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Case No: CO/1244/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2020

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD

and

MR JUSTICE GARNHAM

- -

Between:

THE QUEEN	**Claimant**
(On the application of MOHAMMED ZAHIR KHAN)	
- and -	
SECRETARY OF STATE FOR THE JUSTICE DEPARTMENT	**Defendant**

- -
- -

Hugh Southey QC and **Robert Dacre** (instructed by **Scanlans**) for the **Claimant**
Sir James Eadie QC and **Jason Pobjoy** and **Celia Rooney** (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 24th & 25th June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and others, and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 09:30am on 30 July 2020.

Mr Justice Garnham:

Introduction

1. This is the judgment of the Court to which we have both contributed.

2. By this judicial review application, brought with my permission on 5 May 2020, Mohammed Zahir Khan ("the Claimant") seeks to challenge the early release regime introduced by the Terrorist Offenders (Restriction of Early Release) Act 2020 ("the 2020 Act"). Formally, the Claimant challenges the decision of the Secretary of State for Justice to enforce the legislation in his case, but in substance the challenge is to the legislation itself. The relief which the Claimant seeks is a declaration that s.247A of the Criminal Justice Act 2003 ("CJA 2003"), which was inserted by the 2020 Act, is incompatible with Articles 5, 7 and 14 of the European Convention on Human Rights ("the ECHR" or "the Convention").

3. The 2020 Act was introduced in direct response to two terrorist incidents on the streets of London. On 29 November 2019, five people were stabbed on London Bridge, two fatally, by Usman Khan. Immediately before the attack, Usman Khan had been attending an offender rehabilitation conference at Fishmongers Hall. Two months later, on 2 February 2020, Sudesh Amman was shot dead by police in Streatham High Road after attacking two passers-by with a knife.

4. On 3 February 2020, the Secretary of State for Justice made a statement to the House of Commons announcing the new legislation. He said:

> "…yesterday's appalling incident makes the case plainly for immediate action. We cannot have the situation, as we saw tragically in yesterday's case, where an offender – a known risk to innocent members of the public – is released early by automatic process of law, without any oversight by the Parole Board.
>
> We will be doing everything we can to protect the public, that is our primary duty. And we will therefore introduce emergency legislation to ensure an end to terrorist offenders getting released automatically, having served half their sentence with no check or review. The underlying principle has to be that offenders will no longer be released early automatically and that any release before the end of their sentence will be dependent on risk assessment by the Parole Board.
>
> We face an unprecedented situation of severe gravity and, as such, it demands that the government responds immediately, and that this legislation will therefore also apply to serving prisoners.
>
> Now, the earlier point at which these offenders will be considered for release will be once they have served two-thirds of their sentence and, crucially, we will introduce a requirement that no terrorist offenders will be released before the end of the full custodial term unless the Parole Board agrees."

5. The 2020 Act received Royal Assent, and came into force, on 26 February 2020. It had an immediate effect on the Claimant's release date.

6. We have received detailed and helpful submissions in writing and orally, by Skype, from Mr Hugh Southey QC for the Claimant and Sir James Eadie QC for the Defendant. We are grateful for their assistance.

7. In the Grounds, in his permission application and in his oral submissions before us, Mr Southey indicated that the claim was primarily focused on the extension of the requisite custodial period. When pressed, he said that he did not need to attack the involvement of the Parole Board in regard to his Article 14 challenge given that the potential lines of justification for the two elements of the new arrangements were different. As to Articles 5 and 7 he agreed that to make his challenge coherent he did have to attack the role of Parole Board, although, in argument, he did so only very faintly.

The Facts

8. On 8 March 2018, at the Crown Court in Newcastle, the Claimant pleaded guilty to five counts of encouraging terrorism, contrary to s.1(2) of the Terrorism Act 2006, one count of dissemination of a terrorist publication, contrary to s.2(1) of the 2006 Act and two counts of stirring up religious hatred contrary to s.29C of the Public Order Act 1986.

9. Those offences related to conduct by the Claimant online in the period between 4 December 2016 and 15 March 2017. During that period, the Claimant repeatedly endorsed acts of terrorism, including murder and martyrdom, to provoke local support for ISIS. He also disseminated terrorist publications including an ISIS video calling for a terrorist attack.

10. On 2 May 2018, the Claimant was sentenced to a determinate sentence of four years and six months. He was provided with documentation from the Ministry of Justice that suggested his release from prison would take place on 1 March 2020. That would have been in accordance with the existing regime for automatic release at the halfway point.

The New Legislation

11. S.247A was added into the CJA2003 by s.1(2) of the 2020 Act. S.247A(1) provides as follows:

> (1) This section applies to a prisoner (a "terrorist prisoner") who—
>
> (a) is serving a fixed-term sentence imposed (whether before or after this section comes into force) in respect of an offence within subsection (2), and
>
> (b) has not been released on licence.
>
> (2) An offence is within this subsection (whether it was committed before or after this section comes into force) if—

> (a) it is specified in Part 1 of Schedule 19ZA (offences under counter-terrorism legislation),
>
> (b) it is specified in Part 2 of that Schedule and was determined by the court to have had a terrorist connection under section 30 or (in the case of a person sentenced in Scotland but now subject to the provisions of this Chapter) section 31 of the Counter-Terrorism Act 2008 (sentences for certain offences with a terrorist connection), or
>
> (c) it is a service offence as respects which the corresponding civil offence is an offence specified in Part 2 of that Schedule and was determined by the service court to have had a terrorist connection under section 32 of that Act (sentences for certain offences with a terrorist connection: armed forces).

12. It is to be noted that Part 1 of Schedule 19ZA to the CJA 2003, as inserted by the 2020 Act, does not include offences for which the maximum penalty is two years or less on conviction on indictment.

13. To the extent that these provisions apply to a terrorist prisoner who is already serving a fixed term sentence for a relevant offence they can be described as "retrospective".

14. Subsections 3-6 imposes duties on the Secretary of State to refer cases to the Parole Board:

> (3) It is the duty of the Secretary of State to refer the case of a terrorist prisoner to the Board—
>
> (a) as soon as the prisoner has served the requisite custodial period, and
>
> (b) where there has been a previous reference of the prisoner's case to the Board under this subsection and the Board did not direct the prisoner's release, no later than the second anniversary of the disposal of that reference.
>
> (4) It is the duty of the Secretary of State to release a terrorist prisoner on licence as soon as—
>
> (a) the prisoner has served the requisite custodial period, and
>
> (b) the Board has directed the release of the prisoner under this section.
>
> (5) The Board must not give a direction under subsection (4) unless—
>
> (a) the Secretary of State has referred the terrorist prisoner's case to the Board, and

> (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.
>
> (6) Subsection (7) applies where the terrorist prisoner is serving a sentence imposed under section 226A, 226B, 227, 228 or 236A.

15. Subsections 7-8 relate to the duty placed on the Secretary of State to release terrorist prisoners on licence:

> (7) It is the duty of the Secretary of State to release the terrorist prisoner on licence under this section as soon as the prisoner has served the appropriate custodial term (see sections 255B and 255C for provision about the re-release of a person who has been recalled under section 254).
>
> (8) For the purposes of this section—
>
> "the appropriate custodial term", in relation to a sentence imposed under section 226A, 226B, 227, 228 or 236A, means the term determined as such by the court under that provision;
>
> "the requisite custodial period" means—
>
> (a) in relation to a person serving one sentence imposed under section 226A, 226B, 227, 228, or 236A, two-thirds of the appropriate custodial term,
>
> (b) in relation to a person serving one sentence of any other kind, two-thirds of the sentence, and
>
> (c) in relation to a person serving two or more concurrent or consecutive sentences, the period determined under sections 263(2) and 264(2);
>
> "service offence", "corresponding civil offence" and "service court" have the same meanings as in the Counter-Terrorism Act 2008 (see section 95 of that Act).

16. It is common ground that the effect of these provisions, in the Claimant's case, is that instead of being released without reference to the Parole Board on 1 March 2020, his case will be referred to the Parole Board on 30 November 2020, at the two-thirds point of his sentence. The Parole Board will then consider whether it is satisfied that it is no longer necessary for the protection of the public that the Claimant should remain in custody.

Sentencing for Terrorist Offenders

17. In order to understand the arguments that follow it is convenient to set out here, in summary form, the different types of sentence available for terrorist offenders.

18. What follows is based substantially on the Secretary of State's skeleton argument, which in turn is based on a helpful account provided in her witness statement by Mrs Miranda Wilkinson, Head of Counter-Terrorism and Strategic Projects at the Ministry of Justice. That account was subject to comment from Mr Southey and response from Sir James. We have taken their points into account in what follows.

