

Trabelsi v. Belgium: Extradition of Terrorist Suspects and Aversion to Whole-Life Prison Sentences

I. OVERVIEW 573
II. BACKGROUND 574
 A. *Irreducible Life Sentences*.....574
 B. *Heightened Scrutiny of Sentence Review*.....577
III. THE COURT’S DECISION..... 579
IV. ANALYSIS 583
V. CONCLUSION 587

I. OVERVIEW

Three days after terrorists attacked New York City’s World Trade Center in 2001, the Brussels Court of Assizes issued a search warrant for the home of suspected terrorist Nizar Trabelsi leading to the discovery of automatic weapons, ammunition, chemical formula, and false passports in addition to a detailed plan of the U.S. embassy in Paris.¹ Belgian authorities arrested Trabelsi and charged him with criminal conspiracy, forgery, and illegal possession of combat weapons.² Trabelsi pled guilty as charged and was sentenced to ten years imprisonment by the Brussels Court of Assizes on September 30, 2003.³ After serving five years of his sentence, the United States Department of Justice requested Trabelsi’s extradition to the United States to face criminal prosecution on charges of conspiracy to kill U.S. nationals in targeted facilities, conspiracy to use weapons of mass destruction, and providing material support to al-Qaeda associates.⁴ The Department of Justice informed Belgian authorities that two of these statutory offenses could result in life imprisonment under the United States Criminal Code.⁵ U.S. authorities stipulated that whole-life sentences were discretionary because a district court judge could issue reduced sentences based on mitigating circumstances or a suspect’s willingness to aid law enforcement in their investigation of terrorist organizations.⁶ The United States guaranteed that Trabelsi would not be

1. *Trabelsi v. Belgium*, App. No. 140/10 Eur. Ct. H.R. para. 6, HUDOC (Sept. 4, 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146372>.

2. *Id.* para. 7.
3. *Id.* para. 8.
4. *Id.* para. 13.
5. *Id.* para. 15.
6. *Id.* paras. 22, 27.

subject to the death penalty or prosecuted before a military commission and would await trial in a civilian facility.⁷ When granting this extradition request, the Belgian Minister of Justice concluded that life imprisonment was a discretionary rather than a mandatory sentence under federal law. Moreover, he acknowledged that Article II, Section 2 of the United States Constitution provided executive clemency that former presidents had in fact exercised to commute whole-life sentences.⁸

Trabelsi appealed to Belgium's Conseil d'Etat alleging that extradition to the United States would expose him to inhuman punishment under article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁹ Belgium's appellate court held that a prospective life sentence did not constitute inhuman punishment under article 3 of the ECHR when the requesting country's penal system afforded the possibility of a sentence review or commutation.¹⁰ When petitioning for redress in the European Court of Human Rights (ECtHR), Trabelsi alleged that a whole-life sentence imposed by a U.S. court—even a prospective one—was de facto irreducible because a convicted terrorist had no realistic prospect of parole or a presidential pardon in the aftermath of the World Trade Center attacks.¹¹ Trabelsi was subsequently extradited to the United States.¹² The ECtHR *held* that Belgium's extradition of Trabelsi to the United States violated article 3 of the ECHR by exposing him to a substantial risk of inhuman punishment. *Trabelsi v. Belgium*, App. No. 140/10 Eur. Ct. H.R. para. 139, HUDOC (Sept. 4, 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146372>.

II. BACKGROUND

A. *Irreducible Life Sentences*

Article 3 of the ECHR provides, “No one shall be subjected to torture or to inhuman or degrading treatment.”¹³ The ECHR prohibits inhuman punishment in absolute terms and irrespective of a prisoner's

7. *Id.* paras. 17, 27.

8. *Id.* para. 29.

9. *Id.* para. 34; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

10. *Trabelsi*, App. No. 140/10, para. 36.

11. *Id.* para. 99.

12. *Id.* para. 146.

