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

GRAND CHAMBER

CASE OF KAFKARIS v. CYPRUS

(Application no. 21906/04)

JUDGMENT

STRASBOURG

12 February 2008

In the case of Kafkaris v. Cyprus,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President*,
Nicolas Bratza,
Boštjan M. Zupančič,
Peer Lorenzen,
Françoise Tulkens,
Loukis Loucaides,
Ireneu Cabral Barreto,
Nina Vajić,
Snejana Botoucharova,
Anatoly Kovler,
Stanislav Pavlovschi,
Javier Borrego Borrego,
Elisabet Fura-Sandström,
Dean Spielmann,
Sverre Erik Jebens,
Danutė Jočienė,
Ján Šikuta, *judges*,

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 24 January, 27 June and 5 December 2007,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 21906/04) against the Republic of Cyprus lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Cypriot national, Mr Panayiotis Agapiou Panayi, alias Kafkaris, ("the applicant"), on 3 June 2004.

2. The applicant, who had been granted legal aid, was represented by Mr A. Demetriades, a lawyer practising in Nicosia. The Cypriot Government ("the Government") were represented by their Agent, Mr P. Clerides, Attorney-General of the Republic of Cyprus.

3. The applicant alleged that Articles 3, 5, 7 and 14 of the Convention had been violated as a result of his life sentence and continuing detention.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 2 November 2004 the President of that Section decided to give the application priority (Rule 41) and on

7 January 2005 to give notice of the application to the respondent Government (Rule 54 § 2 (b)). On 11 April 2006 the application was declared admissible by a Chamber of that Section composed of Christos Rozakis, Loukis Loucaides, Nina Vajić, Anatoly Kovler, Khanlar Hajiyev, Dean Spielmann and Sverre Erik Jebens, judges, and Søren Nielsen, Section Registrar. On 31 August 2006 the Chamber relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. On 19 January 2007 Luzius Wildhaber's term as President of the Court came to an end. Jean-Paul Costa succeeded him in that capacity and took over the presidency of the Grand Chamber in this case (Rule 9 § 2).

6. The applicant and the Government each filed a memorial on the merits. The applicant also submitted his claims for just satisfaction. The Government made their comments on that matter.

7. On 3 January 2007 the applicant submitted additional documents concerning the case. On 23 January 2007 the Government submitted comments on these documents.

8. A hearing on the merits took place in public in the Human Rights Building, Strasbourg, on 24 January 2007 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr P. CLERIDES, Attorney-General of the Republic of Cyprus, *Agent*,
Mr B. EMMERSON QC,
Mr S. GRODZINSKI, Barrister-at-law,
Ms M. CLERIDES-TSIAPPAS, Senior Counsel of the Republic, *Counsel*;

(b) *for the applicant*

Mr A. DEMETRIADES, Barrister-at-law, *Counsel*;
Ms J. LOIZIDOU, Barrister-at-law,
Ms S. BARTOLINI, *Advisers*.

The Court heard addresses by Mr Demetriades and Mr Emmerson and the answers of the parties' representatives to questions put by judges. The Government requested, and were granted, permission to complete their reply in writing. Furthermore, the applicant requested, and was granted, permission to reply to the Government's comments of 23 January 2007.

9. The replies of the parties were received on 6 February 2007. In his reply the applicant submitted additional claims for satisfaction. The Government submitted their comments on that matter on 21 February 2007.

10. On 30 April 2007 the Government submitted additional information concerning new developments in the domestic law. On 15 May 2007 the applicant submitted comments in reply.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicant was born in 1946. He is currently serving a sentence of life imprisonment at the Nicosia Central Prison.

A. Background to the case

12. On 9 March 1989 the applicant was found guilty by the Limassol Assize Court on three counts of premeditated murder committed on 10 July 1987, under, *inter alia*, section 203(1) and (2) of the Criminal Code (Cap. 154). On 10 March 1989 the Assize Court sentenced him to mandatory life imprisonment in respect of each count. The applicant had planted an explosive device under a car and detonated it, causing the death of Mr P. Michael and his two children, aged 11 and 13. The applicant had been promised the sum of 10,000 Cypriot pounds by someone who he has not identified for the murder of Mr P. Michael.

13. In its judgment passing sentence on the applicant, the Limassol Assize Court observed that the prosecution had invited the court to examine the meaning of the term "life imprisonment" in the Criminal Code and, in particular, to clarify whether it entailed imprisonment of the convicted person for the rest of his life or just for a period of twenty years as provided by the Prison (General) Regulations of 1981 and the Prison (General) (Amending) Regulations of 1987 (hereinafter "the Regulations"), adopted under section 4 of the Prison Discipline Law (Cap. 286). If the court found that the latter was applicable, then the issue of whether the sentences should be imposed consecutively or concurrently would arise and the prosecution would propose consecutive sentences.

14. The Assize Court relied primarily on the findings of the Nicosia Assize Court in 1988 in the case of *The Republic of Cyprus v. Andreas Costa Aristodemou, alias Yiouroukkis* (judgment of 5 February 1988, case no. 31175/87) and accordingly stated that it was not competent to examine the validity of the Regulations or take into account any possible repercussions they could have on the sentence. The Assize Court held that the term "life imprisonment" used in the Criminal Code meant imprisonment for the remainder of the life of the convicted person. In view

of this, the court did not consider it necessary to examine whether the sentences it imposed would run concurrently or consecutively.

15. In particular, in its judgment the Assize Court stated the following:

> “The Law on the basis of which the accused has been found guilty on three counts of premeditated murder, provides that:
>
> > ‘Whosoever shall be convicted of premeditated murder shall be liable to imprisonment for life’.
>
> It follows, therefore, that for the offence in question life imprisonment is imposed by the court as a mandatory sentence.
>
> Mr Kyprianou, on behalf of the Prosecution, has invited the court to examine the meaning of life imprisonment and decide whether it means imprisonment of the convicted person for the rest of his life or whether it means, as provided by the Prison (General) Regulations of 1981 and the Prison (General) (Amending) Regulations of 1987 (hereinafter “the Regulations”) as provided by Regulation 2 of the Prison (General) Regulations of 1981 and the Prison (General) (Amending) Regulations of 1987 (hereinafter “the Regulations”), adopted under section 4 of the Prison Discipline Law (Cap. 286), imprisonment for a period of twenty years. Mr Kyprianou has suggested that in the event that the court concludes that life imprisonment is interpreted as being for twenty years, an interpretation which, if we understood him correctly, he claimed as the correct one, then the issue as to whether the sentences should be imposed consecutively or concurrently would arise. It was, finally, his suggestion, which was in fact the purpose for which he referred to this matter, that, if this was the outcome, it would be correct in the present case, taking into account the special circumstances of the commission of the offences, that the sentences should be served consecutively.
>
> The same issue, in substance, was put before the Nicosia Assize Court in case no. 31175/87 between *The Republic of Cyprus v. Andreas Costa Aristodemou, alias Yiouroukkis*. In that case the Assize Court, in its detailed judgment, in which reference is made to the general principles governing the issue and also to the jurisprudence, concluded that the meaning of life imprisonment lies in the clear meaning imparted by the words, and that the Assize Court was not competent to examine the validity of any regulations or to take into account any possible repercussions they could have on the sentence. We completely agree with this judgment to which we refer. Concerning the validity of the Regulations, the Attorney-General of the Republic could probably have looked for other mechanisms for deciding the matter at the time when the competent authorities attempted to implement the specific regulation. We do not make mention here of the constitutional right of the President to grant pardon. With regard to the court’s observation that the repercussions of such regulations, if it is assumed of course that they are valid, are not taken into account, we refer in addition to the decision in *Anthony Maguire Frederick George Charles Enos* 40 Cr. App. R. p. 92, *Martin Derek Turner* 51 Cr. App. R. p. 72 and *R. v. Black* (1971) Crim. L.R. 109.
>
> We consider that imprisonment for life means imprisonment for the remainder of the convicted person’s life. It is therefore pointless to consider whether the sentences will run concurrently or whether they will be served consecutively.”

16. When the applicant was admitted to prison to serve his sentence, he was given written notice by the prison authorities that the date set for his release was 16 July 2002. In particular, he was given an F5 form titled “Personal File of Convict”, “I.D. no. 7176”. On the form, under the heading “Sentence”, it was marked “Life” and then “Twenty Years”; under the heading “Period” it was marked “From 17 July 1987 to 16 July 2007” and under the heading “Expiry” it was noted “Ordinary Remission 16 July 2002”. The applicant’s release was conditional on his good conduct and industry during detention. Following the commission of a disciplinary offence on 6 November 1989, his release was postponed to 2 November 2002.

17. The applicant appealed against his conviction.

18. On 21 May 1990 the Supreme Court dismissed the appeal upholding his conviction.

19. On 9 October 1992 in the case of *Hadjisavvas v. the Republic of Cyprus* (judgment of 8 October 1992, (1992) 1 A.A.D. 1134), the Supreme Court, in the context of a habeas corpus application lodged by a life prisoner who was not released on the date given by the prison authorities, declared the Regulations unconstitutional and *ultra vires* (see paragraphs 50-51 below).

20. On 3 May 1996 the Prison Law of 1996 (Law no. 62(I)/96) was enacted, repealing and replacing the Prison Discipline Law.

21. By a letter of 16 March 1998, the applicant applied, via the Director of Prisons, to the President of the Republic at the relevant time for pardon or the suspension of the remainder of his sentence in order to help care for his wife who was suffering from leukaemia.

22. By a letter of 30 April 1998, the Attorney-General at the material time refused his request. In particular he informed the applicant that, following an examination of his application, he was of the opinion that a recommendation to the President to suspend or commute his sentence under Article 53 § 4 of the Constitution was not justified.

23. The applicant was not released on 2 November 2002.

B. Habeas corpus proceedings before the Supreme Court

1. *First-instance proceedings*

24. On 8 January 2004 the applicant submitted a habeas corpus application to the Supreme Court (first-instance jurisdiction) challenging the lawfulness of his detention. In this context he relied upon Article 3, Article 5 § 4 and Article 7 of the Convention. The Supreme Court, after considering the above-mentioned provisions, dismissed the application on 17 February 2004.

In his judgment Kallis J stated, *inter alia*, the following:

"... What is of importance in the present case is the principle set out in the case of *Hogben* and not the differences in the details of the facts. The principle then that has been laid down in the case of *Hogben* is that Article 7 applies only to the sentence that is imposed and not to the manner of serving the sentence. Therefore Article 7 does not prohibit a retrospective change in the law or in practice concerning release or conditional release from prison of a prisoner.

I am therefore of the view that the principle set out in *Hogben* can be applied in the present case. Everything that the learned counsel of the applicant has pleaded has to do with the practice of release from prison. In the instant case the Assize Court imposed a sentence of life imprisonment on the applicant and explained to him at the same time that life imprisonment meant imprisonment for the remainder of his life. What the prison authorities then did, with the F5 form, constitutes an action concerning the execution of the sentence. After the case of *Hadjisavvas* the Regulations on the basis of which the prison authorities gave the applicant the F5 form, have ceased to apply, with the result that the sentence of life imprisonment imposed on the applicant by the Assize Court is applicable. What happened was a change in the legal situation concerning the time of the applicant's release. As in the *Hogben* case, Article 7 § 1 of the Convention is not applicable.

...

I endorse the principle set out in *Hogben*. I consider that the applicant cannot derive a right to judicial review on the basis of Article 5 § 4 of the Convention because of the alleged change in the date of his release from prison which does not change the legal basis for his detention. It should be emphasised that his detention is founded on the sentence of life imprisonment imposed on him by the Assize Court and this had been explained to him as 'imprisonment for the remainder of his life'. It follows that the relevant suggestion by Mr Demetriades does not stand and is dismissed.

On this occasion, I should add that the decision of the Commission on the issue of interpretation of Article 5 § 4 of the Convention is in line with the jurisprudence of the European Court of Human Rights (see *De Wilde, Ooms and Versyp v. Belgium* ('*Vagrancy' cases*) 18 June 1971, Series A no. 12) ...

The fact that *Hogben* is a decision of the Commission does not render it less persuasive. It constitutes a decision of a specialised organ with vast experience in interpreting the Convention. It therefore constitutes an authority of great persuasiveness. I am satisfied about the correctness of the Commission's decision in *Hogben*, which I have endorsed.

It was further the suggestion of Mr Demetriades that 'this kind of sentence imposed on the applicant without the possibility of examination by a Parole Board does not conform with Article 3 of the Convention'.

...

I endorse the above approach [in *Hogben*]. Its essence is that the change in release policy does not constitute a violation of Article 3 of the Convention. The existence or not of a Parole Board does not form part of the *ratio* of the decision. This answers the suggestion of Mr Demetriades concerning the absence of a Parole Board in Cyprus.

Consequently, his suggestion based on Article 3 of the Convention does not stand and is dismissed.

...

Finally, I must note that the applicant has sought his release from prison through an order of habeas corpus. As stated, however, in the case of *Doros Georgiades* (Civil Appeal no. 11355, 3 October 2002), adopting the relevant position of English jurisprudence (see *Halsbury's Laws of England*, 4th edition, Volume 11, §§ 1472 and 1473):

'In general the writ of habeas corpus will not be granted to persons convicted or in execution under legal process, including persons in execution of a legal sentence after conviction on indictment. The writ of habeas corpus will not be granted where the effect of it would be to review the judgment of one of the superior courts which might have been reviewed on appeal or to question the decision of an inferior court or tribunal on a matter within its jurisdiction; or where it would falsify the record of a court which shows jurisdiction on the face of it.'

Consequently, the granting of a habeas corpus order in the present case would have been tantamount to reviewing the sentence that had been imposed by the Assize Court, whereas this could have been done in the context of an appeal."

2. Appeal proceedings

25. On 26 February 2004 the applicant lodged an appeal with the Supreme Court (appeal jurisdiction).

26. In his grounds of appeal, the applicant challenged the interpretation of the term "life imprisonment" made by the Assize Court when sentencing him in 1989 in view of the prison regulations applicable at the time and the notice given to the applicant by the prison authorities upon his admission to prison. He argued that the fact that he had not challenged his sentence following conviction could not be interpreted as an acceptance of the Assize Court's interpretation of the term "life imprisonment." He relied upon, *inter alia*, Article 3, Article 5 § 4 and Articles 7 and 14 of the Convention in relation to the lawfulness of his continuing detention.

27. As regards Article 3 of the Convention, the applicant claimed that the conduct of the authorities had been contrary to this provision. In particular, ground seven of his appeal read as follows:

"The existence on the date on which the sentence was imposed on the convicted person of the Regulation that defined a sentence of life imprisonment as being twenty years, the issuing of the F5 notice, the admission that the applicant would have been released on 2 November 2002 if the aforementioned Regulation had been applicable and the sudden annulment of all the above constituted inhuman and degrading treatment.

The Republic cannot behave in this way towards the applicant's life without any consequences for anyone apart from the applicant, who had to live with this uncertainty.

> The aforementioned change of twenty years' imprisonment to imprisonment for life following an error by the House of Representatives and/or the Attorney-General of the Republic and/or the President of the Republic constitutes, without any fault on the applicant's part, inhuman and degrading treatment which, on account of its uncertainty, violates Article 3 of the Convention.
>
> The aforementioned change from the imposed twenty years' imprisonment to a death sentence, which will take effect on an unknown date given the fact that there is no possibility of re-examining the matter, constitutes inhuman treatment contrary to Article 3 of the Constitution. Indeed, this becomes even more obvious, when one considers that the death penalty has already been abolished in Cyprus."

28. Concerning Article 5 § 4 of the Convention, the applicant in ground six of his appeal noted that he was not requesting judicial review of his sentence on account of a change in policy concerning the day of his release but the examination of the lawfulness of his detention, given that even the prison authorities had admitted that he should have been released on 2 November 2002. In this connection, he complained of the lack of a mechanism to examine the lawfulness of his detention.

29. When challenging the Supreme Court's (first instance) interpretation of Article 7 of the Convention, the applicant distinguished his case from that of *Hogben v. the United Kingdom* (no. 11653/85, Commission decision of 3 March 1986, Decisions and Reports 46, p. 231), in that *Hogben* related to the manner of application of the sentence in view of the change in the policy of the parole board whereas in his case the issue raised was that of a retrospective change of the law due to unconstitutionality and the increase of his sentence from twenty years to life. In this connection, he emphasised that in Cyprus there was no parole board unlike in England.

30. On 20 July 2004 the Supreme Court dismissed the appeal. It stated, *inter alia*:

> "The appellant is essentially raising one issue. And his learned counsel has acknowledged that judgment as to this [issue] will determine the conclusion ... We summarise the appellant's positions as set out in the grounds of appeal as explained.
>
> He does not invoke the Regulations as an autonomous ground for his release, especially since ... they are not applicable any more. Furthermore, he does not suggest or attempt a review of the Assize Court's judgment, as was wrongly perceived at first instance. We are not going against, as he explained, the Assize Court's judgment but the Republic as a whole. The Regulations were then applicable at that time and since the Assize Court had not annulled them for being unconstitutional, we must conclude that it considered them valid. And since the law does not provide a definition of the term 'life imprisonment', it was an element of the regulation of the sentence provided. As Mr Demetriades put it, the overall legal situation at the time of the imposition of the sentence, indicated that life imprisonment meant in essence twenty years' imprisonment. In addition, even if there was doubt, this had to be taken to the applicant's benefit. Hence, in view of this fact, there was no reason to lodge an appeal against the Assize Court's judgment especially since the applicant had been served with the F5 notice.

...

The suggestion of the appellant presumes that a judicial assessment of unconstitutionality, or, more precisely, that the Regulations are *ultra vires* in relation to the law on the basis of which they were issued, brings about legislative change of whatever form. However, as has been decided (see *Georgios Mavrogenis v. the House of Representatives and Others* (1996) 1 A.A.D. 315, at 341 and *Alekos N. Clerides v. the Republic of Cyprus*, 20 October 2000), judicial assessment necessarily adjudicates retrospectively on the law or regulation and, as the principle of separation of powers dictates, it does not entail a legislative development. It is a fact, however, that this question, both at first instance and before us, has not been touched upon from this point of view so as to raise the issue of Law no. 62(1)/96.

In any event the Assize Court imposed a sentence of life imprisonment on the appellant, expressly specifying that this meant imprisonment for the remainder of his life. This was the reason for which it did not examine the question of possible consecutiveness and the appellant's perception that it is inferred that the Assize Court recognised the Regulations as valid is wrong. The Assize Court essentially considered that the Regulations were not connected with the issue of the sentence envisaged for it did not consider that the then existent Regulations changed the fact that in accordance with the law, imprisonment for the remainder of the appellant's life was imposed.

Was this approach wrong? Did in reality the law, viewed as a whole, even in the light of the interpretation suggested by the appellant comparing Article 7 § 1 of the Convention with Article 12 § 1 of the Constitution, envisage imprisonment for only twenty years? We would say that the first-instance judgment was not wrong in finding that this situation corresponded to the one in the case of *Hogben*. The principle applied, namely that Article 7 § 1 of the Convention does not concern the enforcement of the sentence, which remains one of life imprisonment, is not in question. The Regulations were made on the basis of and for the purposes of the Prison (Discipline) Law, whereas it is the Criminal Code that determines the sentence, in this case mandatory life imprisonment and no other.

Nevertheless, and as Mr Demetriades also agreed, we are not reviewing the correctness of the judgment of the Assize Court. Such review does not fall within the [court's] jurisdiction in the context of a habeas corpus application.

...

