



2 July 2014

PRESS SUMMARY

R (on the application of Whiston) (Appellant) v Secretary of State for Justice (Respondent) [2014] UKSC 39

On appeal from: [2012] EWCA Civ 1374

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Kerr, Lord Carnwath, Lord Hughes

BACKGROUND TO THE APPEALS

The question raised on this appeal is whether a person released from prison on a home detention curfew, and then recalled to prison under section 255 of the Criminal Justice Act 2003, has rights pursuant to article 5(4) of the European Convention of Human Rights. Article 5 protects the right to liberty, and article 5(4) confers on an individual who has been deprived of their liberty an associated right to challenge that deprivation before a judicial body.

On 5 October 2010, the appellant, Stuart Whiston, was sentenced to 18 months in prison for robbery. He was entitled to automatic release on licence after serving half his sentence on 5 July 2011. However, on 21 February 2011, he was released on licence under a so-called home detention curfew pursuant to section 246 of the 2003 Act. On 7 April 2011, the Secretary of State decided to revoke the licence under section 255 of the 2003 Act, because the appellant's whereabouts could no longer be monitored in the community, and he was recalled to prison. The decision of the Secretary of State was not subject to any statutory judicial control or review.

The appellant contends that, as a result of the licence granted on 21 February 2011, he regained his liberty, and the subsequent revocation of his licence and his consequent recall to prison on 7 April 2011 therefore constituted a deprivation of his liberty which infringed article 5(4). The Secretary of State argues that, at least where the sentence in question is determinate, in any case where a prisoner who has been released on licence is recalled to prison during the currency of his requisite custodial period, the requirements of article 5(4) are satisfied by the original sentence lawfully passed by the court by which he was originally imprisoned.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Neuberger, with whom Lord Kerr, Lord Carnwath and Lord Hughes agree, gives the main judgment. Lady Hale gives a concurring judgment. Under Strasbourg jurisprudence, where a person is lawfully sentenced to a determinate term of imprisonment by a competent court, he is not, at least in the absence of unusual circumstances, able to challenge his loss of liberty during that term on the ground that it infringes article 5(4). Where the Secretary of State exercises her discretion to release a prisoner before the end of the requisite custodial period of their sentence, article 5(4) is not infringed if that licence is subsequently revoked.

REASONS FOR THE JUDGMENT

All the statutory provisions relevant to this appeal are in the 2003 Act, as amended most recently by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Where a person has been convicted and given a determinate prison sentence of twelve months or more (a “sentence period”), section 244(1) provides that, subject to certain specified exceptions, once he has served half his sentence it is the duty of the Secretary of State to release him on licence. A prisoner may also be released on licence during the requisite custodial period under section 246(1). A licence, whether under section 244 or 246, remains in place until the end of the sentence period, unless the licence is revoked and the person subject to the licence (the ‘licensee’) is recalled. The Secretary of State has the power to revoke a licence and recall a licensee back to prison pursuant to two different statutory provisions [3-8].

First, section 254(1) of the 2003 Act gives the Secretary of State a general power to revoke any licence and to recall the licensee to prison. Where the power of revocation is exercised under section 254(1), the licensee is entitled to be told the reasons for his recall and to make representations to the Secretary of State, and, ultimately, to the Parole Board. Secondly, section 255(1) confers a specific power on the Secretary of State to revoke a section 246 licence. This power of recall can only be exercised until the end of the requisite custodial period, when the licensee would have been entitled to be let out on licence as of right. Unlike the position in relation to the section 254 power of recall, there is no provision for review by the Parole Board of the exercise of the Secretary of State’s section 255 power of recall [9-10].

Under Strasbourg jurisprudence, 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 [38].

On this approach, article 5(4) could not normally be invoked in a case where, in relation to those serving determinate terms, domestic discretionary early release provisions are operated by the executive. The notion that article 5(4) is satisfied by the original sentence appears entirely principled, and the consequence that a person under such a regime has to rely on his domestic remedies, at least unless other Convention rights are engaged, is not unreasonable in practice [40]. The common law should be well able to afford appropriate protection to the rights of people in the position of Mr Whiston without recourse to the Convention [45]. Consequently, in so far as it held that article 5(4) was engaged by the revocation of a mandatory licence, the House of Lords in *Smith and West* [2005] 1 WLR 350 were incorrect and the observations of Lord Brown in *R (Black) v Secretary of State for Justice* [2009] 1 AC 949 are wrong in so far as they suggest that the law of the United Kingdom in relation to article 5(4) differs from the Strasbourg jurisprudence [46].

Lady Hale agrees that the revocation of a discretionary licence does not infringe article 5(4). However, Lady Hale holds that the present law draws a principled distinction between those determinate prisoners who have reached the point in their sentence at which they are entitled to be released on licence and those who have not. If the former are recalled from their licence, and their representations to the Secretary of State are unsuccessful, they are entitled to have their case referred to the Parole Board. The latter, whose release on licence are discretionary, are not [50]. Once a prisoner has passed the point of mandatory release on licence, the basis for any later recall and detention is the risk of reoffending rather than the original order of the court, and, therefore, article 5(4) applies [52].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://www.supremecourt.uk/decided-cases/index.shtml>