, almost thirty years after his conviction (see, *a contrario*, *Vinter and Others*, cited above, §§ 19, 25 and 31), and not before, the Court finds no reason in the circumstances of the present case to assess whether the existence of a pardon offered the applicant any prospects of being released and thus whether the life sentence imposed on him could possibly be considered to be *de jure* and *de facto* reducible before 2011 (compare *Kafkaris v. Cyprus*, cited above, §§ 98-108).

59. In the light of the foregoing, the applicant's life sentence cannot be said to be in breach of Article 3 of the Convention. Accordingly, the Court finds that there has been no violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION – CONDITIONS OF DETENTION

60. The applicant further complained of a violation of Article 3 as regards the conditions of his detention in both the Koraal Specht prison on Curaçao and in the KIA. He submitted *inter alia* that – as also the CPT had pointed out – the prison authorities of the Koraal Specht prison could not safeguard the inmates from inter-prisoner violence; he had had to witness

fellow prisoners being ill-treated or killed, and also the applicant himself had been ill-treated several times by fellow prisoners. Relying upon the report drawn up by the CPT (see paragraph 43 above), the applicant further complained that neither the Koraal Specht prison on Curaçao nor the KIA had instituted a special (more lenient) regime for persons sentenced to a life sentence. Moreover, he had never been placed in a regime benefitting his mental condition. He compared his case in this regard to that of *Mathew v. the Netherlands* (no. 24919/03, ECHR 2005-IX). Finally, the applicant complained about the conditions of detention in the KIA, since rainwater had flowed into the prisoners' cells as a result of profuse rainfall in late 2010 and early 2011 causing illness and stress.

61. The Government argued that the applicant had failed to exhaust domestic remedies, as required by Article 35 § 1 of the Convention, as regards the alleged ill-treatment by fellow prisoners, as the applicant had made no complaints concerning ill-treatment directed towards himself or other inmates.

62. The Government submitted that the applicant's other complaints under Article 3 were unfounded on the merits. They submitted that the "minimum threshold of severity" beyond which there was a violation of Article 3 of the Convention had not been reached. The Government observed that the present case needed to be clearly distinguished from that of *Mathew v. the Netherlands* (cited above), as the applicant had – in contrast to the applicant in the *Mathew* case – never been held for long periods in isolation, nor had he been held in a cell that failed to offer adequate protection against the elements. Moreover, there was no evidence of exceptional circumstances, rooted in the applicant's personality, which implied that his detention would qualify as 'inhuman'.

63. Insofar as the applicant complained that he had never been placed in a regime benefitting his mental condition, the Government submitted that the Joint Court of Justice had not imposed an order for the applicant's placement in a custodial clinic, considering there was no possibility to issue such an order in the Netherlands Antilles and, in view of the applicant's limited intelligence and insufficient ability to express himself verbally, placement in a custodial clinic in the Netherlands was not an option. He was, however, placed under psychiatric observation and he was offered psychiatric help for his personality disorder upon his arrival in the Koraal Specht Prison on Curaçao with a view to rehabilitation. This help ended when the applicant was, at his own request, transferred to the KIA, where psychiatric treatment was not available to the same extent as in the Koraal Specht Prison. Moreover, in the KIA psychiatric help is currently available to the applicant.

A. Admissibility

64. The Court notes that it indeed appears that the applicant did not institute any domestic proceedings concerning ill-treatment directed towards himself in the period he was imprisoned on Curaçao.

65. The Court therefore finds that in respect of this complaint the applicant cannot be considered as having complied with the exhaustion of domestic remedies rule and that, consequently, this part of the application must therefore be declared inadmissible for non-exhaustion of domestic remedies under Article 35 §§ 1 and 4 of the Convention.

66. With regard to the applicant's other complaints concerning the conditions of detention under Article 3 the Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. General principles

67. The Court reiterates that under Article 3 of the Convention the State must ensure that a person is detained in conditions which are compatible with respect for his or her human dignity, that the manner and method of the execution of the measure do not subject him or her to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and that given the practical demands of imprisonment his or her health and well-being are adequately secured (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI, and *Valašinas v. Lithuania*, no. 44558/98, § 102, ECHR 2001-VIII).