13. ECHR, *supra* note 9, art. 3.

actual criminal behavior.¹⁴ Unlike other clauses in the ECHR, article 3 fails to provide for exceptions even in times of war or public emergency.¹⁵ When determining whether incarceration constitutes inhuman treatment under article 3, the court has considered the duration of the sentence in conjunction with the physical and mental strains placed on the prisoner.¹⁶ The court has emphasized that the punishment in question must exceed the ordinary degree of suffering that accompanies any period of involuntary imprisonment in order to violate article 3.¹⁷

The court has consistently held that an adult offender's lifetime imprisonment was not, in itself, prohibited by or incompatible with article 3 or any other article of the ECHR.¹⁸ However, the court has found that an "irreducible life sentence" may qualify as a form of inhuman treatment prohibited under article 3, even when the judgment was rendered by a competent court.¹⁹ Although article 3 does not prevent a prisoner from serving a life sentence in its entirety, it does prohibit a life sentence that proves to be *de jure* and *de facto* irreducible.²⁰ In determining whether a life sentence was irreducible in law and in fact, the court has sought to ascertain whether the prisoner had any prospect of release.²¹ When national law affords the possibility of sentence review "with a view to its commutation, remission, termination or the conditional release of the prisoner," the court has held that this mechanism satisfies the protections afforded under the ECHR.²² For instance, the court has determined that a lifetime sentence did not violate article 3 when a prisoner's prospect for early release was limited to executive clemency.²³ Similarly, the court held that a whole-life sentence

14. *Chahal v. United Kingdom*, App. No. 22414/93 Eur. Ct. H.R. para. 79, HUDOC (Nov. 15, 1996), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58004>.

15. *Selmouni v. France*, App. No. 25803/94 Eur. Ct. H.R. para. 95, HUDOC (July 28, 1999), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58287>.

16. *Labita v. Italy*, App. No. 26772/95 Eur. Ct. H.R. para. 120, HUDOC (Apr. 6, 2000), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58559>.

17. *Kudla v. Poland*, App. No. 30210/96 Eur. Ct. H.R. paras. 92-94, HUDOC (Oct. 26, 2000), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58920>.

18. *See, e.g., Kafkaris v. Cyprus*, App. No. 21906/04 Eur. Ct. H.R. para. 97, HUDOC (Feb. 12, 2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85019>; *Sawoniuk v. United Kingdom*, App. No. 63716/00 Eur. Ct. H.R. para. 85, HUDOC (May 29, 2001), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-5878>; *Kotälla v. Netherlands*, App. No. 7994/77, 1978 Y.B. Eur. Conv. on H.R. 522, 524-27 (Eur. Comm'n on H.R.).

19. *Kafkaris*, App. No. 21906/04, paras. 97, 99.

20. *Id.* para. 98.

21. *Id.*

22. *Id.*

23. *See, e.g., id.* para. 103; *Iorgov v. Bulgaria* (No. 2), App. No. 36295/02 Eur. Ct. H.R. para. 52, HUDOC (Feb. 21, 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001->

did not violate the ECHR when clemency was available at the discretion of a U.S. governor under state law.²⁴

When assessing whether sentencing review procedures complied with ECHR protections, the court has reiterated the sovereign right of signatory states to frame and implement their own criminal justice system.²⁵ Moreover, the court has found that its supervisory role does not extend to adjudicating the length of a prison sentence when sanctioned by another civilian court.²⁶ Further, the ECtHR has recognized a state's fundamental obligation to protect its citizens from violent crimes and has upheld a parole denial on the grounds that a whole-life prisoner posed a continued danger to society.²⁷ Consequently, the ECtHR has traditionally refrained from evaluating the proportionality of a prison sentence in relation to the indictment when a court considered any mitigating circumstances before rendering a judgment.²⁸

Although whole-life sentences have been upheld under article 3 of the ECHR, sentencing guidelines in European states more readily disfavor life imprisonment as compared to the United States.²⁹ For instance, the Council of Europe's management recommendations for long-term prisoners do not condone whole-life sentences.³⁰ Similarly, article 10(3) of the International Covenant on Civil and Political Rights proclaims that the essential aim of a penitentiary system involves the "reformation and social rehabilitation" of its prisoners.³¹ While U.S. courts have increasingly sanctioned "life imprisonment without the possibility of parole" as an alternative to the death penalty, Professor Craig Lerner of George Mason Law School has demonstrated that the Netherlands, England, and France remain the only European countries

100271 (holding that the possibility of a presidential pardon in itself offered a sufficient prospect of early release).

24. See, e.g., *Einhorn v. France*, App. No. 71555/01 Eur. Ct. H.R. paras. 27-28, HUDOC (Oct. 16, 2001), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22159> (finding that article IV, section 9 of Pennsylvania's constitution provided the possibility of commutation for a whole-life prisoner).

25. See, e.g., *Kafkaris*, App. No. 21906/04 para. 99; *Achour v. France*, App. No. 67335/01 Eur. Ct. H.R. para. 51, HUDOC (Mar. 29, 2006), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72927>.

26. See, e.g., *T. v. United Kingdom*, App. No. 24724/94 Eur. Ct. H.R. para. 97, HUDOC (Dec. 16, 1999), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58593>.