The appellant is being detained on the basis of an Assize Court judgment after being sentenced to life imprisonment, determined as imprisonment for the remainder of his life. Thus, he is being detained on a lawful basis and his application for release was correctly rejected with the final observation that 'the granting of a habeas corpus order in the present case would have been tantamount to reviewing the sentence that had been imposed by the Assize Court, whereas this could have been done in the context of an appeal'."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Life sentences

31. Under Cypriot law, the offence of premeditated murder carries a mandatory sentence of life imprisonment.

32. Section 203(1) of the Criminal Code (Cap. 154) (as amended in 1962 by Law no. 3/62) provides as follows:

> "Any person who causes the premeditated death of another person by an unlawful act or omission is guilty of the crime of premeditated murder."

33. Section 203(2) of the Criminal Code (Cap. 154) (as amended in 1983 by Law no. 86/83) provides as follows:

> "Any person who shall be convicted of premeditated murder shall be liable to imprisonment for life."

Before its amendment by Law no. 86/83, the above section provided the mandatory sentence of the death penalty for the offence of premeditated murder.

34. Section 29 of the Criminal Code (as amended by Laws nos. 86/83 and 15(1)/99) provides that, with the exception of premeditated murder and the offence of treason (sections 36 and 37 of the Criminal Code), in cases where a person has been convicted of other serious offences that are punishable by a sentence of imprisonment for life, such as manslaughter (section 205(3) of the Criminal Code), or of any other period, the court trying the case has the discretion to impose a sentence of imprisonment for a shorter period or one of a pecuniary form instead which does not exceed the amount that court is empowered to impose.

35. In the case of *Politis v. the Republic of Cyprus* ((1987) 2 C.L.R. 116), the Supreme Court examined the constitutionality of sections 29 and 203 of the Criminal Code (at the time the death penalty was still in force), and held as follows:

> "The first objective of Article 7 § 2 [of the Constitution] is to sanction the death penalty for the limited class of grave crimes specified therein. The second, to vest competence in the legislature to fix such measure of punishment as mandatory in the exercise of its legislative power ... The expression 'a law may provide' in the second part of Article 7 § 2 imports discretion leaving it to the legislature to ordain the death penalty for premeditated murder as a matter of legislative policy. They are not bound but may do so if they deem it appropriate. By necessary implication they may ordain any other fixed measure of punishment including, no doubt, a sentence of life imprisonment. ... Obviously the constitutional legislation singled out the crimes listed in Article 7 § 2 for exceptional treatment in view of their gravity and their repercussions on the well-being of society. In the case of premeditated murder what marks the gravity of the offence is the element of premeditation that necessarily renders the crime particularly heinous. In agreement with the Assize Court, we rule that sections 29 and 203(2) of the Criminal Code are not unconstitutional and as such

make a sentence of life imprisonment obligatory upon conviction for premeditated murder."

B. Provisions concerning the release of prisoners

1. The Constitution

36. Article 53 of the Constitution provides as follows:

> "1. The President or the Vice-President of the Republic shall have the right to exercise the prerogative of mercy with regard to persons belonging to their respective Community who are condemned to death.
>
> 2. Where the person injured and the offender are members of different Communities such prerogative of mercy shall be exercised by agreement between the President and the Vice-President of the Republic; in the event of disagreement between the two the vote for clemency shall prevail.
>
> 3. In case the prerogative of mercy is exercised under paragraph 1 or 2 of this Article the death sentence shall be commuted to life imprisonment.
>
> 4. The President and the Vice-President of the Republic shall, on the unanimous recommendation of the Attorney-General and the Deputy Attorney-General of the Republic, remit, suspend, or commute any sentence passed by a court in the Republic in all other cases."

37. Following the events of 1963, in particular the withdrawal of Turkish-Cypriots from the government and the consequent occupation of northern Cyprus by Turkish troops, the decision to remit, suspend, or commute any sentence under Article 53 § 4 has to be taken by the President of the Republic with the concurrence of the Attorney-General of the Republic.

38. The Attorney-General may make recommendations or give advice to the President of the Republic concerning the early release of prisoners sentenced to life imprisonment. The President, however, is not bound by such advice or recommendations.

2. Prison Discipline Law (Cap. 286)

39. The relevant provisions of the Prison Discipline Law of 1879, as applicable at the time the Prison (General) Regulations of 1981 came into force (see paragraph 40 below), read as follows.

Section 4 – Regulations for prison discipline

> "The Governor in Council may make regulations for the proper custody and support of prisoners, for the nature and amount of labour to be performed by them, for the classification of prisoners according to their different sentences, for the punishment of offences committed by prisoners, and for the maintenance of good order and

discipline in prisons. All such regulations, before coming into force, shall be published in the Gazette."

Section 9(1) – Remission for good conduct

"Regulations made under section 4 may make provision whereby, in such circumstances as may be prescribed by the regulations, a person serving a sentence of imprisonment may be granted remission of such part of that sentence as may be so prescribed on the ground of his industry and good conduct; and on the discharge of a person from a prison in pursuance of any such remission as aforesaid his sentence shall expire."

Section 11(1) – Release on licence of persons serving imprisonment for life

"The Governor may at any time if he thinks fit release on licence a person serving a term of imprisonment for life subject to compliance with such conditions, if any, as the Governor may from time to time determine."

3. The Prison (General) Regulations of 1981 (Regulatory Act 18/81)

40. The relevant provisions of the Prison (General) Regulations of 1981, made on the basis of section 4 of the Prison Discipline Law (Cap. 286), read as follows.

Regulation 7 – Release of a prisoner

"No convicted person shall be discharged from the Prison before the expiration of his sentence except as provided by Article 53 § 4 of the Constitution of the Republic of Cyprus."

Regulation 94 – Remission of sentence for good conduct

"Every prisoner serving a sentence of nine years or more may be granted remission of one half of the sentence, on the ground of good conduct and industry."

Regulation 96(c) – Calculation of remission for life prisoners

"Where the imprisonment is for life or where a sentence of death is commuted to imprisonment for life, remission of the sentence shall be calculated as if the imprisonment is for twenty years."

Regulation 97 – Date of expiration of sentence

"The date of the expiration of the sentence and the earliest possible date of discharge shall be entered in the personal record of each prisoner and in the discharge book to be kept at the prison, and the Director shall inspect such records and discharge book at frequent intervals so as to ensure that the provisions of this Regulation are strictly complied with."

Regulation 99 – Prisoners serving a life sentence

> “The Director shall submit to the minister for transmission to the Attorney-General of the Republic the name of every prisoner serving a life sentence who has served ten years of such sentence, or of every prisoner serving a sentence exceeding fifteen years who has served eight years of his sentence, who has attained, or is believed in the absence of positive evidence to have attained, the age of 60, for consideration of his case. The Director shall communicate this rule to every such prisoner. Prisoners must be made distinctly to understand that the submission of their name to the minister in no way implies that any remission of sentence will be necessarily granted.”

4. The Prison (General) (Amending) Regulations of 1987 (Regulatory Act 76/87)

41. The Prison (General) (Amending) Regulations of 1987 came into force on 13 March 1987 and amended the Prison (General) Regulations of 1981.

42. The following definition of “imprisonment for life” was introduced in Regulation 2:

> “In the present Regulations:
>
> ...
>
> ‘imprisonment for life’ means imprisonment for twenty years.
>
> ...”

43. Regulation 93, governing the remission of the sentence of prisoners serving a sentence of life imprisonment, provided as follows:

> “(i) Every prisoner serving a sentence of imprisonment for life may be granted remission of his sentence on the ground of good conduct and industry, not exceeding in total one-quarter of such sentence.
>
> (ii) The decision on the reduction of the sentence, as well as the extent of such remission for each aforesaid prisoner, shall not be taken unless the said prisoner has served fifteen years of his sentence.”

44. Regulation 96(c) was repealed.

5. Domestic case-law and practice

45. In the case of *Malachtou v. the Attorney-General of Cyprus* ((1981) 1 C.L.R. 543), the Supreme Court stated, *inter alia*, the following concerning subsidiary legislation:

> “... the power for the enactment of subsidiary legislation must, in the nature of things, emanate strictly from the provisions of the enabling law. Any other approach would constitute an encroachment on the legislative powers of the House of Representatives, the body exclusively entrusted with legislative powers, under our

Constitution. Subsidiary legislation enacted without just cause will be declared *ultra vires* ... A body to which power is delegated to legislate must derive authority from the provisions of the enabling enactment; any attempt to bypass or transgress the limits set thereto will be struck down as *ultra vires*. They cannot infer the existence of any authority to legislate, other than that expressly conferred by law, and must, therefore, confine themselves to the four corners of the enabling enactment. Any relaxation of this approach would certainly undermine the system of separation of powers that pervades our system of law and finds expression in the Constitution."

46. In the case of *Triftarides v. the Republic of Cyprus* ((1985), judgment of 16 October 1985), the Supreme Court, when examining the manner of the remission of sentence by the President under Article 53 § 4 of the Constitution with regard to a prisoner serving a ten-year sentence, stated the following:

"... Under Article 53 § 4 of the Constitution the President of the Republic remitted the sentence passed by the Court and not the sentence that would have been served in the light of Regulation 94. This is clear from the wording of Article 53 § 4 which in so far as material on this point says that 'The President ... remits ... any sentence passed by a court in the Republic ...'."

47. In its judgment of 5 February 1988 in the case of *The Republic of Cyprus v. Andreas Costa Aristodemou, alias Yiouroukkis* (case no. 31175/87) the Nicosia Assize Court, when sentencing the accused for premeditated murder under the Criminal Code, stated, among other things, the following:

"The accused has been sentenced to life imprisonment after being found guilty of premeditated murder. This sentence is imposed by the Court mandatorily; since it is the only one provided by the Criminal Code, Cap. 154, as amended by Law no. 86/83, which also amends section 29 of the Criminal Code, the Court cannot impose another sentence for the crime of premeditated murder. After the abolition by this Law of the death penalty, the legislature provided for the above sentence so it would be in agreement with Article 53 § 3 of the Constitution. This Article provides for the commutation of a death sentence to a sentence of life imprisonment, in the event that the President of the Republic exercises his right of pardon on the basis of § 1 of that Article.

...

Counsel for the accused suggested that the Court should order that the sentence of life imprisonment that was imposed on the accused should run concurrently with the one he is already serving.

...

... [i]n support of his suggestion he referred to the case of *R v. Foy* (1962) 2 All E.R. 246.

... In contrast, Mr Kyprianou argued that the Court must order that the sentence imposed should be served after the one already being served by the accused because, on the basis of the Regulations of 1987 (Official Gazette of the Republic, Annex 3, Part 1 of 13/3/87), which were made by the Council of Ministers and published in the

Official Gazette of the Republic after being put before Parliament, the interpretation of the term 'life imprisonment' is given as meaning 'imprisonment for twenty years'. Regulation 93 of these Regulations provides that a person sentenced to life imprisonment may be granted remission of his sentence on the ground of good conduct and industry, not exceeding in total one-quarter of this sentence. Therefore, Mr Kyprianou continued, the sentence of life imprisonment has been determined at a period of twenty years, or fifteen if the convicted person demonstrates good conduct. Consequently, what Lord Parker said in the case of *R v. Foy*, on which counsel for the accused relied, does not apply. Mr Kyprianou also showed his concern, as Senior Counsel of the Republic, about the possible cases, such as the present one, where one person commits many murders but is only given one sentence of imprisonment for fifteen or twenty years.

Our opinion is that neither Mr Kyprianou nor Mr Clerides is treating the legal issue correctly.

...

On the basis of everything said by Lord Parker [in the case of *R v. Foy* (1962) 2 All E.R. 246], life imprisonment means imprisonment for the remainder of the time for which the applicant is alive. Accordingly, and since a sentence of life imprisonment has been imposed on the accused, no other such sentence can follow. Mr Clerides suggests, however, that the court must issue this order, for he is also basing himself on the Regulations of 1987 and is concerned that, since these Regulations are in force, the accused may possibly be released in fifteen years and thus is not facing the danger of serving another prison sentence of fifteen or twenty years, if the second sentence follows the first one.

Article 12 § 1 of the Constitution provides that a court may not impose a longer sentence than that provided for by the law at the time of the commission of the offence. The Criminal Code indeed provides that the sentence of life imprisonment is mandatory and the only sentence following conviction for premeditated murder. In our judgment, the sentence 'imprisonment for life' means exactly what is stated by the simple Greek words, that is, imprisonment for the remainder of the biological existence of the convicted person. This interpretation was also given by the Court of Appeal of England in the case of *R v. Foy* ... As we have already stated, section 203(2) of the Criminal Code is the only provision prescribing the sentence of life imprisonment as mandatory, and this in the light of the provisions of Article 53 § 3 of the Constitution. The Regulations of 1987 were drawn up on the basis of the Prison (Discipline) Law (Cap. 286), which still applies on the basis of the provisions of the Constitution even though it was enacted just when Cyprus became an English colony. The provisions of this law, however, have to be applied in such a way that they comply with the express provisions of the Constitution. We wonder whether these Regulations are not unconstitutional and whether the interpretation of the term 'imprisonment for life', which is encountered in the Constitution and the Criminal Code, so as to mean 'twenty years', is arbitrary. We say 'we wonder' since such an issue has not been raised before us and thus we have no right in this procedure to convey an opinion on this. Another observation that can be made, however, is the following: it appears that the drafters of the Regulations, even if they are valid, did not notice the special provision of section 11 of the above Law (Cap. 286) which concerns life prisoners and provides that they may be released on licence by a decision of the 'Governor', which may be revoked. The life sentence is specifically provided for in the above Law to last for life, along the lines of the English legal system. This is why

Lord Parker stated what we quoted above. Another issue that is raised, even for the purposes of academic debate, is to what extent a law or regulation can provide for the remission, suspension or commutation of a convicted person's sentence in view of the express provision of Article 53 § 4 of the Constitution which bestows this privilege on the President of the Republic with the concurrence of the Attorney-General.

It has been established by judicial precedent that when the court imposes a sentence, it does not take into account regulations, even if they are applicable, that allow for the remission of the sentence when a convicted person displays good conduct. The Regulations of 1987 were made in order to serve the purposes to which the court does not refer when passing the sentence, which is determined on the basis of the applicable legislation and the Constitution. It is therefore up to the competent authorities, when and if the matter is raised at the appropriate time, to take into account what we have mentioned above in the form of legal observations. We have already imposed on the accused the sentence that the law envisages, that is, life imprisonment, and we have nothing else to add."

48. On 16 October 1991, in a letter to the Director of Prisons, through the Director General of the Ministry of Justice, the Attorney-General at the time stated the following concerning the prisoner Mr Yiouroukkis:

"In reply to your letter dated 26 September 1991 and file no. F162/2/a, I would inform you that the convicted person Andreas Aristodimou Yiouroukkis, to whom your letter refers, was sentenced to life imprisonment by the Nicosia Assize Court on 5 February 1988 in criminal case no. 31175/87 and this was interpreted in the Assize Court's judgment to mean imprisonment for the rest of his biological existence.

This legal approach concerning the nature of life imprisonment was also adopted in a subsequent case, no. 23069/87, by the Limassol Assize Court on 10 March 1989.

In view of the above, the duration of the sentence in the case of a sentence of life imprisonment is not determined and is not reduced in accordance with Regulation 2 and Regulation 93(1) of the Prison (General) Regulations 1981 and 1987 respectively, but the sentence in question is subject to remission or suspension by the President of the Republic, in accordance with Article 53 § 4 of the Constitution, who in exercising his powers, may take into account, among other things, the spirit of the above-mentioned Regulations 2 and 93(1)."

49. On 2 January 1992, in a letter to the Director General of the Ministry of Justice, the Attorney-General at the time stated the following concerning the prisoner Mr Yiouroukkis:

"In reply to your letter dated 3 December 1991 and file no. Y.D. 12.7.01, concerning the duration of the life imprisonment of the convicted person, Andreas Aristodimou Yiouroukkis, I observe the following:

...

In the present case the Nicosia Assize Court, when it imposed the sentence of life imprisonment on the above-mentioned convicted person, interpreted section 203(2) of the Criminal Code, Cap. 154 (as amended, for this purpose, by Law no. 86/83) and judged that life imprisonment means imprisonment for the rest of the convicted person's biological existence. Consequently, there is a court judgment for the duration

of the sentence of the specific convicted person which has not been overruled on appeal and is binding and mandatory for all the authorities of the Republic.

The interpretation of the relevant provision of the Criminal Code given by the Nicosia Assize Court was followed ..., in a subsequent case, by the Limassol Assize Court and since this interpretation has not been questioned by another Assize Court or overruled by the Supreme Court, it must be regarded as the correct judicial interpretation of the Criminal Code provision in question and must be applied in the future to all situations where an accused is sentenced to life imprisonment, even if reference is not made in the judgment to the fact that such imprisonment means imprisonment for the rest of his biological existence.

...

No issue of unequal treatment of prisoners who are serving a sentence of life imprisonment in comparison with prisoners who are serving sentences of a shorter term can be raised, because the sentence of life imprisonment, owing to its nature, differs radically from any other sentence of imprisonment and issues of unequal treatment can arise only when comparing similar, and not dissimilar, things.

Furthermore, there is no possibility of applying secondary legislation, such as the Prison (General) Regulations of 1981 and 1987, when this conflicts with primary legislation such as the relevant provision of the Criminal Code. This is why, to the extent that the Regulations in question conflict with the relevant provision of the Criminal Code as it has been interpreted judicially, they cannot be applied.

...

... when the President of the Republic, in cooperation with the Attorney-General, examines the possibility of remission of the sentence in accordance with Article 53 § 4 of the Constitution, in the case in which the convicted person is serving a sentence of life imprisonment, he will have in mind that the sentence, unless there is a remission, means imprisonment for the remainder of the biological existence of the convicted person and will act accordingly in the light of the circumstances of the case.”

50. On 9 October 1992 the Supreme Court (first instance) in the case of *Hadjisavvas v. the Republic of Cyprus* (see paragraph 19 above) ruled that the Regulations were unconstitutional and *ultra vires*. The prisoner in that case had also been convicted of premeditated murder and sentenced to life imprisonment. He had submitted a habeas corpus application to the Supreme Court when he was not released on the date that had been given to him as a release date by the prison authorities. The Supreme Court dismissed his application and affirmed that the term “life imprisonment” under the Criminal Code meant imprisonment for the remainder of the life of the convicted person. In particular, the court stated as follows:

“The Criminal Code provides a mandatory sentence for the crime of premeditated murder: ‘... a sentence of imprisonment for life’ (see section 203(2) of the Criminal Code as amended by Law no. 86/83). The constitutionality of this provision of the law was examined in the case of *Politis v. Republic* (1987) 2 C.L.R. 116 and was held to be correct in the light of the provisions of Articles 7 § 2 and 12 § 3 of the

Constitution. The sentence of life imprisonment is not equated by the legislature with a prison sentence for any period of time, neither where it is imposed as a mandatory punitive measure on the basis of section 203(2) nor as a discretionary measure under section 29 of the Criminal Code, Cap. 154. This would anyhow be contrary to the provisions of these two sections of the Criminal Code since life imprisonment is mandatory for the crime of premeditated murder whereas for the purposes of section 29, where life imprisonment is a discretionary measure, the courts have the discretion to impose a sentence of a shorter period. A prison sentence for a period shorter than life imprisonment may comprise a sentence longer than imprisonment for twenty years with which life imprisonment is equated on the basis of Regulation 2 of the Prison Regulations. In the case of *Georghios Aristidou v. Republic* (1967) 2 C.L.R. 43 the Court of Appeal imposed a sentence of imprisonment of twenty-five years following the commutation of the appellant's conviction for premeditated murder to manslaughter.

Mr Pourgourides [the applicant's advocate] suggested that the enactment of the Prison (General) (Amendment) Regulations of 1987 (Regulatory Administrative Act 76/87) by the Council of Ministers with the approval of the Parliament, as provided by the enabling Law for the Submission to the House of Representatives of Regulations issued under the Law of 1985 (no. 51/85) and the Prison Discipline (Amendment) Law of 1983 (no. 85/83) resulted in the amendment of the relevant provisions of the Criminal Code so that a sentence of life imprisonment entailed only imprisonment for twenty years. In support of his position he referred to Bennion, Statutory Interpretation, 2nd edition, pp. 154-55, where it is stated that in the United Kingdom the amendment of secondary legislation by Parliament entails its transformation into primary legislation.

