Neutral Citation No: [2021] NICA 68	*Ref:* **MAG11595**
	ICOS No:
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **10/12/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY STEPHEN HILLAND FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT OF JUSTICE DATED 21 OCTOBER 2016

Mr Hugh Southey QC with Mr David McKeown BL (instructed by McConnell Kelly, Solicitors) for the Appellant
Dr Tony McGleenan QC with Mr Philip McAteer (instructed by the Crown Solicitor's Office) for the Respondent

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Before: Treacy LJ, Maguire LJ and McFarland J

MAGUIRE LJ (*delivering the judgment of the court*)

Introduction

[1] The appellant in this case is a man, now aged 40, who at the relevant time was serving a sentence of imprisonment in respect of offences for which he had been convicted in May 2015. The species of sentence he was serving may be described as a determinate custodial sentence ("DCS"). Under this type of sentence the prisoner knows from the date of its imposition how long the commensurate term (based on the seriousness of the offence or offences)[1] shall be and will know also what his licence period is to be – that is the period he must, unless recalled to prison, serve on licence in the community. At the end of the licence period, the sentence comes to an end.

[1] See Article 7 of the Criminal Justice (Northern Ireland) Order 2008.

[2] The particular aspect of the penal process at issue in this appeal is that of recall to custody in respect of a prisoner who had been on licence. Recall is governed by statute and the decision at issue was a decision of the Department of Justice ("the Department" or "DoJ") to recall the appellant. It was dated 21 October 2016. Once recalled, the appellant's case was referred by the Department to the Parole Commissioners for review and this duly occurred resulting in a decision by a Parole Commissioner in respect of his case in January 2017. This decision declined release to the appellant with the consequence that he remained in prison until 3 February 2017 when the licence period expired. The appellant then was duly released.

[3] The case advanced in the court below and in this court has been that the appellant's recall to prison had the effect of breaching his human rights on the basis of the combined effect of article 5 (Right to Liberty and Security) read with article 14 (Prohibition of Discrimination) of the ECHR (as incorporated by the Human Rights Act 1998 into domestic law). It is argued that the appellant has by virtue of the statutory provisions found in the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order") been discriminated against in comparison to the treatment which the statute provided to other allegedly comparable groups of prisoners.

[4] In the court below Colton J ("the judge") rejected this argument holding, in particular, that on a proper analysis the appellant was not in an analogous position to that of the comparator groups of prisoners upon which he relied. But, in any event, the judge went on to hold that, even if this problem could be overcome, nonetheless any difference in treatment could be justified. The judge, therefore, dismissed the case.

Factual Background

[5] The essential facts of this case are not significantly in dispute between the parties and may, having regard to the chronology, be summarised as follows:

(i) 26 May 2015 – The appellant was sentenced to two determinate sentences by the trial judge at Downpatrick Crown Court. The first sentence was in relation to aggravated vehicle taking and driving while disqualified. The sentence was to be of one year's duration with half of the time spent in custody and half on licence. The second sentence was for an offence of assault occasioning actual bodily harm. It was also to be of one year's duration with half of the time spent in custody and half of it spent on licence. The two sentences were to run consecutively.

(ii) 4 February 2016 - The appellant, having served the custodial element of the two sentences, was released from prison into the community on licence (which was subject to conditions)[2]. While the bulk of the conditions consisted of standard conditions, there were also a number of specifically tailored conditions, dealing with such matters as the need to attend appointments with medical and other specialist services and to co-operate with any care or treatment prescribed; a prohibition on owning or driving any vehicle without the approval of the Probation Service of Northern Ireland; and a requirement to participate in drugs and alcohol counselling as directed by the Probation Service of Northern Ireland. The licence was to expire on 3 February 2017, which was to be the end date of the sentence.

(iii) 8 September 2016 – The appellant was arrested on suspicion of involvement in a bout of alleged offending. He was questioned by police but released on bail pending further enquiries. The matters under investigation related to driving while disqualified; driving with no insurance; suspicion of driving whilst unfit as a result of drugs consumption; and suspected taking and driving away. It was also thought that the appellant may have been guilty of dangerous driving and handling stolen goods which had originated in the Republic of Ireland. Further, it was believed that the number plates on the vehicle he was driving were false. The appellant, it further appears, had been involved in an accident which led to his identification as the driver of the vehicle, a fact he denied.

(iv) 7 October 2016 – The Probation Board for Northern Ireland wrote to the Parole Commissioners seeking that they should provide a recommendation to the DoJ for the applicant's recall. This was on the basis that the appellant was a prolific offender who was likely to re-offend and presented as a danger to the public given his continued disregard of the law.

(v) 7 October 2016 – The Parole Commissioner who dealt with this case provided a recommendation for recall to the DoJ. The Parole Commissioner was of the view that on the balance of probabilities the appellant represented a real risk of harm to the public which had increased, more than minimally, since his release and that the risk could not any longer be safely managed in the community. The single commissioner considered that the appellant's conduct constituted a clear breach of his licence conditions in a way which undermined the purposes of release on licence viz the protection of the public, the prevention of re-offending and the advancement of the prisoner's

[2] See Article 8(5) of the 2008 Order: the licence period means "such period as to court thinks appropriate to take account of the effect of the offender's supervision by a probation officer on release from custody – (a) in protecting the public from harm from the offender; and (b) in preventing the commission by the offender of further offences.

own rehabilitation. The commissioner's conclusion was that the original licence conditions were imposed because they were deemed to be necessary to enable his case to be managed in the community. However, in all the circumstances, the risk the appellant represented could not be safely managed in the community and accordingly she recommended that his licence be revoked.

(vi) 7 October 2016 – The DoJ decided to recall the appellant and issued a decision to this effect.

(vii) 9 October 2016 – Recall is effected by means of arrest.

(viii) 12 October 2016 – The DoJ applied to judicially review their own decision as they considered that it contained flaws.[3]

(ix) 21 October 2016 – The High Court quashed the DoJ's decision to recall. The appellant was, however, made the subject of a fresh recall by the DoJ. In accordance with the statutory scheme, the case was sent by the DoJ following recall to the Parole Commissioner dealing with the case for consideration.

(x) 25 November 2016 – Leave is granted by the High Court to the appellant to judicially review the DoJ's fresh decision to recall.

(xi) 16 January 2017 – A single Parole Commissioner upheld the recall decision but the appellant did not pursue the issue further as his licence expired on 3 February 2017 when he was released.

The recall process relevant to this appeal

[6] At the centre of this appeal is the statutory recall process which operates in the context of a variety of different types of offenders. Before considering the appellant's comparator groups, it is useful to set out that part of the 2008 Order which deals with recall.

[7] The key Article of the 2008 Order for present purposes is Article 28. In Article 28(1) references to a person, P, means a prisoner who has been released on licence by reason of either Article 17, Article 18 or Article 20.

[3] While this aspect of the matter represented an unusual turn of events, it is unnecessary to enter into a discussion of the particular flaws which have no effect on the issues which were before the court below or those before this court.

[8] Starting at Article 28(2) and running to Article 28(8) the text provides the framework for the range of recalls.

[9] These paragraphs read as follows:

> "(2) The Department of Justice or the Secretary of State may revoke P's licence and recall P to prison—
>
> (a) if recommended to do so by the Parole Commissioners; or
>
> (b) without such a recommendation if it appears to the Department of Justice or (as the case may be) the Secretary of State that it is expedient in the public interest to recall P before such a recommendation is practicable.
>
> (3) P—
>
> (a) shall, on returning to prison, be informed of the reasons for the recall and of the right conferred by sub-paragraph (b); and
> (b) may make representations in writing with respect to the recall.
>
> (4) The Department of Justice or (as the case may be) the Secretary of State shall refer P's recall under paragraph (2) to the Parole Commissioners.
>
> (5) Where on a reference under paragraph (4) the Parole Commissioners direct P's immediate release on licence under this Chapter, the Department of Justice shall give effect to the direction.
>
> (6) The Parole Commissioners shall not give a direction under paragraph (5) with respect to P unless they are satisfied that—
>
> (a) where P is serving an indeterminate custodial sentence or an extended custodial sentence, it is no longer necessary for the protection of the public from serious harm that P should be confined;

(b) in any other case, it is no longer necessary for the protection of the public that P should be confined.

(7) On the revocation of P's licence, P shall be—

(a) liable to be detained in pursuance of P's sentence; and

(b) if at large, treated as being unlawfully at large.

(8) The Secretary of State may revoke P's licence and recall P to prison under paragraph (6) only if his decision to revoke P's licence and recall P to prison is arrived at (wholly or partly) on the basis of protected information."