19. There are two distinct categories of sentences: determinate and indeterminate sentences. A determinate sentence is one which provides for a fixed term. Determinate sentences are ordinarily served part in prison and part in the community. The point at which an offender is eligible for early release, and the terms of such release, depend on the type of determinate sentence he or she received. Subject to limited exceptions, the imposition of determinate sentences is governed by the twin principles that (i) custody is a sentence of last resort and (ii) any sentence of imprisonment imposed should be for a term commensurate with the seriousness of the offence and no longer. The general purposes of imposing a determinate sentence on an adult offender are: punishment; reduction of crime; reform and rehabilitation; protection of the public and the making of reparation by offenders to persons affected by their offences: s.142(1) CJA 2003; *R (Whitson) v Justice Secretary* [2015] AC 176, [25]. The whole of the custodial term imposed as part of a determinate sentence is imposed for the purpose of punishment and deterrence: *Brown v Parole Board for Scotland* [2018] AC 1.

20. An indeterminate sentence is one which is not imposed for a fixed length of time. It is comprised of a "tariff", which is the minimum amount of time that an offender must remain in custody before being eligible for parole and represents the blameworthiness of any offence. Upon expiration of the tariff period, an offender who is sentenced to an indeterminate sentence will, subject to review by the Parole Board, be eligible for release on licence, albeit he or she will remain subject to licence conditions for the remainder of his or her life. He or she is therefore liable to be recalled to prison at any point.

21. Insofar as they are relevant to the changes introduced by the 2020 Act, the types of sentence that may be given to a terrorist offender convicted of a relevant terrorist offence are standard determinate sentences, extended determinate sentences ("EDS") and special custodial determinate sentences for offenders of particular concern ("SOPC").

22. The majority of terrorist offenders in custody are serving standard determinate sentences. Prior to the enactment of the 2020 Act, a terrorist offender who was given a standard determinate sentence was automatically released at the half-way point of his or her sentence, referred to as the "requisite custodial period" (CJA 2003, s.244(1) and (3)). The Parole Board had no role in that release decision. Since 1 April 2020, certain serious violent and sexual offenders sentenced to a standard determinate sentence of seven years or more are entitled to be released at the two-thirds point of their sentence, as a result of The Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 (the "2020 Order").

23. An EDS may be imposed in respect of certain serious offences where the offender is not given a life sentence but is nonetheless deemed to be "dangerous". The EDS comprises two elements: (i) the appropriate custodial term and (ii) a licence extension, "for a period of such length as the court considers necessary for the purpose of

protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences": (CJA 2003, ss.226(A)(5) and (7)). The licence extension can be up to five years in the case of a specified violent offender, and up to eight years in the case of a specified sexual offender. Prior to the enactment of the 2020 Act, a terrorist offender who was given an EDS on or after 13 April 2015 was eligible for early release after the expiry of two-thirds of his or her custodial term (CJA 2003, s.246A(4)-(6)). Any decision as to early release was made at the discretion of the Parole Board, which could only direct release in a case referred to it by the Secretary of State and if satisfied that imprisonment is no longer necessary for the protection of the public (CJA 2003, s.246A(6)). The Secretary of State was, and remains, under a duty to release the offender at the end of his or her custodial term.

24. Where the Court decides to impose a sentence of imprisonment, a SOPC must be imposed if an offender is of "particular concern", but is not found to be "dangerous", as defined in the CJA 2003. A SOPC must be imposed on an offender convicted of one of the main terrorism offences listed in Schedule 18A of CJA 2003, if the offender is over the age of 18 at the time of the offence and the Court does not impose a life sentence or an EDS. An SOPC is the aggregate of (i) the "appropriate custodial term" and (ii) an additional licence period of 12 months (CJA 2003, s.236A(2)). Prior to the 2020 Act, the early release arrangements for an SOPC were set out in s.244A of the CJA 2003. An SOPC prisoner could apply to the Parole Board for discretionary release once he or she had served one-half of the appropriate custodial term. The Secretary of State is under a duty to release the offender (if he or she has not been released by the Parole Board) once he or she has served the whole of the appropriate custodial term.

25. A terrorist offender may also be sentenced to various indeterminate life sentences. There are four discretionary life sentences available under the current legal framework. First, a mandatory life sentence for the offence of murder, under the Murder (Abolition of the Death Penalty) Act 1965, s.1. Second, a life sentence for serious offences, under s.225 of the CJA 2003. The Court must impose a life sentence under s.225 of the CJA 2003 if: (i) the offender is over 18 and has been convicted of a serious offence, as defined in s.224 of the CJA 2003; (ii) the court is of the opinion that there is significant risk to members of the public of serious harm by the commission by the offender of further specified offences; (iii) the offence of which he has been convicted carries a maximum sentence of life imprisonment; and (iv) the court considers that the seriousness of the offences, or the offence and one or more associated offences, is such to justify the imposition of a sentence of imprisonment for life.

26. Third, a life sentence can be imposed for a second listed offence, under s.224A of the CJA 2003. The criteria for the imposition of a life sentence under s.224A of the CJA 2003 are that: (i) the offender is over 18 and has been convicted of an offence listed in Part 1 of Schedule 15B of the CJA 2003, where the offence took place after 3 December 2012; (ii) the court would, but for s.224A of the CJA 2003, impose a determinate sentence of imprisonment for 10 years or more, disregarding any extension period; and (iii) at the time that the offence was committed the offender had been convicted of an offence listed in Schedule 15B and had been sentenced to a relevant life sentence or a relevant sentence of imprisonment. If these criteria are met, the sentencing court must impose a life sentence unless it is of the opinion that there

are particular circumstance which (a) relate to the offence, to the previous offence referred to in s.224A or to the offender and (b) would make it unjust to do so in all the circumstances.

27. Fourth, a life sentence can be imposed as a matter of common law where the offence in question carries life as a maximum penalty. A life sentence should only be given if and insofar as: (i) he or she has been convicted of a very serious offence; and (ii) there are good grounds for believing that the offender may remain a serious danger to the public for a period of time that cannot presently be reliably estimated: *Attorney General's Reference (No. 32 of 1996)* [1997] 1 Cr App R(S) 251, per Lord Bingham at 264. There is a minimum seriousness threshold that must be crossed for a life sentence to be imposed: *R v Chapman* [2000] 1 Cr App R 77, 85 per Lord Bingham CJ.

28. Where a person is given a life sentence, a judge must specify the minimum term (known as the tariff period) that the offender must spend in prison before being eligible for release. In some cases, the court may impose a 'whole life order', where the tariff period is the remainder of the prisoner's life such that he or she is never considered for release (save in exceptional circumstances, where compassionate release may be sought pursuant to Article 3 of the Convention).

29. In the context of mandatory life sentences, the court will take account of the seriousness of the offence and provisions with respect to crediting periods spent in custody whilst on remand. Schedule 21 of the CJA 2003 specifies statutory 'starting points' for the tariff period. Mandatory life sentences are not set with reference to any notional determinate sentence.

30. In the context of discretionary life sentences, except where a whole life order is made, the court must take account of the seriousness of the offence or offences and the provisions with respect to crediting time spent on remand: Powers of the Criminal Courts (Sentencing) Act 2000, s.82A. Pursuant to s.82A(3)(c), the minimum custodial term shall also be set "such as the court considers appropriate taking into account… the early release provisions as compared with section 244(1) of the Criminal Justice Act 2003". In *Attorney General's Reference (No. 27 of 2013)* [2014] 1 WLR 4209, the Court of Appeal held that the effect of s.82A is to "require the sentencing judge to identify the sentence that would have been appropriate had a life sentence not been justified and to reduce that notional sentence to take account of the fact that had a determinate sentence been passed the offender would have been entitled to early release" [33]. The application of s.82A(3)(c) will ordinarily, but not always, result in a reduction of the notional determinate sentence by half, but there may be exceptional circumstances in which more than half may be appropriate: *R v Sczerba* [2002] EWCA Crim 440; [2002] 2 Cr App R (S) 86, [33]; *R v Jarvis* [2006] EWCA Crim 1985, [19]. There is, therefore, no rule requiring that the custodial term for a discretionary life sentence is set at half of the actual or notional determinate term: *R v Rossi* [2015] 1 Cr App R (S) 15, [20-22].

31. Since 1 April 2020, under the 2020 Order, sexual and violent offenders are not entitled to automatic release until the two-thirds point of their sentences. A court will be entitled to take this into account under s.82A(3)(c) when setting the minimum tariff period in respect of a discretionary life sentence.

