Case Note

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'Discriminatory' Sentencing: A Return to Coherence

Stott v United Kingdom (App. 26104/19); [2024] 78 EHRR 29

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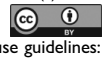

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The Applicant was convicted of numerous sexual offences for which he received an extended determinate sentence (EDS) under Section 226A of the Criminal Justice Act 2003 totalling 25 years which comprised a custodial term of 21 years and an extended licence period of 4 years. By virtue of Section 246A, a prisoner serving an EDS was *eligible* for release by the Parole Board after serving two-thirds of the custodial term. If the Parole Board did not direct the prisoner's release, they are released after they have served the full custodial term. In the case of the Applicant, the application of section 246A meant that he was eligible to be released by the Parole Board after serving 14 years imprisonment and, if no release was directed, he would be released after serving 21 years.

In the domestic proceedings, the Applicant sought to judicially review the early release provision contained within Section 246A on the basis that it gave rise to discrimination and violation of his right to liberty contrary to Articles 5 and 14 of the European Convention on Human Rights (ECHR). The Applicant submitted that the discrimination arose from the fact that: prisoners serving a fixed-term determinate sentence were automatically released after serving half of their sentence and prisoners serving a life sentence became eligible for release on parole after serving their minimum term which was normally fixed at half of the determinate sentence they would have received had they not received the life sentence (see *R v Szczerba* [2002] EWCA Crim 440; [2002] 2 Cr App R (S) 387 and *R v Sweeney* [2007] EWCA Crim 2766). If the Applicant had received a fixed-term determinate sentence he would have been released after serving 10½ years (half of the determinate sentence of 21 years) and if he had received a life sentence he would have been eligible for release after 10½ years (again, half of the determinate sentence of 21 years) therefore, in either case, this was better than being eligible for release after 14 years under Section 246A. The argument was a simple one: different types of prisoners were being treated differently as to when they could apply for release and there was no valid justification for this difference.

At first instance, the Divisional Court (Sir Brian Leveson P & William Davis J: [2017] EWHC 214 (Admin)) held that they were bound by the judgment of the House of Lords in *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54; [2007] 1 AC 484 therefore they had to reject the claim on the basis that the Applicant did not have an 'other status' for the purposes of Article 14. The Divisional Court issued a certificate pursuant to Section 12 of the Administration of Justice Act 1969 permitting an appeal directly to the Supreme Court. The Supreme Court granted permission to appeal. On appeal, the Supreme Court held ([2018] UKSC 59; [2020] AC 51): (1) by a majority of four to one (Lord Carnwath dissenting), that the Applicant had the requisite status for the purposes of Article 14 and that in light of the decision in *Clift v United Kingdom* (App. 7205/07; [2010] ECHR 1106) the Supreme Court should depart from the decision of the House of Lords in *R (Clift) v Secretary of State for the Home Department*. (2) by a majority of three to two (Lady Hale P & Lord Mance dissenting),

that the position of EDS prisoners and other prisoners is not analogous and, even if they were, the difference in treatment was proportionate and justified.

The Applicant applied to the European Court of Human Rights. He argued that '…*as an EDS prisoner he had been treated differently from standard determinate and discretionary indeterminate sentence prisoners as regards eligibility for early release'* (at [59]).

The Fourth Section of the Court held that the application was admissible but there was no violation of Articles 5 and 14 ECHR. The Fourth Section concluded, *inter alia*, that: (1) they were '…*not persuaded that it is appropriate to single out the early release provisions and to seek to make a comparison across the different groups, in respect of whom the other criteria also vary'* (at [105]); (2) that the Applicant's argument was, essentially, that '…*there was a lack of coherence in the specific details of the different regimes in so far as they made provision for eligibility for early release'* (at [107]); and (3) that '…*it could not be said that, at the relevant time, the provisions applicable to the early release of EDS prisoners fell outside the wide margin of appreciation enjoyed by the Contracting States in the matters of prisoners and penal policy'* (at [108]). The Applicant did not apply to the Grand Chamber.

Commentary

In my comment upon this case in the Supreme Court, having noted the comment of Lord Carnwath that '*It is wrong to isolate the particular feature of the provisions for release on parole, and to compare it with other release provisions without regard to their context'*, I asked the following question ((2019) 83 Journal of Criminal Law 10, 12):

> *But is this right? It is certainly a balancing act between having sentencing regimes as standalone regimes unencumbered by issues which relate solely to other sentencing regimes and being fair to all prisoners, regardless of sentencing regime, to place them in a like situation. The two-thirds requirement for the EDS is certainly an anomaly in the current sentencing regimes and one which should not be allowed to stand. Stott is certainly an opportunity lost*.

The Fourth Section of the ECHR firmly answered this question in the affirmative. However, the reasons for this were two-fold: first, the wide margin of appreciation afforded to the United Kingdom in sentencing policy and, second, the 'anomaly' and lack of coherence no longer existed with the changes enacted by the *Sentencing Act 2020*.