[10] The groups of prisoners coming within Articles 15, 18 and 20 (and thereby relevant to this appeal) broadly are as follows:

(a) Article 17 – Determinate custodial sentence ("DCS") prisoners, of whom the appellant is one;

(b) Article 18 – Indeterminate custodial sentence ("ICS") prisoners;

(c) Article 20 – Extended custodial sentence ("ECS") prisoners.

[11] As can be seen, Article 28(2) provides no general governing test dealing with the circumstances in which the DoJ may revoke a prisoner's licence and recall him to prison. The Department, however, is provided with discretion to revoke and recall if the conditions in Article 28(2) are met.

[12] After a recall the Department shall refer the matter to the Parole Commissioners. It will be seen that Article 28(6) provides different tests for a Parole Commissioner to apply when he or she considers the question of a direction to release a prisoner. The Parole Commissioner shall not give a direction in relation to ICS or ECS prisoners unless he or she is satisfied that it is no longer necessary for the protection of the public from serious harm that P should be confined, as set out at Article 28(6)(a) whereas, in the case of a DCS prisoner ("any other case") a direction for release can only be granted if the commissioner is satisfied that it is no longer necessary for the protection of the public that P be confined.

Determinate Custodial Sentence Prisoners

[13] These prisoners are fixed term prisoners serving a DCS. The sentence is set by the court on the basis of the seriousness of the offending[4]. The prisoner who is a DCS prisoner is not dealt with under the dangerousness provisions of the 2008 Order. Rather, a term of sentence having been arrived at by the judge, the offender's sentence will, as laid down by the judge, consist of a period in custody and a period on licence[5]. Commonly, the sentence is structured on a fifty-fifty basis as between these factors. An aspect of the 2008 DCS arrangements is that it no longer features remission of sentence. However, a prisoner in this category must not be subject to a custodial term of greater than 50% of the sentence before obtaining his licence. Concomitantly the licence can exceed the 50% mark.

[14] As soon as a fixed term prisoner (such as a DCS prisoner), other than a prisoner serving an ECS, has served the requisite custodial period the DoJ shall release him on licence under Article 17. Once the licence has been given the issue of recall may arise and Article 28 falls for consideration. A decision (by the DoJ) to recall will usually arise from an increase (or apparent increase) in the risk of harm to the public. Once the prisoner is recalled, his case will then be referred by the DoJ to a member of the Parole Commissioners whose job it will be to review it. It is in the context of such a review that the Parole Commissioner who is reviewing a case will have to apply the relevant part of the test for release found in section 28(6)(a) and (b). In the case of a DCS prisoner the relevant part will be (b) i.e. "in any other case it is no longer necessary for the protection of the public that P should be confined." In the case of a DCS prisoner, who has been recalled, he will stay in prison following recall until either his sentence ends which is when this would have occurred had he been on licence or when he is granted his licence again by reason of a decision of a Parole Commissioner and is re-released. He or she will then (unless returned to prison again) remain on licence until the end point of the sentence. As will be recalled, the appellant in this case was released from prison at the end of the sentence without ever having his licence renewed. This was because his sentence expired.

Indeterminate Custodial Sentence Prisoners

[15] Prisoners in the above category serve in one of the comparator groups which have been used by the appellant for the purpose of his discrimination claim. A feature of the extensive changes made by the 2008 Order was the introduction of sentences which were tailor-made for the needs of dangerous offenders, a new category of prisoner, requiring a fresh approach. Chapter 3 of the 2008 Order is

[4] See Article 7 (2) of the 2008 Order.

[5] See Article 7 (2) and Article 8 (2)-(5).

entitled "dangerous offenders" and contains a bespoke series of provisions in Articles 12-14. Article 13 is entitled "Life sentences or determinate sentences for serious offences"; Article 14 is entitled "Extended custodial sentences for certain violent or sexual offences" and Article 15 is entitled "Assessment and Dangerousness."

[16] In essence, the key issue which arises in respect of offenders facing sentence will be whether or not he or she is within the category of a dangerous offender. This is to be determined by the judge by reference to Article 15[6] where the primary questions to be asked are whether the offender has been convicted on indictment of a specified serious offence and whether, as a result, there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further serious offences. In considering this second issue the court shall take into account such information as is available to it about the nature and circumstances of the offence or offences and may take into account information which is about any matter of behaviour of which the offence forms part and likewise may take into account any information about the offender which is before it.

[17] Assuming that the court views the offender as a dangerous offender, the sentence of the court will reflect this. This will mean that one of three sentences may be used by the court: a life sentence; an ICS; or an ECS.

[18] As regards an ICS, this will primarily arise where the view is taken that, in particular, the use of an ECS is not adequate for the purpose of protecting the public from serious harm occasioned by the commission by the offender of further offences. In this event, the 2008 Order indicates that the court shall as per Article 13 (3):

> "(a) impose an indeterminate custodial sentence;

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[6] Article 15 reads:

(1) This article applies where-

(a) A person has been convicted on indictment of a specified offence; and

(b) it falls to the court to assess under Article 13 or 14 whether there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of such offences.

(2) The court in making the assessment referred to in paragraph (1) (b) –

(a) shall take into account all such information as is available to it about the nature and circumstances of the offence;

(b) may take into account any information which is before it about any pattern of behaviour of which the offence forms part; and

(c) may take into account any information about the offender which is before it.

and

(b) specify a period of at least two years as the minimum period for the purposes of Article 18, being such period as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or the combination of the offence and one or more offences associated with it."

[19] Once the court has set the sentence in respect of the prisoner he or she will have to serve the period of retribution and deterrence which has been fixed before being entitled to seek release on licence from the Parole Commissioners. If granted a licence, the offender will then benefit from release on licence but he or she can be recalled to prison using the procedure available under Article 28 of the Order. Thus, in respect of a prisoner who is serving an ICS, he or she, after the initial release on licence may be in and out of prison during periods on licence. An ICS prisoner can seek to have his licence conditions ended by the Parole Commissioners but only after a period of 10 years after their original imposition. It is only in this respect that the ICS differs from a life sentence.

Extended Custodial Sentence Prisoners

[20] These prisoners also form part of the comparator groups in relation to the applicant's claim arising from the measures which are contained in the 2008 Order relating to dangerousness. Where there is a finding of dangerousness, the court must consider which of the sentences available for use should be used. An ECS is used in accordance with Article 14 of the Order. Such a sentence may be applied where:

"(a) The offender is convicted on indictment of a specified offence; and

(b) The court is of the opinion -

(i) that there is a significant risk to members of the public of serious harm by the commission by the offender of further specified offences; and

(ii) where the specified offence is a serious offence, that the case is not one in which the

court is required by Article 13 to impose a life sentence or an indeterminate custodial sentence."

[21] Article 3 of the 2008 Order defines "serious harm" as meaning death or serious personal injuries, whether physical or psychological.

[22] An ECS involves two elements: the appropriate custodial term and the extension period during which the prisoner will be subject to licence[7]. The object served by the licence is the protection of the public from serious harm. Application to be released on licence can be made to the Parole Commissioners from the half way point of the custodial term[8]. Once released on licence, the offender can be recalled under Article 28. An ECS usually will be chosen by the judge where it would achieve appropriate protection for the public against the risk posed by the offender[9]. The offender will be released administratively when the aggregate sentence is completed.

Colton J's Judgment

[23] Colton J delivered a detailed and careful judgment. By way of summary, he made the following main findings:

(a) Article 28 provides to the DoJ a broad discretion when dealing with recall cases.

(b) Recall usually will occur where there has been an increase in the risk represented by the prisoner, that is to say a risk which is more than minimal since release on licence, and where the increased risk can no longer be safely managed in the community.

(c) After recall the case is referred by the DoJ to the Parole Commissioners for review.

(d) Article 26(6) provides different tests to the Parole Commissioners when they come to consider the question of a direction to release. ICS and ECS prisoners

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[7] The custodial term is the aggregate of (a) the appropriate custodial term and (b) a further period (the extension period). The former reflects the seriousness of the offence whereas the latter reflects the goal of protection of the public from serious harm: see Article 14.

[8] The test for release on licence by the Parole Commissioners, in respect of both ICS and ECS prisoners, is the same as that found at Article 28 (6) (a): see Article 18 (4) (b). This is unsurprising as both provisions are dealing with release of dangerous offenders.

[9] See R v McCarney [2013 NICC 1.

may be released on the basis of an assessment of the risk of "serious harm" whereas DCS prisoners are treated differently as the test applying to them is the test of whether or not it is "no longer necessary for the protection of the public that P should be confined."

