Hilary Term
[2024] UKSC 4
On appeal from: On appeal from: [2021] NICA 68

JUDGMENT

In the matter of an application by Stephen Hilland for Judicial Review (Appellant) (Northern Ireland)

before

Lord Lloyd-Jones
Lord Briggs
Lord Sales
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON
7 February 2024

Heard on 4 October 2023

Appellant
Hugh Southey KC
David McKeown BL
(Instructed by McConnell Kelly & Co (Ballyhackamore)

Respondent
Tony McGleenan KC
Philip McAteer BL
Leona Gillen BL
(Instructed by the Departmental Solicitor's Office and the Crown Solicitor's Office (Belfast))

LORD STEPHENS (with whom Lord Lloyd-Jones, Lord Briggs, Lord Sales and Lord Burrows agree):

1. Introduction

1. This appeal concerns the practice adopted by the Offender Recall Unit ("the ORU") of the Department of Justice relating to the revocation of a prisoner's licence and their recall to prison. As explained at para 58 below, that practice involves the ORU assessing whether revocation of a licence and recall to prison of a prisoner serving a determinate custodial sentence ("DCS") are necessary for the protection of the public from *harm*. In contrast, in respect of higher risk prisoners serving an indeterminate custodial sentence ("ICS") or an extended custodial sentence ("ECS"), the ORU's practice is to assess whether revocation and recall are necessary for the protection of the public from *serious harm*, by which is meant "death or serious personal injury, whether physical or psychological." Accordingly, the Department of Justice treats DCS prisoners differently from ICS and ECS prisoners in relation to the revocation of their licences and their recall to prison. The issue in this appeal is whether that practice unjustifiably discriminates against DCS prisoners in the enjoyment of their right to liberty, contrary to article 14 of the European Convention on Human Rights ("ECHR") taken together with article 5.

2. Counsel on behalf of Stephen Hilland ("the appellant") contends that the difference in treatment is between persons in analogous situations and that the difference in treatment cannot be justified. Counsel also contends that to avoid this unjustifiable difference in treatment the Department of Justice "can and should require a risk of serious harm" before revoking the licence of a DCS prisoner and recalling them to prison.

3. I will briefly outline the circumstances in which this issue arises in this appeal. On 26 May 2015, the appellant was sentenced to two consecutive 12-month determinate custodial sentences pursuant to article 7 of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"). On 4 February 2016, the appellant was automatically released on licence having served half of the sentences in custody. Subsequently a Parole Commissioner, pursuant to article 28(2) of the 2008 Order, recommended to the Department of Justice that the appellant be recalled to prison. On 21 October 2016, the Department of Justice revoked the appellant's licence and recalled him to prison as, amongst other matters, there was a risk of the appellant causing harm (as opposed to serious harm) to the public.

4. The appellant brought judicial review proceedings in the High Court challenging the decision dated 21 October 2016 because of unjustifiable discrimination as between DCS prisoners on the one hand and ICS and ECS prisoners on the other. The discrimination alleged is that there is a less stringent requirement of

a risk of *harm* for the revocation and recall of a DCS prisoner in comparison to a requirement of a risk of *serious harm* for the revocation and recall of an ICS or ECS prisoner. The judicial review application was adjourned pending judgment of this court in *R (Stott) v Secretary of State for Justice* [2018] UKSC 59, [2020] AC 51 ("*R (Stott)*").

5. In a judgment delivered on 18 March 2020 ([2020] NIQB 26) Colton J dismissed the claim on the basis that DCS prisoners on the one hand and ICS and ECS prisoners on the other are not in an analogous situation (a necessary ingredient for any article 14 claim – see para 11 below) and in any event, any difference in treatment was objectively justified. The appellant appealed to the Court of Appeal, which dismissed the appeal in a judgment delivered on 10 December 2021 ([2021] NICA 68) by Maguire LJ (giving the judgment of the court, comprising himself, Treacy LJ and McFarland J).

6. The appellant now appeals to the Supreme Court.

7. The outcome of this appeal turns on the application of the decision and reasoning in the leading case in this court of *R (Stott)* and on the approach taken by the Fourth Section of the European Court of Human Rights ("ECtHR") in *Stott v United Kingdom* (Application No 26104/19) (unreported) 31 October 2023 ("*Stott v UK*").

2. Articles 5 and 14 of the ECHR

8. Given that the appellant's claims are based on articles 5 and 14 of the ECHR, it is appropriate to set out the relevant parts of those provisions immediately. Also, it will be convenient, at this stage, to set out the approach to an article 14 claim.

9. Article 5 of the ECHR provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;

…"

> "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

10. Article 14 provides:

> "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."

11. Lady Black at para 8 of her judgment in *R (Stott)* addressed the approach to an article 14 claim. She stated that:

> "In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or 'other status'. Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking."

These four elements or four questions have been formulated differently in various authorities; see the discussion in *Lennon v Department for Social Development* [2020] NICA 15; [2021] NI 254 at paras 40-42. However, in essence the different formulations are largely semantic. I consider that Lady Black's formulation at para 8 of *R (Stott)* presents the most appropriate tool for the determination of the issues in this appeal and those are the elements that I will address.

3. Factual background

12. The appellant has an extensive criminal record, including some 27 convictions for driving whilst disqualified along with numerous convictions for driving when unfit through drink or drugs. The appellant's record also shows an established pattern of

offending while subject to supervision in the community by the Probation Board for Northern Ireland ("PBNI").

13. On his pleas of guilty, the appellant was convicted at trial of charges comprising offences of aggravated vehicle taking, driving whilst disqualified and driving without insurance. In addition, he also pleaded guilty to and was convicted of a charge of assault occasioning actual bodily harm. On 26 May 2015, he was sentenced at Downpatrick Crown Court to two 12-month determinate custodial sentences pursuant to Chapter 2 of the 2008 Order. The sentences were to run consecutively. Pursuant to article 8(2) of the 2008 Order, when imposing the two determinate custodial sentences, the court specified the custodial period as one half of the term of each of the consecutive sentences. This meant that at the end of the period equal in length to the aggregate of the length of the custodial periods in relation to each of the two sentences (in this case, amounting to 12 months), the Department of Justice was under a duty to release the appellant on licence pursuant to articles 17(1) and 33(2) of the 2008 Order.

14. On 4 February 2016, the appellant was released on licence. The licence contained several requirements including that the appellant must: (a) participate in drug/alcohol counselling as directed by PBNI; (b) attend all appointments with Community Addiction Services; (c) co-operate with any care or treatment; (d) not own or drive any vehicle without the approval of PBNI; and (e) comply with an 8pm curfew.

15. Had the appellant not been recalled to prison, then he would have remained on licence until 4 February 2017.

16. On 8 September 2016, the appellant was arrested at approximately 11.55 pm after a BMW motor vehicle that had been taken without the owner's permission, and which the appellant had been driving, was involved in a road traffic collision on the A1 dual carriageway near Banbridge. The arrest was for several alleged criminal offences, namely driving whilst disqualified, driving without insurance, aggravated vehicle taking and driving whilst unfit through drugs. A sample of the appellant's blood was taken shortly after his arrest. His accommodation was searched, and a small quantity of herbal cannabis was found. Subsequently the police also investigated the potential offence of dangerous driving together with the potential offence of handling stolen goods. The investigation into the offence of handling stolen goods was initiated when it transpired that the registration number displayed on the vehicle's number plates was not the actual registration number for the vehicle. It also transpired that the vehicle had been stolen in July 2016 in County Monaghan in Ireland.

17. On 20 September 2016, PBNI were informed of the allegations that had led to the appellant's arrest.

18. On 7 October 2016, PBNI provided a Recall Report to the Parole Commissioners requesting recall of the appellant to prison. The Recall Report stated that "[u]sing PBNI's ACE assessment procedures, [the appellant] has been assessed as presenting a high likelihood of re-offending" and that "PBNI records indicate that [the appellant] has an established pattern of offending while subject to community supervision". The Recall Report also stated that the appellant was in breach of his 8pm curfew, which was a condition of his licence. The probation officer stated in the Recall Report that:

> "[the appellant] presents a real danger to the public given his continued disregard for the law and the restrictions that have been placed on him. The fact that he continues to drive in such a manner and when he has been disqualified puts every person on the road at risk".