32. Where an indeterminate sentence is imposed on an offender, his or her early release will be governed by s.28 of the Crime (Sentences) Act 1997 ("1997 Act"). The case of a life sentence prisoner to whom s.28 applies is referred to the Parole Board at the end of his minimum custodial term (i.e. the tariff) and the Parole Board has power to direct release in cases referred to it, if satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

33. For all indeterminate sentence prisoners, in cases where a life sentence prisoner is released from custody pursuant to s.28 of the 1997 Act, the sentence itself continues in the form of a 'life licence'. Section 31(1) of the 1997 Act provides that "[w]here a life prisoner, other than a prisoner to whom section 31A below applies, is released on licence, the licence shall, unless previously revoked under section 32 below, remain in force until his death".

34. In the context of all of the above sentences, the courts have consistently held that a sentencing judge must set a custodial sentence by reference to the seriousness of the offence. A sentence should not be adjusted to take account of early release conditions: *R v Round* [2010] 2 Cr App R (S) 45, [44], 49; *R v Bright* [2008] 2 Cr App R (S) 102, [41]. That principle is subject to the one exception in the context of discretionary indeterminate sentences identified at [30] above.

Article 14

35. On behalf of the Claimant, Mr Southey argues that the 2020 Act creates a difference in treatment on grounds prohibited by Article 14. He says that being made subject to the 2020 Act is a form of status for the purpose of Article 14. He says the purpose of the 2020 Act was not to penalise persons convicted of terrorist offences, but instead was to protect the public from the risk posed by the early release of prisoners serving certain forms of sentence. He argues that the 2020 Act applies to a raft of different offences, the nature and gravity of which vary. He says that any exception from the scope of Article 14 should be narrowly construed.

36. Mr Southey maintains that it is important to concentrate not on the question whether the proposed status has an independent existence but on the situation as a whole. He says that prisoners subject to a determinate sentence to which the 2020 Act applies enjoy a status which prisoners serving a normal determinate sentence, a sentence of life imprisonment or an extended sentence, do not. He says that the distinction in status is not simply about what the Claimant did as the new provisions do not apply to all those convicted of terrorism offences. He says that the fact that the changes to the Claimant's sentence are retrospective illustrates the extent to which his status exists independently of what he did.

37. In response, the Secretary of State contends that distinctions based on the nature and gravity of the crimes committed do not fall within "other status". He says that the changes wrought by the 2020 Act only apply to individuals convicted of terrorist offences and reflect the gravity of those crimes and the specific risk posed by terrorist offenders.

Discussion

38. Article 14 provides as follows:

> 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

39. To make out a claim under Article 14, the Claimant must establish four elements:

> …First, the circumstances must fall within the ambit of a convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or "other status". Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatments will be lacking… (Lady Black at paragraph 8 in *R(Stott) v Secretary State for Justice* [2018] UKSC 59)

40. It is common ground that the matters complained of come within the ambit of Article 5. It is necessary for us therefore to consider the other three elements of Article 14.

Other Status

41. There are two conditions which must be satisfied under the legislation for the new arrangements for early release to apply. The first refers to the type of sentence to which the prisoner must be subject; it must be a fixed term sentence (and the prisoner must still be in detention pursuant to that sentence). The second refers to the type of offence. It must be either an offence under counter-terrorism legislation or an offence which the Court has held had terrorist connections. The consequence is that the new regime applies to those convicted of certain terrorist offences and sentenced to a fixed term sentence. That is the basis of the differences in treatment to which those convicted of such sentences will be subject under the new early release arrangements. In other words, the distinguishing feature is conviction of a terrorist offence for which a fixed term sentence is imposed.

42. The question whether such a ground for different treatment can amount to a status for Article 14 purposes has been considered in a number of authorities both in Strasbourg and domestically. It is necessary to consider them in a little detail.

43. The first in time was *Gerger v Turkey* (Application No. 24919/94). There, the European Court of Human Rights ("ECtHR") was concerned with a claim by a prisoner that his conviction before the Turkish National Security Court of an offence under Law no. 3713, the Turkish Prevention of Terrorism Act, meant that he was not entitled to automatic parole until he had served three quarters of his parole, whilst prisoners sentenced under the ordinary criminal law were entitled to parole after serving one half of their sentence. The parallel between the facts of *Gerger* and the present case are obvious.

44. The Court noted, at paragraph 69, that:

> …in principle the aim of Law no. 3713 is to penalise people who commit terrorist offences and that anyone convicted under that law will be treated less favourably with regard to automatic parole than persons convicted under the ordinary law. It deduces from that fact that the distinction is made not between different groups of people, but between different types of offence, according to the legislature's view of their gravity. The Court sees no ground for concluding that that practice amounts to a form of "discrimination" that is contrary to the Convention. Consequently, there has been no violation of Article 14 taken together with Article 5(1)(a) of the Convention. (emphasis added).

45. That distinction, between different treatment for different types of offence and different treatment for different groups of people, has been recognised and applied in a series of subsequent EtCHR decisions. For example, in *Ecis v Latvia*, (Application No. 12879/09) the Court pointed out that the case then before them turned on differences in treatment for men and women convicted of serious crimes, in contrast to *Gerge*r which turned on distinctions "made not between different groups of people but different types of offence".

46. In R(*Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, the Judicial Committee of the House of Lords considered the case of a man sentenced in 1994 to a determinate sentence of 18 years. In 2002 the Secretary of State, exercising his powers under s.35 of the Criminal Justice Act 1991, rejected the recommendation of the parole board that he be released on licence. The Claimant sought judicial review on the ground that the Secretary of State's power to reject a recommendation of the Parole Board, which could be exercised only in relation to prisoners serving determinate sentences of 15 years or more, constituted discrimination contrary to Articles 5 and 14. The Judge dismissed the claim and the Court of Appeal upheld his decision.

47. The Committee dismissed his appeal (although allowed the appeal of others). In the part of his speech which dealt with "other status" Lord Hope referred to *Gerger*. He said this:

> Each of the specific grounds of discrimination listed in article 14 shares one feature in common. This is that they exist independently of the treatment of which complaint is made. In that sense they are personal to the complainant. They can be an acquired characteristic, such as the person's religion or political opinion. They can also, like a person's race or birth, be a characteristic over which he has no control. On the other hand, in *Gerger v Turkey*…the court held that prisoners who were treated differently simply because of the category of the offences which they had committed were not within the protection of article 14. As the court put it in para 69 of its judgment, the distinction was not between different groups of people but between different types of offence according to the legislature's view of their gravity.
>
> 46. It could be said in Mr Clift's case that the length of his sentence did confer a status on him which can be regarded as a personal characteristic. This is because prisoners are divided by

> the domestic system into broadly defined categories, or groups of people, according to the nature or the length of their sentences. These categories affect the way they are then dealt with throughout the period of their sentences.…
>
> 48. The function of article 14, read with article 1 of the Convention, is to secure to everyone within the jurisdiction of the High Contracting Parties the enjoyment of the rights and freedoms set out in section 1 of the Convention without discrimination on grounds which, having regard to the underlying values of the Convention, must be regarded as unacceptable. This suggests that a generous meaning should be given to the words "or other status" while recognising, of course, that the proscribed grounds are not unlimited. It seems to me, on this approach, that the protection of article 14 ought not to be denied just because the distinguishing feature which enabled the discriminator to treat persons or groups of persons differently in the enjoyment of their Convention rights had not previously been recognised.
>
> 49. But the Strasbourg jurisprudence has not yet addressed this question and… it is possible to regard what he has done, rather than who or what he is, as the true reason for the difference of treatment in Mr Clift's case….the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time. A measure of self-restraint is needed, lest we stretch our own jurisprudence beyond that which is shared by all the States Parties to the Convention. I am persuaded, with some reluctance, that it is not open to us to resolve the…issue in Mr Clift's favour (emphasis added).

48. The ECtHR took up the challenge when Mr Clift took his case to Strasbourg. In *Clift v UK* (Application No. 7205/07) the Court observed that:

> the approach adopted in *Gerger* has been followed in a number of cases, but all concerned special court procedures or provisions on early release for those accused or convicted of terrorism offences in Turkey…Thus while *Gerger* made it clear that there may be circumstances in which it is not appropriate to categorise an impugned difference of treatment as one made between groups of people, any exception to the protection offered by Article 14 of the Convention should be narrowly construed. In the present case the applicant does not allege a difference of treatment based on the gravity of the offence he committed, but one based on his position as a prisoner serving a determinate sentence of more than fifteen years. While sentence length bears some relationship to the perceived gravity of the offence, a number of other factors may also be relevant, including the sentencing judge's assessment of the risk posed by the applicant to the public (emphasis added).