68. In assessing whether the treatment inflicted on a prisoner went beyond the "inevitable element of suffering or humiliation" associated with the deprivation of liberty, the Court has often taken into account the cumulative effect of various aspects of prison life (*Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II). In previous cases the Court has analysed such factors as access to natural light or air in the cells, adequacy of heating arrangements, compliance with basic sanitary requirements, the opportunity to use the toilet in private and the availability of ventilation (see, for example, *Peers v. Greece*, no. 28524/95, §§ 70-72, ECHR 2001-III; *Babushkin v. Russia*, no. 67253/01, § 44, 18 October 2007; and *Vlasov v. Russia*, no. 78146/01, § 84, 12 June 2008). That list is not exhaustive; other conditions of detention may lead the Court to the conclusion that the acceptable threshold of suffering or degradation has been exceeded and the applicant was subjected to "inhuman or degrading treatment" (see, for example, *Fedotov v. Russia*, no. 5140/02, § 68, 25 October 2005, and *Trepashkin v. Russia*, no. 36898/03, § 94, 19 July 2007). The length of the

period during which a person is detained in the particular conditions also has to be considered (see, among other authorities, *Alver v. Estonia*, no. 64812/01, 8 November 2005). In particular, the Court must have regard to the state of health of the detained person (see *Assenov and Others v. Bulgaria*, § 135, 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII; *Kudła*, cited above, § 94 and *Ramirez Sanchez v. France* [GC], no. 59450/00, § 119, ECHR 2006-IX).

69. Although Article 3 of the Convention cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance (see *Hurtado v. Switzerland*, 28 January 1994, § 79, Series A no. 280-A). A lack of appropriate medical care may amount to treatment contrary to Article 3 (see *İlhan v. Turkey* [GC], no. 22277/93, § 87, ECHR 2000-VII; *Naumenko v. Ukraine*, no. 42023/98, § 112, 10 February 2004; and *Farbtuhs v. Latvia*, no. 4672/02, § 51, 2 December 2004).

70. According to the Court's settled case-law, any allegation of ill-treatment must be supported by appropriate evidence. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.

2. Application of the above principles to the present case

71. As regards the applicant's complaints about conditions in the prisons in which he was detained and about the fact that he has never been placed in a regime benefitting his mental condition or in a regime specifically tailored to those serving life sentences, the Court considers that he did not develop these complaints in sufficient detail and did not submit information or documents capable of persuading the Court that those conditions were indeed "inhuman and degrading". The Court notes firstly that although the applicant, together with 151 other detainees, participated in proceedings aimed at the improvement of conditions in the KIA (see paragraphs 36-39 above), the applicant has not disputed the Government's observation that he himself had never been placed in a cell that failed to offer adequate protection against the elements (see paragraph 62 above).

72. The Court further observes that while it appears that the applicant has never been treated for his mental illness, he was placed under psychiatric observation and he was offered psychiatric help for his personality disorder upon his arrival in the Koraal Specht Prison on Curaçao. This help ended when the applicant was, at his own request, transferred to the KIA, where psychiatric treatment was not available to the

same extent as in the Koraal Specht Prison. However, also in the KIA psychiatric help is currently available (see paragraph 63 above). The applicant has not provided any information on the question whether he has at any time availed himself of the assistance provided, nor has he – if he did do so – indicated that the assistance available was inadequate for his needs. The mere reference to the CPT report, in which the lack of a regime benefitting the mental condition of detainees and the lack of a regime specifically tailored to those serving life sentences were pointed out, is not sufficient for the Court to find, without more, that Article 3 of the Convention has been violated.

73. The Court concludes, accordingly, that Article 3 was not breached on this account.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

74. The applicant further submitted that there no longer existed a causal link between his continuing detention and the original conviction, as he no longer posed a danger to society. In particular he argued that a discretionary sanction had been imposed on him, that he had fulfilled the 'punitive' part of that sentence and that his continued detention was no longer lawful. He relied on Article 5 § 1 of the Convention, the relevant parts of which provide as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court; ..."

75. The Government submitted that the applicant had been sentenced to a life sentence. In the Kingdom of the Netherlands a life sentence is not divided into a punitive part and a public protection part when imposed. Moreover, by decision of 21 September 2012 the Joint Court of Justice held – on the basis of detailed reports of two psychologists and a psychiatrist – that the continued enforcement of the applicant's life sentence still served a reasonable purpose.