However, the Recall Report also stated that "based on the information available [the appellant] does not meet PBNI threshold to be assessed as posing a significant risk of serious harm to others at present." The Recall Report does not suggest that the lack of a "significant risk of serious harm" should prevent recall in the appellant's case. Indeed, it requested that a recall recommendation be made.

19. The Parole Commissioner who dealt with the matter recommended that the appellant's licence should be revoked. The Parole Commissioner set out various facts in relation to the allegations which had led to the appellant's arrest together with an incorrect factual statement that the appellant had "been charged with dangerous driving and handling stolen goods". Under the heading of "Test" the Parole Commissioner stated:

> "In considering whether or not an offender released on a DCS licence should be recalled, a Parole Commissioner should determine whether there is evidence that proves on the balance of probabilities a fact or facts indicating that the risk of that offender causing *harm* to the public *has increased significantly, that is more than minimally since the date of release on licence* and that the risk cannot be safely managed in the community." (Emphasis added.)

The test relies on (a) a risk of harm to the public as opposed to serious harm; and (b) a significant, ie, more than minimal, increase in risk since the date of release on licence. The Parole Commissioner applied that test to the facts. She determined that "[t]he circumstances … provide strong evidence that establishes on the balance of probabilities that the risk of him causing *harm* to the public *has increased significantly*, that is more than minimally since the date of his release on licence and

that the risk cannot be safely managed in the community." (Emphasis added.) Accordingly, the Parole Commissioner recommended the appellant's licence be revoked and that he be recalled to prison.

20. On 7 October 2016, based on the Parole Commissioner's recommendation and the PBNI's request for recall, the ORU of the Department of Justice decided to revoke the appellant's licence and recall him to prison. Also, on 7 October 2016, in discharge of its duty under article 28(3) of the 2008 Order, the ORU wrote to the appellant giving reasons for the decision ("the reasons for recall letter"). The reasons for recall letter relied on the risk of *harm* to the public as opposed to the risk of *serious harm* and on an increase in risk since the date of release on licence. It stated that:

> "From the information provided, the Department of Justice is satisfied that the risk of *harm* you pose to the public *has increased more than minimally since you were released on licence*. The Department concludes that this risk can no longer be safely managed in the community." (Emphasis added.)

It is accepted by the Department of Justice that in the case of an ICS or an ECS prisoner, then the equivalent reasons for recall letter would have referred to the increase in the risk of *serious harm*. If a component of the Parole Commissioner's and the ORU's practice in relation to revocation and recall of a DCS prisoner, informed by the evidence in the Recall Report, is the necessity to protect the public from serious harm then the appellant's licence could not be revoked, and he could not be recalled to prison. Counsel on behalf of the appellant contends that, absent a risk of serious harm, the Department of Justice is unable to revoke the appellant's licence and recall him to prison even though post-release: (a) there was a high likelihood of the appellant re-offending; (b) the appellant had demonstrated continued disregard for the law; (c) there were serious breaches of his licence conditions by driving a motor vehicle and failing to abide by the terms of his curfew; (d) the appellant presented a real danger to the public putting every person on the road at risk; (e) there was an established pattern of offending while subject to community supervision; and (f) the danger could not be safely managed in the community.

21. On 9 October 2016 the appellant was arrested and returned to custody.

22. On 12 October 2016 the Parole Commissioners, having been notified the previous day by the ORU that the recommendation erroneously stated that the appellant had been "charged with dangerous driving and handling stolen goods", issued an amended recommendation in relation to the appellant which still recommended revocation and recall but corrected the mistake of fact.

23. Also on 12 October 2016, the ORU referred the appellant's recall to the Parole Commissioners in accordance with article 28(4) of the 2008 Order. The letter accompanying the referral notice attached the Parole Commissioner's amended recall recommendation. The letter requested the Parole Commissioners to facilitate "the earliest possible opportunity for a review of the risks posed by [the appellant]". The review of the risks was stated to be assessed "against the statutory test set out in Article 28(6)(b) of the 2008 Order". However, as I will explain, article 28(6)(b) does not contain a statutory test but rather it limits the power of the Parole Commissioners to direct the release of a prisoner.

24. On 14 October 2016, the Department of Justice applied to judicially review its own decision to recall the appellant on two grounds. Firstly, that the Parole Commissioner's original recommendation to recall the appellant contained a material error of fact and secondly that, by failing to spot that error prior to recall, the ORU had failed to perform the necessary due inquiry.

25. On 21 October 2016, the High Court quashed the ORU decision dated 7 October 2016 and the ORU made a fresh recall decision by which it determined that the appellant's licence should be revoked and that he should be recalled to prison. On the same date Steven Allison, on behalf of the ORU, wrote to the appellant giving reasons for the fresh decision. Again, the reasons for recall letter relied on the risk of *harm* to the public as opposed to the risk of *serious harm* and on an increase in risk since the date of release on licence. It stated that:

> "… the Department of Justice is satisfied that the risk of *harm* you pose to the public *has increased more than minimally since you were released on licence*. The Department concludes that this risk can no longer be safely managed in the community." (Emphasis added.)

In addition, Steven Allison observed that "the community probation officer has confirmed that alternative measures to manage the increased level of risk had been considered and discounted".

26. On 1 November 2016 the appellant commenced these proceedings to judicially review the Department of Justice's fresh recall decision dated 21 October 2016. The original basis of his challenge was that the Department's decision to revoke and recall was governed by the provisions of article 28(6) of the 2008 Order which prescribed a different test and therefore an unjustifiable difference in treatment in relation to revocation of a licence and recall to prison as between ICS and ECS prisoners on the one hand and DCS prisoners on the other. Accordingly, the challenge was to the lawfulness of the legislative provisions contained in article 28(6) of the 2008 Order. One of the remedies which the appellant sought was a declaration that article 28(6) of

the 2008 Order is incompatible with article 5 of the ECHR read with article 14. However, on appeal to this court, counsel on behalf of the appellant limited the challenge to the practice of the ORU which led to the impugned decision dated 21 October 2016. On this basis the appellant no longer seeks a declaration that article 28(6) of the 2008 Order is incompatible with article 14 of the ECHR read with article 5. Rather, the appellant contends that the correct test for the recall of a DCS prisoner to prison required there to be a risk of serious harm. On this basis the appellant seeks, amongst other remedies, "a declaration that the Department of Justice applied the wrong test when recalling the appellant."

27. As I have stated the application for judicial review was dismissed by Colton J and by the Court of Appeal.

28. Before leaving the factual background, it is relevant to note that on 19 January 2017 the appellant was charged with five offences in relation to the events of 8 September 2016, namely: (a) aggravated vehicle taking causing damage to another vehicle; (b) driving when unfit through drink or drugs; (c) driving while disqualified; (d) using a motor vehicle without insurance; and (e) handling stolen goods. The evidence in relation to the charge of driving while unfit through drugs relied on a forensic report of a sample of the appellant's blood taken shortly after his arrest on 8 September 2016. The report indicated the presence of several drugs in his blood, including cocaine.

4. The judgments of the High Court and the Court of Appeal

(a) Colton J

29. In a judgment delivered on 18 March 2020, Colton J addressed the four elements which are necessary to establish that different treatment amounts to a violation of article 14 ECHR; see *R (Stott)* at paras 8 and 207 and *Lennon v Department for Social Development* at paras 40–42 (summarised at para 11 above). First, the judge held, at para 84, that the circumstances fell within the ambit of article 5 ECHR. Second, he held, at para 90, that there was a difference in treatment on the ground of the "status" of the appellant as a DCS prisoner. Thereafter the judge turned to the third and fourth elements, namely whether ICS and ECS prisoners were in an analogous situation to DCS prisoners and whether the differential treatment was justified. The judge stated at para 93, that "the proper approach to adopt in the circumstances of this case" was that the third and fourth elements "should not necessarily be considered as freestanding questions but looked at in a holistic way." However, in the event the judge did not consider it necessary to consider the third element holistically with the fourth. Rather, in answer to the third element the judge held, at paras 94-100, that DCS prisoners are not in an analogous situation to ICS or ECS prisoners. On that basis the judge dismissed the appellant's claim for judicial

review. The judge did consider the issue of justification even though it was not necessary to do so. In considering justification the judge took into account matters identified in the section of his judgment dealing with an analogous situation, so that he did in fact consider the fourth element holistically with the third. The judge identified, at para 102, "[the] fundamental legitimate aim of the test for recall" as being "to ensure the protection of the public". The judge stated, at para 103, that "[the] answer in respect of proportionality or unfairness must be viewed in analysing the sentencing package as a whole." In this way it was incorrect to concentrate on one difference as between DCS prisoners and ICS and ECS prisoners. Rather, the judge held, at para 103, that the difference in treatment when viewed as a part of a distinct sentencing package was justified.