49. The significance of the distinction between different groups of people and different types of offence was revisited domestically in *R (Stott) v Secretary of State for Justice* [2020] AC 59. Mr Stott was convicted of numerous sexual offences against children.

He was sentenced to an extended determinate sentence of imprisonment under s.226A of the CJA 2003. This sentence comprised of appropriate custodial term of 21 years imprisonment and an extended licence period of four years. Pursuant to s.246A of the CJA 2003, an offender serving an extended determinate sentence only became eligible for release on parole after serving two thirds of the appropriate custodial term while other prisoners serving determinate sentences became eligible after serving half their sentence. Further, prisoners serving discretionary life sentences became eligible for parole after serving their specified minimum term which was usually fixed at half the determinate sentence which they would have received had they not been subject to a life sentence. The Claimant sought judicial review of the early release provisions in s.246A on the grounds that they constituted discrimination in the enjoyment of his right to liberty contrary to Articles 5 and 14.

50. The Divisional Court held that it was bound by existing House of Lords authority to reject the claim on the grounds that the Claimant did not have an "other status" for the purposes of Article 14. But had it not been so constrained, it would have found that "other status" was established and would then have gone on to find that s.246A of the CJA 2003 was incompatible with Article 14. On appeal to the Supreme Court, it was held that the difference in the treatment of extended determinate sentence prisoners in relation to early release was a difference on the ground of "other status" within the scope of Article 14.

51. At paragraph 77, Lady Black said:

> I am not persuaded by the Secretary of State's attempt to liken the case to *Gerger v Turkey* CE:ECHR:1999:0708JUD002491 994 and *Budak v Turkey* CE:ECHR:2006:0110JUD005734500, rather than *Clift v United Kingdom*, and to exclude the extended determinate term prisoner on the basis that the differential treatment in his case is because of what he has done and the risk he poses. The ECtHR dealt with the *Gerger* cases in para 61 of *Clift v United Kingdom*, and explained them as all being concerned with special provisions for those accused or convicted of terrorism offences. They also stressed that any exception to the protection offered by article 14 should be narrowly construed. True it is that an extended determinate sentence will only be imposed where there is a particular combination of gravity of offence and risk, but within the category of those serving extended determinate sentences, there will be various types of offence of varying seriousness. Putting it another way, what Mr Stott did has led to him receiving an extended determinate sentence, but, once imposed, that extended determinate sentence exists independently of what he did. If a life sentence is capable of constituting an "acquired personal status", as Lord Bingham was understandably disposed to think it was (*R(Clift)* [2007] 1 AC 484, para 28), and a determinate term of 15 years is also (*Clift v United Kingdom*), it is difficult to see why an extended determinate sentence should be viewed differently" (emphasis added).

52. Relying on the approach in *Clift v UK* and *Stott*, the Claimant argues that *Gerger* provides no basis for rejecting the Claimant's submissions that determinate prisoners subject to the 2020 Act enjoy a status in the same way prisoners serving a normal determinate sentence, a sentence of life imprisonment and an extended sentence would enjoy a status. Mr Southey argues that the difference in treatment does not flow simply from what the Claimant did "because the new provisions do not apply to all those convicted of terrorism offences." He says the 2020 Act treats one group of determinate prisoners differently to other prisoners. In that it is similar to the Claimant in *Stott* where the distinction was between those serving more than 15 years and those not. He goes on to suggest that the fact that the changes to the Claimant's status are retrospective illustrates the extent to which, as in *Stott*, his status "exists independently of what he did". The purpose of the 2020 Act, he contends, is expressly to manage the unique risk said to be posed by terrorist offenders irrespective of their original offence and without individual reference to the facts of their case.

53. We reject those arguments. In our judgment, the principle in *Gerger* applies to the present case. What leads to the different treatment as regards early release flows directly from the particular offences of which the Claimant was guilty. The relevant provisions apply only to those convicted of those particular offences.

54. It is said that the motivation for the Government proposing this legislation and for Parliament passing it was both the gravity of the offending and the risk posed by the offenders. Mr Southey says that the decision in *Gerger* was premised on the intentionally punitive nature of the measures in that case, whereas the purpose of the 2020 Act was expressly not to penalise people who have committed terrorism offences but rather to protect the public from the risk posed by the early release of prisoners serving certain forms of sentence. But in our judgment, the critical question is the objective basis for the difference in treatment, and that is the nature and gravity of the offence rather than the motivation of the legislature. In that regard, this case is on all fours with *Gerger*.

55. The Claimant argues that *Gerger* should be distinguished from the present case. In *Gerger*, he says there was only one offence, whereas the 2020 Act addresses a raft of different offences across a spectrum of gravity. But, even if that is true (and there is some doubt whether *Gerger* did relate to only a single offence), the distinction remains one based on the different types of offence and Parliament's view of the gravity of those offences.

56. The Claimant points out that some terrorism offences do not fall within the ambit of the 2020 Act. Schedule 1 to the Act, which lists terrorist offences for the purposes of s.247A(2) does not include offences where the maximum penalty is two years or less. On the other hand, offences in Schedule 1 do include ones which could permit a life sentence being imposed. But in our judgment, the fact that Parliament excluded offences attracting short determinate sentences and offences where life sentences are imposed, only serves to emphasise the fact that the class of prisoner caught by the new regime are identified simply by reference to the different types of offence of which they were guilty. The fact that the changes do not apply to those serving discretionary life sentences is a result of the fact that the amendments could have no application to cases where there is no automatic release. The fact that the changes do

not apply to sentences where the maximum sentence is less than two years simply constitutes a seriousness threshold applied to the relevant type of offences.

57. The decision of the Supreme Court in *Stott* turned on the fact that the differential treatment there was based on a particular type of sentence rather than a particular type of offence. In fact, as Lady Black makes clear in the passage from paragraph 77 set out above, what mattered in Mr Stott's case was that the extended determinate sentence existed independently of what he had done. But no such distinction can be drawn where, as here, the difference in treatment is based solely on the type of offence.

58. It follows that there is no "other status" here on which an Article 14 claim can be based and that claim must fail. Nonetheless, in case we are wrong about that, we go on to consider the other elements of an Article 14 claim, analogous position and justification.

Analogous Position

59. In *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173, Lord Nicholls of Birkenhead considered the appropriate response to the issues of analogous position and justification. At [3] he said that the essential question for the court:

> is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the courts scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.

60. In *Stott* Lady Black (at [148]) and Lady Hale [213] cited this passage in support of their approach in that case of considering justification before analogous position. Mr Southey urges us to do the same here. Sir James argues to the contrary that the comparators suggested by the Claimant are so plainly not in an analogous position that such an approach is inappropriate.

61. The Claimant submits that there are two broad categories of prisoner who are in an 'analogous situation' to determinate prisoners caught by the 2020 Act. First, prisoners serving discretionary life sentences who are ordinarily required to serve one-half of their notional determinate term. Second, prisoners serving standard determinate sentences whose release arrangements are not affected by the 2020 Act.

62. Mr Southey argues that all three groups have the same interests in obtaining their liberty as soon as possible. He says that the 2020 Order does not affect the standard determinate sentence prisoners both because it is not retrospective and because offenders sentenced to less than 7 years imprisonment are exempt. The analogous prisoner sentenced to the same sentence term as the Claimant would already have been released under the terms of the CJA 2003. His length of sentence would also mean that the 2020 Order did not apply. He says that the discretion to impose a

minimum term that is more than one-half of the notional determinate term in a discretionary life sentence does not affect the validity of discretionary life sentence prisoners as an analogous group. The possibility remains of release at the halfway point of the equivalent determinate term.

63. It is often difficult to draw analogies between different categories of prisoners. The sentences for each category are designed for the offenders that fall within it, in order to address the particular type of offending and the risk which that type of offender presents. In *Stott*, the majority of the Supreme Court concluded that prisoners serving extended determinate sentences were not in an analogous position with other prisoners. The headnote to the report includes the following useful summary of the decision:

> The various sentencing regimes laid down under English law had to be considered holistically; that each sentencing regime had its own detailed set of rules dictating when it could be imposed and how it operated in practice, with the early release provisions being part of those rules; that each sentence was tailored to a particular category of offender, addressing a particular combination of offending and risk to the public; that an ordinary determinate sentence was not comparable with an extended determinate sentence because the former could not be broken down into a component for punishment and a component for avoidance of risk to the public whereas the latter could; that, likewise, a discretionary sentence of life imprisonment, although broken down into such components, was not comparable with an extended determinate sentence because a prisoner serving an extended determinate sentence was entitled to be released after serving the whole of the appropriate custodial term while a discretionary life prisoner, even though entitled to apply for release after serving the specified minimum term, had no right to be released at all; that, consequently, prisoners serving extended determinate sentences were not in an analogous position with other prisoners; and that, even if they were, the difference in treatment was proportionate and justified.