This suggestion ignores:

(a) the fact that the Prison Regulations were made within the scope of the authority granted by the Prison (Discipline) Law and not on the basis of the Criminal Code;

(b) the direct connection between the Regulations of 1987 with the authority granted by section 4 of Cap. 286 and the fact that authority for their issue is drawn exclusively from the provisions of that law;

(c) the strict separation of powers which applies in Cyprus and the restriction of the executive to the enactment of secondary legislation on the basis of express authority which is granted by primary legislation (see *Police v. Hondrou & Another*, 3 R.S.C.C. 82; *Malachtou v. Attorney-General* (1981) 1 C.L.R. 543, and *Payiatas v. Republic* (1984) 3 C.L.R. 1239).

Acceptance of Mr Pourgourides's position would have, inter alia, as a consequence the involvement of the executive in the enactment of primary legislation in violation of Article 61 of the Constitution and the principle of separation of powers. In President of Republic v. House of Representatives (1985) 3 C.L.R. 2165 and President of Republic v. House of Representatives (1986) 3 C.L.R. 1159, it is noted that the participation of Parliament in the creation of secondary legislation does not transform its nature into primary legislation.

In *Republic v. Sampson* (Civil Appeal 8532, decided on 26 September 1991) the full bench of the Supreme Court had the opportunity to examine the legal status of the Prison Regulations in relation to the enabling law, the Prison (Discipline) Law,

Cap. 286. At the outset we noted that this law was enacted in 1879 and, as with any other colonial law which was in force at the time of the proclamation of the Republic, the provisions of Cap. 286 are applied while being adjusted 'to the necessary extent to the Constitution' (Article 188 § 1 of the Constitution). This adjustment, as we have pointed out, is within the competence of the judiciary (see, *inter alia*, *Diagoras Development v National Bank* (1985) 1 C.L.R. 581, and *United Pibles Societies (Gulf) v. Hadjikakou* (Civil Appeal 7413, decided on 28 May 1990).

The adjustment of the provisions of Cap. 286 ensures that its provisions are compatible with the principle of the separation of powers, which constitutes the judiciary as the sole judge of the punishment of offenders (see, *inter alia*, *Politis* (cited above) and *The District Officer of Nicosia v. Hadjiyiannis*, R.S.C.C. 79; *The District Officer of Famagusta v. Demetra Panayiotou Antoni*, 1 R.S.C.C. 84; *The Superintendent Gendarmerie of Lefka v. Christodoulos Antoni Hadjiyianni*, 2 R.S.C.C. 21; *Morphou Gendarmerie v. Andreas Demetri Englezos*, 3 R.S.C.C. 7; *The District Officer of Nicosia v. Michael Ktori Palis*, 3 R.S.C.C. 27; *The District Officer of Famagusta v. Michael Themistocli and Another*, 3 R.S.C.C. 47; *Nicosia Police v. Djemal Ahmet*, 3 R.S.C.C. 50; *The District Officer of Kyrenia v. Adem Salih*, 3 R.S.C.C. 69; *Miliotis v. The Police* (1975) 7 J.S.C. 933).

Consequently, to the degree and extent that section 4, in conjunction with section 9, of Cap. 286 confers power for the determination of the duration of a sentence of imprisonment on an authority other than a judicial one, it is contrary to the Constitution and has ceased to be in force following the proclamation of the Republic. Besides, the granting of power to the Director of Prisons to remit the sentence because of good conduct and industry, under the provisions of Regulation 93, is contrary to the principle of the separation of powers, which precludes the involvement of an executive or administrative organ in the determination of the punishment of an offender. The only authority on whom power is conferred by the Constitution to remit, suspend or commute a prison sentence is the President of the Republic, acting with the concurrence of the Attorney General. The examination of the power to make secondary legislation conferred by sections 4 and 9 of Cap. 286 is not directly required in this case, since neither of the two provisions concerns the serving of a sentence of life imprisonment. The serving of life imprisonment is regulated specifically by the provisions of section 11 of Cap. 286, from which it emerges that life imprisonment means imprisonment for the remainder of the life of the convicted person, subject to the right granted to the President of the Republic to suspend the sentence for such period of time as may be fixed on the release of the convicted person on licence. Section 11 of Cap. 286 is in harmony with the Constitution and has maintained its force after the proclamation of the Republic inasmuch as it is consistent with the powers conferred on the President of the Republic by Article 53 § 4 of the Constitution."

51. The Supreme Court thus concluded that it had not been shown that Mr Hadjisavvas should have been released on the date given or any subsequent date and, consequently, the habeas corpus application was rejected.

52. In 1993 nine life prisoners (eight serving a mandatory life sentence and one a discretionary life sentence) were released on the basis of Article 53 § 4 of the Constitution. Their sentences were commuted to twenty years' imprisonment and then remitted so as to allow their immediate release. The procedure followed for the release of these prisoners

was the same. The following example concerns the case of one such prisoner:

53. In a letter of 28 September 1993 to the President of the Republic, the Attorney-General of the Republic stated the following in relation to a life prisoner:

> "Dear Mr President,
>
> Anastasis Savva Politis (convict no. 7035 in the Central Prisons) was sentenced by the Nicosia Assize Court to life imprisonment for premeditated murder.
>
> On the basis of the applicable Prison (General) Regulations 1981 and 1987, it was considered that life imprisonment was equal to imprisonment for twenty years and it was announced to him, the day after he was sentenced, that his sentence would be twenty years' imprisonment from 26 December 1986.
>
> In the meantime his sentence was reduced to eight years' imprisonment on account of a presidential pardon in respect of one-fifth of the sentence (four years), on the occasion of the election of the new President of the Republic in 1988, and on account of the remission of eight years for good conduct and industry, in accordance with the Prison (General) Regulations, and the date of his release was determined as 25 December 1994.
>
> On 5 February 1988 the Nicosia Assize Court, in another case, judged that life imprisonment was for the remainder of the biological existence of the convicted person and, hence, on 29 January 1992, I gave the opinion that in such a case the relevant Regulations cannot be applied in a way that would automatically reduce life imprisonment to twenty years' imprisonment.
>
> In the light of all the above, I suggest that this convicted person's sentence should be commuted to twenty years' imprisonment and reduced by four years on the basis of the presidential pardon of 1988 and by such an additional period that he may be immediately released.
>
> The life prisoners Andreas Soteriou Lemonas, and Demetris Xadjisavvas and Demetris Miliotis were afforded the same treatment, the first two in April 1993 and the last-mentioned recently.
>
> I take this opportunity to suggest, on humanitarian grounds, that the sentences of all life prisoners whose date of release was determined, on the basis of the Prison (General) Regulations 1981 and 1987, as falling within the years 1993 and 1994 should be commuted to twenty years' imprisonment and reduced so they may be released immediately and not kept in a state of agony as to whether they will eventually receive the same treatment.
>
> The next date determined, on the basis of the above Regulations, for release of a life prisoner is the year 2000.
>
> The relevant order is enclosed for your signature in the event that you agree with my above suggestion."

54. On 28 September 1993 the President of the Republic announced the following in relation to the same life prisoner:

> "Because the convicted person Anastasis Savvas Politis (no. 7036) was sentenced, on 27 January 1987, in criminal case no. 537/87, by the Nicosia Assize Court, to life imprisonment for premeditated murder, and
>
> Because the Attorney-General of the Republic, after taking into account the special circumstances of the case, has recommended, based on Article 53 § 4 of the Constitution, commutation of the sentence to imprisonment of twenty years and its remission so that he may be released immediately;
>
> For this reason, on the recommendation of the Attorney-General of the Republic, by this Order, on the basis of Article 53 § 4 of the Constitution, the convicted person's sentence is commuted to twenty years' imprisonment and is remitted so that he is released immediately."

55. On 29 September 1993 an announcement was made concerning the release of six life prisoners, the relevant part of which stated:

> "The President of the Republic, on the basis of recommendations to this end by the Attorney-General of the Republic, and with the opportunity of the first anniversary of the Independence of the Republic of Cyprus during his presidential term, has decided to remit the sentences, so that they are released immediately, of the following life prisoners, who, if their sentences had been assessed on the basis of twenty years' imprisonment, would have been released in 1993 or 1994:
>
> Ian Michael Davison
> Abdel Hakim Saado El Khalifa
> Khalet Abdel Kader El Khatib
> Saadeldin Mohammad Idress
> Achilleas Georgiou Avraam
> Anastasis Savva Politis."

6. The Prison Law of 1996 (Law no. 62(I)/96), as amended

56. On 3 May 1996, the Prison Law of 1996 (Law no. 62(I)/96) was enacted, repealing and replacing the Prison Discipline Law (Cap. 286).

57. The relevant part of section 9(1), governing the release of prisoners, provides as follows:

> "No prisoner who is serving a sentence of imprisonment may be discharged from prison until he has served his sentence in accordance with the provisions of this law except in the case provided for by Article 53 § 4 of the Constitution of the Republic or any other law in force."

58. Section 12(1) of the Prison Law of 1996 provides that, with the exception of prisoners serving a life sentence, a sentence can be remitted if the prisoner demonstrates good conduct and industry. The relevant part reads as follows:

> "In accordance with the provisions of this Law, a person who is serving a prison sentence shall obtain remission of his sentence if he displays good conduct and industry, unless a sentence of life imprisonment has been imposed on him."

59. Section 14 of the Law (as amended by Law no. 12(I)/97), governing the release of prisoners under conditions, provides as follows:

> "1. Subject to the provisions of the Constitution, the President of the Republic, with the agreement of the Attorney-General of the Republic, may order by decree the conditional release of a prisoner at any time.
>
> 2. A prisoner who is conditionally released by virtue of this section, may, until the expiry of his sentence, be under the supervision and inspection of a person specified in the Decree of Conditional Release and shall conform to whatever other conditions and restrictions are set out in the said Decree.
>
> 3. The President of the Republic, with the agreement of the Attorney-General of the Republic, may at any time by a new decree amend or nullify the conditions and restrictions contained in the decree issued by virtue of subsection 1 above.
>
> 4. If before the expiry of the sentence of the prisoner who is released, as referred to above, the President of the Republic, with the agreement of the Attorney-General of the Republic, is satisfied that the said person has failed to comply with any valid condition or restriction set out in the decree, he may by a new decree revoke the convicted person's conditional release and order his return to prison to serve the rest of his sentence.
>
> 5. After the convicted person's return to prison he shall be entitled to the benefits provided in section 12 of this Law only after one year has elapsed from the date of his return to prison and provided that during this year he has displayed industry and good conduct.
>
> 6. The period of time from the date of the decree for the release of the prisoner on the basis of this section until the date of its revocation shall be included in the period of the sentence served by the prisoner.
>
> 7. A prisoner who does not comply with the decree revoking his release shall be deemed to be a fugitive from lawful detention."

C. Additional relevant provisions of the Constitution

60. The relevant provisions of the Constitution read as follows.

1. Part II: Fundamental Rights and Liberties

Article 7 § 2

"No person shall be deprived of his life except in the execution of a sentence of a competent court following his conviction of an offence for which this penalty is provided by law. A law may provide for such penalty only in cases of premeditated murder, high treason, piracy *jure gentium* and capital offences under military law."

Article 8

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

Article 12 § 1

"No person shall be held guilty of any offence on account of any act or omission which did not constitute an offence under the law at the time when it was committed; and no person shall have a heavier punishment imposed on him for an offence other than that expressly provided for it by law at the time when it was committed."

Article 12 § 3

"No law shall provide for a punishment which is disproportionate to the gravity of the offence."

2. Part IX: The Supreme Constitutional Court

Article 144

"1. A party to any judicial proceedings, including proceedings on appeal, may, at any stage thereof, raise the question of the unconstitutionality of any law or decision or any provision thereof material for the determination of any matter at issue in such proceedings and thereupon the Court before which such question is raised shall reserve the question for the decision of the Supreme Constitutional Court and stay further proceedings until such question is determined by the Supreme Constitutional Court.

2. The Supreme Constitutional Court, on a question so reserved, shall, after hearing the parties, consider and determine the question so reserved and transmit its decision to the Court by which such question has been reserved.

3. Any decision of the Supreme Constitutional Court under paragraph 2 of this Article shall be binding on the court by which the question has been reserved and on

the parties to the proceedings and shall, in case such decision is to the effect that the law or decision or any provision thereof is unconstitutional, operate as to make such law or decision inapplicable to such proceedings only."

3. Part VI: The Independent Officers of the Republic

61. Under the Constitution the Attorney-General is an independent officer of the Republic. The relevant parts of Article 112 of the Constitution provide as follows:

> "1. The President and the Vice-President of the Republic shall appoint jointly two persons who are qualified for appointment as a judge of the High Court one to be the Attorney-General of the Republic and the other to be the Deputy Attorney-General of the Republic.
>
> ...
>
> 2. The Attorney-General of the Republic shall be the Head and the Deputy Attorney-General of the Republic shall be the Deputy Head of the Law Office of the Republic which shall be an independent office and shall not be under any Ministry.
>
> ...
>
> 4. The Attorney-General and the Deputy Attorney-General of the Republic shall be members of the permanent legal service of the Republic and shall hold office under the same terms and conditions as a judge of the High Court other than its President and shall not be removed from office except on the like grounds and in the like manner as such judge of the High Court.
>
> ..."

62. Under Article 113 of the Constitution, the Attorney-General is the legal adviser of the Republic and the President:

> "1. The Attorney-General of the Republic, assisted by the Deputy Attorney-General of the Republic, shall be the legal adviser of the Republic and of the President and of the Vice-President of the Republic and of the Council of Ministers and of the Ministers and shall exercise all such other powers and shall perform all such other functions and duties as are conferred or imposed on him by this Constitution or by law.
>
> 2. The Attorney-General of the Republic shall have power, exercisable at his discretion in the public interest, to institute, conduct, take over and continue or discontinue any proceedings for an offence against any person in the Republic. Such power may be exercised by him in person or by officers subordinate to him acting under and in accordance with his instructions."

D. Extracts from the *ex officio* report by the Commissioner for Administration (Ombudsman) of the Republic of Cyprus on the penitentiary system of Cyprus and the conditions of detention in the Central Prisons of 26 May 2004

63. In her report the Commissioner for Administration examined, *inter alia*, issues concerning life imprisonment. In this context she examined the situation in other member States of the Council of Europe, principally the United Kingdom, Greece and France, *vis-à-vis* Cyprus. She stated, amongst other things, the following:

"...

Life imprisonment

79. In the Central Prisons there are currently twelve prisoners who have been sentenced to life imprisonment. The matter of the sentence of life imprisonment, in the light of the regime in force, is being discussed both by the House of Representatives and by the competent committee under the aegis of the Ministry of Justice and Public Order, which also had the initiative in promoting the subject. The central component of this process now in progress is the regulating by law of life imprisonment in a way which will give the possibility to those serving life sentences of being released once they have served a significant part of their sentence and previously received the appropriate treatment and preparation. Reservations are expressed about whether such regulating is constitutional.

80. I am of the opinion that the regulating by law of the matter is permitted by the Constitution. It is not a procedure for granting a pardon but the regulating of the serving of a sentence which in no way conflicts with the prerogative of the President of the Republic to remit, commute or suspend a sentence by virtue of Article 53 § 4. In accordance with the separation of powers, the regulating by law of the matter could include, in the case of the imposition by the courts of the sentence of life imprisonment, empowering the same court to fix a minimum term for the sentence which would be served obligatorily before examination of the possibility of the conditional release of the prisoner. I am of the opinion that this minimum term of the sentence should not exceed twenty to twenty-five years. Within the framework of the proposed regulation a committee may be set up with an advisory role which, on the basis of enacted criteria and in accordance with the rehabilitation progress of each prisoner serving a life sentence and the particular circumstances of each case, could recommend conditional release.

...

Conclusions – Recommendations – Suggestions

...

– In relation to the matter of prisoners serving life sentences, I consider essential the acceleration of the process of the regulating by law of the matter in a way which will fix a minimum time-limit for serving the sentence, which will not exceed twenty to twenty-five years, after the expiration of which and according to the circumstances of

each case the possibility of the conditional release of a prisoner serving a life sentence can be examined.

...”

E. The operation of the Regulations of 1981 and 1987 by the executive and administrative authorities and the legal validity of Regulation 93

64. The following paragraphs contain a summary of the information provided by the Government in the context of the present proceedings as to the position under their domestic law concerning the operation and validity of the 1981 and 1987 Regulations.

65. Prior to the Supreme Court’s judgment in the case of *Hadjisavvas v. the Republic of Cyprus* (see paragraphs 19, 50 and 51 above), the Regulations – in particular Regulations 2 and 93 – were understood by the executive and administrative authorities of the Republic, including the Prison Service, as imposing a maximum period of twenty years to be served by any person who had been sentenced to life imprisonment. Any prisoner sentenced to life imprisonment after the above Regulations came into force would, in practice, have had a period of five years automatically deducted from the time to be served in prison by way of remission pursuant to Regulation 93. Thereafter, days of remission could be deducted from this five-year period as a consequence of misconduct by the prisoner. It was understood by the Republic’s executive and administrative authorities, including the Prison Service, that a life prisoner’s misconduct could not result in him being detained beyond the twenty-year point. In fact, because of the very limited number of life prisoners in Cyprus and the dates of their respective convictions, no life prisoner had ever reached the point in his sentence when these provisions were applied directly so as to lead to his release. The release of the nine life prisoners in 1993 had been pursuant to Article 53 § 4 of the Constitution in the light of how the Regulations would have operated in their cases.

66. In its judgment in the case of *Hadjisavvas*, the Supreme Court declared Regulation 93 to be unconstitutional and *ultra vires* in relation to the enabling primary legislation, namely the Prison Discipline Law. Under Cypriot domestic law, the position was that in proceedings where the constitutionality of subsidiary legislation was raised by a party by way of collateral challenge, the court’s judgment only took effect in relation to the particular subject matter of the proceedings. Thus, the Supreme Court’s judgment in the case of *Hadjisavvas*, in which the constitutionality of Regulation 93 had been raised as a collateral issue to Mr Hadjisavvas’s habeas corpus application, was only operative so as to determine the ongoing legality of his detention. It also followed from Article 144 § 3 of

the Constitution that the above judgment did not operate so as to render Regulation 93 unconstitutional and invalid as against persons other than the parties to that case. In other words, it did not result in Regulation 93 being rendered invalid *vis-à-vis* other individuals.

67. Because the Supreme Court's judgment in *Hadjisavvas* had been binding on the parties to the case, including the executive and administrative authorities of the Republic, Regulation 93 could not thereafter lawfully be applied by the above authorities. Nonetheless, the judgment could not be understood as having retrospective effect such as to impugn the validity of Regulation 93 as it had been applied to other individuals affected by that Regulation. Therefore, the fact that Regulation 93 was declared unconstitutional and *ultra vires* by the Supreme Court in 1992 did not have retrospective effect such as to render the Regulation void *ab initio* for all purposes. It did not, for example, render unlawful any action taken pursuant to Regulation 93 between the date of its enactment and the judgment in *Hadjisavvas*. Accordingly, at the time of the applicant's offence in July 1987 or at the time he was sentenced in March 1989, Regulation 93 could not have been void or without legal effect in respect of the applicant. After the *Hadjisavvas* judgment, however, the administrative and executive authorities of the Republic could not lawfully take action, in reliance on Regulation 93, treating it as reducing a life sentence imposed by a court to a maximum of twenty years' imprisonment since this would have been inconsistent with the Constitution as authoritatively interpreted by the Supreme Court in that judgment.

