



28 November 2018

PRESS SUMMARY

R (on the application of Stott) (Appellant) v Secretary of State for Justice (Respondent)
[2018] UKSC 59
On appeal from [2017] EWHC 214 (Admin)

JUSTICES: Lady Hale (President), Lord Mance, Lord Carnwath, Lord Hodge, Lady Black

BACKGROUND TO THE APPEAL

An extended determinate sentence ('EDS') is one of the available sentences for an offender who is considered 'dangerous'. It comprises two elements: an 'appropriate custodial term' and the 'extension period' for which an offender is subject to a licence. Under section 246A of the Criminal Justice Act 2003, an offender serving an EDS becomes eligible for parole after two-thirds of the appropriate custodial term. By contrast, other categories of prisoners serving determinate sentences become eligible after half of their sentence. Prisoners serving certain types of indeterminate sentences (i.e. discretionary life sentences) will become eligible for parole after their specified minimum term, which is ordinarily fixed at half the determinate sentence they would have received had they not been subject to a life sentence.

On 23 May 2013, the appellant was sentenced to an EDS in respect of ten counts of rape. The appropriate custodial term was fixed at 21 years, with an extension period of four years.

The appellant, Mr Stott, sought judicial review of his sentence. He claimed there was no justification for the difference in treatment in relation to eligibility for parole. He claimed that this was unlawful discrimination within Article 14 of the European Convention on Human Rights ('ECHR'), combined with Article 5 (the right to liberty). Article 14 prohibits discrimination on any ground such as sex, race or "other status". The High Court dismissed his claim, but granted a certificate permitting Mr Stott to appeal directly to the Supreme Court.

It was agreed that the right to apply for early release falls within the ambit of Article 5. As to whether Article 14 applies, there are two issues. The first is whether the different treatment of Mr Stott is on a ground within the meaning of "other status". The second has two parts: (a) whether EDS prisoners are in an analogous situation to either indeterminate sentence prisoners or other determinate sentence prisoners; and, if so, (b) whether there is an objective justification for the difference in treatment between the categories of prisoners.

JUDGMENT

A majority of the Supreme Court dismisses the appeal, holding that the EDS scheme does not breach Article 14 with Article 5. Lady Black gives the leading judgment, with which Lord Carnwath and Lord Hodge agree, save on issues specified in their separate judgments. Lady Hale and Lord Mance both give dissenting judgments.

REASONS FOR THE JUDGMENT

Issue 1 – the status issue

The Court holds by a majority (Lady Black, Lord Hodge, Lady Hale and Lord Mance) that Mr Stott had the requisite status for Article 14 [81, 184, 212, 236]. In light of the European Court of Human

Rights (‘ECtHR’) decision in *Clift v United Kingdom* (Application No 7205/07), the Court should depart from the decision in *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484. In that case the House of Lords had held that different treatment of a prisoner serving a sentence of 15 years or more could not be said to be on the ground of “other status” [70].

For the purposes of determining status, there is no real distinction between Mr Clift as a prisoner serving 15 years or more and Mr Stott as a prisoner serving an EDS [79]. Considering all the relevant case law and bearing in mind that grounds within Article 14 are to be given a generous meaning, the difference in treatment of EDS prisoners in relation to early release is a difference within the scope of Article 14, on the ground of “other status” [81, 185, 237].

Lord Carnwath concludes that difference of treatment of EDS prisoners is not attributable to some “status” for the purposes of Article 14. He would dismiss the appeal on that basis [179].

Issue 2 (a) – analogous situation

The Court holds by a majority (Lady Black, Lord Carnwath, Lord Hodge) that EDS prisoners are not in an analogous situation to other prisoners. The various sentencing regimes must be regarded as whole entities, each designed for particular circumstances and characteristics. The differences between the sentencing regimes are such that prisoners serving sentences under different regimes are not in analogous situations [155, 180, 195].

Lady Hale and Lord Mance (dissenting) hold that EDS prisoners are in an analogous situation to other prisoners serving determinate sentences and prisoners serving discretionary life sentences [214, 239]. Lady Hale says that for all three categories of prisoner, the most important question from their point of view is “when will I get out?” The essence of the right in question is liberty and for that purpose their situations are relevantly similar [214].

Issue 2 (b) – objective justification

The Court holds by a majority (Lady Black, Lord Carnwath, Lord Hodge) that, if EDS prisoners were in an analogous situation, the difference of treatment would be objectively justified [155, 180, 201].

The aim of the EDS provisions, which includes public protection, is legitimate [152]. As to whether the EDS scheme is a proportionate means of achieving that aim, the Court must consider each sentence as a whole. Within the framework of statutory provisions and sentencing guidelines, the sentencing judge imposes the sentence that best meets the characteristics of the offence and the offender. The early release provisions are part of the chosen sentencing regime and objective justification should be considered in that wider context [154].

The EDS is better compared to an indeterminate sentence, rather than to other types of determinate sentence. Counter-balancing the indeterminate prisoner’s earlier eligibility for parole is the lack of any guaranteed end to his incarceration, and the life licence to which he is subjected. This undermines the argument that the difference in treatment in relation to early release is disproportionate or unfair [155]. The EDS is a separate sentencing regime that is neither arbitrary nor unlawful [200].

Lady Hale and Lord Mance (dissenting) hold that that there is no justification for insisting that an EDS prisoner stay in prison for two thirds of the custodial term appropriate to the seriousness of his offending, while a discretionary life sentence prisoner, who is likely to be even more dangerous than an EDS prisoner, would be considered for release after half of what would have been an appropriate determinate sentence [218 – 220, 246, 248].

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://supremecourt.uk/decided-cases/index.html>