64. In our judgment, the suggestion that prisoners serving discretionary life sentences are in an analogous position to those caught by the 2020 Act is hopeless. The whole of a determinate sentence is properly regarded as punishment for the offence; the period of detention of a discretionary life sentence prisoner, after expiry of the tariff, is a means of managing risk. Release for the latter is not automatic. Terrorist offenders made subject to a discretionary life sentence are already subject to a restricted release regime and to a review by the Parole Board before release. The two regimes have different elements and are designed for different sets of circumstances.

65. In *Stott*, at [124], Lady Black said:

> In my view, the Secretary of State is correct to differentiate between determinate and indeterminate sentences in this connection. The ECtHR does make a distinction, treating the post-tariff phase of an indeterminate sentences as directed at managing risk, whereas the whole of a determinate sentence is viewed as punishment. In R (Black) v Secretary of State for Justice [2009] AC 949, Lord Brown of Eaton-under-Heywood (in the majority) remarked on the distinction, commenting (para 67) that, throughout its case law, the Strasbourg court has consistently appeared to treat determinate sentences quite differently, time and

> again contrasting them with the indeterminate cases, with article 5.4 being engaged in the determination of the length of post-tariff detention in life sentence cases, but not in decisions regarding early or conditional release from a determinate term of imprisonment (para 83). So, in Mansell v United Kingdom CE:ECHR:1997: 0702DEC003207296, Ganusauskas v Lithuania CE:ECHR:1999:0907DEC 004792299 and Brown v United Kingdom CE:ECHR:2004:1026DEC 000096804, the ECtHR held article 5 challenges to determinate sentences to be manifestly ill-founded, the sentences being justified throughout the prison term as punishment for the offence.

66. At [155] Lady Black concluded:

> I have come to the view that EDS prisoners cannot be said to be in an analogous situation to other prisoners. Most influential in this conclusion is that, as I see it, rather than focusing entirely upon the early release provisions, the various sentencing regimes have to be viewed as whole entities, each with its own particular, different, mix of ingredients, designed for a particular set of circumstances.

67. Those observations reinforce us in that conclusion.

68. The second suggested comparator, prisoners serving standard determinate sentences unaffected by the 2020 Act, fall into two sub-categories; those serving determinate sentences for non-terrorist offences and those convicted of terrorist offences where the maximum sentence is less than two years. (The latter class of offenders are not caught by the 2020 Act because, as noted above, Schedule 19ZA to the CJA 2003, as inserted by the 2020 Act, does not include offences for which the maximum penalty is two years or less.)

69. In our judgment, it is impossible sensibly to regard a terrorist offender as in an analogous position to an ordinary offender. The nature of the offending is different, the need for punishment is different, the way the offenders have to be managed in custody is different, the risks they pose on release into the community are different. In our judgment, terrorist and non-terrorist offenders are not in analogous positions. In any event, for the reasons we come onto below, in our view the different treatment of those two groups is justified.

70. The difference between terrorist offenders who fall within the scope of the 2020 Act and those who do not is the gravity of the offence. Here, it seems to us, the analysis as to whether the two groups are analogous rapidly blurs into the question whether the difference is justified and, following the dicta of Lord Nicholls in *Carson*, it is helpful first to address the question of justification.

Justification

71. We note first that Mr Southey accepts that the involvement of the Parole Board was justified by the need to assess prisoners before release. But he argues that the extension of the custodial part of the Claimant's sentence from one-half to two-thirds cannot be justified because there is no nexus between the individual risk posed by the offender, his prospects of being rehabilitated, and the arbitrary extension of his release point. He says that the risks that arise in the context of terrorist offenders "might

provide a justification for the Parole Board considering entitlement to release", but do not justify delaying release in all cases to which the 2020 Act applies. The risk posed by individual terrorist offenders will vary and there has been no individual assessment of whether release should be delayed. The extension of the custodial period bears no relationship to the actual risk posed by each individual offender.

72. Mr Southey points out that the minimum period of imprisonment has been changed in the case of prisoners to whom the 2020 Act applies but has not been changed for other terrorism prisoners such as those serving a discretionary life sentence. He says that prisoners subject to the 2020 Act suffer the disadvantage of delayed release without any compensating benefit.

73. Sir James contends that any relevant differential treatment is clearly justified. The 2020 Act pursued the legitimate aim of keeping terrorist prisoners in custody for a longer proportion of their sentence. The change in the law was a direct response to repeated terrorist attacks in the UK between 2017 and 2020. Reference to the Parole Board at the two-third point was justified by the very particular nature of terrorist offending and the need to ensure the public were not put at risk by the prisoner's release. Parliament was entitled to conclude that terrorist offenders are to be distinguished from others because of the immediate and significant risk they pose, a risk that materialises in "serious, unpredictable harm to innocent and random members of the public". Sir James refers to well-known postscript to the speech of Lord Hoffmann in *Rehman* [2003] 1 AC 153 at 62.

74. Sir James argues that the "twin features of the 2020 Act are inextricably linked". A longer period of custody before a prisoner becomes eligible for release improves the evidence base on which the Parole Board makes its decision and increases the opportunity for rehabilitation.

75. In our judgment, on this element of the analysis, the Secretary of State has much the more compelling argument.

76. It is common ground that the test to be applied is whether the Secretary of State's decision is "manifestly without reasonable foundation" (*R (DA) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289.

77. The nature of terrorist offending was helpfully described in the statement of Mrs Wilkinson:

> Terrorist offending is therefore of a very particular nature. It is driven by ideology, which is combined with a genuine and real desire to do harm. Unlike other types of violent offending, such harm is not ordinarily directed at a discrete number of individuals, but rather the community at large. This means that it is difficult to identify potential victims, and the likely number of victims if an offender reoffends may well be high. It is moreover unpredictable in nature, in that a terrorist offence may be committed at any time. Many of the risk factors are also 'acute', meaning that can change quickly over days or even hours.
>
> As a result of the above, the index offences for which sentences are imposed do not always reflect the very high level of harm that an offender may subsequently cause. A relatively short standard determinate sentence imposed upon a terrorist

> offender can mask the fact the individual could be much more dangerous than other offenders who receive similar sentences, because of the ideological and unpredictable nature of their offending, as well as the disparate identity of their potential victims.

78. Faced with the real and immediate threats to public safety demonstrated by the attacks of November 2019 and February 2020, altering arrangements for the early release of terrorist prisoners was a logical and rational response. The offending in issue was especially grave, involving as it did random knife attacks on innocent bystanders causing fatal injuries. The risk such offenders posed reflected not only the likelihood of further offending of a similar nature, but also the potentially serious consequences of the risk eventuating.

79. In those circumstances, in our judgment, keeping terrorist prisoners in custody for a longer proportion of their sentence, and requiring Parole Board approval before early release, was an entirely legitimate response. The additional period of detention before assessment by the Parole Board increases the opportunity for treatment and rehabilitation and for gathering the material to which the Board would have regard in coming to a decision.

80. In our view, Parliament was justified in distinguishing serious terrorist offenders of this sort from other offenders who had received ordinary determinate sentences, given the pernicious nature of the offending, the obvious difficulties of managing such offenders in the community and the significant risk of unpredictable harm to random members of the public when they were released. Certainly, we do not regard the decision as manifestly without reasonable foundation.

81. Parliament was also entitled, in our view, to exclude from the new arrangements for early release those guilty of the less serious types of terrorist offending. Terrorist offences where the maximum sentence is two years or less are markedly less grave and since the gravity of the offending was the driving factor in the introduction of these new provisions, limiting the application of the 2020 Act to more serious offences was entirely justified.