III. INTERNATIONAL MATERIALS

A. Extracts from relevant Council of Europe texts

1. Instruments adopted by the Committee of Ministers of the Council of Europe

68. Article 21 of the Council of Europe Convention on the Prevention of Terrorism provides as follows:

Article 21 – Discrimination clause

"...

3. Nothing in this Convention shall be interpreted either as imposing an obligation to extradite if the person who is the subject of the extradition request risks being exposed to the death penalty or, where the law of the requested party does not allow for life imprisonment, to life imprisonment without the possibility of parole, unless under applicable extradition treaties the requested party is under the obligation to

> extradite if the requesting party gives such assurance as the requested party considers sufficient that the death penalty will not be imposed or, where imposed, will not be carried out, or that the person concerned will not be subject to life imprisonment without the possibility of parole."

69. Matters relating to long-term imprisonment and conditional release were addressed by the Committee of Ministers as long ago as 1976, when it adopted Resolution (76) 2 on the treatment of long-term prisoners on 17 February 1976 (at the 254th meeting of the Ministers' Deputies):

> "The Committee of Ministers,
>
> ...
>
> I. Recommends that the governments of the member States:
>
> ...
>
> 9. ensure that the cases of all prisoners will be examined as early as possible to determine whether or not a conditional release can be granted;
>
> 10. grant the prisoner conditional release, subject to the statutory requirements relating to the time served, as soon as favourable prognosis can be formulated; considerations of general prevention alone should not justify refusal of conditional release;
>
> 11. adapt to life sentences the same principles as apply to long-term sentences;
>
> 12. ensure that a review, as referred to in 9, of the life sentence should take place, if not done before, after eight to fourteen years of detention and be repeated at regular intervals;
>
> ..."

70. In its general report the sub-committee responsible for drafting the resolution stated:

> "... it is inhuman to imprison a person for life without any hope of release. A crime-prevention policy which accepts keeping a prisoner for life even if he is no longer a danger to society would be compatible neither with modern principles on the treatment of prisoners during the execution of their sentence nor with the idea of the reintegration of offenders into society. Nobody should be deprived of the chance of possible release. Just how far this chance can be realised must depend on the individual prognosis."

71. On 30 September 1999 the Committee of Ministers adopted Recommendation No. R (99) 22 concerning prison overcrowding and prison population inflation (adopted at the 681st meeting of the Ministers' Deputies), the relevant part of which provides as follows.

“...

23. The development of measures should be promoted which reduce the actual length of the sentence served, by giving preference to individualised measures, such as early conditional release (parole), over collective measures for the management of prison overcrowding (amnesties, collective pardons).

24. Parole should be regarded as one of the most effective and constructive measures, which not only reduces the length of imprisonment but also contributes substantially to a planned return of the offender to the community.

25. In order to promote and expand the use of parole, best conditions for offender support, assistance and supervision in the community have to be created, not least with a view to prompting the competent judicial or administrative authorities to consider this measure as a valuable and responsible option.

26. Effective programmes for treatment during detention and for supervision and treatment after release should be devised and implemented so as to facilitate the resettlement of offenders, to reduce recidivism, to provide public safety and protection and to give judges and prosecutors the confidence that measures aimed at reducing the actual length of the sentence to be served and the community sanctions and measures are constructive and responsible options.

...”

72. On 24 September 2003 the Committee of Ministers adopted Rec(2003)22 on conditional release (at the 853rd meeting of the Ministers’ Deputies), the relevant parts of which provide as follows.

“The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering that it is in the Council of Europe member States’ interest to establish common principles regarding the enforcement of custodial sentences in order to strengthen international cooperation in this field;

Recognising that conditional release is one of the most effective and constructive means of preventing reoffending and promoting resettlement, providing the prisoner with planned, assisted and supervised reintegration into the community;

Considering that it should be used in ways that are adapted to individual circumstances and consistent with the principles of justice and fairness;

...

Considering, therefore, that it is desirable to reduce the length of prison sentences as much as possible and that conditional release before the full sentence has been served is an important means to that end;

Recognising that conditional release measures require the support of political leaders, administrative officials, judges, public prosecutors, advocates and the public, who therefore need a detailed explanation as to the reasons for adapting prison sentences;

Considering that legislation and the practice of conditional release should comply with the fundamental principles of democratic States governed by the rule of law, whose primary objective is to guarantee human rights in accordance with the European Convention on Human Rights and the case-law of the organs entrusted with its application;

...

Recommends that governments of member States:

1. introduce conditional release in their legislation if it does not already provide for this measure;

2. be guided in their legislation, policies and practice on conditional release by the principles contained in the appendix to this recommendation;

3. ensure that this recommendation on conditional release and its explanatory memorandum are disseminated as widely as possible.

Appendix to Recommendation Rec(2003)22

...

II. General principles

3. Conditional release should aim at assisting prisoners to make a transition from life in prison to a law-abiding life in the community through post-release conditions and supervision that promote this end and contribute to public safety and the reduction of crime in the community.

4(a) In order to reduce the harmful effects of imprisonment and to promote the resettlement of prisoners under conditions that seek to guarantee safety of the outside community, the law should make conditional release available to all sentenced prisoners, including life-sentence prisoners.

4(b) If prison sentences are so short that conditional release is not possible, other ways of achieving these aims should be looked for.

5. When starting to serve their sentence, prisoners should know either when they become eligible for release by virtue of having served a minimum period (defined in absolute terms and/or by reference to a proportion of the sentence) and the criteria that will be applied to determine whether they will be granted release ('discretionary release system') or when they become entitled to release as of right by virtue of having served a fixed period defined in absolute terms and/or by reference to a proportion of the sentence ('mandatory release system').

6. The minimum or fixed period should not be so long that the purpose of conditional release cannot be achieved.

...

IV. Granting of conditional release

Discretionary release system

16. The minimum period that prisoners have to serve to become eligible for conditional release should be fixed in accordance with the law.

17. The relevant authorities should initiate the necessary procedure to enable a decision on conditional release to be taken as soon as the prisoner has served the minimum period.

18. The criteria that prisoners have to fulfil in order to be conditionally released should be clear and explicit. They should also be realistic in the sense that they should take into account the prisoners' personalities and social and economic circumstances as well as the availability of resettlement programmes.

19. The lack of possibilities for work on release should not constitute a ground for refusing or postponing conditional release. Efforts should be made to find other forms of occupation. The absence of regular accommodation should not constitute a ground for refusing or postponing conditional release and in such cases temporary accommodation should be arranged.

20. The criteria for granting conditional release should be applied so as to grant conditional release to all prisoners who are considered as meeting the minimum level of safeguards for becoming law-abiding citizens. It should be incumbent on the authorities to show that a prisoner has not fulfilled the criteria.

21. If the decision-making authority decides not to grant conditional release it should set a date for reconsidering the question. In any case, prisoners should be able to reapply to the decision-making authority as soon as their situation has changed to their advantage in a substantial manner.

Mandatory release system

22. The period that prisoners must serve in order to become entitled to release should be fixed by law.

...

VIII. Procedural safeguards

32. Decisions on granting, postponing or revoking conditional release, as well as on imposing or modifying conditions and measures attached to it, should be taken by authorities established by law in accordance with procedures covered by the following safeguards:

(a) convicted persons should have the right to be heard in person and to be assisted according to the law;

(b) the decision-making authority should give careful consideration to any elements, including statements, presented by convicted persons in support of their case;

(c) convicted persons should have adequate access to their file;

(d) decisions should state the underlying reasons and be notified in writing.

33. Convicted persons should be able to make a complaint to a higher independent and impartial decision-making authority established by law against the substance of the decision as well as against non-respect of the procedural guarantees.

34. Complaints procedures should also be available concerning the implementation of conditional release.

35. All complaints procedures should comply with the guarantees set out in Rules 13 to 19 of the European rules on community sanctions and measures.

36. Nothing in paragraphs 32 to 35 should be construed as limiting or derogating from any of the rights that may be guaranteed in this connection by the European Convention on Human Rights.

...”

73. On 11 January 2006 the Committee of Ministers adopted Rec(2006)2 on the European Prison Rules (at the 952nd meeting of the Ministers’ Deputies), the relevant part of which provides as follows.

“***Part VIII***

Sentenced prisoners

Objective of the regime for sentenced prisoners

102.1 In addition to the rules that apply to all prisoners, the regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime-free life.

102.2 Imprisonment is by the deprivation of liberty a punishment in itself and therefore the regime for sentenced prisoners shall not aggravate the suffering inherent in imprisonment.”

2. Relevant extracts from reports by the Commissioner for Human Rights

(a) Report by Mr Alvaro Gil-Robles on his visit to Cyprus of 12 February 2004 – Doc. CommDH(2004)2

“10. Meanwhile, the Parliament has passed amendments to the Penal Code allowing prison sentences to be replaced by community service. The Minister of Justice also disclosed current discussions in the government on the penalty of life imprisonment, with a view to making termination of imprisonment possible subject to certain conditions.”

(b) Follow-up report on Cyprus (2003-05) "Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights" – Doc. CommDH(2006)12

"11. In her report concerning the detention conditions at the Central Prison in 2004, the Ombudswoman criticised the Cypriot authorities' interpretation of life sentence as imprisonment for the rest of the convicted person's life. In most other Council of Europe member States life imprisonment does not entail imprisonment for the rest of the natural life of the convicted person. At the time of the Commissioner's first visit there were discussions in the government about the possibility of terminating life imprisonment subject to certain conditions. A solution to this question has yet to be found, though. The Deputy Director of the Central Prison spoke of the difficulties in dealing with those currently serving life sentence, fourteen men at the time of the Office's visit, both in terms of the prisoners' morale, and security issues. The usual incentives for encouraging good behaviour in prisoners were inevitably of no use in relation to those serving life sentences, and this posed security problems both for the warders and for the other prisoners."

B. Extracts from relevant European Union texts

74. The Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between member States (OJ L 190 of 18 July 2002, p. 1) provides for the execution in any member State of a judicial decision made in another member State for the arrest and surrender of a person for the purpose of criminal proceedings or the execution of a custodial sentence. The relevant parts of Article 5 provide as follows:

Article 5
Guarantees to be given by the issuing member State in particular cases

"The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing member State, be subject to the following conditions:

...

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

C. Extracts from relevant international law texts

75. The relevant part of Article 77 of the Rome Statute of the International Criminal Court, pertaining to applicable penalties, provides as follows:

> "1. Subject to Article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in Article 5 of this Statute:
>
> (a) Imprisonment for a specified number of years, which may not exceed a maximum of thirty years; or
>
> (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
>
> ..."

76. Article 110, concerning the Review by the International Criminal Court on the reduction of sentences, provides as follows:

> "1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.
>
> 2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.
>
> 3. When the person has served two-thirds of the sentence, or twenty-five years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.
>
> 4. In its review under § 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:
>
> (a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;
>
> (b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or
>
> (c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.
>
> 5. If the Court determines in its initial review under § 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

77. The applicant submitted that his continuous detention for life was in breach of Article 3 of the Convention, which provides as follows:

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

78. The applicant's complaint under this provision was twofold. First of all he complained that the whole or a significant part of the period of his detention for life was a period of punitive detention that exceeded the reasonable and acceptable standards for the length of a period of punitive detention as required by the Convention. Secondly, he complained that the unexpected reversal of his legitimate expectations for release and his continuous detention beyond the date which had been set for his release by the prison authorities had left him in a state of distress and uncertainty over his future for a significant period of time. In his opinion, this amounted to inhuman and degrading treatment.

A. The parties' submissions

1. The applicant

79. At the outset, the applicant accepted that the imposition on 10 March 1989, the date of his conviction, of a mandatory life sentence, defined by the Regulations as amounting in essence to twenty years, did not constitute a violation of Article 3 of the Convention. The applicant drew a distinction between the time the sentence had been imposed in 1989 and after 1996, when the twenty-year definition of a life sentence had been abolished. On the F5 form, which the applicant had received when he had been admitted to prison, it had been clearly marked "twenty years" under the heading "Sentence". He had then been informed that he would be released on 16 July 2002 subject to his good conduct. Following the commission of a disciplinary offence his release date was delayed until 2 November 2002. However, further to the Supreme Court's judgment in the case of *Hadjisavvas v. the Republic of Cyprus* (see paragraphs 19, 50 and 51 above), in which it had been declared that the Regulations were unconstitutional, and the subsequent repeal of those Regulations in 1996 excluding any possibility of remission for life prisoners, the imposition of mandatory imprisonment had become imprisonment for the rest of one's life.

80. The applicant stressed that under the legislative scheme currently in force in Cyprus there was no parole board system and no provision was made for the granting of parole to prisoners or for the protection of their rights during the execution of their sentence and their readmission to society. Thus, the principal purpose of the sentence of imprisonment imposed by the Cypriot courts and subsequently enforced by the relevant authorities was punitive. This, in the applicant's view, coupled with the mandatory nature of the sentence, was contrary to Article 3 of the Convention (relying, *inter alia*, on *Mastromatteo v. Italy* [GC], no. 37703/97, § 72, ECHR 2002-VIII). The procedure currently in place granted unfettered discretion to the President and was arbitrary in its nature. In this context the applicant referred to the *ex officio* report of 26 May 2004 by the Cypriot Commissioner for Administration (Ombudsman) on the penitentiary system of Cyprus and the conditions of detention in the Central Prisons (see paragraph 63 above).

81. Although prisoners fell within a specific category of right-holders, they nevertheless had rights that ought to be protected by the authorities (here the applicant relied on *Silver and Others v. the United Kingdom*, 25 March 1983, Series A no. 61). Cypriot law imposed a mandatory sentence of life imprisonment in all cases of murder, depriving the courts of the vital discretion which judges should be allowed, having regard to the rights of the convicted person in imposing a sentence proportionate to the gravity of the offence committed. In this connection the applicant referred to Recommendation R (92) 17 of the Committee of Ministers of the Council of Europe to member States concerning consistency in sentencing, adopted by the Ministers' Deputies on 19 October 1991, according to which "whatever rationales for sentencing are declared, disproportionality between the seriousness of the offence and the sentences should be avoided". He also noted that even under the Rome Statute 1998, genocide was not automatically punished by life imprisonment (Article 77 § 1 of the Rome Statute – see paragraph 75 above).

82. The applicant claimed that the framework for protection of the rights of persons serving life-imprisonment sentences in Cyprus was contrary to the practices in most other member States of the Council of Europe and that there was an obvious need to establish a common policy. In this connection the applicant stated that in both France and Italy it had been explicitly recognised that an offender sentenced to life imprisonment had a fundamental right to be considered for release. In addition, the Federal Constitutional Court of Germany had recognised that a life sentence that had been fully implemented invariably entailed the loss of human dignity and the denial of the controversial right to rehabilitation. A release mechanism had been set up in Germany to ensure that life sentences were not implemented in a way that undermined human dignity by suppressing all hopes of release. Furthermore, it was a general requirement of

international human rights law that a convicted person should not be deprived of a second opportunity to return to society, following a non-problematic serving of his punishment and sentence and the completion of a rehabilitation procedure.

83. Finally, although the applicant welcomed the developments towards the establishment of a parole board in Cyprus, he noted that these were belated with regard to his case and, in any event, merely consisted of a draft bill which might never be passed or might not be passed in the proposed form.

84. With regard to the second part of his complaint under Article 3, the applicant submitted that his continuing detention beyond 2 November 2002 had caused him intense physical and mental suffering and that he had been deprived of all hope of obtaining a remission of his sentence which had become irreducible. This was not only obvious from any contact anyone made with him but was also reflected in his efforts to gain his freedom.

85. During his detention the applicant had been under the legitimate expectation that he would be released in 2002 since his date of release was set in the form given to him by the prison authorities. Despite his compliance with the Regulations and through no fault of his own, his release had in effect been cancelled. As a result, since 2002, he had been subjected to continuing feelings of anguish and uncertainty. The applicant claimed that he had now been left in a state of distress over his future, which was analogous to being on "death row" in that his future was death in prison.

2. The Government

86. With regard to the applicant's first complaint, the Government emphasised that the applicant had not been sentenced to an irreducible life sentence with no possibility of early release. Notwithstanding the gravity of his crime, like all life prisoners, he had sufficient hope for release under domestic law for the purposes of Article 3 of the Convention. First of all, under Article 53 § 4 of the Constitution, the President of the Republic could, on the recommendation of the Attorney-General, remit, suspend or commute any sentence passed by a court in the Republic. Secondly, under section 14 of the Prison Law of 1996, the President could, with the agreement of the Attorney-General, order the conditional release of a prisoner, including a prisoner serving a life sentence, at any time. Prisoners were free to apply to the President and the Attorney-General whenever they wished for release under the above provisions. Although release was a matter within the exclusive authority of the President, his decision involved the advice and required the agreement of the Attorney-General, who acted as an independent officer and not as part of the Republic's executive authorities. Consequently, his participation added an element of independence to the process.

87. In deciding whether to exercise his powers under the above provision, the President took into account the nature of the offence, the amount of time a prisoner had already served and any exceptional or compassionate grounds for early release. In this connection, the Government noted that an expression of genuine remorse on the part of a lifer would be an important consideration though not decisive. The President further determined whether the continued detention of the prisoner was necessary for the purposes of retribution and deterrence or for protecting the public from risk of serious harm.

88. The applicant had in fact applied for release under Article 53 § 4 of the Constitution on several occasions throughout the duration of his imprisonment but it had not been considered appropriate to release him. However, he had never applied for conditional release pursuant to section 14(1) of the Prison Law of 1996.

89. The Government observed that, from an examination of the Commission's and Court's case-law on Article 3, the appropriate test to apply was whether an applicant had been deprived of "all hope of obtaining an adjustment of his sentence": a test which entailed asking whether the sentence was reducible *de jure* and *de facto*. If a sentence of life imprisonment was reducible *de jure*, the mere fact that the prospects of early release were limited or that the decision about whether to grant early release depended on the discretion of the executive, even if that discretion was not subject to the review of the domestic courts, did not violate Article 3, provided that *de facto* there was a realistic possibility of that discretion being exercised in the future. A life prisoner would have to show either that early release was a legal impossibility or that there was no realistic prospect of early release in practice. In this connection, the Government relied on the Court's decision in *Einhorn v. France* ((dec.), no. 71555/01, ECHR 2001-XI) and argued that there were clear parallels between the situation in Cyprus and that in Pennsylvania.

90. In the present case, the applicant had a continuing possibility of early release *de jure*, under Article 53 § 4 of the Constitution and section 14(1) of the Prison Law of 1996. There was no reason to think that these provisions would never be exercised *de facto*. In practice, life prisoners had been released. Subsequent to the nine life prisoners released in 1993, two other life prisoners had been released under Article 53 § 4 of the Constitution in 1997 and 2005. There was no evidence in the present case indicating that in a change of circumstances in which the applicant displayed significant remorse for his crimes, which he had not done so far, and was no longer considered to represent any significant danger to society, he could not be released under the above provisions.

91. Notwithstanding the above, the Government recognised that there was scope for improvement in the current system *vis-à-vis* life prisoners. In particular, they noted that, at present, firstly, there was no published

procedure or criteria governing the operation of Article 53 § 4 of the Constitution or section 14(1) of the Prison Law of 1996; secondly, there was no obligation to disclose to a prisoner the opinion of the Attorney-General on his application; thirdly, there was no requirement for the President to give reasons for refusing an application for early release, nor was this the practice; and, finally, refusal to order early release was not amenable to judicial review in the courts.