27. See, e.g., *id.* paras. 97-98.

28. See, e.g., *Kafkaris*, App. No. 21906/04, para. 99.

29. See Seema Kandel, *Life Meaning Life: Is There Any Hope of Release for Prisoners Serving Whole Life Orders?*, 75 J. CRIM. L. 70, 82 (2011).

30. *Id.*

31. International Covenant on Civil and Political Rights, art. 10(3), Dec. 19, 1966, 172 U.N.T.S. 176.

who impose a whole-life sentence in which executive clemency provides the sole avenue for early release.³² Many European nations, including Belgium, enforce whole-life sentences on the condition that prisoners receive parole review after a minimum number of years.³³ Norway, Spain, and Portugal have adopted blanket prohibitions on lifetime sentences.³⁴

In a recent decision, the court re-examined the issue of irreducible life sentences under article 3 in light of the rehabilitative aim of incarceration.³⁵ In order to characterize a life sentence as reducible in law and in fact, the court held a sentence must be subjected to a review that would evaluate whether the prisoner had been rehabilitated such that continued incarceration was no longer justified on legitimate penal grounds.³⁶ While acknowledging punishment as one legitimate goal of imprisonment, the court nonetheless reasoned that denying whole-life prisoners any prospect of release or parole review was incompatible with a genuine respect for human dignity.³⁷ The court strayed from precedent and held for the first time that a life prisoner was entitled to know the preestablished review procedures at the outset of sentencing as well as the criteria used to evaluate early release.³⁸ Consequently, a nation's failure to provide a consistent mechanism for parole review of a whole-life prisoner at the moment of sentencing was incompatible with article 3.³⁹

B. Heightened Scrutiny of Sentence Review

Under well-established case law, article 3 prohibits torture and inhuman punishment in absolute terms—irrespective of a prisoner's crimes—and shall not be abridged even in times of war or public

32. Craig S. Lerner, *Life Without Parole as a Conflicted Punishment*, 48 WAKE FOREST L. REV. 1101, 1113 (2013) (quoting Mario M. Cuomo, Editorial, *New York State Shouldn't Kill People*, N.Y. TIMES (June 17, 1989), <http://www.nytimes.com/1989/06/17/opinion/new-york-state-shouldn-t-kill-people.html>).

33. *Id.* (“This list includes the following: Austria, Belgium, the Czech Republic, Estonia, Germany, Lithuania, Luxembourg, Poland, Romania, Russia, Slovakia, Slovenia, and (possibly) Switzerland.”); see also Babar Ahmad & Others v. United Kingdom, App. Nos. 24027/07, 11949/08, 36742/08, 669911/09, 67354/09 Eur. Ct. H.R. para. 138, HUDOC (Sept. 24, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110267> (referencing these countries as evidence of the European trend towards outlawing whole-life sentences entirely).

34. Lerner, *supra* note 32, at 1114.

35. Vinter & Others v. United Kingdom, App. Nos. 66069/09, 130/10, 3896/10 Eur. Ct. H.R. para. 112, HUDOC (July 9, 2013), <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-122664>.

36. *Id.* para. 119.

37. *Id.* paras. 113-115.

38. *Id.* para. 122.

39. *Id.*

emergency.⁴⁰ Consequently, when a signatory state considers extraditing a suspect to a foreign jurisdiction for criminal prosecution, it must first fulfill its obligation under the ECHR and evaluate whether extradition would subject a prisoner to inhuman treatment.⁴¹ A member state's duty to investigate is not abrogated by the fact that the nation requesting extradition is not also a signatory of the ECHR.⁴² The court has taken note of the international threat that terrorist organizations pose to the protection of human rights and acknowledged a state's interest in investigating criminal activity beyond its own territory for the sake of public safety.⁴³ While endorsing extradition's aim of criminal deterrence, the court has recognized the international community's shared interest in preventing fugitive offenders from evading justice, especially in a modern era where terrorist organizations increasingly recruit members and strategize attacks throughout the world.⁴⁴ Nonetheless, the court has affirmed that a member state must refuse extradition when the requesting country's sentencing standards indicate that a whole-life prisoner would receive treatment inconsistent with article 3 protections.⁴⁵