(e) The judge rejected the DoJ's submission that irrespective of the difference in language found in Art 28 (6) as between (a) and (b) the same test is used. Rather, he accepted the submission that this could not be correct. In the judge's opinion, it could not be disputed that the concept of 'serious harm' was a fundamental element of the 2008 Order, which was designed to deal with risks posed by dangerous offenders. Article 28(6)(b) expressed a different threshold. As he put it: "The use of the different wording, that is "serious harm", in Article 28(6)(a), and "harm", depending on what type of prisoner it is considering is consistent with the conclusion I have reached on this issue." Different treatment therefore arose.

(f) The question which the judge thought arose was whether the different treatment amounted to a violation of Article 14.

(g) To determine this issue the judge followed the approach of Lady Black in the case of *R(Stott) v Secretary of State for Justice* [2018] 3 WLR 1831. She had held that four elements had to be established.

(h) The first of these required that the circumstances fell within the ambit of a Convention right. In this regard, the judge held at paragraph [84] that they did. He said:

> "On the authority of *Clift* both in the House of Lords and in the ECtHR and a reading of the article it seems to me that decisions regarding recall readily come within the ambit of Article 5."

(i) The second element to be considered according to Lady Black was whether the difference in treatment was on the ground of one of the characteristics listed in Art 14 or "other status." On this issue the judge, having noted that the appellant did not seek to rely on any of the characteristics listed in the Article but did rely on "other status", held that the appellant did come into this category and therefore within the definition of Article 14. The judge stated that he had "come to the conclusion that the difference in treatment which I have identified is a difference within the scope of Article 14 and the appellant meets the threshold necessary to establish "other status."

(j) Lady Black's third element was the need for the claimant and the comparator to be viewed as in an analogous situation. On this issue, the judge was of the view that a prisoner serving a licence period under a DCS is clearly in a difference position from the position of a prisoner serving the licence period under an ICS or a prisoner serving the licence period as part of an ECS. In this regard, he did not consider that a DCS prisoner could be regarded as in an analogous position to a prisoner serving an ICS or ECS.

(k) Finally, the fourth element in Lady Black's analysis was that of justification. On this issue the judge was of the opinion that if he was wrong in relation to his finding on the issue of analogous situation, he viewed the difference in treatment as justified.

The legal principles relating to Article 14 of the Convention

[24] Article 14 of the Convention reads as follows:

> "The enjoyment of the rights and freedoms set forth in this 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."

[25] Over recent years there has, domestically, been regular discussions in the higher courts about what questions a judge needs to ask himself or herself in order to establish whether a particular situation involves treatment which amounts to a violation of Article 14.

[26] Ordinarily, the context will be one in which it will be of key importance to establish the status of the applicant who has taken the case; whether the subject matter of the case falls within the ambit of one of the substantive articles of the Convention; whether it can be shown that the treatment at issue is to be compared with the treatment of others in an analogous situation; whether the differential treatment is on the ground of an Article 14 protected status; and, if required, a consideration, assuming the tests to date have been passed, of whether any differential treatment is justified or whether it is manifestly without reasonable foundation.

[27] In the case of *Lennon v Department of Social Development*, in this court[10], Stephens LJ helpfully discussed, drawing on a range of authorities, the development of jurisprudence in this sphere.

[28] While it is right to say, as Stephens LJ did at paragraph [42], that the court recognised that the differing formulation of the questions were largely semantic, it is helpful to recall the discussion, beginning at paragraph [40]:

> "[40] We consider that the formulation of the questions to be addressed can be traced back to paragraph [20] of the judgment of Brooke LJ delivered on 6 March 2002 in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR as amplified in *R (Carson) v Secretary of State for Work and Pensions* [2002] 3 All ER 994 at page 1010 and paragraph 52. Lady Hale returned to the question at paragraph [133]-[134] of her judgment delivered on 21 June 2004 in *Ghaidan v Godin-Mendoza* [2004 UKHL 30 recognising the need for a fifth question. In *Re McLaughlin* [2018] 1 WLR 4250 at paragraph [15] of her judgment delivered on 30 August 2018 Lady Hale stated:
>
> > 'As is now well known, this raises four questions, although these are not rigidly compartmentalised:
> >
> > (1) Do the circumstances "fall within the ambit of one or more of the Convention rights?
> >
> > (2) Has there been a difference of treatment between two persons who are in an analogous situation?
> >
> > (3) Is that difference in treatment on the ground of one of the characteristics listed or "other status"?
> >
> > (4) Is there an objective justification for that difference in treatment?'

[10] [2021] NI 254

This formulation by Lady Hale in *McLaughlin* was part of a majority judgment of which three members of the court explicitly agreed, and upon which Lord Hodge in the minority relied at paragraph [61]. Subsequently, in their judgment delivered on 28 November 2018 in *R (Stott) v Secretary of State for Justice* [2018] 3 WLR 1831 Lady Black at paragraph [8] and Lady Hale at paragraph [207] provided slightly contrasting formulations of the four questions. Lady Black stated that in order to establish that different treatment amounts to a violation of Article 14, it is necessary to establish four elements:

> '(a) The circumstances must fall within the ambit of a Convention right;
>
> (b) The difference in treatment must have been on the ground of one of the characteristics listed in Article 14 or "other status";
>
> (c) The applicant and the person who has been treated differently must be in analogous situations;
>
> (d) Objective justification for the differential treatment will be lacking.'

[41] The most recent Supreme Court authority on Article 14 is *R(DA and DS) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289. None of the Justices set out the four questions except Lady Hale who at paragraph [136] stated:

> 'In deciding complaints under Article 14, four questions arise:
>
> (i) Does the subject matter of the complaint fall within the ambit of one of the substantive Convention rights?
>
> (ii) Does the ground upon which the complainants have been treated

differently from others constitute a "status"?

(iii) Have they been treated differently from other people not sharing the same status who are similarly situated or, alternatively, have they been treated in the same way as other people not sharing that status whose situation is relevantly different from theirs?

(iv) Does that difference or similarity in treatment have an objective and reasonable justification, in other words, does it pursue a legitimate aim and do the means employed bear "a reasonable relationship of proportionality" to the aims sought to be realised (see *Stec v United Kingdom* (2006) 43 EHRR 1017 paragraph 51)?'"

[29] In the case of *Lennon*, Stephens LJ noted that there was a degree of latitude available when it came to the way to formulate the appropriate questions to be used as tools to guide the court. The Court of Appeal ultimately decided that "Lady Black's formulation at paragraph [8] of *Stott* presents the most appropriate tool for the determination of the issues in this particular case and those are the questions that we will address."

[30] As far of this court is concerned, it is evident that in the court below, the questions chosen by Colton J were taken from the judgment of Lady Black in *Stott*. *Stott*, as will be discussed later, was a case concerned with prisoners, and, in particular, Mr Stott's right to seek early release. This contrasts with the position in *Lennon* which was about widowed parent's welfare benefits. We can see no reason why the court should not view the *Stott* questions as those which it should apply.

[31] Before leaving this discussion about the formulation of questions, it is useful to refer to another section of Stephen's LJ's judgment in *Lennon*, as the Court of Appeal drew attention to what it described as "The requirement for an obvious answer to *Stott* question (3) and the general approach to the questions." Stephens LJ said:

"[43] In addressing the four *Stott* questions it is important to bear in mind the observations of Lord Nicholls of Birkenhead at paragraph [3] of

R (Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173 as follows:

> 'For my part, in company with all of your lordships, I prefer to keep formulation of the relevant issues in these cases as simple and non-technical as possible. *Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in art 14*. If this prerequisite is satisfied, *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 the question will be plain. *There may be such an obvious relevant difference between the complainant and those 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 court's 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 (emphasis added).

From this it can be seen that questions (1) ands (2) of the four *Stott* questions are pre-requisites. Question (3) which relates to "analogous situations" may be so obvious that the difference in treatment withstands scrutiny on that ground alone. If this is not so clear then a different approach is called for which is consideration of question (4). We proceed on the basis that in considering question (3) unless the answer is obvious that there is no analogous situation then we should proceed to question (4).'"

The Appellant's Case on Appeal

[32] As in the lower court, the appellant has, in this court put his case in an expansive way. The appellant contends that the decision to recall him; Article 28 of the 2008 Order; and the policy of the DoJ which has underpinned its decision making, all have breached the appellant's rights under article 5 and article 14 of the ECHR. As the matter is put in the appellant's skeleton argument:

> "the test applied when assessing (the appellant's) risk was harsher than that applied to prisoners serving other forms of sentence."

Such difference of treatment amounted to unlawful discrimination.

[33] In the submission of the appellant, the overriding theme was that the trial judge erred in dismissing the appellant's case.