(b) The Court of Appeal

30. On appeal to the Court of Appeal the appellant contended that Colton J erred in relation to the sequence in which he addressed the third and fourth elements of the appellant's article 14 claim. It was contended that Colton J either should have addressed the fourth element before the third or alternatively that he should have addressed the third and fourth elements holistically. The appellant also contended that the judge erred in finding that DCS prisoners and ICS and ECS prisoners were not in an analogous situation and in finding that the difference in treatment was objectively justified.

31. In a judgment delivered on 10 December 2021, the Court of Appeal unanimously dismissed the appellant's appeal. In relation to the issue as to whether the judge erred in failing to address the fourth element before the third or alternatively in failing to address the third and fourth elements holistically, Maguire LJ, giving the judgment of the Court of Appeal, stated at para 105, that:

> "This court prefers the view that there is scope for flexibility in the way a national court goes about its consideration of this issue [dependent] 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 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."

Thereafter, the Court of Appeal dismissed this ground of appeal holding, at para 106, that "the trial judge was not acting wrongly or illegally in approaching [the third and fourth elements of an article 14 claim] in the way he did." Indeed, not only did the Court of Appeal dismiss this ground of appeal but also Maguire LJ stated, at para 106, that the Court of Appeal would "approach the case broadly on the same lines as [Colton J] did, considering both the issue of analogous situation and justification in that general order."

32. The Court of Appeal upheld the judge's findings that: (i) the appellant and his comparators were not in an analogous situation; and (ii) in any event, in the field in question, the differential treatment at issue served a legitimate aim and was proportionate and justifiable. Accordingly, the Court of Appeal dismissed the appellant's other grounds of appeal.

5. The grounds of appeal

33. The respondent accepts that (a) the practice of the ORU relating to the revocation of a licence and the recall to prison of a prisoner serving a DCS falls within the ambit of article 5; (b) there is a difference in treatment as between DCS prisoners on the one hand and ICS and ECS prisoners on the other; (c) the ground upon which the appellant has been treated differently from others constitutes a "status"; and (d) it can properly be said that the status upon which the appellant relies exists independently of his complaint, which is about the practice concerning the revocation of his licence and his recall to prison. Accordingly, the appellant has established the first and second elements of an article 14 claim: see para 11 above.

34. The remaining issues in this appeal relate to the third and fourth elements of an article 14 claim. The grounds of appeal as defined by the parties are:

> **Ground one**: whether Colton J and the Court of Appeal erred in failing to address the fourth element of the article 14 claim before the third or alternatively whether they erred in failing to address the third and fourth elements of the article 14 claim holistically.

> **Ground two**: whether Colton J and the Court of Appeal erred in finding that the appellant as a DCS prisoner is not in an analogous situation with ICS and ECS prisoners.

Ground three: whether Colton J and the Court of Appeal erred in finding that there is an objective justification for the difference in treatment between DCS prisoners and ICS and ECS prisoners.

6. Article 28 of the 2008 Order and the practice of the Parole Commissioners and the ORU in relation to revocation and recall

35. Article 28 of the 2008 Order is the statutory provision providing for the recall of DCS, ICS and ECS prisoners while on licence. It is appropriate to set it out at this stage and to make several observations in relation to it. It is also appropriate to set out the practice which has been adopted by the Parole Commissioners and the ORU in relation to revocation and recall which, in part, may be derived from article 28(6) of the 2008 Order.

(a) Different provisions for the release on licence of DCS, ICS and ECS prisoners and the impact of those differences on the provisions for revocation and recall

36. Before setting out article 28, it is important to note fundamental differences in relation to the provisions for release on licence of DCS, ICS and ECS prisoners and how those differences impact on the provisions concerning revocation and recall.

37. Except for "terrorist prisoners", DCS prisoners must be released on licence by the Department of Justice at the end of the custodial period without reference to the Parole Commissioners. Accordingly, release on licence for all DCS prisoners (except "terrorist prisoners") is automatic without any assessment by the Parole Commissioners or by the Department of Justice as to whether the prisoner poses a risk of harm or serious harm or whether, whatever the level of risk, it can be safely managed in the community. It follows that except for DCS "terrorist prisoners" in relation to the revocation of a DCS prisoner's licence and their recall to prison it is inappropriate to consider whether the risk of harm posed by the prisoner post-release has increased significantly. It also follows that the test applied in *In re Foden's Application* [2013] NIQB 2; [2014] NIJB 133 at para 18 was incorrect in so far as it required "an increase (or an apparent increase) in the risk of harm to the public" in relation to the recall to prison of a DCS prisoner (except for DCS "terrorist prisoners").

38. In contrast an ICS prisoner can only be released on licence if the Parole Commissioners give a direction to that effect: article 18(3)(b). Article 18(4)(b) provides that the Parole Commissioners shall not give a direction to release an ICS prisoner unless "they are satisfied that it is no longer necessary for the protection of the public from serious harm that [the ICS prisoner] should be confined." As release on licence is dependent on an assessment of the level of risk posed by the prisoner and

whether it can be safely managed in the community, it follows that in relation to the revocation of an ICS prisoner's licence and their recall to prison it is appropriate to consider whether the risk of harm posed by the prisoner post-release has increased significantly, ie, more than minimally.

39. An ECS prisoner must be released on licence by the Department of Justice at the end of "the appropriate custodial term", but the Parole Commissioners may direct their release on licence at any stage between the half-way point and the completion of the appropriate custodial term. In relation to those ECS prisoners automatically released at the end of the appropriate custodial term, they will have been released irrespective of both whether they pose a risk of serious harm or harm and whether the risk, whatever the level, can be safely managed in the community. It follows that in relation to the revocation of the licences of those ECS prisoners and their recall to prison it is inappropriate to consider whether the risk of harm posed by the prisoner post-release has increased significantly. The position is different where the ECS prisoner's release has been directed by the Parole Commissioners between the half-way point and the completion of the appropriate custodial term. Such an ECS prisoner can only be released on licence if the Parole Commissioners give a direction to that effect: article 18(3)(b). Article 18(4)(b) provides that the Parole Commissioners shall not give a direction to release an ECS prisoner unless "they are satisfied that it is no longer necessary for the protection of the public from serious harm that [the ECS prisoner] should be confined." As release on licence is dependent on an assessment of the level of risk posed by the prisoner and whether it can be safely managed in the community, it follows that in relation to the recall to prison of those ECS prisoners it is appropriate to consider whether the risk of harm posed by the prisoner post-release has increased significantly.

(b) Article 28 of the 2008 Order

40. Article 28 in so far as relevant provides:

> "(1) In this Article 'P' means a prisoner who has been released on licence under Article 17 [or] 18 ….
>
> (2) The Department of Justice … 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 … 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 … 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 and was not released under Article 20A, 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."

(c) Observations in relation to article 28

41. In understanding article 28 more fully, I make several observations.

42. First, the recall provisions in article 28 apply to DCS, ICS and ECS prisoners as DCS prisoners are released on licence under article 17, and ICS and ECS prisoners are released on licence under article 18: article 28(1).

43. Second, under article 28(2)(a) a recommendation from the Parole Commissioners is a precondition to a revocation and recall decision by the Department of Justice. The Department of Justice may only make a revocation and recall decision without such a recommendation if "it is expedient in the public interest to recall [the prisoner] before such a recommendation is practicable": article 28(2)(b).