While acknowledging rehabilitation as a fundamental aim of incarceration, the court in *Harkins & Edwards v. United Kingdom* recently determined that extradition was not permissible when the requesting country sought to impose a whole-life sentence and failed to provide sentence review procedures that would gauge a prisoner's progress during incarceration.⁴⁶ Even in the absence of gross disproportionality, a discretionary lifetime sentence without the benefit of parole would violate article 3 if the sentence proved irreducible in law and in fact.⁴⁷ In *Harkins*, the court nonetheless upheld the extradition of two suspects indicted for felony murders to the United States because the applicants failed to demonstrate the likelihood that U.S. authorities would

40. See, e.g., *Chahal v. United Kingdom*, App. No. 22414/93 Eur. Ct. H.R. para. 79, HUDOC (Nov. 15, 1996), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58004>; *Selmouni v. France*, App. No. 25803/94 Eur. Ct. H.R. para. 95, HUDOC (July 28, 1999), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58287>.

41. *Soering v. United Kingdom*, App. No. 14038/88 Eur. Ct. H.R. para. 88, HUDOC (July 7, 1989), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57619>.

42. *Saadi v. Italy*, App. No. 37201/06 Eur. Ct. H.R. para. 138, HUDOC (Feb. 28, 2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85276>.

43. *Othman (Abu Qatada) v. United Kingdom*, App. No. 8139/09 Eur. Ct. H.R. para. 183, HUDOC (May 9, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108629>.

44. *Soering*, App. No. 14038/88, para. 89.

45. *Id.* para. 91.

46. *Harkins & Edwards v. United Kingdom*, App. Nos. 9146/07, 32650/07 Eur. Ct. H.R. para. 133, HUDOC (July 9, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108599>.

47. *Id.* para. 138.

in fact refuse a parole review or fail to consider their clemency applications.⁴⁸ Similarly, the court recently upheld the extradition of suspected al-Qaeda operatives to the United States on the grounds that federal judges may exercise sentencing discretion, that prisoners could reduce a whole-life sentence by aiding law enforcement investigation, and that former U.S. presidents have in fact issued pardons to commute the sentences of life prisoners.⁴⁹

Conversely, in July 2013, the court adopted a more narrow interpretation of an irreducible life sentence under article 3 when it held that these whole-life sentences constituted inhuman treatment because prisoners could only obtain a pardon from the Secretary of State on the grounds of terminal illness or mental incapacity.⁵⁰ In *Vinter & Others v. United Kingdom*, the court criticized the U.K. system where in addition to terminal illness or incapacity, whole-life prisoners also had to clearly demonstrate:

[T]he risk of re-offending is minimal, further imprisonment would reduce the prisoner's life expectancy, there [were] adequate arrangements for the prisoner's care and treatment outside prison, and early release [would] bring some significant benefit to the prisoner or his or her family.⁵¹

The court in *Vinter* characterized these conditions as “highly restrictive” and reasoned that a lifetime prisoner's prospect for early release must entail a coherent system of parole review based on foreseeable criteria in order to satisfy article 3 protections.⁵² Accordingly, the court held that these whole-life sentences were de jure and de facto irreducible because procedures were not in place at the commencement of sentencing to evaluate a prisoner's subsequent progress towards rehabilitation.⁵³

III. THE COURT'S DECISION

In the noted case, the ECtHR relied on *Vinter* to conclude that Belgium violated its obligation to prevent inhuman treatment under the ECHR when it extradited Nizar Trabelsi to the United States to face

48. *Id.* paras. 6, 23, 142.

49. Babar Ahmad & Others v. United Kingdom, App. Nos. 24027/07, 11949/08, 36742/08, 669911/09, 67354/09 Eur. Ct. H.R. paras. 243-244, HUDOC (Sept. 24, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110267>.

50. *Vinter & Others v. United Kingdom*, App. Nos. 66069/09, 130/10, 3896/10 Eur. Ct. H.R. para. 126, HUDOC (July 9, 2013), <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-122664>.

51. *Id.*

52. *Id.* para. 127.

53. *Id.* para. 130.

charges of aiding and abetting al-Qaeda operations.⁵⁴ The court first noted that signatory states have an affirmative obligation to investigate and determine the likelihood that extradition exposes someone to a whole-life sentence that proves irreducible in law and in fact.⁵⁵ The court affirmed that whole-life sentences do not violate the ECHR per se; however, it recognized that protection against inhuman treatment required more than a guarantee that life imprisonment is merely a discretionary sentence under the indictment.⁵⁶ The court reasoned that a requesting country's criminal justice system must provide a coherent mechanism for postconviction review such that it affords long-term prisoners with a genuine hope of early release.⁵⁷ Rejecting Belgium's contention that it could not reliably speculate as to whether U.S. authorities would in fact review the sentences of prisoners convicted of terrorism for early release, the court determined it would review the risks posed by extradition ex ante in accordance with article 3's preventative aim.⁵⁸ Moreover, the court dismissed the government's claim that discretionary sentencing guidelines and the prospect of executive clemency provided a coherent system of parole review.⁵⁹ Finally, the court relied on *Vinter* to find that the diplomatic assurances made by the Department of Justice failed to establish a review mechanism that evaluated a prisoner's progress towards rehabilitation to gauge whether continued detention constituted inhuman punishment.⁶⁰ Ultimately, the ECtHR held that Belgium's extradition of Trabelsi to the United States violated article 3 of the ECHR.⁶¹