82. As to the justification for requiring a prisoner to serve two-thirds rather than one half or some other fraction of his sentence before being eligible for release, the short point, in our judgment, is that the line has to be drawn somewhere. It was at the halfway point and Parliament has now decided it should be at the two thirds point. There can be no objection in principle to selecting a particular fraction. In *Clift v UK*, the ECtHR said this (at [75]):

> As regards the difference in treatment between those serving less than fifteen years and those serving fifteen years or more, the Government argued that while the cut-off point might appear arbitrary, a bright line distinction was necessary and justified. The Court accepts in principle that the application of more stringent early release provisions may have to be dependent on a bright-line cut-off point and considers that such a bright-line distinction will not of itself fall foul of the Convention (see *Twizell v. the United Kingdom*, no. 25379/02, [24], 20 May 2008; *Amato Gauci v. Malta*, no. 47045/06, [71], 15 September 2009; and *Allen and others v. the United Kingdom* (dec.), no. 5591, 6 October 2009). Accordingly, in the present case, the fact that different early release provisions

> applied to those serving determinate sentences of fifteen years or more, compared to those serving less than fifteen years, does not of itself suggest unlawful discrimination

83. In those circumstances, we reject the complaint under Article 14.

Article 7

84. It is convenient to deal with Article 7 before Article 5. Article 7 might be thought to provide the more obvious framework against which to test the present challenge and so we begin with that. Before we do so, we remind ourselves that, at least nominally, Mr Southey attacks both elements of the new arrangements, the two third point and the Parole Board point, in his arguments on Articles 7 and 5.

85. Article 7(1) provides:

> No one shall be held guilty of any criminal offence 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 (emphasis added).

86. The fundamental question is what is the "penalty"? Is it the sentence imposed by the sentencing court or is it the sentence ameliorated by whatever provisions are then in force for early release?

87. Mr Southey bases his argument in respect of Article 7 firmly on the Grand Chamber decision in *Del Rio Prada v Spain* (2014) 58 EHRR 37. It is necessary to consider the facts of that case in a little detail.

88. Ms Del Rio Prada was sentenced to a total of 3,000 years' imprisonment for offences linked to terrorist attacks, committed between 1982 and 1987 in eight different sets of criminal proceedings. The maximum term of imprisonment to be served for all sentences was fixed at 30 years. In February 2001, the date on which the applicant would fully discharge her sentence was set at 27 June 2017.

89. In April 2008, the applicant's release date was proposed for 2 July 2008, after taking into account remissions of sentence on the basis of work she had done in detention. The applicant was granted ordinary and extraordinary remissions of sentence on six occasions between 1993 and 2004. In May 2008 the court rejected the proposed release date and requested a new date based upon a new precedent set by the Supreme Court on 28 February 2006 (the "Parot" Doctrine) which stated that sentence adjustments and remissions were not to be applied to the maximum term of imprisonment of 30 years but to each of the sentences imposed.

90. The applicant appealed against the decision on the basis that the judgment of the Supreme Court had resulted in an increase to the term of her imprisonment by almost nine years and was in breach of the principle of non-retroactive application of criminal law provisions. In June 2008, the date for the applicant's final release was set

for 27 June 2017. The court rejected the applicant's appeal on the basis that the criminal law applied had been in force at the time of its application and had not breached the principle of non-retroactive application. The applicant lodged an appeal before the Constitutional Court which was declared inadmissible.

91. At paragraphs 91-93, when addressing the "foreseeability of criminal law" the Grand Chamber observed:

> 91. When speaking of "law" art.7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability. These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries.
>
> 92. It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. 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. 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.
>
> 93. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain. The progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Convention States. 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. The lack of an accessible and reasonably foreseeable judicial interpretation can even lead to a finding of a violation of the accused's Article 7 rights. Were that not the case, the object and the purpose of this provision—namely that no one should be subjected to arbitrary prosecution, conviction or punishment—would be defeated.

92. At paragraph 111 the Grand Chamber said this:

> The Court notes that the Audiencia Nacional (the court) used the new method of application of remissions of sentence for work done in detention introduced by the "Parot doctrine" rather than the method in use at the time of the commission of the offences and the applicant's conviction, thus depriving her of any real prospect of benefiting from the remissions of sentence to which she was nevertheless entitled in accordance with the law.

93. The Grand Chamber concluded that the relevant Spanish law in force at the time of her conviction was sufficiently precise to enable the applicant to foresee the scope of

the penalty imposed on her. She had an expectation that she would serve a 30-year maximum term, from which any remissions for work done in detention would be deducted. The application of the *Parot Doctrine* meant that the remissions of sentence to which the applicant was entitled had no effect on the length of her imprisonment; it was not a measure relating solely to the execution of the penalty imposed on the applicant but constituted a redefinition of the scope of the "penalty" imposed and in consequence fell within the scope of art.7(1). The applicant could not have foreseen the resulting consequences of the judgment in modifying the scope of the penalty imposed to her detriment and accordingly there was a violation of art.7.

94. Mr Southey submits that that decision of the Grand Chamber amounts to an authoritative restatement of principle. He says that the Court emphasised that the key question in determining whether there had been a breach of Article 7 when a prisoner complained about changes in an early release regime was whether the change was foreseeable at the time of sentence. He says that when considering Article 7 in this context the key issues are whether the rule that is said to have changed is sufficiently certain to be said to be part of the substantive law at the time of sentence; whether there has been a change in that law; whether that change was foreseeable and what the change relates to.

95. Sir James says the reliance on *Del Rio Prada* is misplaced given the analysis of the relevant principles in a series of cases culminating in the ECtHR decision in *Abedin v UK* (Application No. 54026/16). He says the ECtHR case-law has long distinguished between measures constituting a penalty and those representing the execution or enforcement of a penalty. He contends that the 2020 Act does not change the penalty imposed on the prisoner: the length of a prisoner's sentence, imposed by the sentencing court, is not increased in any sense. There are changes to the administration of that penalty, and in particular to the early release arrangements. However, the domestic and ECtHR case-law clearly indicates that changes of this nature do not infringe Article 7.

96. In our judgment, Sir James is correct in his assertion that prior to *Del Rio Prada*, it was well established in domestic and Strasbourg jurisprudence that a change to the administration of a penalty, by an alteration to the early release provisions or the like, will not engage Article 7.

97. The starting point for the analysis is the ECtHR case of *Hogben v. the United Kingdom* (Application No. 11653/85, Commission decision of 3 March 1986, Decisions and Reports (DR) 46 p. 231). In that case, as a result of a change in the policy on release on parole, the applicant was transferred from open to closed prison, and had to serve a substantially longer time in prison than would otherwise have been the case. In answering his Article 7 complaint, the former Commission said this:

> 3. The Commission recalls that the applicant was sentenced to life imprisonment in 1973 for committing a murder in the course of a robbery. It is clear that the penalty for this offence at the time it was committed was life imprisonment and thus no issue under Article 7 arises in this respect. 4. Furthermore, in the opinion of the Commission, the "penalty" for purposes of Article 7 § 1 must be considered to be that of life imprisonment. Nevertheless it is true that as a result of the change in parole policy the applicant will not become eligible for release on parole until he has served 20 years' imprisonment. Although this may give rise to

> the result that his imprisonment is effectively harsher than if he had been eligible for release on parole at an earlier stage, such matters relate to the execution of the sentence as opposed to the "penalty" which remains that of life imprisonment. Accordingly, it cannot be said that the "penalty" imposed is a heavier one than that imposed by the trial judge (emphasis added).

98. In *R (Uttley) v SSHD* [2004] 1WLR 2278, the appellant complained that there had been a breach of Article 7 resulting from his release at the two- thirds point of his sentence on licence. Lord Rodger held (at [38] and [43]):

> 38. …For the purposes of article 7(1) the proper comparison is between the penalties which the court imposed for the offences in 1995 and the penalties which the legislature prescribed for those offences when they were committed around 1983. As I have explained, the cumulative penalty of 12 years' imprisonment that the court imposed for all the offences in 1995 was not heavier than the maximum sentence which the law would have permitted it to pass for the same offences at the time they were committed in 1983. There is accordingly no breach of article 7(1).
>
> 43.. Here there was no change in the relevant penalties which the law permitted a court to impose. What changed between 1983 and 1995 were the arrangements that were to apply on the prisoner's early release from any sentence of imprisonment imposed by the court. In particular, since 1992 a prisoner such as the respondent has remained subject to his sentence for its entire duration of 12 years, whereas before 1992 an equivalent sentence would have expired when he was released after serving 8 years. The respondent says that, for this reason, the sentence of 12 years imposed on him in 1995 was "heavier" than a sentence of 12 years imposed at the time of the offences in 1983. Leaving aside all the other possible objections, this argument simply involves a misinterpretation of article 7(1). Of course, if legislation passed after the offences were to say, for instance, that a sentence of imprisonment was to become a sentence of imprisonment with hard labour, then issues would arise as to whether the article was engaged, even where the maximum sentence had been life imprisonment at the time of the offences. But in this case there is no suggestion that the actual conditions of the respondent's imprisonment changed. The very worst that could have happened to him under the 1991 Act was that he would have required to serve the whole of his 12 year sentence in gaol. Happily for him, that has not in fact happened. But, even if it had, he would still have spent only 12 years in prison — which is well within the limits of the penalty that was allowed by law for the three rapes and many other offences at the time when he committed them. There is no violation of article 7(1) (emphasis added).