44. Third, article 28(2)(a) does not specify a statutory test to be applied by the Parole Commissioners as to the circumstances in which they will make a recommendation to the Department of Justice.

45. Fourth, if there is a recommendation from the Parole Commissioners, then article 28(2) provides the Department of Justice with discretion to revoke and recall.

46. Fifth, article 28(2) does not specify a statutory test to be applied by the Department of Justice as to the circumstances in which discretion should be exercised when considering the revocation of a prisoner's licence and his recall to prison. It simply provides that the Department of Justice *may* revoke a licence and recall a prisoner to prison if recommended to do so by the Parole Commissioners. Colton J held, at para 31 of his judgment, and I agree, that article 28(2) provides the Department of Justice with "a very broad discretion".

47. Sixth, in the absence of a statutory test, it is for the Parole Commissioners and the Department of Justice to formulate the appropriate test to be applied as to when to recommend or decide to revoke a licence and recall a prisoner to prison. The appropriate test should be informed by and should not undermine the statutory purposes of the 2008 Order. For instance, it should not be used to undermine the automatic nature of release on licence of DCS prisoners at the end of the custodial period. Furthermore, the policy should be informed by the purposes of post-release supervision on licence as set out in article 24(8) of the 2008 Order, namely: (a) the protection of the public; (b) the prevention of re-offending; and (c) the rehabilitation of the offender.

48. Seventh, if a prisoner's licence is revoked and he is recalled to prison then article 28(3) places a duty on the Department of Justice to inform the prisoner of the reasons for recall and of his right to make written representations in respect of it.

49. Eighth, once a prisoner has been recalled by the Department of Justice exercising its powers under article 28(2) then there is a duty on the Department of Justice to refer the prisoner's recall to the Parole Commissioners: article 28(4). The duty enables the Parole Commissioners to determine whether to direct the prisoner's release on licence under article 28(6).

50. Ninth, article 28(6)(a) and (b) do not provide a test for the exercise by the Parole Commissioners of the power to direct the release of a prisoner on licence. Rather, article 28(6)(a) and (b) limit the power of the Parole Commissioners to give such a direction. Accordingly, it is a threshold to be passed before a recommendation can be made but it is not a test as to the circumstances in which a direction will be given.

51. Tenth, the limitation on the power under article 28(6) to direct the release of prisoners on licence differs as between ICS and ECS prisoners on the one hand and DCS prisoners on the other. In relation to an ICS or ECS prisoner, pursuant to article 28(6)(a) the Parole Commissioners shall not give a direction to release the prisoner on licence unless they are satisfied that "it is no longer necessary for the protection of the public from *serious harm* that [the ICS or ECS prisoner] should be confined; …" (Emphasis added.) However, pursuant to article 28(6)(b), the power to direct the release of a DCS prisoner on licence shall not be exercised unless the Parole Commissioners are satisfied that "it is no longer necessary for *the protection of the public* that [the DCS prisoner] should be confined." (Emphasis added.)

52. Eleventh, "protection of the public" in relation to DCS prisoners is not defined in article 28(6)(b). However, article 8(5) of the 2008 Order defines "the licence period" in relation to a DCS prisoner as meaning:

> "such period as the 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*." (Emphasis added.)

Moreover, article 24(8)(b) identifies one of the purposes of the supervision of offenders while on licence as being "the prevention of re-offending." Accordingly, reading article 28(6)(b) with articles 8(5) and 24(8)(b) the "protection of the public" is the protection of the public from harm (not serious harm) from the offender and in particular the protection of the public from harm caused by the commission by the offender of further offences.

(d) The Parole Commissioners' practice as to when to recommend revocation of a licence and the recall of a prisoner to prison

53. As I have indicated given the absence of a statutory test, it is for the Parole Commissioners to develop a practice as to when to make a recommendation to the ORU that a prisoner's licence is revoked, and the prisoner is recalled to prison, which must conform with the statutory purpose of the 2008 Order. In fact, the Parole Commissioners have developed a practice which is contained in a guidance document issued on 4 April 2011 by Peter Smith QC, the then Chief Commissioner ("the Parole Commissioners' Guidance").

54. The Parole Commissioners' Guidance considers, between paras 4 and 8, the test to be applied by the Parole Commissioners when considering a request to make a recommendation to the Department of Justice under article 28(2)(a) of the 2008 Order for the revocation of a prisoner's licence and their recall to prison. The guidance indicates that the test "may be derived, … in part, from the provisions of [article 28(6) of the 2008 Order] dealing with the review of recalls". The guidance states, at para 4, that:

> "… as far as ICS and ECS prisoners are concerned, the recommendation [to the Department of Justice] will turn on the issue of the protection of the public from *serious harm* (Article 28(6)(a)) and in DCS cases the protection of the public from *harm* (Article 28(6)(b))." (Emphasis added.)

The guidance cautions that what it termed "these tests" for ICS and ECS prisoners and DCS prisoners "require careful adaption before they can be utilised …." In particular, the Parole Commissioners' Guidance states that:

> "… it must be recognised at all stages that the decision as to whether to make a recommendation or not must turn on the prisoner's post-release conduct and that mere analysis of pre-release factors is not enough."

The test which is subsequently articulated combines either *serious harm* for ICS and ECS prisoners and *harm* for DCS prisoners with post-release conduct. Accordingly, the guidance does contain a difference in treatment as between ICS and ECS prisoners on the one hand and DCS prisoners on the other.

55. At para 5 the Parole Commissioners' Guidance identifies a test in ICS cases and in ECS cases where the prisoner's release has been directed by the Parole

Commissioners during the period between the prisoner's parole eligibility and custody expiry date. The guidance states that these "prisoner[s] will have been released on the basis that the risk of serious harm posed could be safely managed in the community". The guidance states that in these cases:

> "… the test would be … whether the risk of *serious harm* posed [by the prisoner's post-release conduct] has *increased significantly (ie more than minimally) and can no longer be safely managed in the community.*" (Emphasis added.)

There are features of this test which I emphasise: (a) the test focuses on post-release conduct albeit "that the significance of the post-release conduct [is] assessed against the background of what is known of the prisoner's pre-release attitudes and behaviour going back to the index offence and beyond" (para 7 of the guidance); (b) the test requires a risk of *serious harm* as opposed to *harm* so that there is a difference in treatment as between these prisoners and DCS prisoners; (c) the test requires an increase in the risk of serious harm; and (d) the test requires that the risk of serious harm can no longer be safely managed in the community.

56. The Parole Commissioners' Guidance, at para 6, states that the remaining two categories (DCS prisoners and ECS prisoners automatically released on licence at their custody expiry date) give rise to more difficulty. The guidance explains that "[t]his is because they will have been released on licence irrespective of both whether they pose a risk of serious harm/harm and whether, whatever the risk level, it can be safely managed in the community". Given that difficulty the guidance states that "[t]he focus must be on post-release conduct" and that this focus is "imperative". The guidance states that in relation to these prisoners a preferable approach is to ask:

> "Has there been post-release conduct which, if it happened, indicates that there is a risk of *serious harm* (ECS)/*harm* (DCS) posed by this prisoner which can be no longer safely managed in the community?" (Emphasis added.)

There are features of this test which I emphasise: (a) again, the test focuses on post-release conduct assessed pursuant to para 7 of the guidance (see para 55 above); (b) the test treats DCS prisoners differently to this category of ECS prisoners in that there must be a risk of *harm* in relation to DCS prisoners and a risk of *serious harm* in respect of this category of ECS prisoners; (c) as the release on licence is automatic the test does not include an express requirement that there should have been an increase in the risk of serious harm or of harm; (d) the test requires that the risk of serious harm or of harm posed by the prisoner cannot be safely managed in the community; (e) the phrase "can be *no longer* safely managed in the community" should be read as

"cannot be safely managed in the community" in order to avoid the implication of an increase in the risk of serious harm or harm posed by the prisoner post-release.

57. In so far as the test applied by the Parole Commissioner in this case (see para 19 above) incorporated the concept of a significant, ie, more than minimal, increase in risk since the date of the appellant's release on licence it did not apply the test set out in the Parole Commissioners' Guidance for DCS prisoners, see para 56 above.