The court began its discussion of inhuman treatment by affirming the obligation of signatory states to investigate whether extradition risks exposing the suspect to a potentially irreducible life sentence upon conviction.⁶² Acknowledging every nation's sovereign right to determine and implement its own criminal justice system, the court confirmed that its supervisory role involved evaluating whether that penal system provided lifetime prisoners with a reliable prospect of early release.⁶³ Noting that terrorist organizations in particular pose a grave international

54. *Trabelsi v. Belgium*, App. No. 140/10 Eur. Ct. H.R. paras. 138-139, HUDOC (Sept. 4, 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146372>.

55. *Id.* para. 116.

56. *Id.* para. 112.

57. *Id.* paras. 125-127.

58. *Id.* para. 130.

59. *Id.* para. 137.

60. *Id.* paras. 97, 133.

61. *Id.* para. 139.

62. *Id.* para. 116.

63. *Id.*

threat to public safety and human rights, the court relied on its reasoning in *Soering v. United Kingdom* to reiterate that the benefits of criminal deterrence must be weighed against the risks of inhuman incarceration notwithstanding a suspect's alleged crimes.⁶⁴ The court found that Belgium's obligation to conduct such an investigation was in no way mitigated by the fact that the United States was not also a signatory of the ECHR.⁶⁵

The court then turned to the indictment issued by the United States District Court for the District of Columbia and assurances made by the Department of Justice to determine that even a discretionary whole-life sentence posed a risk of inhuman treatment in Trabelsi's case.⁶⁶ Noting that the sentencing range under the U.S. Criminal Code was proportionate to the serious charges levied against Trabelsi, the court nonetheless found that this did not alleviate Belgium's duty to investigate the adequacy of review standards and procedures.⁶⁷ The court held that assurances made by the Department of Justice—namely that Trabelsi's case would be adjudicated in a civilian court and subject to a discretionary prison sentence—did not in itself guarantee protection against inhuman treatment under the ECHR.⁶⁸ Even in the absence of gross disproportionality, the court relied on its rationale in *Kafkaris v. Cyprus* to find that a state's penal system must afford the possibility of postconviction sentence review with a view towards remission, commutation, or conditional parole in order to uphold article 3 protections.⁶⁹ Similarly, although U.S. law afforded Trabelsi the possibility of reducing a whole-life sentence by aiding law enforcement investigation of al-Qaeda activity, the court determined that this guarantee failed to provide a consistent prospect of early release.⁷⁰ To safeguard against the substantial risk of inhuman punishment posed by extradition, the court held that a requesting country's penal system must have preestablished parole review procedures that use objective criteria to determine whether continued punishment was necessary to protect public safety.⁷¹

Under this procedure-based analysis, the court rejected Belgium's contention that the mere availability of executive clemency provided

64. *Id.* para. 117.

65. *Id.* para. 116.

66. *Id.* paras. 125-127.

67. *Id.* para. 127.

68. *Id.* paras. 135-136.

69. *Id.* para. 132.

70. *Id.* para. 137.

71. *Id.*

sufficient postconviction relief as was held in *Kafkaris*.⁷² The Belgian Minister of Justice affirmed Trabelsi's extradition on the grounds that the U.S. Constitution provides for presidential pardon authority that has in fact been exercised, albeit sparingly, for prisoners convicted of crimes involving national security.⁷³ However, the court departed from its rationale in *Harkins*—that a prospective determination of whether U.S. authorities would in fact avail themselves of sentence review mechanisms may involve too much speculation—to hold that it could evaluate parole review mechanisms prior to conviction and determine whether these procedures offered any genuine prospect of early release.⁷⁴ The court reasoned that article 3's preventative framework imposed an affirmative obligation on member states as well as the court to prospectively gauge the risk of inhuman treatment.⁷⁵ Rather than affirming extradition on the grounds that U.S. law provided postconviction sentencing review as it did in *Harkins*, the court scrutinized the substantive and procedural elements of these mechanisms to determine if they offered a sufficient prospect of early release.⁷⁶