92. Furthermore, although there was no clear consensus among member States with regard to early release for lifers and the criteria to be applied in this respect, there was an increasing emphasis in the practice of some member States, in the statements issued by Council of Europe institutions and in the Court's jurisprudence, on the need for fair, consistent and transparent procedures in the administration of provisions governing early release for those serving life sentences. With all the above in mind and before the present application had been lodged, the Ministry of Justice and Public Order had initiated a review of the procedures in Cyprus with a view to improving the rights of life prisoners. The Government noted that the proposals for legislative reform would be put forward at some time during 2007. They submitted a draft bill that had been prepared for the purposes of amending section 14 of the Prison Law. The proposals for amendment involved, *inter alia*, the fixing of a minimum period to be served to meet the requirements of retribution and deterrence before a prisoner could be considered eligible for parole on licence under section 14 of the Prison Law and the establishment of an independent parole board with responsibility for assessing the risk to the public once the relevant part of the sentence had been served and with the power to direct a prisoner's release on licence where the evidence indicated an acceptable level of risk. The provisions of the bill set out in detail the procedure to be followed by the board and the rights of prisoners in this matter. Nonetheless, the Government stressed that the fact that they were considering reform of the present system did not entail an acceptance that there had been a violation of the applicant's Convention rights.

93. With regard to the applicant's second complaint, the Government submitted that although the effect of the judgment in the case of *Hadjisavvas* and the subsequent repeal of the Regulations had caused disappointment to the applicant in view of his expectation that he would be released on 2 November 2002, such disappointment did not cross the high threshold of severity required for the finding of a violation of Article 3 of the Convention. This was particularly so given that, in sentencing the applicant, the Limassol Assize Court had adopted the earlier judgment of the Nicosia Assize Court in the case of *The Republic of Cyprus v. Yiouroukkis*, casting doubts on the compatibility of the Regulations both with the Constitution and section 11 of the Prison Discipline Law. The Limassol Assize Court had rejected the possibility of imposing three

consecutive terms and had concluded that imprisonment for life meant imprisonment for the remainder of the accused's life. The applicant had also been present at the sentencing hearing. Consequently, the applicant's expectation about his future release must have been significantly qualified by that court's judgment, notwithstanding the administrative form given to him shortly thereafter upon his admission to prison.

94. Furthermore, if the applicant had sought the advice of counsel immediately after the sentence had been passed, he would no doubt have been advised that he should not assume that he would automatically be released after fifteen or even twenty years. In addition, three and a half years after the applicant had been sentenced, the Supreme Court delivered its judgment in the case of *Hadjisavvas*, thus definitively resolving the issue. So for the past fourteen years the position in domestic law had been quite clear. It could not therefore be said that the applicant had been in a state of uncertainty throughout his sentence.

B. The Court's assessment

1. General principles

95. Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, for example, *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV). Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25).

96. The Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. In accordance with Article 3 of the Convention, the State must ensure that a person is detained under conditions which are compatible with respect for his human dignity and that the manner and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI).

97. The imposition of a sentence of life imprisonment on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention (see, *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; and *Sawoniuk v. the United Kingdom* (dec.), no. 63716/00, ECHR 2001-VI). 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*, cited above; *Stanford v. the United Kingdom* (dec.), no. 73299/01, 12 December 2002; and *Wynne v. the United Kingdom* (dec.), no. 67385/01, 22 May 2003).

98. 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. An analysis of the Court's case-law on the subject discloses that where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3. The Court has held, for instance, in a number of cases that, where detention was subject to review for the purposes of parole after the expiry of the minimum term for serving the life sentence, it could not be said that the life prisoners in question had been deprived of any hope of release (see, for example, *Stanford*, cited above; *Hill v. the United Kingdom* (dec.), no. 19365/02, 18 March 2003; and *Wynne*, cited above). The Court has found that this is the case even in the absence of a minimum term of unconditional imprisonment and even when the possibility of parole for prisoners serving a life sentence is limited (see, for example, *Einhorn*, cited above, §§ 27-28). It follows that a life sentence does not become "irreducible" by the mere fact that in practice it may be served in full. It is enough for the purposes of Article 3 that a life sentence is *de jure* and *de facto* reducible.

99. Consequently, although the Convention does not confer, in general, a right to release on licence or a right to have a sentence reconsidered by a national authority, judicial or administrative, with a view to its remission or termination (see, *inter alia*, *Kotälla*, and *Bamber*, both cited above; and *Treholt v. Norway*, no. 14610/89, Commission decision of 9 July 1991, DR 71, p. 168), it is clear from the relevant case-law that the existence of a system providing for consideration of the possibility of release is a factor to be taken into account when assessing the compatibility of a particular life sentence with Article 3. In this context, however, it should be observed 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 European level, provided that the system chosen does not contravene the principles set forth in the Convention (see, *mutatis mutandis*, *Achour v. France* [GC], no. 67335/01, § 51, ECHR 2006-IV).

2. Application of the above principles to the instant case

100. In the instant case, the Court must determine whether the sentence of life imprisonment imposed on the applicant in the particular circumstances has removed any prospect of his release.

101. In reaching its decision the Court has had regard to the standards prevailing amongst the member States of the Council of Europe in the field of penal policy, in particular concerning sentence review and release arrangements (see *Soering v. the United Kingdom*, 7 July 1989, § 102, Series A no. 161; and *V. v. the United Kingdom* [GC], no. 24888/94, § 72, ECHR 1999-IX). It has also taken into account the increasing concern regarding the treatment of persons serving long-term prison sentences, particularly life sentences, reflected in a number of Council of Europe texts (see paragraphs 68-73 above).

102. At the outset the Court notes that in Cyprus the offence of premeditated murder carries a mandatory sentence of life imprisonment (see paragraphs 31-33 above), which under the Criminal Code, as confirmed by the domestic courts, is tantamount to imprisonment for the rest of the convicted person's life. Furthermore, it observes that Cypriot law does not provide for a minimum term for serving a life sentence or for the possibility of its remission on the basis of good conduct and industry. However, the adjustment of such a sentence is possible at any stage irrespective of the time served in prison. In particular, under Article 53 § 4 of the Constitution as it has been applied since 1963, the President of the Republic, on the recommendation of the Attorney-General, may suspend, remit or commute any sentence passed by a court (see paragraphs 36-37 above). The President can therefore at any point in time commute a life sentence to another one of a shorter duration and then remit it, affording the possibility of immediate release. Moreover, section 14 of the Prison Law of 1996 provides for the conditional release of prisoners, including life prisoners (see paragraph 59 above). In line with this provision, subject to the provisions of the Constitution, the President, with the agreement of the Attorney-General, can order by decree the conditional release of a prisoner at any time.

103. Admittedly, it follows from the above provisions that the prospect of release for prisoners serving life sentences in Cyprus is limited, any adjustment of a life sentence being only within the President's discretion, subject to the agreement of the Attorney-General. Furthermore, as acknowledged by the Government, there are certain shortcomings in the current procedure (see paragraph 91 above). Notwithstanding, the Court does not find that life sentences in Cyprus are irreducible with no possibility of release; on the contrary, it is clear that in Cyprus such sentences are both *de jure* and *de facto* reducible. In this connection, the Court notes that from the parties' submissions it transpires that life prisoners have been released under Article 53 § 4 of the Constitution. In particular, nine life prisoners were released in 1993 and another two in 1997 and 2005 respectively (see

paragraphs 52 and 90 above and paragraph 158 below). All of these prisoners, apart from one, had been serving mandatory life sentences. In addition, a life prisoner can benefit from the relevant provisions at any time without having to serve a minimum period of imprisonment. Consequently, it cannot be inferred that the applicant has no possibility of release and he has not adduced evidence to warrant such an inference.

104. In his submissions, the applicant has placed great emphasis on the lack of a parole board system in Cyprus. However, the Court reiterates that matters relating to early release policies including the manner of their implementation fall within the power member States have in the sphere of criminal justice and penal policy (see, *mutatis mutandis*, *Achour*, cited above, § 44). In this connection, the Court observes that at the present time there is not yet a clear and commonly accepted standard amongst the member States of the Council of Europe concerning life sentences and, in particular, their review and method of adjustment. Moreover, no clear tendency can be ascertained with regard to the system and procedures implemented in respect of early release.

105. In view of the above, the Court considers that the applicant cannot claim that he has been deprived of any prospect of release and that his continued detention as such, even though long, constitutes inhuman or degrading treatment. However, the Court is conscious of the shortcomings in the procedure currently in place (see paragraph 91 above) and notes the recent steps taken for the introduction of reforms.

106. Furthermore, with regard to the applicant's second complaint, although the change in the applicable legislation and consequent frustration of his expectations of release must have caused him a certain amount of anxiety, the Court does not consider that in the circumstances this attained the level of severity required to fall within the scope of Article 3. Bearing in mind the chronology of events and, in particular, the lapse of time between them, it cannot be said that the applicant could justifiably harbour genuine expectations that he would be released in November 2002. In this connection, the Court notes that apart from the clear sentence passed by the Assize Court in 1989 the relevant changes in the domestic law happened within a period of approximately four years, that is, between 1992 and 1996, thus about six years before the release date given by the prison authorities to the applicant came around. Therefore, any feelings of hope on the part of the applicant linked to the prospect of early release must have diminished as it became clear with the changes in domestic law that he would be serving the life sentence passed on him by the Assize Court.

107. It is true that a life sentence such as the one imposed on and served by the applicant without a minimum term necessarily entails anxiety and uncertainty related to prison life but these are inherent in the nature of the sentence imposed and, considering the prospects for release under the

current system, do not warrant a conclusion of inhuman and degrading treatment under Article 3.

108. Accordingly, the Court finds that there has been no violation of that provision.

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

109. The applicant submitted that his continuing detention since 2 November 2002 violated Article 5 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;
>
> ..."

A. The parties' submissions

1. The applicant

110. The applicant submitted that when the Limassol Assize Court had sentenced him to a mandatory sentence of "life imprisonment", in accordance with the Prison Regulations applicable at the material time, "life imprisonment" had meant imprisonment for a term of twenty years. Although the Assize Court had been aware of this definition, it had failed to review the matter and declare the said Regulations unconstitutional or, at least, inapplicable to the applicant's case. It had simply proceeded to impose the sentence. He had then served his sentence but had not been released when his sentence had expired on 2 November 2002. By that date the applicant had exhausted the punitive element of his offence for murder and his detention had thus become arbitrary or disproportionate in terms of the objectives of the sentence imposed on him.

111. The applicant maintained that it was hard to understand the logic behind or the justification for his continued detention, especially since there was no evidence that he was mentally unstable and dangerous to the public (relying, *inter alia*, on *Stafford v. the United Kingdom* [GC], no. 46295/99, §§ 28-49 and 62-83, ECHR 2002-IV).

2. The Government

112. The Government submitted that the applicant's continuing detention beyond 2 November 2002 was compatible with Article 5 § 1 (a) of

the Convention. The applicant had been serving a mandatory sentence of imprisonment for life which had been imposed on him by a court's judgment, on 10 March 1989, pursuant to section 203 of the Criminal Code, following conviction. At all times since his conviction, the applicant's detention had been authorised by the sentence of life imprisonment prescribed by the Criminal Code and passed by the Limassol Assize Court. The causal link with the original sentence had not therefore been broken. In this connection, they pointed out that the applicant's sentence, being a mandatory life sentence, had not been imposed by reference to considerations pertaining to the dangerousness of the offender, which were amenable to change over time; the sentence was not divided up into a punitive element, that is, a punitive "tariff" phase of detention, and a subsequent element based on the risk presented by the prisoner, that is, an ensuing phase of detention on the grounds of public protection.

113. The Supreme Court's judgment in the case of *Politis v. the Republic of Cyprus* (see paragraph 35 above) made it clear that the Constitution had singled out certain categories of crimes, including premeditated murder, for exceptional treatment in view of their gravity and their repercussions for the well-being of society. This was irrespective of the fact that a life prisoner might, in practice, be released under the Constitution or the Prison Law of 1996. Likewise, in the case of *Hadjisavvas*, the Supreme Court had held that the legislature did not equate the sentence of life imprisonment to imprisonment for any time-span, either where this was imposed as a mandatory measure of punishment under section 203(2) of the Criminal Code, or where it was imposed as a discretionary measure under section 23 of the Code.

114. For this reason the Government considered that the position in Cyprus was equivalent to that examined by the Court in *Wynne v. the United Kingdom* (18 July 1994, Series A no. 294-A), in which the Court held that a mandatory life sentence had been imposed automatically as the punishment for the offence of murder irrespective of the considerations pertaining to the dangerousness of the offender. The developments in English domestic law subsequent to the above case had no parallel in Cyprus where there was no equivalent of the tariff-fixing exercise.

115. The Government finally submitted that the Regulations had been irrelevant to the lawfulness of the applicant's continued detention since, by the time they might have operated in such a way as to result in the applicant's early release in November 2002, they had been repealed by the Prison Law of 1996.

B. The Court's assessment

1. General principles

116. 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*, *Stafford*, cited above, and *Amuur v. France*, 25 June 1996, § 50, *Reports of Judgments and Decisions* 1996-III). 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).

117. 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).

2. Application of the above principles to the instant case

118. 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. Furthermore, the applicant does not contest the lawfulness of his detention until 2 November 2002. Rather, the question to be determined is whether the detention of the applicant after that date conformed to the original mandatory life sentence imposed on him.

119. The Court observes that the applicant was convicted of premeditated murder by the Limassol Assize Court on 9 March 1989 and on the next day received a mandatory life sentence by that court on the basis of

section 203(2) of the Criminal Code. Such a sentence is imposed automatically under the Criminal Code as the punishment for the offence of premeditated murder irrespective of the considerations pertaining to the dangerousness of the offender. In imposing the life sentence, the Limassol Assize Court made it quite plain that the applicant had been sentenced to life imprisonment for the remainder of his life as provided by the Criminal Code and not for a period of twenty years (see paragraphs 14 and 15 above).

120. The Court considers therefore that the fact that the applicant was subsequently given a notice by the prison authorities, on the basis of the Prison Regulations in force at the time, setting a conditional release date cannot and does not affect the sentence of life imprisonment passed by the Limassol Assize Court or render his detention beyond the above date unlawful. In the Court's view there is a clear and sufficient causal connection between the conviction and the applicant's continuing detention, which was pursuant to his conviction and in accordance with the mandatory life sentence imposed on him by a competent court, in conformity with the requirements of the Convention and free of arbitrariness.

121. On the facts of the case, therefore, the Court is satisfied that the continuing detention of the applicant after 2 November 2002 is justified under Article 5 § 1 (a). There has therefore been no violation of Article 5 § 1 of the Convention.

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

122. In his submissions before the Grand Chamber, the applicant raised a supplementary complaint that the mandatory nature of life imprisonment coupled with the absence of a parole system in Cyprus constituted a violation of Article 5 § 4 of the Convention, 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."

123. The Government submitted that the sentence lawfully imposed on the applicant being detention for life, no new issues of lawfulness could arise with regard to his detention which required review by an independent tribunal. His detention was lawful and the requirements of Article 5 § 4 of the Convention were incorporated in the original sentence of the Limassol Assize Court.

124. The Court notes that this complaint was raised for the first time in the applicant's memorial to the Grand Chamber. It is therefore not covered by the decision on admissibility of 11 April 2006, which delimits the scope of the Court's jurisdiction (see, among other authorities, *Brogan and Others v. the United Kingdom*, 29 November 1988, §§ 46-47, Series A no. 145-B;

Assanidze v. Georgia [GC], no. 71503/01, § 162, ECHR 2004-II; and *Draon v. France* [GC], no. 1513/03, § 117, 6 October 2005). It follows that this complaint falls outside the scope of the case before the Grand Chamber.

IV. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

125. The applicant complained that the unforeseeable prolongation of his term of imprisonment as a result of the repeal of the Regulations and, further, the retroactive application of the new legislative provisions violated Article 7 of the Convention, which provides as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. The parties' submissions

1. The applicant

126. The applicant submitted that when he had been sentenced to mandatory life imprisonment on 10 March 1989 by the Limassol Assize Court, under the Prison Regulations applicable at the time, "life imprisonment" had been tantamount to imprisonment for a period of twenty years. As a result of the repeal of the Regulations, the amendment of the relevant legislative provisions and the retroactive application of the provisions thus amended, he had been subjected to an unforeseeable prolongation of his term of imprisonment from a definite twenty-year sentence to an indeterminate term for the remainder of his life, with no prospect of remission, and to a change in the conditions of his detention. Thus, a heavier penalty had been imposed than that applicable at the time he had committed the offence of which he had been convicted, in breach of Article 7 of the Convention.

127. In the applicant's view, the Government should be estopped from denying that his sentence had been more than twenty years and that by applying the Regulations he would have served his sentence by 2002. It was clear from the facts that the applicant believed that his sentence expired in 2002. He had not appealed against his sentence, relying on the notice and release date given by the prison authorities. In fact, both the prison authorities and the Office of the Attorney-General had been aware of this. The prolongation of his sentence following the repeal of the Regulations

could not have been foreseen either at the time of committing the offence or at the time of his sentencing. His sentence had been retroactively increased from a definite twenty-year term to an indefinite term without the prospect of remission.

128. Finally, the applicant considered that his case did not fall within the ambit of the exemption provided for in the second paragraph of Article 7 of the Convention.

2. The Government

129. The Government pointed out that Article 7 did not relate to changes in how a sentence passed by a court was executed, as opposed to changes in the substantive penalty prescribed for the offence itself (relying, *inter alia*, on *Hogben v. the United Kingdom*, no. 11653/85, Commission decision of 3 March 1986, DR 46; *Grava v. Italy* no. 43522/98, § 51, 10 July 2003; and *Uttley v. the United Kingdom* (dec.), no. 36946/03, 29 November 2005).

130. Section 203(2) of the Criminal Code, imposing a mandatory life sentence for premeditated murder, was the only substantive provision of domestic law prescribing the applicable penalty to be imposed by the courts for such a crime. In contrast, the Regulations did not contain a provision which defined in substantive terms the penalty for the offence of murder but had been subordinate legislation made on the basis of, and for the purposes of, the Prison Discipline Law and simply concerned the manner of the execution of that sentence. They had not been made pursuant to the Criminal Code, but rather under sections 4 and 9 of the Prison Discipline Law, which, as its title suggested, had been concerned with prison discipline. Neither of the two sections authorised the making of regulations prescribing the sentences that could be imposed by the courts.

131. The definition in Regulation 2 (as inserted by the 1987 Regulations) that "imprisonment for life meant imprisonment for twenty years" and Regulation 93 (as amended by the 1987 Regulations) prescribing that a life prisoner could earn a remission of his sentence on the grounds of good conduct and diligence concerned the execution of the life sentence imposed by the court.

132. The Government noted that the above analysis had been accepted by the domestic courts. First of all, the Limassol Assize Court, when sentencing the applicant in March 1989, had questioned the validity of the Regulations under the Constitution and held that, in any event, even if they had been valid, they could not have been taken into account when sentencing the applicant so as to enable it to impose three consecutive life sentences. That court had considered that "imprisonment for life meant imprisonment for the remainder of the accused's life". Under the Constitution subordinate legislation could not alter that position. No appeal had been brought against this sentence in 1989. Furthermore, the Supreme Court, when examining the applicant's appeal concerning his habeas corpus

application, had held that the then existing Regulations did not change the fact that, in accordance with the law, imprisonment for the remainder of the applicant's life had been imposed.

133. In the Government's view the Supreme Court's interpretation of the legal effect of the Regulations had been correct. The penalty for the offence within the meaning of Article 7 of the Convention had always been mandatory life imprisonment in accordance with section 203(2) of the Criminal Code. A change in law which required a prisoner to serve a greater part of his original sentence than he would have had to serve at the time he committed the offence did not constitute a violation of Article 7. Judged from the prisoner's perspective, the position was no doubt harsher. But this did not alter the fact that the "applicable penalty" for the purposes of Article 7 remained throughout the penalty prescribed by the relevant domestic law.