(e) The ORU's practice as to when to revoke a licence and recall a prisoner to prison

58. As explained in evidence filed in these proceedings by Steven Allison, the head of the ORU of the Department of Justice, the ORU's practice is to apply the same tests in relation to the revocation and recall as applied by the Parole Commissioners in their recommendation decisions on recall. Accordingly, in the exercise of the Department of Justice's discretion under article 28(2) of the 2008 Order to revoke a prisoner's licence and recall the prisoner to prison the ORU considers the risk of *harm* in respect of a DCS prisoner and the risk of *serious harm* in relation to an ICS or ECS prisoner. The ORU also considers whether the risk of harm can be safely managed in the community. In those respects, the ORU applies the test set out in the Parole Commissioners' Guidance. However, in this case the ORU also purported to consider whether the risk of harm posed by the appellant had increased more than minimally since he was released on licence: see paras 20 and 25 above. In doing so the ORU followed the Parole Commissioner's recommendation decision on recall but did not apply the test set out in the Parole Commissioners' Guidance.

7. Sentencing regimes under the 2008 Order

59. In her assessment in *R (Stott)* of analogous situation and objective justification (the third and fourth elements of the article 14 test (see para 11 above), Lady Black set out both the sentencing regime to which Mr Stott was subject and the sentencing regimes with which Mr Stott invited comparison: paras 83–107 of *R (Stott)*. The regimes in issue in *R (Stott)* were those set down in England and Wales by the Criminal Justice Act 2003. To address the same issues in this appeal, it is necessary to set out the sentencing regime in Northern Ireland to which the appellant was subject, and also the other sentences in Northern Ireland with which he invites comparison. Those regimes are set down in the 2008 Order and are not identical to the regimes established by the Criminal Justice Act 2003. For ease of exposition, I will refer to the provisions of the 2008 Order as presently in force (the amendments introduced since the date of the impugned decision being inconsequential to the issues raised in this appeal) and I will only refer to the aspects of the regime which are relevant to this appeal.

60. An example of the legislative amendments to the 2008 Order since 21 October 2016, is the introduction of specific arrangements for terrorist offenders under articles 13A and 20A. Those arrangements for terrorist offenders are yet further examples of different sentencing regimes, or of different ways sentences may be executed, to cater for different levels of offending and different risks.

(a) The sentencing framework: determinate custodial sentences

61. A DCS is a sentence of imprisonment for a determinate term: article 7(1)(a). It is imposed under Chapter 2 of Part 2 of the 2008 Order headed "Custodial Sentences" rather than under Chapter 3 headed "Dangerous Offenders and other Terrorist Offenders." The provisions in Chapter 3 relating to dangerous offenders do not apply when the court imposes a DCS. A dangerous offender is an offender who has been convicted on indictment of a specified offence and the court assesses that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further such offences: article 15 of the 2008 Order. A DCS prisoner is not a dangerous offender and ordinarily will not pose a risk of serious harm.

62. Article 7 of the 2008 Order, under the heading "Length of custodial sentences" and in so far as relevant, provides that "(2) … the sentence shall be for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it." In forming any opinion under article 7(2) as to the term of the sentence, article 9(1) of the 2008 Order provides that "a court shall take into account all such information as is available to it about the circumstances of the offence or (as the case may be) of the offence and the offence or offences associated with it (including any aggravating or mitigating factors)". Furthermore, in forming such opinion, a court is obliged to disregard the release provisions in articles 8 and 17 of the 2008 Order; see *R v Bright* [2008] EWCA Crim 462; [2008] 2 Cr App R (S) 102, at para 41; *R v Round* [2009] EWCA Crim 2667; [2010] 2 Cr App R (S) 45, at para 44; and *R (Abedin) v Secretary of State for Justice* [2015] EWHC 782 (Admin), at para 24. In accordance with sentencing principles the length of the sentence will be informed by the requirements of retribution, deterrence and the risk that the offender poses to the public. The whole of the sentence is imposed for the purpose of punishment and deterrence.

63. After imposing a determinate custodial sentence under article 7, a court is then required to address the separate matter raised in article 8 of the 2008 Order of specifying the custodial period. That article under the heading of "Length of custodial period" and insofar as relevant, provides:

""(1) This Article applies where a court passes—

(a) a sentence of imprisonment for a determinate term, other than … an extended custodial sentence, or

(b) …

in respect of an offence committed after the commencement of this Article.

(2) The court shall specify a period (in this Article referred to as 'the custodial period') at the end of which the offender is to be released on licence under Article 17.

(3) The custodial period shall not exceed one half of the term of the sentence.

(4) Subject to paragraph (3), the custodial period shall be the term of the sentence less the licence period.

(5) In paragraph (4) 'the licence period' means such period as the 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*.

(6) Remission shall not be granted under prison rules to the offender in respect of the sentence." (Emphasis added.)

64. In *Morgan v Ministry of Justice* [2023] UKSC 14; [2023] 2 WLR 905 at paras 17-28, this court made several points about article 8 of the 2008 Order. For the purposes of the issue in this appeal it is relevant to note that: (a) the obligation to fix a custodial period does not arise where a court passes an ECS: article 8(1); (b) the custodial period for a DCS prisoner shall not exceed one half of the term of the sentence; (c) the length of the licence period determines the length of the custodial period; (d) in fixing the length of the licence period the court takes into account the

effect of the offender's supervision by a probation officer in protecting the public from *harm* from the offender (not *serious harm*) and preventing the commission by the offender of further offences.

65. A prisoner serving a DCS is a "fixed-term prisoner": article 16(1). Article 17, under the heading "Duty to release certain fixed-term prisoners" and insofar as relevant provides:

> "(1) As soon as a fixed-term prisoner, other than one to whom Article 18 or 20A applies, has served the requisite custodial period, the Department of Justice shall release the prisoner on licence under this Article.
>
> (2) In this Article 'the requisite custodial period' means—
> (a) …, the custodial period specified by the court under Article 8; … "

Article 17 does not apply to ICS prisoners as they are not fixed-term prisoners or to ECS prisoners (to whom article 18 applies instead) or terrorist prisoners (to whom article 20A applies instead). For DCS prisoners, other than terrorist prisoners, release on licence is automatic once the prisoner has served the custodial period specified by the court under article 8. The custodial period must be at least one half of the term of the sentence and can be shorter if the court considers it appropriate for the licence period to be longer than one half of the term of the sentence, taking into account the effect of the offender's supervision by a probation officer in protecting the public from *harm* (not *serious harm*) and preventing the commission by the offender of further offences.

66. Article 19 enables the Department of Justice to release a DCS prisoner on licence during the period of 135 days before the prisoner has served the custodial period. If a DCS prisoner is released on licence under article 19, then article 26 provides that a curfew condition must be included in the licence. Article 19 does not apply to an ECS prisoner: see article 19(3)(a). There is no comparable power to release an ICS prisoner before they have served the relevant part of an ICS.

67. Article 20 enables the Department of Justice to release a DCS prisoner on licence on compassionate grounds.

68. Article 21, under the heading "Duration of licences: fixed-term prisoners" and in so far as relevant, provides:

> "(1) Where a fixed-term prisoner is released on licence under this Chapter, the licence shall, subject to any revocation under Article 28 …, remain in force for the remainder of the sentence.
>
> (2) …."

Accordingly, once a DCS has expired, not only is the individual no longer a prisoner, but also, they are no longer subject to the licence and cannot be recalled to prison.

69. The licence conditions are set by the Department of Justice: article 24. However, under article 23, a court which sentences an offender to a DCS of 12 months or more in respect of any offence, when passing sentence, may recommend to the Department of Justice particular conditions which in its view should be included in any licence granted to the offender under article 17 on release from prison. In exercising the powers under article 24 in respect of an offender, the Department of Justice shall have regard to any such recommendation.

70. Article 27 imposes a duty on a person subject to a licence to comply with such conditions as may for the time being be included in the licence.

71. The Parole Commissioners' Guidance and the ORU's practice is to ask the following when considering the revocation of a DCS prisoner's licence and their recall to prison:

> "Has there been post-release conduct which, if it happened, indicates that there is a risk of *harm* posed by this prisoner which can be no longer safely managed in the community?" (Emphasis added.)