Finally, the court concluded that assurances made by U.S. authorities failed to provide mechanisms for postconviction relief that reliably evaluated a prisoner's progress towards rehabilitation or assessed whether continued incarceration was no longer justified.⁷⁷ The court relied on its recent holding in *Vinter* to affirm that a whole-life sentence would only be considered reducible if subjected to postconviction review that evaluated a prisoner's progress towards rehabilitation on the basis of objective and preestablished criteria.⁷⁸ The court determined that prisoners were entitled to know—at the outset of sentencing—the standards and procedures domestic authorities would avail themselves of when evaluating their rehabilitation.⁷⁹ Rejecting Belgium's contention that executive clemency and discretionary sentencing under U.S. law provided sufficient review, the court found that these procedures unduly relied on the discretion of federal officials and failed to guarantee an objective standard.⁸⁰ Because of these insufficient institutional

72. *Id.*

73. *Id.* para. 28. In 1999, President Bill Clinton offered clemency to sixteen convicted militants of the Puerto Rican paramilitary organization FALN, which was responsible for numerous bombings on U.S. targets in the 1970s. *Id.* para. 27.

74. *Id.* para. 130.

75. *Id.*

76. *Id.* para. 136.

77. *Id.* para. 137.

78. *Id.* para. 138.

79. *Id.*

80. *Id.* para. 137.

protections, the court determined that extradition posed a significant risk that Trabelsi would be exposed to an irreducible life sentence that did not offer a reliable prospect of early release.⁸¹ Accordingly, the court held that Belgium's extradition of Trabelsi to the United States violated article 3 of the ECHR by exposing him to a substantial risk of inhuman punishment.⁸²

IV. ANALYSIS

In the noted case, the court narrowed its interpretation of a "prospect of release" when analyzing whether the U.S. penal system guaranteed adequate postconviction review for whole-life prisoners such that the sentence was not irreducible in law and in fact.⁸³ Article 3 of the ECHR prohibits signatory states from sanctioning inhuman punishment and obligates members to assess the prospect of such treatment in a foreign state.⁸⁴ The court broadly construed article 3 in this case as granting it authority to scrutinize the actual substance of sentence review procedures under U.S. law. By expanding extradition barriers, the court set a new standard for diplomatic relations that could hinder law enforcement's efforts to curtail international terrorism. First, such a broad policy in favor of rehabilitation will unduly burden the extradition process when it requires states to speculate whether foreign officials will conduct postconviction sentencing review before a suspect has even been convicted of a crime, much less sentenced. Second, the court engaged in advocacy when addressing the substantive elements of a nonmember's penal system and departed from its demonstrated support for state sovereignty. Finally, vague scrutiny of a state's postconviction procedures failed to clarify the meaning of inhuman punishment while hindering law enforcement's efforts to deter criminal activity beyond a nation's territory.

An extradition decision that turns on the likelihood that a requesting country would in fact conduct postconviction sentence review in the event that a suspect was ultimately subjected to a whole-life sentence involves too much speculation. The court's holding adheres to the larger policy concern promulgated in *Vinter*, which advocates the rehabilitative

81. *Id.* para. 138.

82. *Id.* para. 139.

83. *Id.* para. 137.

84. *See, e.g.,* *Chahal v. United Kingdom*, App. No. 22414/93 Eur. Ct. H.R. para. 80, HUDOC (Nov. 15, 1996), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58004>; *Selmouni v. France*, App. No. 25803/94 Eur. Ct. H.R. para. 95, HUDOC (July 28, 1999), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58287>.

aspects of incarceration and the necessity of sentence review procedures that evaluate a prisoner's progress against preestablished objective criteria.⁸⁵ However, the *Vinter* decision addressed applicants already serving mandatory whole-life sentences for murder convictions, and early release was only available under U.K. law on compassionate grounds, which in practice was limited to cases of terminal illness or mental incapacity.⁸⁶ Here, Trabelsi awaits prosecution in the United States where he might be subjected to a discretionary life sentence that could be reduced by good behavior or commuted through presidential clemency.⁸⁷ Unlike the narrow prerequisites for clemency in *Vinter* that in fact only offered a prospect of release in cases of terminal illness or mental incapacity, Article II of the Constitution grants broad presidential pardoning discretion that has in fact been exercised to commute sentences for serious offenses implicating national security.⁸⁸ Moreover, unlike the U.K. penal system, the Department of Justice has established procedures and regulations governing sentence review for executive clemency that provide convicted prisoners with an unlimited number of applications regardless of the nature or duration of their sentence.⁸⁹ The court in this case failed to explain how these review procedures did not assess a prisoner's progress towards rehabilitation under the *Vinter* standard, finding only that a prospect of early release would in fact be doubtful for Trabelsi given the allegations of terrorism levied against him.⁹⁰