[34] There was no need for the Court of Appeal, it was argued, to deal further with issues which had been dealt with in the appellant's favour in the court below. This applied, in particular, to whether the proceedings before the court engaged with questions within the ambit of a Convention right. On this matter, it was already established that this properly was a case where the court could comfortably accept that both Article 5 and Article 14 could be read together.

[35] The same approach could be taken to the question of whether there had been a difference in treatment between the way the appellant had been treated, as a DCS prisoner, as against how ICS and ECS prisoners (the appellant's comparators) were treated.

[36] A similar situation also applied in relation to the question of whether there was differential treatment on a ground prohibited by Article 14.

[37] In respect of all of these issues it was pointed out that there had been no respondent's notice served in relation to any of these specific findings and that they had not been challenged by the respondent in the course of the appeal.

[38] The net effect, according to counsel, was that only two aspects of the appeal were live: that of whether the judge had properly addressed the issue of whether the appellant as a DCS prisoner was in an analogous position to the prisoners serving ICSs and ECSs and that of whether the difference in treatment in this case could be justified by the respondent.

[39] In respect of the former issue, counsel contended that this was a case in which the issue of justification should be addressed first. The judge, he said, while directing himself that the issues of analogous circumstances and justification should have been looked at in a holistic manner, rather than as free standing questions, did not observe this approach in practice, as he did ultimately address the two issues separately. This Mr Southey suggested was contrary to authority.

[40] If it was necessary to determine whether the position of the appellant and of ICS and ECS prisoners were analogous, counsel argued, that, contrary to the judge's view, they were. This was put in the following way:

> "26. The issue is analogous to the situation in Clift as explained in *Stott*. Both *Clift* and this case are concerned with systems where what was in issue was whether the risk posed by the prisoner justified continued detention. That implies that they are in an analogous situation as they have the same interests in obtaining their liberty…
>
> 26.2 it should be remembered that the aim of recall is to manage risk rather than penalise … As a consequence, this is not a situation where a harsher regime is intended to balance some other part of the regime. The reality is that the legislation is premised on the hope that all prisoners will remain at liberty because they are low risk.
>
> 26.3 In *Brown v Parole Board* [2018] AC 1 it was expressly recognised that ECS [prisoners] serving their custodial term and DCS prisoners are in analogous situation[s]. That is because they are both serving a sentence imposed by a judge."

[41] In addition to the above, on the issue of analogous situation, counsel also alleged failures in the judge's reasoning. Such included:

- The judge's consideration of the issue of whether there was a proportionate justification for the difference in treatment before consideration of whether the groups were analogous.
- His alleged failure to consider whether the groups in issue were in relevantly similar positions.
- His alleged use of irrelevant factors such as that licence conditions may vary does not mean that the groups of prisoners do not have the same interest in being released following recall.
- Similarly, the fact that sentences imposed on prisoners serving ECS and ICS are more severe than sentences imposed on determinate prisoners does not mean that the groups of prisoners do not have the same interest in being released following recall. Ultimately, recall has nothing to do with any punishment.
- His alleged misuse of the margin of appreciation in determining whether groups were in an analogous situations.

- The judge's alleged error of looking at the relevant sentencing regimes as a whole.

[42] While the court has considered the full range of the appellant's submission as set out in his skeleton argument, it will not replicate here all that was said in it.

[43] The appellant ultimately sought an order of this court setting aside the judgment and order of Colton J. In addition, he sought, as per the original Order 53 Statement, such further or other relief as the court may deem appropriate.

The Respondent's Case on Appeal

[44] The respondent's case is directed at the central grounds of the appellant's case. The starting point was that the judge had concluded that the appellant and his comparators were not in an analogous situation but, in addition, the judge had also held that justification for any difference in treatment had been established by the respondent.

[45] Counsel submitted that there is no absolute rule in respect of whether the court below should have dealt with the question of justification or analogous situation first. The court below was free to proceed as it thought fit and it did not matter which issue was determined first.

[46] In effect, it was a discretionary decision and while it was accepted that it was not uncommon to see judgments concentrate upon the question of justification rather than upon whether the people in question were in analogous situations, either approach was acceptable.

[47] This way of viewing matters was, it was suggested, consistent with the language used in the relevant case law and there was no merit in the appellant's reliance on this point.

[48] The next issue related to the issue of analogous situation itself. On this issue, emphasis was placed on consideration of the various sentencing regimes at issue in this case, especially in the context of recall provisions. Viewed as a whole, the DCS prisoner's regime was not analogous with the regime of ICS or ECS prisoners respectively.

[49] As the matter was put in the respondent's skeleton argument:

> "The appellant's complaint here is about the operation of two different recall tests provided for under statute in the

> context of two different sentencing regimes, not about similar recall provisions being operated differently."

[50] Strong reliance was placed on the Supreme Court decision in *Stott* where the majority of the court had held that the prison regimes there under consideration were not to be viewed as in analogous situations. Consequently, Colton J was correct, it was argued, to have applied *Stott*, looking at the various regimes as a whole.

[51] The respondent challenged a variety of contentions of the appellant as they related to the case law. Examples, in the context of the issue of analogous situation, without seeking to set out a comprehensive list, included the following:

- The way in which the case of *Clift* was dealt with was the subject of counter-submissions. The appellant characterised *Clift* – as explained in *Stott* – as showing that the relevant comparators were in analogous situations "as they have the same interests in obtaining their liberty." However, this was contested by the respondent which offered the view that the appellant's complaint was about the operation of two different recall tests provided for by the statute in the context of two different sentencing regimes, not about similar recall provisions being operated differently.

- Contrary to the appellant's case, the respondent pointed out that the appellant's reliance on the case of *Foley*[11] (which had been relied on by the appellant's counsel, Mr Southey, in *Stott*) had proved misplaced in *Stott* with *Foley* being viewed as being wrongly decided. *Foley* had held that for a determinate sentence prisoner the halfway point of sentence ended the punitive element, a position rejected by the majority in *Stott* who viewed it as continuing.

- While the appellant had supported the view that, substantively, *Clift* was to be viewed as the guiding light and the relevant authority in this area, this was denied by the respondent which argued that in fact this line of authority had been rejected by the majority of the court in *Stott*. Accordingly, it was urged on Colton J to reflect this by applying a similar approach to that taken by the court in *Stott*, a step which he later took.

- In reply to the suggestion in the appellant's skeleton in relation to Brown (see para 26.2)[12] to the effect that DSC and ECS prisoners serving their custodial

[11] R (Foley) v Parole Board for England and Wales [2012] ACD 123.

[12] Para [40] supra

sentences were both serving a sentence imposed by the judge, the respondent offered the opinion that this was "nothing to the point." Counsel argued that "The court did not find in *Brown* that just because the sentence was imposed by a judge did not mean that the cases were analogous."

- There existed an important point of distinction between ICS and ECS prisoners in comparison with DCS prisoners. The former fall into these categories because the sentences belong to prisoners who have been found to be "dangerous" prisoners, who represent an especially serious level of risk vis a vis members of the public as opposed to DCS prisoners, who do not bring with them the same risk. At its extreme, the ICS prisoner is described as having to serve an "indeterminate" sentence which reflects the fact that the offender is, essentially, serving the equivalent of a life service.

- Finally, the respondent disputed the proposition advanced by the appellant that the judge had erred in referencing a margin of appreciation enjoyed by the state or legislature in a case of this nature. In the respondent's submission on appeal, it was suggested that there was nothing in relation to this point which undermined the respondent's overall analysis in relation to analogous situation.

[52] In respect of the issue of justification, the respondent appears to have generally endorsed the judge's position and to have agreed with the judge's approach, setting out lengthy portions of his judgment.

[53] For example, the respondent appears to have accepted the methodology which the judge deployed of asking whether any differential treatment had a legitimate aim and whether the method chosen to achieve it was appropriate and not dis-proportionate in its adverse impact.

[54] Similarly, the respondent appears to have approved of the judge's position in respect of his analysis of the purpose of recall viz that of ensuring the protection of the public against serious crime while balancing it against the rights of the offender and the need to avoid arbitrary detention.

[55] An important passage in the judgment receives what appears to be the general approbation of the respondent. The judge said:

> "The 2008 Order seeks to enhance the protection of the public by the introduction of mandatory post-release management of offenders. Offenders who receive different sentences are subject to different release/licence conditions when they serve the custodial element of their

> sentence. The difference is reflected in the length of the potential licence and on the licence period and on the licence conditions to which they are subjected to on release.
>
> The more dangerous offenders (ECS and ICS) are on licence for a longer period of time and subject to stricter licence conditions than a less serious offender (DCS). It seems to me that this is an entirely appropriate and proportionate method of achieving the legitimate aim of protecting the public.
>
> The answer in respect of proportionality or unfairness must be viewed in analysing the sentencing package as a whole. The DCS will be on licence for a shorter period of time and will invariably be subject to less stringent licence conditions. Reflecting their status as dangerous offenders an ICS prisoner is likely to spend a longer time in custody before being released and will invariably be subject to more stringent licence conditions and for a longer period than a DCS. An ECS prisoner will be on licence for a longer period of time than a DCS and will be subject to more stringent licence conditions."[13]

[56] The judge's conclusion that the statistics provided to him by the respondent support his view that the differences identified in the test for recall are appropriate and not in any way disproportionate is then cited by the respondent.