I would observe that in relation to revocation and recall, this question has symmetry with the statutory provisions in relation to the imposition of a DCS. Pursuant to article 8 of the 2008 Order a DCS offender can obtain a longer licence period and therefore a shorter custodial period based on protection of the public from *harm*. Ordinarily a DCS offender does not present a risk of serious harm so it would be inappropriate for article 8 to be structured to enable a DCS offender to obtain a longer licence period by taking into account the protection of the public from serious harm. If article 8 was structured in that way, then it would result in an unwarranted extension of the licence period because ordinarily a DCS prisoner does not pose a risk of serious harm. Similarly, when considering revocation of a licence a practice requiring there to be a risk of serious harm would ordinarily mean that a DCS prisoner's licence would never

be revoked. In this case, it would mean that the appellant's licence could not be revoked despite the constellation of factors listed at (a) to (f) in para 18 above. It would also mean that, absent a risk of serious harm, a DCS prisoner's licence could not be revoked even if none of the statutory purposes of post-release supervision were being or were likely to be achieved. The statutory purposes being (a) the protection of the public from *harm*; (b) the prevention of re-offending; and (c) the rehabilitation of the offender: see article 24(8) read with article 8(5) as explained at paras 47 and 52 above.

72. The question to be asked also has symmetry with the obligation on a DCS prisoner under article 27 to comply with their licence conditions. If recall was dependent on the prisoner posing a risk of serious harm, then because a DCS prisoner ordinarily does not pose such a risk they would be able to repetitively breach all their licence conditions without suffering the consequence of recall to prison.

73. In summary, the imposition of a DCS does not depend on a finding that the offender is a dangerous offender. Ordinarily, the offender does not present a risk of serious harm. A DCS prisoner is a fixed-term prisoner, so at the end of the sentence the prisoner cannot be incarcerated and is no longer subject to a licence. The release of a DCS prisoner on licence is automatic at the end of the custodial period, although the prisoner can be released on licence 135 days prior to the end of that period. The practice in relation to revocation and recall to prison has symmetry with the statutory provisions for the imposition of a DCS, with the purposes of post-release supervision on licence and with the obligation on a DCS prisoner to comply with their licence conditions.

(b) The sentencing framework: mandatory life sentences

74. A life sentence must be imposed for murder (section 1 of the Northern Ireland (Emergency Provisions) Act 1973; this is referred to as a "mandatory life sentence". As the offence of murder is not a specified offence a murderer cannot be a dangerous offender as defined in article 15 of the 2008 Order. However, the very nature of the offence frequently and obviously gives rise to a significant risk to members of the public of serious harm.

75. If a mandatory life sentence is imposed, then a court may order that the release provisions should not apply to the offender: article 5(3) of the Life Sentences (Northern Ireland) Order 2001. However, if the court does not make such an order, then it must determine the length of the minimum term that the offender will be required to serve in prison before they will first become eligible to be released on licence by the Parole Commissioners. The minimum term shall be such part of the life sentence as the court considers appropriate to satisfy the requirements of retribution and deterrence, having regard to the seriousness of the offence, or of the combination

of the offence and one or more offences associated with it: article 5 of the Life Sentences (Northern Ireland) Order 2001. The risk that the offender poses is not considered in fixing the minimum term. Rather, it is a matter for the Parole Commissioners to consider whether, and if so when, the offender is to be released on licence. Accordingly, a mandatory life sentence incorporates a period of detention justified by reference to retribution and deterrence, followed by a period of detention justified solely by public protection.

76. In relation to the release on licence of a mandatory life sentence prisoner, the Parole Commissioners are obliged not to give a direction to the Department of Justice to release the prisoner unless they are satisfied that it is no longer necessary for the protection of the public from *serious harm* that the prisoner should be confined: article 6(4)(b) of the Life Sentences (Northern Ireland) Order 2001. The Parole Commissioners' Guidance states that the practice in relation to the release on licence of a mandatory life sentence prisoner is that "the risk of serious harm posed [can] be safely managed in the community." Applying that practice, there is no guarantee to the end of the incarceration of a mandatory life sentence prisoner. Such a prisoner may never be released on licence if public protection requires that the prisoner is detained. Further, under the practice, a mandatory life sentence prisoner might have to wait for many years after their minimum term has expired before the Parole Commissioners consider it safe to release them.

77. Life sentence prisoners who are released will be subject to licence conditions which will remain in place for the rest of their lives: article 8(1) of the Life Sentences (Northern Ireland) Order 2001. Licence conditions may be added, varied, or cancelled in consultation with the Parole Commissioners. The licence conditions will adversely affect the private lives of the prisoner for the rest of their lives, especially those conditions which may be appropriately draconian.

78. If released on licence, the prisoner can be recalled to prison using the procedure available under article 9 of the Life Sentences (Northern Ireland) Order 2001 which is similar to the procedure under article 28 of the 2008 Order. For instance, (a) the revocation of the prisoner's licence and their recall to prison by the Department of Justice is ordinarily on a recommendation by the Parole Commissioners; (b) upon recall the Department of Justice must refer the case to the Parole Commissioners; and (c) the Parole Commissioners can direct the immediate release of the prisoner but they cannot give such a direction unless they are satisfied that it is no longer necessary for the protection of the public from *serious harm* that the prisoner should be confined.

79. The Parole Commissioners' Guidance and the practice of the ORU in relation to the revocation of a mandatory life sentence prisoner's licence and their recall to prison is to ask:

> "… whether the risk of *serious harm* posed [by the prisoner's post-release conduct] has *increased significantly (ie more than minimally) and can no longer be safely managed in the community*."

The test for revocation of the licence of a mandatory life sentence prisoner and their recall to prison is consistent with the practice in relation to the release of a mandatory life sentence prisoner on licence. It would be incongruous if a prisoner who had been released on licence because the risk of serious harm which they pose can be safely managed in the community was subject to recall based on their posing a risk of harm. If the revocation and recall practice depended on a risk of harm, then the practice in relation to release on licence would be undermined by the practice in relation to revocation and recall.

80. In summary, this is a sentencing regime for offenders who have committed murder. The imposition of a mandatory life sentence does not depend on whether the offender poses a significant risk of serious harm though frequently and obviously many murderers do pose such a risk. The period of incarceration of a mandatory life sentence prisoner is indeterminate. The release on licence of a mandatory life sentence prisoner is not automatic but rather depends on an assessment of risk by the Parole Commissioners. Accordingly, a mandatory life sentence prisoner may never be released from incarceration but if they are then they remain on licence for the rest of their life with consequential but appropriate interference with their private life. The practice in relation to revocation and recall to prison has symmetry with the practice in relation to release on licence.

(c) The sentencing framework: dangerous offenders

81. Chapter 3 of the 2008 Order introduced sentences which were tailor-made for a new category of prisoner, namely dangerous offenders. Chapter 3 contains a bespoke series of provisions in articles 12-14. Article 13 is headed "Life sentence or indeterminate custodial sentence for serious offences"; article 14 is headed "Extended custodial sentence for certain violent or sexual offences" and article 15 is headed "Assessment of dangerousness".

82. The key issue which arises in respect of offenders facing these potential sentences will be whether they are within the category of a dangerous offender. This is to be determined by the court by reference to article 15, where the primary questions to be asked are whether the offender has been convicted on indictment of a *specified offence* and whether there is a significant risk to members of the public of *serious harm* occasioned by the commission by the offender of further such offences.

83. An offence is a "specified offence" if it is a specified violent offence (that is an offence specified in Part 1 of Schedule 2), a specified sexual offence (that is an offence specified in Part 2 of Schedule 2) or a specified terrorism offence (that is an offence specified in Part 3 of Schedule 2): article 12(1) and (3).

84. There are some 34 categories of specified violent offences in Part 1 of Schedule 2, including for instance, manslaughter, kidnapping, riot, affray, false imprisonment, robbery, arson and several offences under the Offences against the Person Act 1861, such as wounding with intent to cause grievous bodily harm.