134. If the applicant's argument were correct, it would mean that a retrospective change in subordinate legislation or indeed any change in administrative practice in any member State of the Council of Europe which postponed the date on which a prisoner was eligible for early release from a prison sentence, whether determinate or indeterminate, that was lawfully imposed by a court would be incompatible with Article 7. That would be a significant departure from the existing case-law under the Convention.

135. For all the above reasons, the Government considered that it could not be said that the repeal of the Regulations had resulted in the retroactive increase of the penalty of life imprisonment which had been applicable at the time the murders were committed by the applicant and which had been imposed on him by the Limassol Assize Court in respect of those offences.

136. Finally, the Government noted that in the event the Court were to conclude that at the time of the commission of the offence the Regulations had operated in domestic law in such a way as to limit the maximum penalty for the offence to twenty years (as distinct from governing the manner of implementation of a penalty of life imprisonment), then the repeal of those Regulations had resulted in a retrospective increase in that maximum. It would then also be necessary to consider whether the maximum penalty prescribed by the regulations was fifteen years or twenty years. If the latter was the case then the applicant would not have been entitled to release pursuant to the requirements of Article 7 until July 2007. It had been clear under the Regulations that the maximum period a life prisoner could be required to serve was twenty years and the earliest date of release was after serving fifteen years of his sentence. Although it was administrative practice to deduct the five years at the outset of the sentence, so as to identify the earliest possible date of release, this practice was not required by the Regulations or by the enabling legislation. An administrative practice of such nature could not in the Government's view constitute a substantive restriction on the maximum length of the sentence

imposed by the court. The Government, however, emphasised that this was not the correct interpretation of domestic law and that the interpretation given by the Supreme Court should be followed and adopted by the Court.

B. The Court's assessment

1. General principles

137. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *S.W. v. the United Kingdom*, and *C.R. v. the United Kingdom*, 22 November 1995, §§ 35 and 33 respectively, Series A no. 335-B and C).

138. Accordingly, it embodies in general terms the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) (see *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (*Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII, and *Achour*, cited above, § 41).

139. When speaking of "law", Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law (see, *mutatis mutandis*, The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 47, Series A no. 30; *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A; and *Casado Coca v. Spain*, 24 February 1994, § 43, Series A no. 285-A). In this connection, the Court has always understood the term "law" in its "substantive" sense, not its "formal" one. It has thus included both enactments of lower rank than statutes and unwritten law (see, in particular, *mutatis mutandis*, *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 93, Series A no. 12). In sum, the "law" is the provision in force as the competent courts have interpreted it (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 88, ECHR 2005-XI).

140. Furthermore, the term "law" implies qualitative requirements, including those of accessibility and foreseeability (see, among other authorities, *Cantoni v. France*, 15 November 1996, § 29, *Reports* 1996-V; *Coëme and Others*, cited above, § 145; and *E.K. v. Turkey*, no. 28496/95, § 51, 7 February 2002). These qualitative requirements must be satisfied as

regards both the definition of an offence and the penalty the offence in question carries (see *Achour*, cited above, § 41). An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it what acts and omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission (see, among other authorities, *Cantoni*, cited above, § 29). Furthermore, a law may still satisfy the requirement of "foreseeability" where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among other authorities, ibid., § 35, and *Achour*, cited above, § 54).

141. The Court has acknowledged in its case-law that however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see, *mutatis mutandis*, The Sunday Times *(no. 1)*, § 49, and *Kokkinakis*, § 40, both cited above). The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (see, *mutatis mutandis*, *Cantoni*, cited above). Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen" (see *S.W. v. the United Kingdom*, cited above, § 36, and *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II).

142. The concept of "penalty" in Article 7 is, like the notions of "civil right and obligations" and "criminal charge" in Article 6 § 1 of the Convention, autonomous in scope. To render the protection afforded by Article 7 effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see *Welch v. the United Kingdom*, 9 February 1995, § 27, Series A no. 307-A, and *Jamil v. France*, 8 June 1995, § 30, Series A no. 317-B). The wording of Article 7 § 1, second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and

its severity (see *Welch*, cited above, § 28, and *Jamil*, cited above, § 31). To this end, both the Commission and the Court in their case-law have drawn a distinction between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty". In consequence, where the nature and purpose of a measure relates to the remission of a sentence or a change in a regime for early release, this does not form part of the "penalty" within the meaning of Article 7 (see, *inter alia*, *Hogben*, cited above; *Hosein v. the United Kingdom*, no. 26293/95, Commission decision of 28 February 1996, unreported; *Grava*, cited above, § 51; and *Uttley*, cited above). However, in practice, the distinction between the two may not always be clear cut.

2. Application of the above principles to the instant case

143. At the outset the Court notes that it is common ground between the parties that at the time the applicant was prosecuted and convicted, the offence of premeditated murder was punishable by mandatory life imprisonment under section 203(2) of the Criminal Code and that he had been sentenced under that provision. The legal basis for the applicant's conviction and sentence was therefore the criminal law applicable at the material time and his sentence corresponded to that prescribed in the relevant provisions of the Criminal Code.

144. The essence of the parties' arguments concerns the actual meaning of the term "life imprisonment". On the one hand the applicant maintains that at the time he committed the offence of which he was convicted life imprisonment had been tantamount to imprisonment for a period of twenty years. The subsequent repeal of the Prison Regulations and the retroactive application of the Prison Law of 1996 brought about both an unforeseeable prolongation of his term of imprisonment to an indefinite term for the remainder of his life and a change in the conditions of his detention. On the other hand the Government submit that section 203(2) of the Criminal Code was, and still remains, the only substantive provision of domestic law prescribing the penalty of a life sentence to be imposed by the courts for premeditated murder. This was the penalty imposed by the Limassol Assize Court on the applicant. The Prison Regulations concerned the execution of the life sentence imposed by the court, namely, the assessment of a possible remission of his sentence on the grounds of good conduct and diligence.

145. Consequently, the issue that the Court needs to determine in the present case is what the "penalty" of life imprisonment actually entailed under the domestic law at the material time. The Court must, in particular, ascertain whether the text of the law, read in the light of the accompanying interpretative case-law, satisfied the requirements of accessibility and foreseeability. In doing so it must have regard to the domestic law as a whole and the way it was applied at the material time.

146. Although at the time the applicant committed the offence it was clearly provided by the Criminal Code that the offence of premeditated murder carried the penalty of life imprisonment, it is equally clear that at that time both the executive and the administrative authorities were working on the premise that this penalty was tantamount to twenty years' imprisonment (see paragraph 65 above). The prison authorities were applying the Prison Regulations, made on the basis of the Prison Discipline Law (Cap. 286), under which all prisoners, including life prisoners, were eligible for remission of their sentence on the grounds of good conduct and industry. For these purposes, Regulation 2 defined life imprisonment as meaning imprisonment for twenty years (see paragraph 42 above). As admitted by the Government, this was understood at the time by the executive and the administrative authorities, including the prison service, as imposing a maximum period of twenty years to be served by any person who had been sentenced to life imprisonment (see paragraph 65 above). The prison authorities were therefore assessing the remission of the life sentences of prisoners on the basis of twenty years' imprisonment. This also transpires from the letter sent by the then Attorney-General of the Republic to the President at that time (see paragraph 53 above).

147. On 5 February 1988 the Nicosia Assize Court, in its sentencing judgment in the case of *the Republic of Cyprus v. Andreas Costa Aristodemou, alias Yiouroukkis*, clearly stated that life imprisonment under the Criminal Code was for the remainder of the biological existence of the convicted person and not for twenty years. Subsequently, on 10 March 1989 the Limassol Assize Court, when passing sentence on the applicant, relied on the findings of the Nicosia Assize Court in the above case. It accordingly sentenced the applicant to "life imprisonment" for the remainder of his life. In spite of this, when the applicant was admitted to prison to serve his sentence, he was given a written notice by the prison authorities with a conditional release date, the remission of his life sentence having been assessed on the basis that it amounted to imprisonment for a term of twenty years. It was not until 9 October 1992 in the case of *Hadjisavvas v. the Republic of Cyprus* (see paragraphs 19 and 50 above) that the Regulations were declared unconstitutional and *ultra vires* by the Supreme Court (see paragraphs 50-51 above). They were eventually repealed on 3 May 1996.

148. In view of the above, while the Court accepts the Government's argument that the purpose of the Regulations concerned the execution of the penalty, it is clear that in reality the understanding and the application of these Regulations at the material time went beyond this. The distinction between the scope of a life sentence and the manner of its execution was therefore not immediately apparent. The first clarification by a domestic court in this respect was given in the *Yiouroukkis* case subsequent to the commission of the offence by the applicant that led to his prosecution and conviction. Furthermore, the Court notes that in both the case of

Yiouroukkis and that of the applicant, the prosecution was inclined to take the view that life imprisonment was limited to a period of twenty years (see paragraphs 15 and 47 above).

149. At the same time, however, the Court cannot accept the applicant's argument that a heavier penalty was retroactively imposed on him since in view of the substantive provisions of the Criminal Code it cannot be said that at the material time the penalty of a life sentence could clearly be taken to have amounted to twenty years' imprisonment.

150. The Court considers, therefore, that there is no element of retrospective imposition of a heavier penalty involved in the present case but rather a question of "quality of law". In particular, the Court finds that at the time the applicant committed the offence, the relevant Cypriot law taken as a whole was not formulated with sufficient precision as to enable the applicant to discern, even with appropriate advice, to a degree that was reasonable in the circumstances, the scope of the penalty of life imprisonment and the manner of its execution. Accordingly, there has been a violation of Article 7 of the Convention in this respect.

151. However, as regards the fact that as a consequence of the change in the prison law (see paragraph 58 above), the applicant, as a life prisoner, no longer has a right to have his sentence remitted, the Court notes that this matter relates to the execution of the sentence as opposed to the "penalty" imposed on him, which remains that of life imprisonment. Although the changes in the prison legislation and in the conditions of release may have rendered the applicant's imprisonment effectively harsher, these changes cannot be construed as imposing a heavier "penalty" than that imposed by the trial court (see *Hogben* and *Hosein*, both cited above). In this connection, the Court would reiterate that issues relating to release policies, the manner of their implementation and the reasoning behind them fall within the power of the member States in determining their own criminal policy (see *Achour*, cited above, § 44). Accordingly, there has not been a violation of Article 7 of the Convention in this regard.

152. In conclusion, the Court finds that there has been a violation of Article 7 of the Convention with regard to the quality of the law applicable at the material time. It further finds that there has been no violation of this provision in so far as the applicant complains about the retrospective imposition of a heavier penalty with regard to his sentence and the changes in the prison law exempting life prisoners from the possibility of remission of their sentence.

V. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

153. Finally, the applicant complained that he had been subjected to discriminatory treatment *vis-à-vis* both life prisoners and other prisoners, contrary to Article 14 of the Convention taken in conjunction with Articles 3, 5 and 7. Article 14 of the Convention provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. The parties' submissions

1. The applicant

154. The applicant submitted that most other life prisoners had been released having served their twenty-year sentence. In this connection he noted that while these prisoners had been released by way of commutation of their sentences by the President of the Republic under Article 53 § 4 of the Constitution, for reasons unknown to him, he had been subjected to discriminatory treatment and kept in prison. Furthermore, he noted that in addition to the nine life prisoners released in 1993, another four life prisoners had been released between 1997 and 2005 on the basis of Article 53 § 4. As a consequence of this discriminatory treatment, he had become the longest-serving life prisoner at the Central Prisons.

155. Finally, he argued that, following the amendments to the relevant legislation, under section 12(1) of the Prison Law of 1996 as a life prisoner he had been excluded from the possibility of any remission of his sentence.

2. The Government

156. The Government acknowledged that the applicant had been treated differently to the nine life prisoners who had been released in 1993 by way of commutation of their sentences by the President of the Republic under Article 53 § 4 of the Constitution. However, they submitted that this difference in treatment was not contrary to Article 14 of the Convention. In particular, the applicant had not been treated differently from the nine life prisoners because of any "personal characteristic" but because of the nature of the Assize Court's judgment in sentencing him. The Assize Court had expressly addressed the proper interpretation of a life sentence and the question of whether the Regulations had been unconstitutional. The other nine prisoners had all been sentenced prior to the judgment in the case of *Yiouroukkis*, in which these matters of interpretation of the life sentence and validity of the Regulations had first been raised. It was clear from the letters

sent by the Attorney-General to the President that the nine prisoners had been released on the basis that it had been announced to them that their sentences would be twenty years' imprisonment. Contrary to the position in the applicant's case, this announcement had not previously been qualified by the remarks of the sentencing courts.

157. Furthermore, all the nine prisoners had nearly reached the end of the period they would have been required to serve under the Regulations when the Supreme Court gave its judgment in the case of *Hadjisavvas*. They had all been eligible for release under the Regulations in either 1993 or 1994 and, unlike the applicant, had served almost the whole of their sentences on the clear understanding that they would be automatically released under the Regulations. In those circumstances, the President, acting on the recommendation of the Attorney-General, decided that it was appropriate, on humanitarian grounds, to release the nine prisoners early under Article 53 § 4 of the Constitution. The same considerations did not apply to the applicant's case. Therefore, the Government considered that by requiring the applicant to serve the term of life imprisonment (unconstrained by any impact of the Regulations), thereby treating him differently from the other nine life prisoners, they had plainly pursued the legitimate penal aim of requiring the applicant to serve the full sentence imposed by the Criminal Code and the domestic courts. In this connection, the Government pointed out that the life prisoner, Mr Yiouroukkis, had been treated in exactly the same way and for exactly the same reasons as the applicant. He was therefore also still serving his life sentence.

158. Finally, the Government noted that since 1993 only two life prisoners had been released under Article 53 § 4 of the Constitution and not four as the applicant alleged. The other two cases that the applicant referred to did not involve prisoners serving a life sentence.

B. The Court's assessment

1. General principles

159. The Court reiterates that Article 14 of the Convention has no independent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols. However, the application of Article 14 does not presuppose a breach of one or more of such provisions, and to this extent it is autonomous (see, for example, *Thlimmenos v. Greece* [GC], no. 34369/97, § 40, ECHR 2000-IV). A measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature (see, for example, *Case "relating to certain aspects of the laws on*

the use of languages in education in Belgium" v. Belgium (merits), 23 July 1968, § 9, Series A no. 6). Accordingly, for Article 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols (see, for example, *Thlimmenos*, cited above, § 40, and *Karlheinz Schmidt v. Germany*, 18 July 1994, § 22, Series A no. 291-B).

160. Furthermore, the Court notes that Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognised by the Convention. It safeguards persons who are in analogous or relevantly similar positions against discriminatory differences in treatment that have as their basis or reason a personal characteristic ("status") by which persons or a group of persons are distinguishable from each other (see *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 56, Series A no. 23, and *Thlimmenos v. Greece*, cited above, §§ 40-49).

161. According to the Court's case-law, a difference of treatment is discriminatory, for the purposes of Article 14 of the Convention, if it "has no objective and reasonable justification". In other words, the notion of discrimination includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 82, Series A no. 94). Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention (see, among other authorities, *G.M.B. and K.M. v. Switzerland* (dec.), no. 36797/97, 27 September 2001). The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see *Gaygusuz v. Austria*, 16 September 1996, § 42, *Reports* 1996-IV). The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background (see *Rasmussen v. Denmark*, 28 November 1984, § 40, Series A no. 87, and *Inze v. Austria*, 28 October 1987, § 41, Series A no. 126), but the final decision as to observance of the Convention's requirements rests with the Court (see *Willis v. the United Kingdom*, no. 36042/97, § 39, ECHR 2002-IV).

2. Application of the above principles to the instant case

162. In the present case the Court notes that the discriminatory treatment alleged by the applicant lies in the distinction drawn, firstly, between the applicant and other life prisoners who have been released since 1993 and, secondly, between the applicant, as a life prisoner, and other prisoners under section 12(1) of the Prison Law of 1996.

163. As regards the applicant's first complaint, the Court observes that the life prisoners referred to were all released following the commutation and remission of their sentences by the President of the Republic in the exercise of his wide prerogative and discretionary power under Article 53 § 4 of the Constitution, which is applied on a case-to-case basis. In particular, the nine life prisoners who, like the applicant, had received their sentence within the period when the Prison Regulations were applicable and had been allocated a release date by the prison authorities were not released on the basis of the Regulations or their sentence but by the President in the exercise of his discretionary Constitutional powers. Furthermore, as the Government have pointed out, in the applicant's case the Limassol Assize Court had expressly addressed the proper interpretation of a life sentence and passed a sentence of imprisonment for the remainder of the applicant's life.

164. In view of the above, and particularly bearing in mind the wide variety of factors taken into account in the exercise of the President's discretionary powers, such as the nature of the offence and the public's confidence in the criminal-justice system (see paragraph 87 above), it cannot be said that the exercise of this discretion gives rise to an issue under Article 14.

165. With regard to the applicant's second complaint, the Court considers that the applicant cannot claim to be in an analogous or relevantly similar position to other prisoners who are not serving life sentences, given the nature of a life sentence.

166. The Court concludes, therefore, that there has not been a violation of Article 14 of the Convention taken in conjunction with Articles 3, 5 and 7.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

167. Article 41 of the Convention provides:

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

A. Damage

168. The applicant did not seek compensation for pecuniary damage. He submitted that a finding of a violation in respect of his complaints and his consequent release from prison would constitute adequate satisfaction. Furthermore, although the applicant sought an award for non-pecuniary damage he did not claim a specific sum and left the matter to the Court's

discretion. In this connection, he submitted that he had been subjected to intense mental suffering and had been experiencing feelings of uncertainty, fear and anguish owing to the wrongful continuation of his imprisonment and the prospect of dying in prison. The applicant requested the Court, when assessing the amount to be awarded under this head, to bear in mind, *inter alia*, the reasonable expectations of release emanating from the notice given to him by the prison authorities, the increase in his sentence without any fault on his part and the fact that the whole experience could be considered tantamount to the feelings experienced by a person on "death row".

169. The Government submitted that should the Court find a violation in relation to the applicant's first complaint under Article 3, such a violation would constitute sufficient just satisfaction. In this connection, they emphasised that even if the domestic law had been different, for example, even if the possibility of the applicant's release were to be determined by an independent parole board, it did not follow that the existence of such procedures would have necessarily led to the applicant's release at any particular time. If the Court were to find a violation of the Convention in respect of any of the applicant's other complaints, the Government accepted that depending on the precise nature of the Court's findings it might be appropriate to award the applicant a sum in compensation for non-pecuniary damage to be determined by the Court on a just and equitable basis considering all the aspects of the case.

170. Having regard to all the circumstances of the case, the Court considers that a finding of a violation of Article 7 of the Convention constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage suffered by the applicant.

B. Costs and expenses

171. The applicant claimed the amount of 7,645.25 Cypriot pounds (CYP), including value-added tax (VAT) at 15%, for the legal costs and expenses incurred in the domestic proceedings concerning his habeas corpus application. He further claimed the sum of CYP 20,933.35, including VAT at 15%, for those incurred in the proceedings before the Court. This amount took into account the sum of 715 euros (EUR) granted as legal aid by the Council of Europe for the proceedings before the Chamber. He submitted bills of costs containing an itemised breakdown of the work.

172. His claim concerning the domestic proceedings was in respect of a total of 51 hours' work on the part of his lawyer, charged at an hourly rate of CYP 125, and for out-of-pocket expenses, which mainly included communication costs.

173. His claim for costs and expenses incurred before the Court was composed of the following items:

(a) CYP 8,075, plus VAT, for fees and expenses covering the work carried out by his lawyer for the preparation of the observations before the Chamber and the Grand Chamber, and for meetings and correspondence. The above amount was claimed in respect of a total of 56 hours' work, 13 hours being charged at an hourly rate of CYP 125 and the remainder at an hourly rate of CYP 150;

(b) CYP 468, plus VAT, for out-of-pocket expenses mainly in respect of communication costs (faxes, telephone bills, mail), copying costs and the purchase of books concerning the issues raised in the case;

(c) CYP 9,150, plus VAT, for fees and expenses covering work carried out by his lawyer in preparation for the Grand Chamber and the attendance of his representatives at the Grand Chamber hearing; and

(d) CYP 863, plus VAT, for fees and expenses incurred in relation to the preparation by his lawyer, subsequent to the Grand Chamber hearing, of the reply to the Government's comments of 23 January 2007.