99. Mr Uttley took his case to Strasbourg. In *Uttley v United Kingdom* (Application No. 36946/03) the Court referred to *Hogben* and ruled that the application in the case before them was manifestly inadmissible. It was held that for the purposes of Article 7 the penalty was, and was only, the sentence passed by the court. The Court concluded:

> Although, as the Court of Appeal found in the present case, the licence conditions imposed on the applicant on his release after eight years can be considered as "onerous" in the sense that they inevitably limited his freedom of action, they did

> not form part of the "penalty" within the meaning of Article 7, but were part of the regime by which prisoners could be released before serving the full term of the sentence imposed. Accordingly, the application to the applicant of the post-1991 Act regime for early release was not part of the "penalty" imposed on him, with the result that no comparison is necessary between the early release regime before 1983 and that after 1991. As the sole penalties applied were those imposed by the sentencing judge, no "heavier" penalty was applied than the one applicable when the offences were committed (emphasis added).

100. In *R (Robinson) v Secretary of State for Justice* [2010] 1 WLR 2380, the Court of Appeal held that provisions relating to the early or conditional release relate to the administration or execution of a determinate sentence. They were not part of the sentence. Moses LJ said, at [25], that

> For the purposes of the issue in the instant appeal article 6 requires an answer to the question: what was the sentence passed by the court with which it is said the legislature has interfered? The answer under English jurisprudence is that it was a sentence of five years. The legislative changes have not affected or increased the level of that sentence (emphasis added).

101. *Robinson* was an Article 6 case but Moses LJ made clear at [26] that the distinction between a penalty and the administration of the penalty applied "whether the right in issue is enshrined in Article 5 in Article 6 or in Article 7".

102. *Del Rio Prada* was considered by the Divisional Court in *Abedin*. The Court held that changes to the early release date for a serving prisoner did not constitute a violation of the prisoner's Article 5 or 7 rights. The judgment of Laws LJ included the following at [17]:

> In my judgment this reasoning (in *Del Rio Prada*) is very specifically geared to the facts of the case. There is no erosion in principle of the well-established distinction between the penalty imposed and the means of its enforcement or execution. *Del Rio Prada*, notwithstanding Mr Southey's submissions this morning, is not as I see it authority for anything like a general proposition to the effect that any detrimental change to provisions concerning release on licence if it is not foreseeable at the time of sentence alters the meaning of the penalty for the purpose of Article 7. The general remarks at paragraphs 91 to 93 (which I have not read) certainly produce no such conclusion nor does the specific passage at paragraph 111 and following dealing with the question whether the Parot doctrine was reasonably foreseeable.
>
> In the present case there has been nothing approaching a redefinition of the scope of the penalty imposed for the claimant's offence. Del Rio Prada does not assist him (emphasis added).

103. Mr Abedin took his case to Strasbourg. In *Abedin v UK* (Application No. 54026/16) the ECtHR considered *Del Rio Prada* in some detail before it unanimously declared the application inadmissible. The judgment of the court included the following:

> 32. The starting point for the Court's examination of whether Article 7 was engaged here must be, as explained in Uttley and reaffirmed explicitly in the

> *Del Rio Prada* judgment [83], that where the nature and purpose of a measure relate to a change in the regime for early release, this does not form part of the "penalty" within the meaning of Article 7. The applicant's submission that Del Rio Prada and Arrozpide Sarasola and Others confirmed that early release provisions could lead to the modification of the scope of the sentence overly simplifies the Court's analysis in that case…
>
> 33. The Court went on to underline that such changes had to be distinguished from changes made to the manner of execution of the sentence, which did not fall within the scope of Article 7 § 1 in fine. It can be seen, therefore, that the critical element in determining the applicability of Article 7 to such a case is whether the changes introduced had the effect of modifying or redefining the penalty itself.
>
> 34. In *Del Rio Prada* the multiple, lengthy, individual sentences imposed on the applicant (amounting to over 3,000 years' imprisonment) were converted into a single thirty-year sentence pursuant to applicable legislation. At the same time, Spanish law provided for prisoners to earn remissions of sentence for work done 21 in detention, at a stipulated rate of one day's remission for every two days' work. As the Court explained: "101. … remission of sentence gave rise to substantial reductions of the term to be served – up to a third of the total sentence – unlike release on licence, which simply provided for improved or more lenient conditions of execution of the sentence (see, for example Hogben and Uttley, both cited above…)".
>
> 35. The Article 7 issue arose because, instead of applying remission earned to the applicant's thirty-year sentence as had previously been the judicial practice, the authorities applied the remissions earned by the applicant to the individual sentences in line with a recent change in the case-law. The Court considered the overall effect of the change to the practice in Spain was, essentially, to modify or redefine the penalty imposed on the applicant from one of thirty years less any remissions earned to one of thirty years with no entitlement to remissions, resulting in a violation of Article 7...
>
> 36. The same considerations do not apply to the present case. The applicant's penalty of twenty years' imprisonment has not been changed, and it is to that penalty that the early release provisions continue to apply. There has been no conceivable redefinition, or modification, of the "penalty" imposed on the applicant. Nothing in the Court's judgment in *Del Rio Prada* called into question the central proposition outlined in Uttley that where the nature and purpose of a measure relate exclusively to a change in the regime for early release, this does not form part of the "penalty" within the meaning of Article 7. The Court is satisfied that this was the case here. The new provisions on the duration of licence conditions amounted to a change to the manner of execution of the applicant's sentence and as such did not fall within the scope of Article 7 § 1 in fine (emphasis added).

104. The critical feature of the Grand Chamber's analysis, in our judgment, was its conclusion that application of the *Parot Doctrine* constituted a redefinition of the scope of the penalty imposed on Ms Del Rio Prada. That seems to us a wholly unsurprising conclusion given that prior to the introduction of that doctrine,

remissions of sentence for work done in detention were expressly provided for by statute and periodically approved by the judge responsible for the execution of the sentences. In effect, the sentence of the Court had been amended and that amendment sanctioned judicially. The decision as to her release undermined that amendment. None of that is true of Mr Khan's case.

105. In the present case the changes wrought by the 2020 Act were changes in the arrangements for early release; they were not changes to the sentence imposed by the sentencing judge. In the absence of a fundamental change of the sort described in *Del Rio Prada*, a redefinition of the penalty itself, the principle is clear; an amendment by the legislature to the arrangements for early release raise no issue under Article 7. A change to those arrangements does not amount to the imposition of a heavier penalty than that applicable at the time the offence was committed. In those circumstances we reject the claim under Article 7.

Article 5

106. Article 5 provides that:

> (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…

107. In considering Article 5, the Grand Chamber in *Del Rio Prada* concluded that it was well established that all deprivations of liberty must not only be based on one of the exceptions listed in sub paragraph (a)–(f) but must also be "lawful". 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 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. The "quality of the law" implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness.

108. The standard of "lawfulness" set by the Convention requires that all law be sufficiently precise to allow the person—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Where deprivation of liberty is concerned, it is essential that the domestic law clearly define the conditions for detention. The Court reiterated that although Article 5(1)(a) of the Convention does not guarantee, in itself, a prisoner's right to early release, be it conditional or final, the situation may differ when the competent authorities, having no discretionary power, are obliged to apply such a measure to any individual who meets the conditions of entitlement laid down by law.

109. Of particular importance to its analysis was what was said in [107] of the Grand Chamber's decision:

> The Court notes that the application of the "Parot doctrine" to the applicant's situation deprived of any useful effect the remissions of sentence for work done

> in detention to which she was entitled by law and in accordance with final decisions by the judges responsible for the execution of sentences. In other words, the applicant was initially sentenced to a number of lengthy terms of imprisonment, which were combined and limited to an effective term of 30 years, on which the remissions of sentence to which she was meant to be entitled had no effect whatsoever. It is significant that the Government have been unable to specify whether the remissions of sentence granted to the applicant for work done in detention have had—or will have—any effect at all on the duration of her incarceration.