I do not intend to substantively address the issue of margin of appreciation in this commentary (though it is closely linked to the coherence argument) save only to remark that the release of prisoners is a controversial political issue, not least due, in recent times, to concerns of prison overcrowding which has led United Kingdom governments to recently make alterations to the rules upon when a person can be released on licence (either by way of home detention curfew (*Criminal Justice Act 2003 (Home Detention Curfew) Order 2023*, SI 2023/390) or at conditional release date (*Criminal Justice Act 2003 (Requisite and Minimum Custodial Periods) Order 2024*, SI 2024/844). Whilst it is fair to say that the release of prisoners has become overly elaborate and utterly confusing (due to several factors such as the date of the offence, the nature of the offence, the sentencing regime applicable at the time and the type of sentence) it is, as has been said many times, a matter for Parliament, rather than the courts (*R v Burinskas (Attorney General's Reference (No 27 of 2013)*) [2014] EWCA Crim 334; [2014] 1 WLR 4109, [37]).

By the time the Applicant's case was considered by the Fourth Section, legislative changes had been made which ultimately undermined the coherence argument (see below). Despite this, it is worth reviewing the argument. In theory, though not always in practice, the more serious the offence and the greater the risk to the public, the longer and more serious the sentence. Currently, sentences in England & Wales fall into one of three broad categories: life sentences; extended sentences (which includes sentences of particular concern); and determinate sentences. Again, in theory, but not in practice, those that pose

the highest long-term risk to the public receive life sentences, those that pose a medium long-term risk receive extended sentences, and those that pose a low long-term risk receive determinate sentences. Whilst this appears to be a common-sense approach, the model does not always work given the artificial nature of 'risk' as it relates to what *might* happen, not what *will* happen.

One of the reasons why the model does not work, and the reason I shall focus upon, is the one which was highlighted in the Applicant's case: eligibility for release. Applying that criterion to the categories of sentences:

1. Life sentence. The Applicant's risk at the time of sentencing was one which did not require a life sentence. If it had required a life sentence (and assuming the relevant periods would remain the same) he would have received a minimum term of 10½ years (half of the notional determinate sentence of 21 years) meaning that he must serve the minimum term and be eligible for release once it had been served. He would at that point have his case considered by the Parole Board who would decide whether his risk was such that it was no longer necessary for the protection of the public that he remain confined (Crime (Sentences) Act 1997, s. 28(6)(b)). There would be no guarantee that he would be released at the expiry of his minimum and, if not, his case would be reviewed again by the Parole Board every two years (Crime (Sentences) Act 1997, s. 28(7)(b)) thereafter until he was released (though this may not occur). The *earliest* possible point of release would be after 10½ years.
2. Extended sentence. The Applicant received an extended sentence therefore this is what will occur. An extended sentence falls into two parts: the requisite custodial period and the extension period. The Applicant's total sentence was 25 years comprising a requisite custodial period of 21 years and an extension period of 4 years. He will become eligible for his case to be considered by the Parole Board at the two-thirds point of his custodial period (14 years) who would decide whether his risk was such that it was no longer necessary for the protection of the public that he remain confined (Criminal Justice Act 2003, s. 246A(6)(b)). There would be no guarantee that he would be released and, if not, his case would be reviewed again by the Parole Board until he had served the requisite custodial period of 21 years (Criminal Justice Act 2003, s. 246A(7)). He will then serve a further 4 years on licence in the community and be subject to recall by the Secretary of State for Justice until he reached his sentence expiry date (after 25 years). The *earliest* possible point of release would be after 14 years.
3. Determinate sentence. The Applicant's risk at the time of sentencing could not be adequately managed by a determinate sentence. If it had required a determinate sentence (and assuming the relevant periods would remain the same) he would have received a sentence of 21 years meaning that he would have served 10½ years in custody (Criminal Justice Act 2003, s. 244(3)(a)) and 10½ years on licence in the community and be subject to recall by the Secretary of State for Justice until he reached his sentence expiry date (after 21 years). The *earliest* possible point of release would be after 10½ years.

The earliest possible point of release for each category of sentence is therefore 10½ years for both life and determinate sentences and 14 years for extended sentences. There is an obvious anomaly in the case of extended sentences (though whether it is an 'anomaly' was questioned in *Burkinkas* by Lord Thomas of Cwmgiedd CJ (at [39])). For the Fourth Section, the question was *not* whether these differing categories of sentencing regimes justified this anomaly but rather that the earliest point of release was just *one* criterion or factor by which the categories of sentences could be compared and it was, in effect, wrong to single it out as a focus for comparison for purposes of different treatment (at [105]).

As noted above, the Applicant's coherence argument was undermined by legislative changes that took place by the *Sentencing Act 2020* (at [29]). At the point of the Applicant's sentencing, the sentencing regimes were as stated above. At the point of the Fourth Section considering the Applicant's case, the sentencing regimes were different and more coherent regarding earliest possible points of release. For

example, under the Sentencing Act 2020, the minimum term for a life sentence is no longer calculated as half the notional determinate sentence, but rather two-thirds (Sentencing Act 2020, s. 323(1C)). As such, when the Applicant's case was considered, his coherence argument was seriously undermined as life sentences and extended sentences became *eligible* for release at the same point. The Applicant chose not to appeal to the Grand Chamber.

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