[57] In short, the respondent urged this court to uphold the judge's conclusions on these issues.

Case-law

[58] In an area of penal policy of this nature, involving a range of statutory or policy measures, it is no surprise that there is an emphasis upon no single size fitting all and upon initiatives that are specially devised to achieve a particular goal or to deal with a particular problem. Rarely will one case in this sphere be the same as another or be litigated in exactly the same way as another. In these circumstances while one decided case may shed light on the approach to be taken in respect of another it would be unusual for one individual case to be viewed as exactly the same as another.

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[13] At paragraph [103].

[59] With this thought in mind, the court will, having considered the authorities drawn to its attention, address in this judgment particular cases in a sparing way.

Stott

[60] In our view, the case which appears to be the most useful in this litigation is the Supreme Court's decision decided in 2018 (by a 3 to 2 majority) in *Stott*. After all, it appears that the parties in this appeal held back the hearing of this case at first instance in order to have the advantage of the judgments in *Stott*.

[61] *Stott* was a prisoner's case which involved the issue of early release. Mr Stott alleged discrimination contrary to Article 5 read with Article 14 in that under the particular sentence he was required to serve he could only gain access to early release at the two-thirds point of his sentence whereas other prisoners (the comparators he used) could gain access at the half way mark. The case ultimately made its way to the Supreme Court which dismissed it.

[62] While there existed a wider range of issues in *Stott* than exist in the present appeal, it is helpful to bear in mind that a systematic approach to the definition of how to deal with a case of this kind was taken by Lady Black: see paragraph [8] of her judgment. She set out a range of questions to be addressed and then considered them in turn. In the end the outcome was that some of the questions led to a positive outcome for Mr Stott (matters such whether there was different treatment as between the appellant and his comparators and whether the alleged discrimination fell within the ambit of Article 14 while others led a negative outcome from Mr Stott's point of view, in particular the two key issues of analogous situation (referred to in the judgment as issue 2A) and justification (referred to in the judgment as issue 2B).

[63] In Lady Black's judgment she provided a full discussion of the sentencing framework relating to the facts of Mr Stott's case, together with the reasoning of the court below and the submissions of the claimant and the Secretary of State, before going on to the substantive consideration of the questions before the court.

[64] In broad terms, she indicated that the various sentencing regimes had to be considered carefully. Each regime had its own detailed set of rules dictating when the sentence could be imposed and how it should operate in practice, with the early release provisions forming part of those rules. Each sentence was tailored to a particular category of offender, addressing a particular combination of offending and risk to the public. An ordinary DCS prisoner was not comparable, she held, with an extended determinate sentence prisoner as 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. 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 sentence prisoner, even though entitled to apply for release after serving the specified minimum term, had no right to be released at all. Consequently, prisoners serving extended determinate sentences were not in an analogous position with other prisoners. But, even if they were, the difference in treatment was proportionate and justified.

[65] It may be helpful to set out a number of passages in Lady Black's judgment to provide illustrations of the sort of issues she considered important.

[66] At paragraph [122] she spoke of the "fundamental difference between the parties in relation to whether a determinate sentence can be said to comprise two separate components, a period for punishment and deterrence, and a further period based on the risk posed by the offender to the public…" On this issue, she continued at paragraph [124]:

> "In my view, the Secretary of State is correct to differentiate between determinate and indeterminate sentences. The ECtHR does make a distinction, treating the post-tariff phase of an indeterminate sentence as directed at managing risk, whereas the whole of a determinate sentence is viewed as punishment."
>
> Authority, both domestically and from the ECtHR, is then cited in support of this proposition. At paragraph [128] Lady Black referred to the decision in a case called *Brown v Parole Board for Scotland [2017] UKSC 69*. At paragraph 66 of Lord Reed's judgment in that case, he said:
>
> 'the purpose of detention during the extension period is materially different from that of a determinate sentence…the extension period is 'of such length as the court considers necessary for the purpose of mention … namely 'protecting the public from serious harm from the offender … The punitive aspect of the sentence has already been dealt with by the custodial term, which is 'the term of imprisonment … which the court would have passed on the offender otherwise than by virtue of this section … Where a prisoner serving an extended sentence is detained during the extension period … his continued detention is therefore justified solely by the need to protect the public from serious harm.'"

[67] The foregoing led to Lady Black's conclusion on this issue at paragraph [133] of her judgment:

> "Having reviewed the authorities, it seems to me that the Strasbourg jurisprudence is against the two component analysis, so far as determinate sentences are concerned. Viewing the whole term as punitive would also be consistent with the generally applicable purposes of sentencing …"

[68] Another example of Lady Black's thinking is found in a discussion which begins at paragraph [145]. In this paragraph the judge recognises the "complexity and detail of the provisions governing various sentences that can be imposed." She went on:

> "… far from there being a basic sentencing regime, with discrete variations for particular sentences, each sentence has its own detailed set of rules, dictating when it can be imposed and how it operates in practice … Some sentences can only be imposed if there is a significant risk of the offender causing serious harm to members of the public by committing further offences … Some sentences can only be imposed where the offender has already committed offences of a particular type … All this fine detail tends to support the Secretary of State's argument that each sentence is tailored to a particular category of offender, addressing a particular combination of offending and risk … the judge selects the sentence which matches the attributes of the case before him, and fixes the term of any period of imprisonment, extended sentence etc. I can therefore see the force in the argument that the release provisions about which Mr Stott complains should not be looked at on their own, but as a feature of the regime under which he has been sentenced … There might be said, therefore, to be a building case for holding that he is not in an analogous situation to others sentenced under different regimes."

[69] The judge's views crystallise at paragraph [155] of her judgment where she returns to issue 2A. She states:

> "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 focussing 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."

[70] Lady Black discusses the issue of justification between paragraphs [152] and [155]. She found that the arrangements under consideration by her served a legitimate aim. [But it might be said that she did not descend into precise detail.] She recorded that the respondent had spoken of the ECS arrangements being concerned with procuring enhanced public protection and maintaining public confidence in the sentencing framework. The judge also referred to comments made on the issue of legitimate aim in *Clift* and she appears to have had no difficulty with the notion of increased measures being put in place in relation to higher risk prisoners.

[71] At paragraph [153], Lady Black acknowledged that in considering the issue of justification of the measures under consideration the ECtHR would allow a contracting state a margin of appreciation, indeed a wide margin when it comes to questions of prisoners and penal policy, although closely scrutinising the situation where the complaint is in the ambit of Article 5. At the same time she indicated that the court must equally respect policy choices of parliament in relation to sentencing.

[72] In an interesting passage at paragraph [154] she speaks of the way to proceed on the justification issue. She said:

> "… the answer depends significantly, I think, upon whether one concentrates entirely upon the early release provisions in the EDS and other sentences, or looks up from the detail to consider the various sentencing regimes. Ultimately, I am persuaded that the proper way to look at the issue is by considering each sentence as a whole … The sentencing judge imposes the sentence that complies with the statutory conditions prescribed by Parliament, and the sentencing guidelines and, within that framework, best meets the characteristics of the offence and the offender. The early release provisions have to be seen as part of the chosen sentencing regime, and the question of whether there is an objective justification for the differential treatment of prisoners in relation to early release, considered in that wider context."

[73] At paragraph [155], the judge arrives at her conclusion that the package under consideration was justified as a proportionate means of achieving the government's legitimate aim.

[74] There were two other judges who together with Lady Black made up the majority in the court. Lord Carnwath dealt with the issues of analogy and justification (which this court will concentrate on) shortly beginning at paragraph [180]. In essence, he was in agreement with Lady Black and, the third Judge in the majority, Lord Hodge. Lord Carnwath felt that the EDS regime must be looked at as a whole and could not be treated as analogous to regimes which have different purposes and different characteristics. In his closing sentence on these issues, he said that

> "Short of irrationality or (in Strasbourg terms) manifest unreasonableness, the courts should not allow themselves to be drawn into detailed consideration of the line drawn by the legislature between the treatment of different categories of offender."