76. The Court reiterates that where the "lawfulness" of detention is in issue, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. This primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention (see, *inter alia*, *Amuur v. France*, 25 June 1996, § 50, *Reports of Judgments and Decisions* 1996-III, and *Stafford v. the United Kingdom* [GC], no. 46295/99, § 63, ECHR 2002-IV). In this respect, the Court's case-

law indicates that it may be necessary to look beyond the appearances and the language used and concentrate on the realities of the situation (see *Van Droogenbroeck v. Belgium*, 24 June 1982, § 38, Series A no. 50). In addition, any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness (see, among many other authorities, *Winterwerp v. the Netherlands*, 24 October 1979, §§ 39 and 45, Series A no. 33, and *Amuur*, cited above, § 50).

77. The "lawfulness" required by the Convention presupposes not only conformity with domestic law but also, as confirmed by Article 18, conformity with the purposes of the deprivation of liberty permitted by sub-paragraph (a) of Article 5 § 1 (see *Bozano v. France*, 18 December 1986, § 54, Series A no. 111, and *Weeks v. the United Kingdom*, 2 March 1987, § 42, Series A no. 114). Furthermore, the word "after" in sub-paragraph (a) does not simply mean that the detention must follow the "conviction" in point of time: in addition, the "detention" must result from, "follow and depend upon" or occur "by virtue of" the "conviction". In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty in issue (see *Van Droogenbroeck*, §§ 35 and 39, and *Weeks*, § 42, both cited above).

78. Turning to the circumstances of the present case, the Court is in no doubt, and it was common ground between the parties, that the applicant was convicted in accordance with a procedure prescribed by law by a competent court within the meaning of Article 5 § 1 (a) of the Convention. Rather, the question to be determined is whether the detention of the applicant currently conforms to the original life sentence imposed on him.

79. The Court observes that the applicant was convicted of premeditated murder of a six-year old girl by the Joint Court of Justice on 11 March 1980 and sentenced to life imprisonment (see paragraphs 15-16 above). Such a sentence is discretionary under the Curaçao Criminal Code. In imposing the life sentence, the Joint Court of Justice clearly formulated that the applicant had been sentenced to life imprisonment in order to prevent him from returning to society (see paragraph 16 above).

80. Moreover, the Court observes that the Joint Court of Justice reviewed the legality of the applicant's sentence and considered by decision of 21 September 2012 that his sentence still served a reasonable purpose, *i.e.* the protection of public safety (see paragraph 35 above). In the Court's view there is therefore a clear and sufficient causal connection between the conviction and the applicant's continuing detention in conformity with the requirements of the Convention and free of arbitrariness.

81. Therefore, it follows that this complaint is manifestly ill-founded and must be declared inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

82. The applicant further complained that the imposition of the life sentence without the possibility of a regular review by a court violated Article 5 § 4, which reads as follows:

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

83. The Government contested that argument.

84. The Court recalls that the issue raised by this complaint has been determined by its admissibility decision in *Kafkaris v. Cyprus (no. 2)* ((dec.), no. 9644/09, 21 June 2011). The Court rejected that complaint as manifestly ill-founded finding that the court which had imposed the life sentence had made it quite plain that the applicant had been sentenced to life imprisonment for the remainder of his life. It was clear, therefore, that the determination of the need for the sentence imposed on the applicant did not depend on any elements that were likely to change in time (unlike in *Stafford*, cited above, § 87). The "new issues" relied upon by the applicant in the *Kafkaris* case could not be regarded as elements which rendered the reasons initially warranting detention obsolete or as new factors capable of affecting the lawfulness of his detention. Nor could it be said that the latter applicant's sentence was divided into a punitive period and a security period as he claimed. Accordingly, the Court considered that the review of the lawfulness of the applicant's detention required under Article 5 § 4 had been incorporated in the conviction pronounced by the courts, no further review therefore being required.