85. There are some 16 categories of specified sexual offences in Part 2 of Schedule 2, including for instance, rape, indecent assault upon a female, incest by a man, incest by a woman, burglary with intent to commit rape, meeting a child following sexual grooming and numerous offences under the Sexual Offences (Northern Ireland) Order 2008.

86. Serious harm "means death or serious personal injury, whether physical or psychological": article 3(1).

87. In considering whether there is a significant risk to members of the public of *serious harm* occasioned by the commission by the offender of further specified offences the court (a) *shall* take into account such information as is available to it about the nature and circumstances of the offence or offences; (b) *may* take into account 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: article 15(2)(a)-(c).

88. If the court views the offender as a dangerous offender, then one of three sentences may be imposed on the offender by the court under the 2008 Order namely a discretionary life sentence, an ICS or an ECS. However, under the 2008 Order a discretionary life sentence or an ICS can only be imposed if in addition the offender is convicted on indictment of a *serious offence*.

89. A "serious offence" is defined in article 12(2) as an offence specified in Schedule 1. There are some 35 categories of *serious offences* in Schedule 1, including for instance, manslaughter, rape, kidnapping, riot, affray, false imprisonment, and several offences under the Offences against the Person Act 1861, such as wounding with intent to cause grievous bodily harm.

(d) The sentencing framework: discretionary life sentences

90. A discretionary life sentence can only be imposed where (a) a person is convicted on indictment of a *serious offence*; and (b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further *specified offences*: article 13(1). A discretionary life sentence will be imposed if (a) the offence is one in respect of which the offender would apart from article 13 be liable to a life sentence, and (b) the court is of the opinion that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of such a sentence.

91. All the same provisions in the Life Sentences (Northern Ireland) Order 2001 which apply to the release on licence of a mandatory life sentence prisoner also apply to a discretionary life sentence prisoner who has been sentenced under the 2008 Order.

92. The Parole Commissioners' Guidance and the practice of the ORU in relation to the revocation of a discretionary life sentence prisoner's licence and their recall to prison is the same as for a mandatory life sentence prisoner.

93. In summary this is a sentencing regime for offenders who have been convicted on indictment of a *serious offence* and who pose a significant risk to members of the public of *serious harm* occasioned by the commission by the offender of further *specified offences*. The release of a discretionary life sentence prisoner on licence is not automatic but rather depends on an assessment of risk by the Parole Commissioners. Accordingly, a discretionary life sentence prisoner may never be released from incarceration but if they are then they remain on licence for the rest of their life with consequential but appropriate interference with their private life. The practice in relation to revocation and recall to prison has symmetry with the practice in relation to release on licence.

(e) The sentencing framework: ICS

94. An ICS is a sentence of imprisonment for an indeterminate period: article 13(4)(a). An ICS can only be imposed where (a) a person is convicted on indictment of a *serious offence*; and (b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further *specified offences*.

95. The structure of the 2008 Order is that an ICS will be imposed if a discretionary life sentence is not imposed and if the court considers that an ECS would not be adequate for the purpose of protecting the public from serious harm occasioned

by the commission by the offender of further specified offences: article 13(3). Accordingly, where there is a choice between an ICS and an ECS then the latter should be chosen where it would achieve appropriate protection for the public against the risk posed by the offender: see *R v C (P) (Practice Note)* [2009] 1 WLR 2158, at para 20.

96. If an ICS is imposed then the court must 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: article 13(3)(b). The risk that the offender poses is a matter for the Parole Commissioners to consider when determining whether, and if so when, the offender is to be released on licence.

97. The provisions in relation to the release on licence of an ICS prisoner are in article 18 of the 2008 Order, headed "Duty to release prisoners serving indeterminate or extended custodial sentences." An ICS prisoner may be released on licence as soon as they have served the relevant part of the sentence and the Parole Commissioners have directed their release. The period specified by the court under article 13(3) as the minimum period is "the relevant part" of an ICS. The Parole Commissioners are obliged not to give a direction to the Department of Justice to release an ICS prisoner unless they are satisfied that it is no longer necessary for the protection of the public from *serious harm* that the prisoner should be confined: article 18(3) and (4). The Parole Commissioners' Guidance states that the practice in relation to the release on licence of an ICS prisoner is that "the risk of serious harm posed [can] be safely managed in the community." Applying that practice there is no guarantee to the end of the incarceration of an ICS prisoner. Such a prisoner may never be released on licence if public protection requires that the prisoner is detained. Also applying that practice an ICS prisoner might have to wait for many years after his minimum term has expired before the Parole Commissioners consider it safe to release him.

98. If released on licence, an ICS prisoner can seek to have his licence conditions ended by a direction by the Parole Commissioners to the Department of Justice: article 22 of the 2008 Order. However, an ICS prisoner may not make an application to the Parole Commissioners for such a direction until a period of 10 years has expired beginning with the date of the prisoner's release. Furthermore, before directing the Department of Justice that the licence conditions shall cease to have effect the Parole Commissioners must be satisfied that it is no longer necessary for the protection of the public from *serious harm* that the licence should remain in force. An ICS differs from a mandatory or discretionary life sentence in that the prisoner's licence conditions may cease to have effect.

99. If released on licence an ICS prisoner can be recalled to prison using the procedure available under article 28 of the 2008 Order. The Parole Commissioners' Guidance and the practice of the ORU in relation to the revocation of an ICS prisoner's licence and their recall to prison is the same as for a mandatory life sentence prisoner.

100. In summary this is a sentencing regime for offenders who have been convicted on indictment of a *serious offence* and who pose a significant risk to members of the public of *serious harm* occasioned by the commission by the offender of further *specified offences*. The release of an ICS prisoner on licence is not automatic but rather depends on an assessment of risk by the Parole Commissioners. Accordingly, an ICS prisoner may never be released from incarceration but if they are then they remain on licence for the rest of their life with consequential but appropriate interference with their private life, unless the Parole Commissioners direct that the licence conditions should end. The practice in relation to revocation and recall to prison has symmetry with the practice in relation to release on licence.

(f) The sentencing framework: ECS

101. An ECS is a sentence of imprisonment the term of which is equal to the aggregate of (a) the appropriate custodial term; and (b) a further period ("the extension period") for which the offender is to be subject to a licence: article 14(3) of the 2008 Order. An ECS is similar, but not identical to an extended determinate sentence ("EDS") imposed in England and Wales under the Criminal Justice Act 2003. The sentencing framework in relation to an EDS was set out by Lady Black in *R (Stott)* at paras 84-89.

102. An ECS can only be imposed where (a) a person is convicted on indictment of a *specified offence* committed after the commencement of article 14; and (b) the court is of the opinion— (i) that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further *specified offences*; or (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 ICS.

103. The appropriate custodial term generally means a term which is the term that would be imposed in compliance with article 7, which article also applies when the court is determining the length of a DCS. The whole of the appropriate custodial term is imposed for the purpose of punishment and deterrence: see *R (Stott)* at paras 128-131.

104. The length of the extension period shall be such as the court considers necessary for the purpose of protecting members of the public from *serious harm*

occasioned by the commission by the offender of further specified offences. Accordingly, the extension period is justified by the need to protect the public from serious harm: see *R (Stott)* at para 131. The extension period shall not exceed five years in the case of a specified violent offence or eight years in the case of a specified sexual offence: article 14(8).

105. The provisions in relation to the release on licence of an ECS prisoner are in article 18 of the 2008 Order, headed "Duty to release prisoners serving indeterminate or extended custodial sentences." An ECS prisoner is eligible to apply for a direction from the Parole Commissioners to the Department of Justice to release the prisoner on licence from the half-way point of their appropriate custodial term (not the half-way point of their overall sentence which will be the aggregate of the appropriate custodial term plus the licence period tacked on to it). If the ECS prisoner has not been released on licence during the period between the half-way point and the expiry date of the appropriate custodial term, then the Department of Justice must automatically release the ECS prisoner on licence at the end of their appropriate custodial term without any assessment of risk by the Parole Commissioners or for that matter by the Department of Justice: article 18(3) (4) and (8).