[75] In Lord Hodge's judgment, there is a strong emphasis on the issue of analogous situation. In his view, the approach taken by Lady Black was correct and he firmly aligned himself with her process of reasoning. In particular, he agreed that a determinate sentence cannot be divided into a part relating to punishment and deterrence on the one hand and the avoidance of risk on the other. As he put the matter:

> "The idea that the punitive and deterrence part of a determinate sentence ends at the point of entitlement to, or at least eligibility for consideration for, early release is central to Mr Southey's case and the reasoning of the Divisional Court. In my view that idea is not correct."

[76] Lady Hale and Lord Mance dissented. As regards the former, she concentrated more on the issue of justification than that of analogous circumstances.

Clift

[77] The decision of the ECtHR in the case of *Clift v United Kingdom* has been referred to by counsel before this court and in the court below and was mentioned by Colton J in his judgment. Factually, it has some resemblance to the present case but not as much, the court considers, as Stott, where the majority of the court did not consider *Clift* as an authority which assisted them on the issues of analogous situation or justification.

[78] For present purposes it will suffice to say that *Clift* centred on alleged discrimination among groups of prisoners in the context of the machinery (essentially by whom and how) release decisions would be taken in relation to them.

[79] While the decision is often referred to in relation to the issue of the meaning of an earlier part of Article 14 related to the phrase "other status", the court need not go into that issue in this case.

[80] What is of significance in this case is the discussion by the ECtHR of the issues of analogous situation and justification.

[81] As regards the former, this is discussed between paragraphs 66-68. As these paragraphs are short, excluding case references, it is convenient to set them out:

> "66. The Court has established in its case law that in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous or relevantly similar situations. The Court notes that the requirement to demonstrate an "analogous position" does not require that the comparator groups be identical. The fact that the applicant's situation is not fully analogous to that of a short term or life prisoner does not preclude the application of Article 14. The applicant must demonstrate that, having regard to the particular nature of the complaint, he was in a relevantly similar situation to others treated differently.
>
> 67. In the present case, the Court notes that the applicant's complaint concerns provisions regulating the early release of prisoners. The decision whether to allow early release is a risk assessment exercise: failure to approve early release is not intended to constitute further punishment but to reflect the assessment of those qualified to conduct it that the prisoner in question posed an unacceptable risk upon release. The court accordingly considers that, insofar as the assessment of the risk posed by a prisoner eligible for early release is concerned, there is no distinction to be drawn between long-term prisoners serving less than fifteen years, long-term prisoners serving fifteen years or more and life prisoners. The methods of assessing risk and the means of addressing any risk identified are in principle the same for all categories of prisoners.

> 68. The Court therefore concludes that the applicant can claim to be in an analogous position to long term prisoners serving less than fifteen years and life sentence prisoners in the circumstances of the present case."

[82] As regards the latter, this is dealt with at paragraphs 73-79. By this stage the issue had moved to the overall question of whether discrimination had been established. As the court put it, "[a] difference of treatment is discriminatory if it has no objective and reasonable justification, in other words, if it does not pursue a legitimate aim or if there is not a relationship of proportionality between the means employed and the aim sought to be realised." In considering this issue stock had to be taken of the Contracting State's margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and the background. This was because a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. The national authorities were in principle better placed than the international judge to appreciate what was in the public interest. Moreover, the court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation." While in principle a similar wider margin of appreciation applied in questions of prisoner and penal policy, the court must nevertheless exercise close scrutiny where there is a complaint that domestic measures have resulted in detention which was arbitrary or unlawful.

[83] Interestingly, the court at paragraph 74 noted that more stringent early release provisions in respect of some prisoners may be justified where it can be demonstrated that those to whom they apply pose a higher risk to the public upon release.

[84] Overall, the court viewed the legitimate aim in this case to be protection of the public. It also considered that the use of 'bright line rules' would not of itself fall foul of the Convention: see paragraph 76.

[85] In respect of the outcome of the case, it considered that the Government had failed to justify the system it was operating which, the court referred to, as an indefensible anomaly. There was accordingly a violation of Article 5 taken together with Article 14.

SC and Others

[86] A further case the court will refer to was not available to Colton J at first instance and was not available to the court at the date of the hearing of the appeal. It

was published only recently (in July 2021) and offers an in-depth discussion of the operation of aspects of Article 14.[14]

[87] This is the judgment of Lord Reed, with whom the other members of the court agreed, in *SC, CB and 8 children v Secretary of State for Work and Pensions and others* [2021] UKSC 26. This court will dip into the judgment (which consists of 210 paragraphs) in respect only of the legal aspects of certain major issues. What the court says hereafter does not purport to set out a comprehensive description of the issues dealt with in it. Before finalising this judgment, the court offered each party to the appeal the opportunity to comment on *SC* and we are grateful for their helpful responses.

[88] The court notes that the terms of Article 14 have already been set out in this judgment at paragraph [24] above. As is well known, the Article can only be considered in conjunction with one or more of the substantive rights and freedoms set forth in the Convention or its protocols insofar as they are given effect to by the Human Rights Act 1998. In this case Article 14 is to be read with Article 5. For the sake of the record the court will set out its terms:

> "**Article 5**
>
> Everyone's 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…"

The "following cases" are then set out but it is unnecessary to replicate them for present purposes.

[89] At paragraph [37] of Lord Reed's judgment he summarises the approach to Article 14 adopted by the ECtHR, which he derived from the well-known case of *Carson v United Kingdom* (2010) 51 EHRR 13 at paragraph 61:

> "(1) The court has established in its case law that only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of article 14.

[14] See also the recent judgment of this Court in The Department for Communities and the Department for Pensions v Cox [2021] NICA 46 (Delivered 3 August 2021)

> (2) Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations.
>
> (3) Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.
>
> (4) The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background."

[90] The major topic which in the course of his judgment Lord Reed concentrated on which arises for consideration in this appeal relates to the issue of the State's justification of the measure being impugned in the proceedings. There is a substantial consideration of this issue as it has operated in relevant European and domestic law at paragraphs [92]–[162]. The following bullet points can be extracted by way of highlights:

- The court will respect the policy choice of the executive or the legislature in relation to measures of economic or social strategy in the context of welfare benefits unless it is "manifestly without reasonable foundation." This reflects the approach of the European court and should continue to be followed [97].
- The European court has generally adopted a nuanced approach which can be understood as applying certain general principles but, which enables account to be taken of a range of factors which may be relevant in particular circumstances so that a balanced overall assessment can be reached … The general principle that the national authorities enjoy a wide margin of appreciation in the field of welfare benefit and pensions forms an important element of the court's approach, but its application to particular facts can be greatly affected by other principles [142].
- Domestic courts have generally endeavoured to apply an analogous approach to that of the European court [143].
- Where the European court would allow a wide margin of appreciation to the legislature's policy choice, the domestic courts allow a correspondingly wide margin or "discretionary area of judgment"[143].
- In domestic law, as at the Strasbourg level, one would expect closer scrutiny where the case concerns discrimination on a ground such as sex or race rather

than a difference in treatment on less sensitive grounds, especially if it is simply a by-product of a legitimate policy [145].

- In the light of that jurisprudence as it currently stands, it remains the position that a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation … very weighty reasons will usually have to be shown, and the intensity of the review will usually be correspondingly high, if a difference in treatment on a "suspect" ground is to be justified [158].
- "Manifestly without reasonable foundation", as used by the European court is merely a way of describing a wide margin of appreciation. A wide margin has also been recognised by the European court in numerous other areas where that phrase has not been used, such as national security, penal policy and matters raising sensitive moral or ethical issues [160].
- It follows that in domestic cases, rather than trying to arrive at a precise definition of the ambit of the "manifestly without reasonable foundation" formulation, it is more fruitful to focus on the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case. The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy and matters raising sensitive moral or ethical issues. It follows … that the ordinary approach to proportionality will accord the same margin to the decision-maker as the "manifestly without reasonable foundation" formulation in circumstances where a particularly wide margin is appropriate [161].

At paragraph [162] the judge went on the make the following general remarks:

> 162. It is also important to bear in mind that almost any legislation is capable of challenge under article 14. Judges Pejchal and Wojtyczek observed in their partly dissenting opinion in JD, para 11:
>
> > 'Any legislation will differentiate. It differentiates by identifying certain classes of persons, while failing to differentiate within these or other classes of persons. The art of legislation is the art of wise differentiation. Therefore any legislation may be contested from the viewpoint of the principles of equality

> and non-discrimination and such cases have become more and more frequent in the courts.'
>
> In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process. As Judges Pejchal and Wojtyczek commented (ibid):
>
> > 'Judicial independence is accepted only if the judiciary refrains from interfering with political processes. If the judicial power is to be independent, the judicial and political spheres have to remain separated.'"