85. The Court considers the complaints made in the present case to be indistinguishable from the complaint made in *Kafkaris (no. 2)*. The Court has accepted that continued detention may violate Article 3 if it is no longer justified on legitimate penological grounds and the sentence is irreducible *de facto* and *de jure*. However, contrary to the applicant's submissions, it does not follow that his detention requires to be reviewed regularly in order for it to comply with the provisions of Article 5. Moreover, it is clear from the reasoning from the Joint Court of Justice that the life imprisonment has been imposed on the applicant in order to meet the requirements of punishment and protection of public safety (see paragraph 16 above). Consequently, as in *Kafkaris (no. 2)*, the Court is satisfied that the lawfulness of the applicant's detention required under Article 5 § 4 was incorporated in the life sentence imposed by the domestic court in his case, and no further review would be required by Article 5 § 4.

86. Accordingly, this complaint is manifestly ill-founded and must be declared inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

87. The applicant moreover complained under Article 13 of the Convention, which provides as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

88. The applicant restated, under this Article, his complaints about the lack of proceedings by which he is able to challenge his life sentence. The Government denied that Article 13 had been violated.

89. Article 5 § 4 providing a *lex specialis* in relation to the more general requirements of Article 13 (see *Chahal v. the United Kingdom*, 15 November 1996, § 126, *Reports of Judgments and Decisions* 1996-V), the Court considers that it follows from its findings in relation to the complaint under Article 5 § 4 above that also this complaint is manifestly ill-founded and must be declared inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

VI. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

90. In the course of the proceedings before this Court the applicant put forward two additional complaints.

91. By letter of 2 November 2012 the applicant informed the Court of the outcome of the review proceedings before the Joint Court of Justice (see paragraph 35 above). He complained under Article 6 § 1 of the Convention that the latter court could not be considered an independent and impartial tribunal. The relevant part of Article 6 § 1 provides as follows:

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

92. The Court observes that the review proceedings before the Joint Court of Justice only concerned the question whether the applicant was eligible for release on parole. They did, therefore, not concern a dispute ("contestation") over "civil rights and obligations", or the "determination of a criminal charge" under Article 6 § 1 of the Convention, but an issue relating to the execution of a sentence. The Convention institutions have consistently held that Article 6 of the Convention does not apply to such proceedings (see *A.B. v. Switzerland*, no. 20872/92, Commission decision of 22 February 1995, DR 80-B, p. 66; *Garagin v. Italy* (dec.), 33290/07, 29 April 2008; *Enea v. Italy* [GC], no. 74912/01, § 97, ECHR 2009; and *Boulois v. Luxembourg* [GC], no. 37575/04, § 85, ECHR 2012).

93. The reason for this is that a release on parole may, as in the applicant's case, concern a person who has been convicted in a final

judgment. The proceedings at issue then no longer relate to a criminal charge against that person within the meaning of Article 6 of the Convention. Moreover, Article 6 is not applicable under its "civil limb" either, as under article 1:30 of the Curaçao Criminal Code there is no 'right' to be released on parole (see, *mutatis mutandis*, *Boulois*, cited above, §§ 96-101).

94. Consequently, it follows that 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 declared inadmissible in accordance with Article 35 § 4.

95. In his reply to the Government's observations the applicant furthermore argued that the agreement of 1 December 1999 concerning his transfer from Curaçao to Aruba, which stipulated that the law of the administering country remained applicable, was incompatible with the principles of interregional and international law. According to the applicant the further enforcement of his sentence should have been governed by the law of Aruba, since the responsibility for the enforcement of the sentence was equally transferred.

96. The Government submitted that the applicant had initially been imprisoned on Curaçao, where he had committed the offence and where he had been resident at the time. The applicant had been transferred to the KIA on Aruba at his own request, in order to be closer to his family. The authorities of Curaçao had agreed with the transfer on the condition that its enforcement rules continued to be observed. The Government contested that this agreement was incompatible with any rule of interregional and international law.

97. The Court observes that the applicant's transfer to Aruba took place in 2000. The applicant has never before raised this complaint. The Court accordingly concludes that this part of the application is out of time for the purposes of Article 35 § 1 and must be declared inadmissible in accordance with Article 35 § 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* admissible the complaints concerning Article 3 as regards the life sentence and the general conditions of detention, except for the complaint concerning ill-treatment directed towards the applicant in the period the applicant was imprisoned on Curaçao, and declares inadmissible the remainder of the application;

2. *Holds* that there has been no violation of Article 3 of the Convention in respect of the life sentence;

3. *Holds* that there has been no violation of Article 3 of the Convention in respect of the conditions of detention.

Done in English, and notified in writing on 10 December 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President