174. The Government left the matter to the Court's discretion.

175. With regard to the proceedings in the domestic courts, the Court reiterates that, where it finds that there has been a violation of the Convention, it may award the applicant the costs and expenses incurred before the national courts "for the prevention or redress of the violation" (see, for example, *Hertel v. Switzerland*, 25 August 1998, § 63, *Reports of Judgments and Decisions* 1998-VI, and *Carabasse v. France*, no. 59765/00, § 68, 18 January 2005). In the instant case, as the applicant's case before the Supreme Court was essentially aimed at remedying the violations of the Convention alleged before the Court, these domestic legal costs may be taken into account in assessing the claim for costs.

176. As regards the costs and expenses incurred in the Strasbourg proceedings, the Court reiterates that according to its established case-law costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred and are reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI; *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002; and *Sahin v. Germany* [GC], no. 30943/96, § 105, ECHR 2003-VIII).

177. The Court has found a violation of Article 7 of the Convention. Furthermore, it notes that the issues before the Grand Chamber were extensive and complex and that significant work was involved in the preparation of the case.

178. Nonetheless, the Court still considers that the total sum claimed in fees is excessive.

179. Having regard to the circumstances of the case, the Court awards the applicant, in respect of all the costs incurred in the domestic and Convention proceedings, a total of EUR 16,000.16, less the sums already

received under this head in legal aid (EUR 2535.16), making a total of EUR 13,465, together with any tax that may be chargeable on that amount.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* by ten votes to seven that there has been no violation of Article 3 of the Convention;

2. *Holds* by sixteen votes to one that there has been no violation of Article 5 § 1 of the Convention;

3. *Holds* unanimously that the complaint under Article 5 § 4 of the Convention falls outside the scope of its examination;

4. *Holds*
   (a) by fifteen votes to two that there has been a violation of Article 7 of the Convention with regard to the quality of the law applicable at the material time;
   (b) by sixteen votes to one that there has been no violation of this provision in so far as the applicant complains about the retrospective imposition of a heavier penalty with regard to his sentence and the changes in the prison law exempting life prisoners from the possibility of remission of their sentence;

5. *Holds* by sixteen votes to one that there has been no violation of Article 14 of the Convention;

6. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

7. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months EUR 13,465 (thirteen thousand four hundred and sixty-five euros) in respect of costs and expenses, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 12 February 2008.

Michael O'Boyle	Jean-Paul Costa
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following opinions are annexed to this judgment:

(a) concurring opinion of Judge Bratza;

(b) joint partly dissenting opinion of Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens;

(c) partly dissenting opinion of Judge Loucaides joined by Judge Jočienė;

(d) partly dissenting opinion of Judge Borrego Borrego.

J.-P.C.
M.O'B.

CONCURRING OPINION OF JUDGE BRATZA

I agree with the conclusions of the Grand Chamber on all aspects of the case and would only add a few remarks of my own as to the complaint under Article 3 of the Convention in view of the importance of the issue raised.

I consider that the time has come when the Court should clearly affirm that the imposition of an irreducible life sentence, even on an adult offender, is in principle inconsistent with Article 3 of the Convention. What amounts to an "irreducible" sentence for this purpose has been variously explained by the Court as being a sentence for the duration of the life of the offender with no "possibility" or "hope" or "prospect" of release. As is observed in the Court's judgment, a life sentence is not "irreducible" merely because the possibility of early release is limited nor because, in practice, the sentence may be served in full.

In the present case, in common with the majority of the Court, I am unable to conclude that the applicant had no "prospect" or "hope" of release, having regard to the statutory powers which currently exist in Cyprus (and which are set out in the judgment) to suspend, remit or commute a life sentence and to grant conditional release.

It is true that the exercise of these powers, including the power conditionally to release a life prisoner under the Prison Law of 1996 as amended, is within the discretion of the President of the Republic, on the recommendation or with the agreement of the Attorney General, and that the exercise of the discretion is not currently subject to review by a judicial or other independent body. It is also true that there exist no procedural safeguards governing the exercise of the discretion: in particular, the discretion is not exercised according to any published criteria and there is no requirement to publish the opinion of the Attorney-General or to give reasons for the refusal of an application for early release.

However, I do not consider that the absence of such independent review or procedural safeguards can be said to rob the applicant, as a life prisoner, of any "hope" or "prospect" of release, as those terms have been previously interpreted and applied by the Court. Nor, having regard to the way in which the powers have been exercised in practice in Cyprus (see paragraph 52 of the judgment), can I accept the suggestion in the minority opinion that, in the absence of any independent review or procedural safeguards, any prospect of release in the Republic is not "real and tangible" and that, consequently, the life sentence imposed on the applicant subjected him to inhuman and degrading treatment in violation of Article 3.

On the other hand, the absence of any such review and safeguards attaching to the executive discretion conditionally to release a life prisoner is not necessarily without significance in terms of the Convention. But its significance, if any, relates in my view not to Article 3 of the Convention

but to Article 5 § 4, which provides that everyone who is deprived of his liberty by arrest or detention shall be entitled to have "the lawfulness of his detention ... decided speedily by a court and his release ordered if the detention is not lawful".

In its *Stafford* judgment (*Stafford v. the United Kingdom* [GC] no. 46215/99, ECHR 2002-IV), the Court was concerned with the continued detention of a mandatory life prisoner in the United Kingdom after the expiry of the so-called "tariff" representing the punishment element of the life sentence. The Court observed that, after the expiry of the tariff, continued detention depended on elements of dangerousness and risk associated with the objectives of the original sentence for murder. In the Court's view, since these elements might change with the course of time, new issues of lawfulness arose which required determination by a body satisfying the requirements of Article 5 § 4, that is, an independent body with power to order release and following a procedure containing the necessary judicial safeguards, including, for example, the possibility of an oral hearing (ibid., §§ 87-90).

The system which was there being examined by the Court has, currently, no equivalent in Cyprus in that when imposing a mandatory life sentence a trial judge does not specify a tariff representing the element of punishment and the period of a life prisoner's detention is not notionally divided into pre- and post-tariff phases. Nevertheless, even in the absence of a tariff system, it appears to me that the Court's reasoning in the *Stafford* case may not be without relevance to a system such as exists in Cyprus where there is an express power of conditional release which is applicable even in the case of a mandatory life prisoner. The question whether conditional release should be granted in any individual case must, in my view, principally depend on an assessment of whether the term of imprisonment already served satisfies the necessary element of punishment for the particular offence and, if so, whether the life prisoner poses a continuing danger to society. As the *Stafford* judgment makes clear, the determination of both questions should in principle be in the hands of an independent body, following procedures containing the necessary judicial safeguards, and not of an executive authority.

In the end, however, it is neither necessary nor appropriate finally to decide the question whether the lack of independent review of the applicant's continued detention or of adequate procedural safeguards where an application for conditional release is made would give rise to an issue under Article 5 § 4 of the Convention since, as the Court has found, the applicant's complaint under that provision was lodged after the decision on admissibility and since the matter has not been fully argued before the Court.

JOINT PARTLY DISSENTING OPINION OF JUDGES TULKENS, CABRAL BARRETO, FURA-SANDSTRÖM, SPIELMANN AND JEBENS

(Translation)

We do not share the opinion of the majority as regards Article 3 of the Convention and we wish to state our reasons for this. The issue at the heart of this case is whether a life sentence or an irreducible sentence is compatible with Article 3 of the Convention. In the current context, this is a crucial issue in view of the trend observed in many European countries towards longer custodial sentences.

1. First of all, we must reiterate the clear message given by the Court in the *Selmouni v. France* judgment ([GC], no. 25803/94, ECHR 1999-V) as to the interpretation of Article 3 of the Convention, a fundamental provision in the structure of the Convention: "... the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies" (ibid., § 101).

2. As the majority rightly observe, it is important to determine firstly whether the sentence of life imprisonment imposed on the applicant has removed any prospect of his release (see paragraph 100 of the judgment), and is therefore tantamount to imprisonment for the rest of the convicted person's life (see paragraph 102).

Under the current system in Cyprus, any prospect a life prisoner has for release rests with the President of the Republic, who has the discretionary power, subject to the agreement of the Attorney-General, to remit, commute or suspend sentences (Article 53 § 4 of the Constitution). Moreover, section 14 of the Prison Law of 3 May 1996 (as amended by Law no. 12(I)/97) extended the President's constitutional powers to cover conditional release. Hence, although the prospect of release for prisoners serving life sentences does exist in theory, it is in practice extremely limited. It is true that the mere fact that the prospect of release is limited is not sufficient in itself for a finding of a violation of Article 3 of the Convention (see *Einhorn v. France* (dec.), no. 71555/01, §§ 27-28, ECHR 2001-XI). However, the prospect of release, even if limited, must exist *de facto* in concrete terms, particularly so as not to aggravate the uncertainty and distress inherent in a life sentence. By "*de facto*" we mean a genuine possibility of release. That was manifestly not the case in this instance.

3. While it can be accepted that acts of pardon and clemency are in general within the discretionary power of the executive, as soon as these are extended to cover all types of sentence review and release arrangements, an issue is also raised under Article 3 if there are no adequate safeguards

against arbitrariness. Although 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 that the Court carries out at European level, this is provided so that the system chosen does not contravene the principles set forth in the Convention (see, *mutatis mutandis*, *Achour v. France* [GC], no. 67335/01, § 51, ECHR 2006-IV). The State's power in the sphere of criminal justice is therefore not unlimited.

As the Government expressly acknowledged, the procedure currently followed in Cyprus suffers from a number of shortcomings (see paragraph 91 of the judgment) and proposals for legislative reform were expected during 2007 (see paragraph 92). In particular, there is no obligation to inform a prisoner of the Attorney-General's opinion on his application for early release or for the President to give reasons for refusing such an application. Nor is this the President's practice. In addition, there is no published procedure or criteria governing the operation of these provisions. Consequently, a life prisoner is not aware of the criteria applied or of the reasons for the refusal of his application. Lastly, a refusal to order a prisoner's early release is not amenable to judicial review. This lack of a fair, consistent and transparent procedure compounds the anguish and distress which are intrinsic in a life sentence and which, in the applicant's case, have been further aggravated by the uncertainty surrounding the practice relating to life imprisonment at the time.

In this connection, we attach weight to the safeguards concerning conditional release recommended by the Council of Europe in the various instruments referred to in the judgment (see, in particular, paragraphs 69-72). Indeed, for this reason, the present case can be distinguished from other cases in which the Court has held that the life sentences in issue were compatible with Article 3 and in which the criminal-justice systems under consideration had a number of safeguards in place in respect of conditional release (see, among other authorities, *Stanford v. the United Kingdom* (dec.), no. 73299/01, 12 December 2002; *Sawoniuk v. the United Kingdom* (dec.), no. 63716/00, ECHR 2001-VI; *Einhorn*, cited above, §§ 20-21, 27-28; *Hill v. the United Kingdom* (dec.), no. 19365/02, 18 March 2003; and *Wynne v. the United Kingdom* (dec.), no. 67385/01, 22 May 2003).

4. The judgment states that "at the present time there is not yet a clear and commonly accepted standard amongst the member States of the Council of Europe concerning life sentences and, in particular, their review and method of adjustment. Moreover, no clear tendency can be ascertained with regard to the system and procedures implemented in respect of early release" (see paragraph 104).

In our view, such an assessment quite simply does not appear compatible with the relevant Council of Europe instruments which the judgment takes care to cite. For more than thirty years the Committee of Ministers and the

Parliamentary Assembly have repeatedly concerned themselves with matters relating to long-term sentences and have expressly called on member States to "introduce conditional release in their legislation if it does not already provide for this measure" (Committee of Ministers Recommendation Rec(2003)22 of 24 September 2003 on conditional release). The same Recommendation further acknowledges that conditional release – which is not a form of leniency or of lighter punishment but a means of sentence implementation – "is one of the most effective and constructive means of preventing reoffending and promoting resettlement". The European Prison Rules adopted by the Committee of Ministers on 11 January 2006 (Recommendation Rec(2006)2), reflecting the existing European consensus in this field, also refer to the question of release of sentenced prisoners: "In the case of those prisoners with longer sentences in particular, steps shall be taken to ensure a gradual return to life in free society" (107.2). And very recently, in a statement of 12 November 2007, the Council of Europe's Commissioner for Human Rights firmly asserted that "the use of life sentences should be questioned". He added that if release was denied persistently until the end of a detainee's life, this would amount to *de facto* life imprisonment.

The same trend can be observed at European Union level. Thus, Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between member States, adopted by the Council of the European Union on 13 June 2002, provides for the execution in any member State of a judicial decision issued in another member State for the arrest and surrender of a person for the purpose of criminal proceedings or the execution of a custodial sentence but, crucially, makes this obligation subject to certain guarantees to be provided by the State, including the following: "if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after twenty years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing member State, aiming at a non-execution of such penalty or measure ..." (Article 5 § 2).

Lastly, the most recent developments in international criminal justice reflect a similar approach. A life sentence may be imposed on a person found guilty of the crime of genocide, crimes against humanity, war crimes or the crime of aggression only "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person" (Article 77 § 1 (b) of the Rome Statute of the International Criminal Court). The Statute also specifies the conditions for obtaining reductions of sentences: "When the person has served two-thirds of the sentence, or

twenty-five years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced ...” (Article 110).

The judgment takes care to refer to and quote extensively from the majority of these instruments, which, on a European and universal scale, have contributed and are still contributing to forming a genuine body of law on sentences and prisoners in advanced democratic societies. However, it draws no practical inferences from them, thereby creating the risk of a backward step in the protection of fundamental rights.

5. It is commonly accepted nowadays, not only at international level but also at domestic level, for example in numerous constitutional instruments, that besides the punitive purpose of sentences, they must also encourage the social reintegration of prisoners. Although life imprisonment is provided for by law in most countries, it does not necessarily imply imprisonment for the remainder of the convicted person’s life. Most legal systems provide for the possibility of reviewing life sentences and of granting release after a certain number of years of imprisonment. It is regrettable in this connection that the judgment contains no reference to comparative law. For example, as the parliamentary debates in the United Kingdom concerning the bill to abolish the death penalty in 1964 clearly illustrate, as a general rule “experience shows that nine years, ten years, or thereabouts is the maximum period of confinement that normal human beings can undergo without their personality decaying, their will going, and their becoming progressively less able to re-enter society and look after themselves and become useful citizens”. The Court often reiterates, in relation to prisoners, that suffering must not go beyond that inevitably associated with the legitimate requirements of the sentence (see *Mouisel v. France*, no. 67263/01, § 48, ECHR 2002-IX). However, once it is accepted that the “legitimate requirements of the sentence” entail reintegration, questions may be asked as to whether a term of imprisonment that jeopardises that aim is not in itself capable of constituting inhuman and degrading treatment.

6. That being so, we cannot accept that under the procedure currently in place in Cyprus the applicant has a real and tangible prospect of release, and we therefore consider that there has been a violation of Article 3 of the Convention on that account. Unless one chooses to ignore reality, a sentence of life imprisonment, with no hope of release, attains the level of severity required for Article 3 of the Convention to apply and constitutes inhuman and degrading treatment. As Judge Bratza asserts in his partly concurring opinion, we likewise believe that “the time has come when the Court should clearly affirm that the imposition of an irreducible life sentence, even on an adult offender, is in principle inconsistent with Article 3 of the Convention”.

PARTLY DISSENTING OPINION OF JUDGE LOUCAIDES JOINED BY JUDGE JOČIENĖ

I am in agreement with the judgment of the Court except as to the finding that there has been a violation of Article 7 of the Convention "with regard to the quality of the law applicable at the material time". This is the first time that the "quality of law" concept has been used in the context of Article 7 of the Convention, with reference more particularly to the second sentence of the first paragraph, which provides as follows: "Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

Although I have some difficulty in understanding how the "quality of law" fits in as a requirement of the above provision, I will proceed on the basis of the approach of the majority.

In finding the violation in question, the Court proceeded to state in the operative provisions that "there has been no violation of this provision in so far as the applicant complains about the retrospective imposition of a heavier penalty with regard to his sentence and the changes in the prison law exempting life prisoners from the possibility of remission of their sentence".

In fact, the wording and the philosophy of Article 7 of the Convention aim at preventing abuses by the State (for example, punishing a person *ex post facto* for ulterior motives through an offence invented for this purpose). Thus, Article 7 intends to offer "essential safeguards against arbitrary prosecution, conviction and punishment"[1]. The basic scope and objective of Article 7 is to prohibit the retrospective effect of criminal legislation.

The Court found that there had been no retrospective imposition of a heavier penalty on the applicant in the circumstances of the present case. Normally one would have expected the matter to end at that point. However, the Court proceeded to state that "there is no element of retrospective imposition of a heavier penalty involved in the present case but rather a question of 'quality of law'". In particular, the Court found that "... at the time the applicant committed the offence, the relevant Cypriot law taken as a whole was not formulated with sufficient precision as to enable the applicant to discern, even with appropriate advice, to a degree that was reasonable in the circumstances, the scope of the penalty of life imprisonment and the manner of its execution. Accordingly, there has been a violation of Article 7 of the Convention in this respect" (see paragraph 150 of the judgment).

The basis of this finding is the fact that although the sentence imposed on the applicant by the Court was the one clearly envisaged by the Criminal Code for the relevant offence (premeditated murder), namely life

1. *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A.

imprisonment, "[w]hen the applicant was admitted to prison to serve his sentence, he was given written notice by the prison authorities that the date set for his release was 16 July 2002" (see paragraph 16), which meant that he would serve only a sentence of twenty years. The twenty-year sentence was based on the prison regulations concerning the execution of a life sentence imposed by a court. According to the jurisprudence of the Convention institutions, there is a clear distinction between a sentence and its execution, and this distinction applies in relation to Article 7 of the Convention (see *Hogben v. the United Kingdom*, no. 11653/85, Commission decision of 3 March 1986, Decisions and Reports 46, p. 231).

In *Grava v. Italy* (no. 43522/98, § 51, 10 July 2003) the Court stated (translation from French original):

> "Furthermore, in the Court's opinion the 'penalty' within the meaning of Article 7 § 1 must be regarded as the sentence of four years' imprisonment. The question of remission as envisaged in Presidential Decree no. 394/1990 concerns the execution of the sentence and not the sentence itself. Accordingly, the 'penalty' imposed cannot be said to have been heavier than the one provided for by law (see, *mutatis mutandis*, *Hogben v. the United Kingdom*, no. 11653/85, Commission decision of 3 March 1986, Decisions and Reports 46, pp. 231 and 242, with regard to parole)."

The Court accepted the distinction between the sentence and its execution in the present case. In this connection the Court stated:

> "However, as regards the fact that as a consequence of the change in the prison law (see paragraph 58 above), the applicant, as a life prisoner, no longer has a right to have his sentence remitted, the Court notes that this matter relates to the execution of the sentence as opposed to the 'penalty' imposed on him, which remains that of life imprisonment. Although the changes in the prison legislation and in the conditions of release may have rendered the applicant's imprisonment effectively harsher, these changes cannot be construed as imposing a heavier 'penalty' than that imposed by the trial court (see *Hogben* and *Hosein*, both cited above). In this connection, the Court would reiterate that issues relating to release policies, the manner of their implementation and the reasoning behind them fall within the power of the member States in determining their own criminal policy (see *Achour*, cited above, § 44). Accordingly, there has not been a violation of Article 7 of the Convention in this regard" (see paragraph 151 of the judgment).