Consideration

[91] In the light of the materials which have been put before the court, together with the arguments advanced by the parties to this appeal, the court will now seek to draw its conclusions on a topic by topic basis.

The Scope of the Appeal

[92] The court is satisfied that the scope of the appeal need not involve this court, in effect, re-litigating issues which were decided by the trial judge and which have not subsequently been the subject of a Notice of Appeal.

[93] Thus, the court accepts that, as the judge found:

(i) The questions before the court are within the ambit of Article 5 read with Article 14. On the facts of the case the Articles can be read together.

(ii) There exists a difference in treatment as between the position of the appellant, as a determinate custodial sentenced prisoner and prisoners who are ECS or ICS prisoners in respect of the test which binds the Parole Commissioners in relation to the giving of directions for immediate release pursuant to Article 28(6) of the 2008 Order. In respect of this matter, the court accepts the judge's reasoning leading up to his conclusion at paragraph [64]. The judge considered the difference in treatment as flowing from the wording of the 2008 Order (and to be deliberate) which we consider is correct. Likewise, we consider that the judge was also correct when he rejected the Department's submission that it applied the same test despite the difference in language found within Article 28(6).

(iii) The court held that the applicant qualified as a person within the notion of "other status" for the purpose of Article 14. This was conceded by the respondent in the court below.

The sequence in which the live issues in this appeal should be taken

[94] It is not clear that this point was dealt with extensively in the court below but it is clear that the matter has been raised in the context of this appeal. Plainly, the judge was aware of the views which had been expressed by Lord Nicholls in *Carson*. These views were quoted by the judge in his own judgment and have been likewise set out in this judgment.[15] Lord Nicholls spoke of his preference "to keep formulation of the relevant issues in these cases as simple and non-technical as possible." He then went on to say that:

> "Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in Article 14."

[95] The judge then noted that if this pre-requisite was satisfied "the essential question for the court is whether the alleged discrimination of which complaint is made, can withstand scrutiny." Finally, he noted the following:

> "Sometimes the answer to the question will be plain. There may be such an obvious relevant difference between the complainant and those whom he seeks to compare himself that their situations cannot be regarded

[15] See paragraph [81] in the Judgment of the court below and paragraph [13] supra.

> as analogous. Sometimes where the position is not so clear, a different approach is called for. Then the court's 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."

[96] Colton J referred in the course of his judgment to Lady Black's remarks in *Stott* at paragraph 8. She had said as follows:

> "Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking. It is not always easy to keep the third and fourth elements entirely separate, and it is not uncommon to see judgment concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations."

[97] Colton J's approach, based on his reading of *Stott,* was that "there is a degree of overlap in these issues i.e. whether ICS and ECS prisoners are in an analogous situation to DCS prisoners and whether the differential treatment is justified (see paragraph [91]). In *Stott* at paragraph [138] Lady Black had said:

> "In determining whether groups are in a relevantly analogous situation for Article 14, regard has to be had to the particular nature of the complaint that is being made, see for example paragraph [66] of *Clift v United Kingdom*."

[98] At paragraph [148] of *Stott* Lady Black went on to say:

> "Recognising that there are valid arguments both ways in relation to Issue 2A, (whether the others are in an analogous situation) it seems appropriate to act on the wise suggestion of Lord Nicholls of Birkenhead, in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173, that sometimes, lacking an obvious answer to the question whether the claimant is in an analogous situation, it may be best to turn to a consideration of whether the differential treatment has a legitimate aim, and whether the method chosen to achieve the aim is appropriate and not disproportionate in its adverse impact (Issue 2B), although I will in fact return to Issue 2A again thereafter."

[99] All of this led Colton J to say at paragraph [93]:

> "It seems to me this is the proper approach to adopt in the circumstances of this case. The Strasbourg jurisprudence demonstrates a tendency to move almost seamlessly into consideration of whether the applicant is in an analogous situation and/or whether the difference is justified. They should not necessarily be considered as freestanding questions but looked at in a holistic way."

[100] For completeness, this court will refer to other authorities and sources which impinge on the issue as follows:

(i) In *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434 Baroness Hale at one point stated that "… the classic Strasbourg statements of the law do not place emphasis on the identification of an exact comparator. They ask whether 'differences in otherwise similar situations justify a difference in treatment.'"

(ii) In that same case Baroness Hale discussed the contents of Lord Nicholls speech in *Carson*. It is unnecessary to repeat that. At paragraph [25] of *AL*, Baroness Hale went on to say that the Strasbourg case law on Article 14 shows in only a handful of cases a situation in which the court found that the persons with whom the complainant wished to compare himself were not in a relevantly similar or analogous position.

(iii) Baroness Hale also quoted *Feldman, Civil Liberties and Human Rights in England and Wales*, 2nd Edition p 144[16]. He said:

> "The way the court approaches it is not to look for identity of position between different cases, but to ask whether the applicant and the people who are treated differently are in 'analogous' situations. This will to some extent depend on whether there is an objective and reasonable justification for the difference in treatment, which overlaps with the questions about the acceptability of the ground and the justifiability of the difference in treatment. This is why, as van Dijk and van Hoof observe… 'in most instances of the Strasbourg case law ...

[16] Page 1444 of the case report.

> the comparability test is glossed over, and the emphasis is (almost) completely on the justification test.'"

[101] Similarly, Harris and others in *Law of the European Convention of Human Rights*, 4th Edition, page 770, refer to the following:

> "In more recent cases, the court has simply stated that discrimination means 'treating differently, without an objective and reasonable justification, persons in relevantly similar situations.'"

[102] However, at page 770 the authors state that "the court will only examine complaints from applicants who are comparing like with like." Still later, the following comment is found:

> "…this is another area of Article 14 that is difficult to apply. Further, it has been noted that the Court will sometimes gloss over the analogous situation test and collapses it into the issue of whether there can be a justification for the differentiation."

[103] As will have been noted above, in the Northern Ireland Court of Appeal in the case of *Lennon*, Stephens LJ, having discussed Lord Nicholls dictum in *Carson* and having referred to the discussion of this issue in *Stott* was of the view that:

> "We proceed on the basis that in considering question (3) [analogous situation] unless the answer is obvious that there is no analogous situation then we should proceed to question (4)."

On this see paragraph [31] above.

[104] In this court's view this is not a topic in relation to which it is necessary for the court to set down a hard and fast rule which may only have the effect of creating a level of inflexibility which is out of place or which introduces undue complexity.

[105] This court prefers the view that there is scope for flexibility in the way a national court goes about its consideration of this issue dependant on the particular facts of the case which are under consideration. The approach to be taken will depend on an exercise in judgment and it should rarely be the case that a judge is precluded from exercising a choice as to the way to proceed. Sometimes, a court may view the issue as relatively clear in favour of an examination of whether the analogous situation test can be satisfied whereas in other cases the court may forsake

that approach in favour of proceeding to what, for shorthand, may to be described as question 4. But the option will remain open that instead of approaching the matter by reference to the issue of analogous situation, it may be appropriate not to do so and to simply go directly to the question of justification.

[106] In this particular case, we consider that the trial judge was not acting wrongly or illegally in approaching this matter in the way he did and we would not interfere with his judgment on this ground. Nor do we think that the approach taken by Colton J was significantly at variance with the way the majority in the Supreme Court approached the matter in *Stott*. We will approach the case broadly on the same lines as he did, considering both the issue of analogous situation and justification in that general order.

Analogous situation

[107] The starting point for the discussion of this issue is to be found in the background to the 2008 Order. The Order represented a major initiative in criminal justice reform in Northern Ireland. What brought it about was a combination of two factors. Firstly, in 2003, a particularly controversial murder case occurred in Northern Ireland. In this case, the offender had been in prison but was the beneficiary of automatic release arrangements at the half way point of his sentence. Shortly after release, he then murdered his female victim leading to serious public concern about the automatic release arrangements. Secondly, at or about the same time, a new sentencing framework was legislated for in England and Wales in the form of the Criminal Justice Act 2003. This introduced, in addition to ordinary determinate sentences, a series of sentences designed for public protection based on whether or not the sentencing court viewed the offender as a 'dangerous' offender.

[108] A decision was made, after consultation, to introduce similar arrangements in Northern Ireland and these were legislated for in 2008.

[109] Thus from that date the concept of 'dangerousness' became embedded in law in Northern Ireland and with it a series of protective sentences, which included ICS prisoners and ECS prisoners. It is these groups which in these proceedings are said to be analogous to DCS prisoners, such as the appellant.

[110] The issue for the court is whether, as asserted by the appellant, the appellant and his comparators are in an analogous situations or whether, as asserted by the respondent, they are not.