The court's imposition of procedural requirements on nonmember states regarding their own sentence review standards runs counter to its well-established position of respecting a state's sovereign right to determine its own criminal justice system. When initially considering whether whole-life sentences deprived prisoners of all hope of early release, the court held that "where national law afford[ed] the *possibility* of review of a life sentence with a view to its commutation, remission, termination, or the conditional release of the prisoner," a lifetime

85. *Trabelsi*, App. No. 140/10, paras. 137-138.

86. *Vinter & Others v. United Kingdom*, App. Nos. 66069/09, 130/10, 3896/10 Eur. Ct. H.R. para. 126, HUDOC (July 9, 2013), <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-122664>.

87. *Trabelsi*, App. No. 140/10, para. 27.

88. *Id.*

89. *Id.* The Office of the Pardon Attorney reviews all applications for executive clemency and prepares non-binding recommendations for the President that account for circumstances of the offense as well as the applicant's character. *Id.* para. 109.

90. *Id.* paras. 127, 138.

sentence was not considered irreducible under article 3.⁹¹ In *Kafkaris*, although a whole-life prisoner could only obtain early release under Cyprus law through executive clemency, the court nonetheless held that this review was sufficient because other prisoners had in fact received clemency previously.⁹² Rejecting the applicant's contention that the lack of a parole board review rendered his lifetime sentence irreducible in law, the court reiterated that matters relating to early release procedures, "including the manner of their implementation," fall within a member state's sovereign authority.⁹³ Here, even if Trabelsi is convicted of a whole-life prison sentence, the U.S. Constitution grants executive clemency that the court affirmed in *Kafkaris* as offering a sufficient prospect of release.⁹⁴ Moreover, U.S. presidents have in fact pardoned prisoners convicted of violent offenses relating to national security.⁹⁵

Conversely, the court has previously expressed concern regarding the role of a government's executive branch in exercising independent discretion when evaluating the release of prisoners convicted of whole-life sentences.⁹⁶ For instance in *Stafford v. United Kingdom*, the court found that the Secretary of State's veto over parole board recommendations regarding whole-life prisoners was "difficult to reconcile with the notion of separation of powers between the executive and the judiciary."⁹⁷ The court reasoned that such independent oversight created a risk of abuse when executive officials could overrule a procedure-based review at their own discretion.⁹⁸

Nonetheless, the court recently affirmed that the extradition of suspects to the United States to face charges of providing material support to al-Qaeda was not an article 3 violation, even though these applicants were also possibly facing discretionary life sentences.⁹⁹ In *Babar Ahmed v. United Kingdom*, although the court doubted whether any mitigating circumstances would lead a U.S. court to impose a

91. *Kafkaris v. Cyprus*, App. No. 21906/04 Eur. Ct. H.R. para. 98, HUDOC (Feb. 12, 2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85019> (emphasis added).

92. *Id.* para. 103. Article 53 of the Cyprus Constitution grants presidential power to "remit, suspend, or commute" sentences issued by a court in the Republic at any time. *Id.* para. 26 (quoting CYPUS CONST. pt. 3, art. 53).

93. *Id.* paras. 103-104.

94. *Trabelsi*, App. No. 140/10, para. 137.

95. *Id.* para. 27.

96. *Stafford v. United Kingdom*, App. No. 46295/99 Eur. Ct. H.R. para. 78, HUDOC (May 28, 2002), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60486>.

97. *Id.*

98. *Id.* para. 82.