110. Mr Southey argues that the Court's reasoning in *Del Rio Prada* applies with equal force here. According to the law in force at the time of sentence, the Claimant would have been entitled to automatic early release at the halfway point of his sentence. There was no discretion in play. And he could not have foreseen that the law would be changed to prevent this automatic release.

111. Referring to *Robinson* and *Abedin*, Sir James submits that the contention that the 2020 Act is incompatible with Article 5 flies in the face of well-established principle. He says that *Del Rio Prada* has no application here. The effect of the decision of the Spanish Supreme Court in 2006 was retroactively to cancel remissions that had already been granted. He says that in those circumstances it is wholly unsurprising that the ECtHR "had concerns". The present context, he says, is entirely different. The issue of foreseeability simply does not arise: it is well established in the case-law that there is no right to early release; it was always open to Parliament to change the early release provisions. This is not a case where the Claimant is serving any longer a period than that which was ordered by the sentencing Judge (indeed, it remains possible that he will serve only two-thirds of his sentence in custody).

112. In our judgment, Sir James is right in his submission that *Del Rio Prada* does not undermine well-established principles as to the application of Article 5. Those principles emerge from the following decisions.

113. In *Brown v United Kingdom* (Application No. 968/04) the Strasbourg court said this:

> "Discretionary and mandatory lifers, after the expiry of the punitive element of their sentence, are detained on the basis of risk - the justification for their continued detention is whether it is safe for the public for them to live in the community once more. ... The applicant however has been sentenced to a fixed prison term by a court as the punishment for his offence. The lawfulness of his detention does not depend, in Convention law terms, on whether or not he ceases to be at risk of re-offending. <u>The fact that the applicant before the end of the sentence may expect to be released on licence does not affect this analysis.</u> When such a prisoner is recalled his detention is again governed by the fixed term imposed by the judge conforming with the objectives of that sentence and thus within the scope of Article 5 § (1)(a) of the Convention (emphasis added).

114. In *R (Smith & West) v Parole Board* [2005] 1 WLR 350 Lord Bingham said at [36]:

> It seems to me plain that in cases such as the appellants' <u>the sentence of the trial court satisfies article 5(1) not only in relation to the initial term served by the prisoner but also in relation to revocation and recall</u>, since conditional release

subject to the possibility of recall formed an integral component of the composite sentence passed by the court.

115. In *R v Bright* [2008] 2 Cr App R (S) 102, at [41], Sir Igor Judge P said:

> Mr Winter sought to argue that as the judge intended a three-and-a half year sentence actually to be served, the sentence should in any event be reduced to five-and-a-quarter years. The submission is based on a fallacy. The actual sentence was seven years' imprisonment. The release provisions did not and should not have affected the judge's sentencing decision. What he was required to do was to explain the effect of the sentence in the context of the applicable statutory provisions relating to release. He did not ''intend'' that the appellant should be released after three-and-a-half years: that would simply have been the consequence if the 2003 Act had applied to the sentence, and he was required to state that consequence in open court. Precisely the same applies to his observations when reconsidering the sentence. He knew that the appellant would be eligible for release after three-and-a-half years, but not automatically entitled to it. He was entitled to say, as a judge of considerable experience, that it would be very likely indeed that the defendants would in fact be released at the end of three-and-a-half years. Again, that did not mean that he so ''intended''. The sentence of seven years' imprisonment is not open to question on the basis that the order achieved a different result to that which the judge intended. Indeed, he himself made it absolutely clear that he had no intention whatever of changing the sentence which he decided to impose. (emphasis added).

116. In *R v Round* [2010] 2 Cr App R (S) 45 at [44] Hughes LJ said that:

> The general principle that early release, licence and their various ramifications should be left out of account upon sentencing is, as it seems to us, a matter of principle of some importance. The existence of the varied regimes which we have attempted to summarise at [23] and [24] above confirm us in that view. Above all, the HDC regime is entirely in the discretion of the Secretary of State. Whatever the statute may say about eligibility, there is no way of knowing in advance what decision may be made about HDC release. The Secretary of State might, between the passing of the sentence and the arrival of any possibility of HDC release, change his policy, whether because of public concern about release, or pressure on prison places, or for any other reason…Even if the policy remains the same, its application to any individual is a matter of considerable uncertainty... It is, we are satisfied, wrong in principle for sentencers to be required to adjust the sentence imposed to so uncertain a future prospect. And it is wrong in principle for the judge to be required to analyse in nice detail the many pages of Prison Service Instructions in order to attempt to foresee the impact on the prisoner of a discretionary regime (emphasis added).

117. In *R (Whitson) v Secretary of State for Justice* [2015] AC 176 at 38-39, Lord Neuberger, with whom Lord Kerr, Lord Carnwath and Lord Thomas agreed, held as follows:

> Where a person is lawfully sentenced to a determinate term of imprisonment by a competent court, there is (at least in the absence of unusual circumstances) no question of his being able to challenge his loss of liberty

> during that term on the ground that it infringes article 5.4. This is because, for the duration of the sentence period, the lawfulness of his detention has been decided . . . by a court, namely the court which sentenced him to the term of imprisonment.
>
> That does not appear to me to be a surprising result. Once a person has been lawfully sentenced by a competent court for a determinate term, he has been deprived of his liberty in a way permitted by article 5.1(a) for the sentence term, and one can see how it follows that there can be no need for the lawfulness of his detention during the sentence period to be decided speedily by a court, as it has already been decided by the sentencing court. If that is the law, it would follow that Mr Whiston's appeal in this case must fail.

118. In *Abedin*, Laws LJ referred to *Smith & West* and *Brown* and rejected a similar argument from Mr Southey as he ran before us. At [20] he said:

> I turn briefly to Article 5. That too was held to have been violated on the facts in Del Rio Prada "in the light of the considerations that led it to find a violation of Article 7" (see paragraph 130). This does not I think assist the claimant.

119. William Davies J agreed with Laws LJ and added this at [24]:

> I propose to add only this in view of my own personal experience of criminal jurisdiction. In the course of his submissions Mr Southey QC put this proposition: namely that judges in criminal courts when sentencing do to some extent take account of release provisions. That was the submission made. It is, with respect, plainly wrong. It flies in the face of what is set out at paragraph 20 in the judgment of Moses LJ in the case of *Robinson* already cited by my Lord. It also is contrary to any number of decisions of the Court of Appeal Criminal Division where even in cases where a judge has misapplied the release provisions in his explanation of the sentence, the sentence has not been interfered with (see for instance *R v Bright* [2008] EWCA Crim 419). The penalty imposed by a sentencing judge is the sentence he announces in court. Were he to attempt to reflect the release provisions in his sentence at any given time confusion and chaos would reign.

120. In *Brown v Parole Board for Scotland* [2018] AC 1 Lord Reed said (at [58]):

> Prisoners who are detained during the custodial term, or during a period ordered to be served under section 16 of the 1993 Act (as explained in para 55 above), are during that period in an analogous position to prisoners serving determinate sentences. They are serving a period of imprisonment of a term of years which the court has stipulated as appropriate for the offence committed. If they are released on licence and then recalled during that period, they continue to serve the period of imprisonment imposed by the court.(emphasis added)

121. From those authorities it is possible to draw the following principles:

i) The early release arrangements do not affect the judge's sentencing decision;

ii) Article 5 of the Convention does not guarantee a prisoner's right to early release;

iii) The lawfulness of a prisoner's detention is decided, for the duration of the whole sentence, by the court which sentenced him to the term of imprisonment;

iv) The sentence of the trial court satisfies Article 5(1) throughout the term imposed, not only in relation to the initial period of detention but also in relation to revocation and recall; and

v) The fact that a prisoner may expect to be released on licence before the end of the sentence does not affect the analysis that the original sentence provides legal authority for detention throughout the term.

122. In our judgment those principles are not affected by the decision in *Del Rio Prada. Del Rio Prada* does not detract from the core distinction between sentence passed by the sentencing judge and the administration or execution of the sentence. Throughout the relevant period, the governing authority for the detention is the original sentence. It is entirely foreseeable (if necessary with appropriate legal advice) that during the currency of a determinate sentence, which was calculated and imposed without account being taken of the possibility of early release, the arrangements for the execution of the sentence might be changed by policy or legislation. Accordingly, the lawfulness of the sentence was not undermined or compromised by changes of the sort made by the 2020 Act.

123. In those circumstances, the challenge under Article 5 must also fail.

Conclusions

124. For those reasons we reject the challenges under Articles 14, 5 and 7 and this application is dismissed.