[111] The court has carefully considered this issue in the light of the extensive material put before it, together with the court's consideration of the legal authorities.

[112] It concludes that, for the reasons it will now set out, the appellant has not established that the two groups are in fact in an analogous situation. In our view, the approach to be taken ought to follow in substance the majority view in the case of *Stott* which is a similar case, though not on all fours.

[113] The principal reasons for the Court's conclusion are as follows:

(a) We accept the proposition put forward in *Stott* that varying sentencing regimes should be considered holistically. Each regime should be viewed separately and each has its own set of rules regulating how it is to operate. Whatever might be said of the position as between the different sentencing options within the category of sentencing for dangerous offenders, there is, in our opinion, a clear difference between the position of a standard form of offender – a DCS prisoner - and that of a dangerous offender.

(b) The importance of the introduction of a category of offender specified as dangerous cannot be overstated as is evidenced by the detailed statutory provisions which the legislature has enacted. These provisions, described earlier in this judgment, are constructed to deal with those offenders who represent a significant risk of causing serious harm to members of the public. They are defined by the introduction of a particular combination of rules and in a way which enables a court to identify who should be made subject to the particular sentence which best suits the needs of the offender and society alike. In the light of these factors, the judge fixes the terms of the sentence. The object as a whole is enhanced public protection serving the interests of maintaining public confidence.

(c) In contrast, it seems to us, that DCS prisoners belong in a separate world in which the same high level of control will be absent and where generally the offender will be subject to a more liberal regime free from the designation that he or she is a judicially established 'dangerous' offender.

(d) Overall the position in Northern Ireland is that there are a wide range of sentencing regimes in respect of which each should be viewed as whole entities, each with its own particular, different, mix of ingredients designed for a particular set of circumstances. In our view, this would be generally inconsistent with the notion that the mix of sentences contended for by the appellant represent relevantly similar situations.

(e) Another factor pointing in the same direction, it seems to us, is that the very provision which is here in issue – Article 28(6) of the 2008 Order – points to the obvious conclusion that it was at no time the intention of the draftsperson that he intended to apply the same test to standard DCS prisoners and public protection prisoners as regards the granting of power

to a Parole Commissioner to direct P's immediate release. On the contrary, the language of Article 28(6)(a) and (b) is contrasting which we think indicates that two separate and distinct regimes were in contemplation, as Colton J found. This points away from the conclusion that the court is dealing with like for like entities. The existence of two tests within the one provision tends to show that the intention was that each was intended to serve differing situations.

(f) Finally, it seems clear that there are numerous differences which the legislature has provided for as between different regimes which also has the effect of pointing away from regarding DCS and ICS and ECS prisoners as being in an analogous situation. These are to be found in each's sentencing structure; the nature of the sentence calculation in each case; the processes by which licence or release may be gained; how and when it also may be lost; once lost, how it may be achieved again; and whether and in what cases it cannot be achieved again. These, it seems to us, are not minor or inconsequential matters and should not be viewed as such. These, and other similar factors, are part of the individual matrix which surrounds each individual species of sentence.

Justification

[114] The court does not find it difficult to reach a view about the aim of recalls in this context. Whether the recall in question is directed at a DCS prisoner who, as in this case, is alleged to have abused his licence, or is directed to an ICS or ECS prisoner who is believed to have acted in a similar way, it seems to us that the purpose of recall is the protection of the public in the context of the risk which the individual offender represents.

[115] Within the framework of the regime which governs the particular prisoner's sentence, there will be scope for refinement but the overall goal, it seems to us, will, we suspect, rarely be open to any serious question. In this appeal it seems to us that the aim of the process cannot seriously be disputed.

[116] In these circumstances, the court will move to the issue of whether the difference in treatment which Colton J found to exist between a DCS prisoner in the form of the appellant and a ICS or ECS prisoner offends against proportionality or is otherwise unjustifiable.

[117] By way of reminder, the difference is between the test which applies to, put generally, prisoners who are within the category of dangerous prisoners, on the one hand, and prisoners who are DCS prisoners, who are dealt with under paragraph (b) of Article 28(6), on the other. As the Order puts it:

> "The Parole Commissioners shall not give a direction under paragraph (5) with respect to P unless they are satisfied that –
>
> (a) Where P is serving an Indeterminate Custodial Sentence or an Extended Custodial Sentence, it is no longer necessary for the protection of the public from serious harm that P should be confined;
>
> (b) In any other case, it is no longer necessary for the protection of the public that P should be confined."

[118] Test (b) is that which applies to this case i.e. whether in the appellant's case it was no longer necessary for the protection of the public that P (the appellant) should be confined.

[119] It seems to us that, taken by itself, test (b) as applied in this case, produces an unexceptional result bereft of any hint of discrimination. What, apparently has driven this case is the existence of test (a) in the immediate vicinity of test (b), which applies a different test. However, as the court has already found, the situations underlying test (a) and test (b) are not the same. This is copper-fastened by the fact that in other parts of the 2008 Order the draftsperson has referred to test (a) in a free standing way without reference to test (b)[17]. In simple terms, test (a) in the 2008 Order is plainly linked to the circumstances of "dangerous" offenders and was not intended to be used in the quite different context of DCS prisoners.

[120] If further support is necessary for the court's conclusion in this regard it seems to us that it can be derived from the totality of the evidence in this appeal and in particular: from (i) the absence of any evidence of substance that supports a contention that any public protection prisoner has, in a measureable way, been treated more favourably than a prisoner who is subject to test (b) and (ii) from the statistical evidence which Colton J referred to in his judgment at paragraphs [104]-[106] based on the affidavit evidence of Steven Allison, an official within the DoJ. For example, he averred that:

> "41. If the applicant were correct in their core assertion then one would expect for the statistical data to show that more DCS than ECS prisoners have been recalled over the years. In fact, from 2010 to the end of 2016, the statistics show that only 27.4% of prisoners released on a DCS

[17] See, as already noted, Article 18 (4) (b).

> licence were subject to recall. This can be contrasted with the fact that 92.4% of prisoners released on ECS licence were subject to recall…
>
> 42. The reality – reflected by the statistics – is that in general, ECS prisoners will, upon release on licence be subject to more stringent licence conditions, in comparison to DCS prisoners. Licence conditions will be applied proportionately to the risk assessment at the point of release. The greater the risk, the more stringent will be the licence conditions."

[121] In similar vein, at paragraph 44 of his affidavit, the deponent went on to say that "In general, ECS prisoners will present with a significantly higher risk profile than for DCS prisoners. This is reflected in the more stringent and particular licence conditions. This means that it is relatively easier for PBNI to manage the risk of DCS prisoners in the community, than for ESC prisoners. This is because there is usually much more scope to vary licence conditions for a DCS prisoner to enable continued management of risk in the community, which reduces the chance of having to resort to recall in a DCS case. In contrast, if there is an increase in risk for an ECS prisoner, there are less options available to manage that risk, before resort to recall is required."

[122] All of these remarks, underline what otherwise might have been inferred, viz that the circumstances here being made the subject of comparison are in fact different and need to be treated as such. The court should be slow to condemn existing arrangements without good reason.

[123] This may be another way of saying that within the Convention system there is stress on the court acting in cases where there is a practical and effective purpose being served rather than the pursuit of "rights that are theoretical or illusory."[18]

[124] In the area of justification, it is essential to place the court's duty to arrive at a judgment in its proper context. This invites the following remarks:

(a) This is a case, which on any view, is evidentially weak.

(b) The instrument under consideration is the product of a democratic legislature.

(c) The subject area is penal policy.

[18] See Airey v Ireland (1979) 2 EHRR 439 at para 24.

(d) The court is not dealing with a 'suspect' ground or grounds.

(e) Very weighty reasons are not in play in this case.

(f) It is a case which would usually be associated with a wide margin of appreciation applied with due balance.

(g) There is no sustainable suggestion that the existence of Article 28(6)(a) has made any real difference to the way this appellant's case was dealt with or treated.

(h) Equally, the court struggles to conclude that this is a case where the appellant has been treated arbitrarily.

(i) The appellant, it should not be forgotten, did have two hearings about his case conducted by an independent specialist tribunal in the form of the Parole Commissioners within a short time of his recall.

(j) This is not a case in which the court should second guess the legislature. It is a case where the court should consider the effect of the doctrine of separation of powers.

[125] In all these circumstances the court is able to reach the clear view that the terminus reached by the judge was correct and we express our agreement with it.

Conclusion

[126] We dismiss the appeal of the appellant and affirm the judge's conclusions that:

(i) the appellant and his comparators were not in an analogous situation.

(ii) in any event, in the field in question, the arrangements at issue served a legitimate aim and was proportionate and justifiable.