99. *Babar Ahmad & Others v. United Kingdom*, App. Nos. 24027/07, 11949/08, 36742/08, 669911/09, 67354/09 Eur. Ct. H.R. paras. 243-244, HUDOC (Sept. 24, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110267>.

sentence less than life imprisonment, it reasoned that the applicants failed to demonstrate why continued incarceration in the United States was not justified to promote public safety.¹⁰⁰ Similarly, the court also recently affirmed the extradition of suspects to the United States for criminal prosecution on felony murder charges in *Harkins*, finding that available postconviction relief offered a sufficient prospect of early release for whole-life prisoners.¹⁰¹ In *Harkins*, the court held that the applicants failed to demonstrate the likelihood that U.S. authorities would in fact refuse to review their sentences if convicted.¹⁰²

In this case, the court failed to clearly elaborate why executive clemency or discretionary sentencing guidelines under U.S. law no longer sufficed to provide a whole-life prisoner with a prospect of early release, finding only that such procedures did not account for a prisoner's progress towards rehabilitation in light of the justifications for continued punishment.¹⁰³ Just as executive clemency in *Kafkaris* provided a prospect of release under Cyprus law that had in fact been exercised to commute lifetime sentences, the Constitution provides Trabelsi with an unlimited opportunity to apply for a presidential pardon if convicted.¹⁰⁴ Unlike the restrictive criteria rejected by the court in *Vinter* that reserved clemency exclusively for cases of terminal illness and mental incapacity, U.S. law grants the executive broad pardon authority that has in fact commuted sentences of whole-life prisoners convicted of crimes relating to national security.¹⁰⁵ Moreover, Trabelsi failed to demonstrate, as in *Harkins*, that U.S. authorities would refuse to provide postconviction relief in his case merely because he faced a felony indictment. Furthermore, Trabelsi's contention that continued imprisonment in the United States no longer served a legitimate penal function because he already served time for these charges in Belgium is without merit according to the court's reasoning in *Babar*.

The court's heightened scrutiny of a state's available procedures for postconviction relief hinders international cooperation in deterring criminal activity through the extradition process. When a bilateral extradition agreement between nations approves a transfer, the court's

100. *Id.* para. 244.

101. *Harkins & Edwards v. United Kingdom*, App. Nos. 9146/07, 32650/07 Eur. Ct. H.R. para. 142, HUDOC (July 9, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108599>.

102. *Id.*

103. *Trabelsi v. Belgium*, App. No. 140/10 Eur. Ct. H.R. para. 137, HUDOC (Sept. 4, 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146372>.

104. *Id.* para. 27.

105. *Id.*

retroactive invalidation on vague humanitarian grounds further complicates an already difficult process while failing to provide states with specific guidelines as to how they should evaluate another state's review procedures. Judicially imposed restrictions on extradition hinder the efforts of member and nonmember states alike in pursuing criminal enterprises that operate globally and threaten the national security of countries that must now refuse extradition in light of this new standard. Because article 5 of the ECHR only permits detention of illegal aliens during pending deportation proceedings, this holding creates additional problems for states that want to deport suspected terrorists but cannot do so under article 3 if inhuman treatment will likely result.¹⁰⁶ Consequently, when the prospect of deportation no longer exists, continued detention becomes excessive under article 5, and a state may be compelled to release a suspect without prosecution in any jurisdiction.¹⁰⁷ Moreover, this dynamic can create perverse incentives for signatory states to refrain from detaining suspects who cannot be extradited because they do not wish to bear the incarceration expense or the burden of parole supervision.

V. CONCLUSION

The court's expansion of article 3 in the noted case makes it more difficult for states to establish a clear and consistent test in determining whether a prospect of early release exists for whole-life prisoners that reflects a genuine respect for human dignity. A broad policy in favor of rehabilitation, which compels states to speculate as to whether foreign authorities will avail themselves of their own sentence review mechanisms before an actual conviction, burdens an already complicated extradition process without a definitive benefit. While the court reasoned that respect for human dignity demanded that a prisoner's progress towards rehabilitation must be gauged against objective preestablished criteria, it failed to elaborate why executive clemency under U.S. law was no longer sufficient under this standard. By imposing procedural requirements on nonmember states regarding their own sentence review standards, the court improperly adjudicated issues beyond its purview in a manner that infiltrated traditional boundaries of state sovereignty. Additional obstacles in extradition procedure will not only hinder international efforts towards criminal deterrence but also

106. Vijay Padmanabhan, *Introductory Note to Human Rights Committee and the European Court of Human Rights—Treatment of Terrorism Suspects*, 48 I.L.M. 567, 569 (2009).

107. *Id.*

threaten the public safety of signatory states who can no longer deport or prosecute suspected terrorists. In a world where terrorist groups increasingly recruit members and execute attacks throughout the globe, such extradition restrictions can pose substantial dangers both at home and abroad.

Stephen Gieger*

* © 2015 Stephen Gieger. J.D. candidate 2016, Tulane University Law School; B.A. 2013, University of Virginia. I would like to thank my family, my friends, and the members of the Tulane Journal of International and Comparative Law for their guidance and support.