However, the Court also found that "[t]he distinction between the scope of a life sentence and the manner of its execution was not immediately apparent". The relevant part of the judgment runs as follows:

> "In view of the above, while the Court accepts the Government's argument that the purpose of the Regulations concerned the execution of the penalty, it is clear that, in reality, the understanding and the application of these Regulations at the material time went beyond this. The distinction between the scope of a life sentence and the manner of its execution was not immediately apparent" (see paragraph 148).

I believe that the real reason which led the majority to find a violation of Article 7 was in actual fact the possible confusion or even the impression that formed in the applicant's mind as a result of the note given to him by the administrative authorities on his admission to prison after his conviction

to the effect that, on the basis of the prison regulations, he was going to serve twenty years, even though such confusion was incompatible with the Criminal Code and the relevant judgment of the court which convicted the applicant and *imposed on him a clear sentence of life imprisonment*. This is also accepted by the Court in the following fundamental finding:

> "At the same time, however, the Court cannot accept the applicant's argument that a heavier penalty was retroactively imposed on him *since in view of the substantive provisions of the Criminal Code it cannot be said that at the material time the penalty of a life sentence could clearly be taken to have amounted to twenty years' imprisonment*" (see paragraph 149, emphasis added).

There follows the finding of a violation, expressed as follows:

> "The Court considers, therefore, that there is no element of retrospective imposition of a heavier penalty involved in the present case but rather a question of 'quality of law'. In particular, the Court finds that at the time the applicant committed the offence, the relevant Cypriot law taken as a whole was not formulated with sufficient precision as to enable the applicant to discern, even with appropriate advice, to a degree that was reasonable in the circumstances, the scope of the penalty of life imprisonment and the manner of its execution. Accordingly, there has been a violation of Article 7 of the Convention in this respect" (see paragraph 150).

I. Confusion or an incorrect impression regarding the sentence notwithstanding the clear provisions of the Criminal Code, even if such a problem is caused by the administrative authorities, cannot be considered to entail a violation of Article 7 because this Article is only concerned with the retrospective effect of criminal legislation (an element which was ruled out by the Court in this case) and not with any confusion or wrong impressions on the part of applicants regarding their sentence. This is not a problem falling within the scope of the Convention.

II. The "quality of law" criterion was used outside its normal context (generally it is linked with the phrase "in accordance with the law" or "prescribed by law") as established by the jurisprudence of the Court and was, in fact, irrelevant for the purposes of the requirements of Article 7 of the Convention, in respect of which the Court had already found that that "there is no element of retrospective imposition of a heavier penalty involved in the present case" since "*in view of the substantive provisions of the Criminal Code it cannot be said that at the material time the penalty of a life sentence could clearly be taken to have amounted to twenty years' imprisonment*" (see paragraphs 149 and 150 of the judgment, emphasis added). Therefore, the scope and nature of the sentence was, in accordance with the Criminal Code, sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness. If the sentence did not satisfy these requirements, then there should have been a violation of the substantive provisions of Article 7. But no such violation, rightly, was found by the Court in this case.

Finally, I wish to state my reaction to the Court's following finding: "In particular, the Court finds *that at the time the applicant committed the offence, the relevant Cypriot law taken as a whole* was not formulated with sufficient precision as to enable the applicant to discern, even with appropriate advice, to a degree that was reasonable in the circumstances, the scope of the penalty of life imprisonment and the manner of its execution" (see paragraph 150 of the judgment, emphasis added).

In every system of law there is a hierarchy of legal instruments or rules (in general: Constitution, conventions, statutes, regulations, administrative acts). Therefore one cannot speak about "Cypriot law taken as a whole" as if all the sources or rules of Cypriot law were of equal legal effect. Those of inferior rank cannot be incompatible with those above them.

It is not appropriate, therefore, to refer to "Cypriot law" or, for that matter, to any country's law "taken as a whole" on the basis that all legal instruments are on an equal level and have equal effect, forming one uniform and homogeneous indivisible "law", and then to continue to judge it "as a whole" in order to decide whether or not it was formulated with sufficient precision. Depending on the subject – for example, constitutional law or criminal law – the question whether the "law" was sufficiently precise has to be decided with reference to the provisions of the relevant specific enactments at the same level in the hierarchy of that law. One cannot combine an enactment with relevant regulations or administrative acts of any kind and rule on them regardless of whether the regulations and administrative acts are inconsistent with the enactment. Therefore, I believe it was wrong for the majority to come to their conclusion by relying on the relevant "*Cypriot law taken as a whole*".

Furthermore, in this particular case what was relevant and decisive in enabling a person to discern the scope of the penalty of life imprisonment was the Criminal Code, with the help of its interpretation clauses and any relevant jurisprudence, rather than any inferior subsidiary regulation, administrative acts or practice, *a fortiori* if appropriate legal advice was also available. Such advice could also easily have explained that if there was any inconsistency between the Criminal Code and any regulations, the Code prevailed. The appropriate legal advice could also have explained the difference between the penalty and its execution and the fact that execution, being a matter governed by regulations, administrative acts or practice, was liable to change at any time if the penal policy of the relevant government authorities changed.

Accordingly, assuming that before the applicant embarked on the premeditated murder of the victim and his two children, he had asked a lawyer about the sentence applicable at the time of the commission of the crime, he would have received advice to the effect that the Criminal Code punished this crime with life imprisonment, and if he had wanted to know more about the manner of the execution of this sentence in terms of prison

regulations or practice, he could very well have been advised that the regulations provided for a twenty-year term for the execution of a life imprisonment sentence but that (a) these regulations might change at any time and leave whole-life imprisonment as the only possible sentence and that (b) if such regulations caused any confusion as compared with the Criminal Code or "went beyond" the mere execution of the penalty, they were inconsistent with the Code and therefore legally ineffective and liable to be withdrawn at any moment.

I have had to elaborate on matters that quite honestly I believed were not very complicated. But I felt that I had to do so because of the importance of the case and its possible effects, especially as far as future cases are concerned. I find the approach of the majority to amount to an extension of Article 7 of the Convention, which is not justified by either the language or the philosophy of the Article.

Finally, I must make it clear that in my opinion the violation of Article 7 of the Convention as formulated in the judgment *does not affect the lawfulness of the applicant's continued detention*. Reference is made in this connection to the finding of the Court in paragraph 121 of the judgment as regards Article 5 § 1 of the Convention:

> "On the facts of the case, therefore, the Court is satisfied that the continuing detention of the applicant after 2 November 2002 is justified under Article 5 § 1 (a) of the Convention. There has therefore been no violation of Article 5 § 1."

For the above reasons I consider that there has been no violation of Article 7 in any respect.

PARTLY DISSENTING OPINION OF JUDGE BORREGO BORREGO

(Translation)

1. Perplexity. Ivory tower. And regret. I greatly regret having to write this opinion, as the account of the facts leaves me perplexed and the reasoning of the judgment is far removed from reality, as though it had been pronounced from an ivory tower.

Account of the facts and perplexity

2. The present case originated in the horrific murder of a member of Cypriot high society and his two children by a contract killer. Several days after the murder, the contract killer was arrested by the police. He is still in prison. The events took place more then twenty years ago. The police have still not managed to find the person behind the murder, who was probably also a member of high society. The prisoner, for his part, has never disclosed the person's identity.

3. Facts are facts, and as well as being stubborn things, they are sacred. Among the facts described, there is one that appears intermittently, while another has been mislaid and another has vanished.

4. The fact appearing intermittently is that the crime of which the applicant was convicted was a contract killing.

The First Section's decision of 11 April 2006, declaring the application admissible, makes no reference to the professional nature of the killing whereas the present judgment does (one and a half lines in paragraph 12). No further mention is made in the rest of the judgment. In other words, the fact of the contract killing first of all does not exist, and is then mentioned very briefly before disappearing. I remain perplexed as to the intermittent nature of this reference to an absolutely crucial fact.

5. As to the fact that has been mislaid, an account of criminal proceedings starts with the crime and only afterwards goes on to describe the investigation, detention, trial, judgment and appeals. But not in this case. The murder and the date on which it occurred, from which all subsequent facts proceed, are displaced to the extent of not being mentioned.

Despite the title of the chapter, "Background to the case", paragraph 12 begins not with the murder but with the date of the guilty verdict, 9 March 1989. What is the reason for displacing a fundamental fact in this way? I do not know, but I find it interesting to read (in paragraph 14) that the judgment of 10 March 1989 passing sentence on the applicant "relied primarily" on a judgment of 5 February 1988. The applicant was sentenced to life imprisonment in 1989, and the sentencing judgment interpreted "life imprisonment" to mean imprisonment "for the remainder of the convicted

person's life", on the basis of the 1988 judgment. The fact that the murder took place in 1987 was overlooked, yet in a State based on the rule of law the law applicable to a criminal act is the law in force at the time of the act.

No judicial precedent existed in Cyprus in 1987 for interpreting life imprisonment as entailing the deprivation of liberty for the remainder of the convicted person's life.

6. As to the fact that has vanished, in 1991 (the precise date has not been indicated) the widow/mother of the victims visited the prison to ask the applicant for the name of the person who had hired him to carry out the murder. Since he failed to reply, she contacted the President of Cyprus, requesting him to interview the applicant. The President went to the prison together with the Attorney-General. The parties' accounts differ as to what was said: according to the applicant, in return for the person's name, the President offered to release him and to give him a sum of money and employment abroad. However, the Government asserted (in their letter of 23 January 2007 to the Court, which was included in the case file) that no offer had been made and that the applicant had been informed that any cooperation on his part would be taken into consideration when the question of his early release came to be examined.

The disappearance of this fact also leaves me perplexed. The President, together with the Attorney-General, visited a criminal in prison to ask him to identify the person who had hired him, in exchange for his early release. This personal request by the President was rebuffed by the prisoner, even though he was aware that, under Cypriot law, "any adjustment of a life sentence [was] only within the President's discretion subject to the agreement of the Attorney-General" (see paragraph 103).

How can anyone explain the absence of this crucial fact from the judgment of the Grand Chamber of the European Court of Human Rights? I would rather not go into a comparative analysis of the treatment of life prisoners in the Council of Europe's member States, but personally I am truly perplexed at the disappearance of this fact, and I feel obliged to say so.

Ivory-tower reasoning

7. Sometimes the law can become complicated. In such cases the courts must apply it in such a way as to make it simpler. However, where the law is absolutely straightforward ("no penalty without law"), and the facts are likewise straightforward, a court cannot complicate the law or perform conjuring tricks with the facts.

In this judgment the Court has, to my mind, indulged in ivory-tower reasoning. It has been very far removed from the reality of a horrific contract murder; it has ignored the shock felt by Cypriot high society at the murder of one of its members, probably committed at the behest of another of its members, and the silence (whether out of criminal loyalty or fear) of

the applicant, who refused to cooperate with the President of Cyprus; it has also been detached from legal, administrative, executive and judicial reality, according to which life imprisonment meant a maximum of twenty years at the material time, and from a judicial decision which dated from after the offence but was applied to the applicant by keeping him in prison until his death unless he expressed "remorse" and agreed to identify the individual who had paid him for the crime he had carried out.

In my opinion, there has been a violation of Article 7 of the Convention in the present case, since the applicant was sentenced to a penalty that did not exist at the time of the offence. There has consequently also been a violation of Article 3, Article 5 § 1 (a) and Article 14 of the Convention.

Violation of Article 7

8. To avoid confusion, I shall quite simply ask five questions and then give the answers.

First question: when was the crime committed? Answer: on 10 July 1987. (I invite readers to waste their time looking for the date of the crime in the judgment. This is the first time I have seen a judgment in which the date of the offence giving rise to the trial is not mentioned.)

Second question: what was the penalty for murder at the time of the offence? Answer: life imprisonment (law of 1983 – see paragraph 33 of the judgment). Prior to that law, murder carried the death penalty.

Third question: what was the definition of life imprisonment at the time of the offence? Answer: on the basis of the Prison Discipline Law (Cap. 286), the 1981 Regulations provided: "Where the imprisonment is for life or where a sentence of death is commuted to imprisonment for life, remission of the sentence shall be calculated as if the imprisonment is for twenty years" (see paragraph 40 of the judgment). Subsequently, a still more lenient provision was included in the amended Prison Regulations, which came into force on 13 March 1987, nearly four months before the murder: "'imprisonment for life' means imprisonment for twenty years" and prisoners may be granted remission of one-quarter of such a sentence (that is, five years) "on the grounds of good conduct and industry" (see paragraphs 41, 42 and 43).

Fourth question: with regard to Article 7, what are we to understand by "law"? Answer: "the 'law' is the provision in force as the competent courts have interpreted it" (see paragraph 139).

Fifth question: on 10 July 1987, did any existing law or interpretation of the law in Cyprus preclude the interpretation of life imprisonment as meaning imprisonment for fifteen or twenty years? Answer: no.

Why, then, if everything appears so straightforward, is the judgment so complicated?

It even refers six times (in four paragraphs, 146-49) to "clarity" in various forms (noun, adjective, adverb): "it was clearly provided by the

Criminal Code ...", "it is equally clear ...", "the Nicosia Assize Court ... clearly stated ...", "it is clear ...", "the first clarification ...", "... could clearly be taken to have amounted to ...". I do not understand why it is necessary to repeat *ad nauseam* something so straightforward, or why we should clarify what is clear from the outset.

The Court's ivory-tower reasoning becomes more evident in paragraph 147, where the majority seek to explain that "on 5 February 1988", in the *Yiouroukkis* case, the Nicosia Assize Court interpreted life imprisonment (for the first time in Cyprus, and I have to say this as the judgment does not) as meaning "imprisonment for life". And the judgment further asserts: "Subsequently, on 10 March 1989, the Limassol Assize Court, when passing sentence on the applicant, relied on the findings of the Nicosia Assize Court in the above case." "Subsequently"? Admittedly, 1989 is subsequent to 1988. However, there is a problem: the murder was committed in 1987 and it is not possible to impose a heavier penalty than the one applicable "at the time the [act or omission] was committed" (Article 7 of the Convention).

This excess of clarity becomes dazzling and leads to a whole sequence of contradictory arguments.

Thus, in paragraph 150, the majority find a violation of Article 7 but at the same time observe that "there is no element of retrospective imposition of a heavier penalty involved in the present case". In other words, there is a breach of the principle "no punishment without law" and yet no heavier penalty was retrospectively imposed. What a superb contradiction!

Similarly, paragraphs 151 and 152 state that the penalty was imposed on the applicant in breach of Article 7 but that the execution of the sentence does not infringe the Convention. This distinction between a penalty breaching the Convention and its implementation being in conformity with the Convention is quite magnificent. (Following the same reasoning, a death sentence could be in breach of the Convention, but since the electric chair was comfortable and the room had a pleasant atmosphere, execution of the sentence would not infringe the Convention.)

Here is yet another example of this contradiction. In order to justify the distinction I have referred to in the paragraphs above, the majority rely on three previous cases. They include *Hogben* and *Hosein*, two cases against the United Kingdom, in which another problem arises in addition to the one already discussed: the execution of life sentences in the United Kingdom is completely different from the situation in Cyprus, as indeed is acknowledged by both the Government (in paragraph 92) and the Court (in paragraphs 102 and 105). It is clear that the same judicial precedent cannot be applied to two completely different factual situations.

As regards the case of *Achour v. France*, while I obviously agree with the judgment in so far as it refers to the "power of the member States in determining their own criminal policy", I consider that the majority neglect the fact that Cyprus changed its criminal policy concerning life imprisonment nine years after the events in issue, when Law no. 62(I)/96 was enacted on 3 May 1996, repealing Cap. 286 (see paragraphs 56 and 57 of the judgment).

"The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system" (see paragraph 137). An essential guarantee, straightforward facts, a straightforward law, and a conclusion that is also straightforward: a violation of Article 7.

Article 3

9. The applicant's "future [is] death in prison" (paragraph 85). Why?

Because "any adjustment of a life sentence [is] only within the President's discretion" (see paragraph 103), and the President, who is precisely the highest State institution, visited the applicant in an (unsuccessful) attempt to request his cooperation.

If the applicant does not identify the person who hired him to carry out the crime, he will not leave prison alive. He is aware of this, as are his lawyer and the entire country. Surprisingly, it seems that the majority of the Court do not realise this, hence the reasoning concerning Article 3, which to my mind has been produced from an ivory tower. Several paragraphs, such as paragraph 106, display a lack of sensitivity that is unworthy of a court of human rights.

Since 2 November 2002 the applicant's imprisonment has amounted to torture. The definition of torture, as has been internationally accepted since 9 December 1975 (Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), is "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession ...". Since 2 November 2002 the applicant has been in prison because he did not "collaborate" in disclosing the identity of the person who paid him to carry out a murder, who has yet to be identified by the police or the authorities. The crime was horrific, but the fact that the person behind it is still at large cannot on any account be offset or obscured by the applicant's life-long imprisonment.

I find it hypocritical to justify the applicant's continued imprisonment by the fact that he has not displayed "significant remorse for his crimes" (see paragraph 90). It is worth noting the use of the word "remorse" rather than "confession" and the reference to the existence of "significant danger to society" as opposed to a danger of the authorities facing criticism for their

inability to identify the person behind the murder, since the applicant's release would serve as a reminder of the crime and of the fact that the unidentified powerful citizen at whose behest it was committed is still at large.

My conclusion: a violation of Article 3 of the Convention since 2 November 2002.

Article 5 § 1 (a)

10. Once again, I note a contradiction resulting from the Court's ivory-tower reasoning. Although the majority find a breach of the fundamental safeguard embodied in the maxim "no punishment without law", at the same time they assert that the applicant has been "lawfully" deprived of his liberty.

As the Convention provides, no one may be deprived of his liberty after being convicted in breach of the Convention. This is a straightforward matter: a violation of Article 5 § 1 (a) since 2 November 2002.

(One surprising detail is that the Government are prepared to admit that since July 2007 (see paragraph 136) the applicant's detention has been unlawful, but the majority of the Court go even further than this argument by the Government in finding it "lawful" to keep him in prison indefinitely.)

Article 14 taken in conjunction with Articles 3, 5 and 7 of the Convention

11. After everything that has been discussed, the fact that the majority argue that there has been no discrimination does not simply constitute ivory-tower reasoning but much more than that. In my opinion, such an assertion is almost an insult to intelligence.

The applicant, Mr Kafkaris, a criminal, is the victim of discriminatory treatment in relation to all other criminals imprisoned in Cyprus, because he is unable or unwilling to identify the powerful citizen behind this horrific murder. Denying that fact or hypocritically trying to disguise it by speaking of "remorse" rather than a "confession" amounts to turning a blind eye to reality.

I therefore consider that there has been a violation of Article 14 taken in conjunction with Articles 3, 5 and 7 of the Convention.

Personal conclusion

12. There has been, and there continues to be, something much more serious than a violation of four fundamental Convention rights in the present case. I consider that there has been a breach of the very principle of the rule of law.

13. I shall conclude my opinion with one final observation: in the judgment, from start to finish, all those who are mentioned are given the appropriate designation for their sex, with the exception of the judges and Registrar of the Grand Chamber. I object to the presentation of judges as sexually neutral individuals in a society made up of men and women. The distinction between the two sexes in relation to judges is expressly acknowledged in the Rules of Court, since Rule 25 § 2 requires the Court's composition to be gender balanced. It is also a matter of concern to the Parliamentary Assembly of the Council of Europe, which advocates the presence of women on all lists of candidates for posts as judges of the Court. This has prompted the Committee of Ministers to request an advisory opinion. So the opinion on the sex of candidates for posts as judges will be given by judges who are presented to the public as sexually neutral. Any comment would, to my mind, be superfluous. But to avoid any confusion, I wish to point out that I belong to the male sex.