106. In relation to an application to be released on licence between the half-way point and the expiry date of the appropriate custodial term the Parole Commissioners are obliged not to give a direction to the Department of Justice to release an ECS prisoner unless they are satisfied that it is no longer necessary for the protection of the public from *serious harm* that the prisoner should be confined: article 18(3) and (4). The Parole Commissioners' Guidance states that the practice in relation to the release on licence of an ECS prisoner is that "the risk of serious harm posed [can] be safely managed in the community." Applying that practice, there is no guarantee to the end of the incarceration of an ECS prisoner between the half-way point and the expiry date of the appropriate custodial term. However, an ECS prisoner will be automatically released on licence at the expiry date of the appropriate custodial period.

107. In contrast to life sentence prisoners and ICS prisoners the licence provisions imposed on a person serving an ECS end on the expiry of the specified extension period: article 21 of the 2008 Order.

108. In summary, the imposition of an ECS depends on whether (a) the offender has been convicted on indictment of a *serious offence* and (b) on whether the offender poses a significant risk to members of the public of *serious harm* occasioned by the commission by the offender of further *specified offences*. A ECS prisoner is a fixed-term prisoner so at the end of the sentence the prisoner cannot be incarcerated and is no longer subject to a licence. The release of an ECS prisoner on licence between the half-way point and the expiry of the appropriate custodial term is not automatic but rather depends on an assessment of risk by the Parole Commissioners. However,

release on licence is automatic at the end of the appropriate custodial term. Accordingly, in contrast to a DCS prisoner who is automatically released on licence at the expiry of the custodial period, an ECS prisoner may be incarcerated for the entirety of the appropriate custodial period. Furthermore, in contrast to a DCS prisoner an ECS prisoner may not be released on licence before the expiry of the appropriate custodial period. The practice in relation to revocation and recall to prison of an ECS prisoner has symmetry with the practice in relation to release on licence between the half-way point and the expiry of the appropriate custodial term.

8. Ground one: whether Colton J and the Court of Appeal erred in failing to address the fourth element of the article 14 claim before the third or alternatively whether they erred in failing to address the third and fourth elements of the article 14 claim holistically.

109. Counsel on behalf of the appellant submitted that an overlap between the third and fourth elements of an article 14 claim has been recognised: see *R (Stott)* at para 137. He submitted that in view of that overlap it is both usual and *necessary* to look at justification first so that real account is taken of justification when determining whether the appellant and the comparators are in an analogous situation. In advancing this ground of appeal counsel relied on *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434. In that case Lady Hale reviewed an analysis of the Strasbourg case law on article 14 and endorsed, at para 25, the observation that "in most instances of the Strasbourg case law . . . the comparability test is glossed over, and the emphasis is (almost) completely on the justification test." Lady Hale having considered the decision of the Grand Chamber in *Burden v United Kingdom* [2008] STC 1305 suggested that "… unless there are very obvious relevant differences between the two situations, it is *better* to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification." (Emphasis added.)

110. Counsel for the appellant also relied on the sequence adopted by Lady Black in *R (Stott)* in relation to the third and fourth elements of an article 14 claim. In that case Lady Black, at para 148, considered that "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." It was only after finding, at para 155, that there was objective justification for the difference in treatment that she came to the view that the appellant was not in an analogous situation.

111. I reject the appellant's reliance on *AL (Serbia) v Secretary of State for the Home Department*. In that case Lady Hale was suggesting a *better* approach. Furthermore, noting that the Strasbourg court often looks at justification without first determining

analogous situation is different from the Strasbourg court *requiring* that objective justification is addressed before addressing the element of an analogous situation. Furthermore, Lady Hale did not suggest that the Strasbourg jurisprudence requires a court to look at justification before determining the question as to an analogous situation.

112. Lady Black in *R (Stott)* was not purporting to suggest that a court *must* determine the question of justification before the question of analogous situation. Rather, at para 148, she stated that "it may be best" in that case to consider objective justification before reaching a conclusion as to an analogous situation. Furthermore, in *R (Stott)* Lord Hodge not only addressed the element of an analogous situation first but also reached the conclusion, at para 182, that Mr Stott was not in an analogous situation before considering objective justification.

113. Further support for discretion as to the sequence in which the third and fourth elements are addressed is contained in *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173. In Lord Nicholls' oft quoted passage, at para 3, he stated that:

> "For my part, in company with all 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 article 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 this question will be plain. There *may be* such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. *Sometimes*, where the position is not so clear, a different approach is called for. Then the 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.)

As the emphasised words make clear Lord Nicholls was not suggesting that a court *must* determine the question of justification before the question of analogous situation.

114. Further support for discretion as to the sequence in which the third and fourth elements are addressed is contained in *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223, at para 60. In that case this court first considered the issue of whether the comparator groups were analogous.

115. The wise advice of Lord Nicholls remains advice which may be followed by a court but there is no requirement for a court to determine the question of justification before the question of analogous situation. Accordingly, I reject the appellant's submission that it is necessary for a court to determine the question of justification before the question of analogous situation.

116. The alternative basis faintly advanced in relation to this ground of appeal is that the judge was required to consider the third and fourth elements of the appellant's article 14 claim holistically and that he failed to do so. As Lady Black observed in *R (Stott)* at para 137 "it is not at all easy to separate [the third and fourth elements of an article 14 claim] into watertight compartments". Accordingly, it may well be appropriate to consider matters relevant to both elements when considering one of them. However, in this case the appellant has not identified any matter relevant to objective justification which was left out of Colton J's or the Court of Appeal's assessment of whether the appellant and the comparators were in an analogous situation. Furthermore, on a fair reading of Colton J's judgment he did consider matters relevant to the analogous situation assessment when considering objective justification. I also consider that Maguire LJ, at para 113(c) did consider matters relevant to justification when considering the analogous situation assessment.

117. I would dismiss this ground of appeal.

9. Ground two: whether Colton J and the Court of Appeal erred in finding that the appellant as a DCS prisoner is not in an analogous situation with ICS and ECS prisoners.

118. Before turning to the issues of analogous situation and objective justification, it is necessary to consider in some detail the decision of this court in *R (Stott)* and the decision of the ECtHR in *Stott v UK.* As I noted at para 59 above, the sentences imposed under the Criminal Justice Act 2003 are not identical to those imposed under the 2008 Order. I will briefly summarise the similarities and the differences.

(a) There are both mandatory and discretionary life sentences in Northern Ireland as in England and Wales.

(b) A DCS in Northern Ireland is equivalent to, but not identical to, a determinate sentence of imprisonment in England and Wales. In Northern Ireland, the court specifies the custodial period at the end of which the offender is to be released on licence. The position in England and Wales is that if the court imposes a sentence of imprisonment for a term of 12 months or more then pursuant to section 244(1) of the Criminal Justice Act 2003, "[as] soon as [the] prisoner … has served the requisite custodial period …, it is the duty of the Secretary of State to release him on licence under this section". Section 244(3), in so far as relevant, provides that in relation to a person serving a sentence of imprisonment for a term of 12 months or more the requisite custodial period means one-half of his sentence. Accordingly, in England and Wales, when imposing a sentence of imprisonment for a term of 12 months or more, the court has no role to play in determining "the custodial period" or "the licence period". The release on licence is automatic at the half-way point and the licence period cannot be extended by the court.

(c) A home detention curfew ("HDC") is provided for in England and Wales by early release on licence under section 246 of the Criminal Justice Act 2003 read with a licence condition imposing a curfew under sections 250(5) and 253. The equivalent HDC in Northern Ireland is early release on licence under article 19 of the 2008 Order read with a licence condition imposing a curfew under article 26.

(d) The equivalent sentence in England and Wales to an ICS in Northern Ireland is a sentence of imprisonment for public protection ("IPP") under section 225 of the Criminal Justice Act 2003. However, the IPP sentence for new cases was abolished in England and Wales by section 123 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

(e) An ECS in Northern Ireland is equivalent to an EDS under section 226A of the Criminal Justice Act 2003.

(f) A sentence for offenders of particular concern ("SOPC") which can be imposed in England and Wales has not been introduced in Northern Ireland.

119. The complaint made by Mr Stott concerned provisions relating to his release on parole. Mr Stott had been sentenced, in England, to an EDS under section 226A of the Criminal Justice Act 2003. The sentence comprised an appropriate custodial term of 21 years' imprisonment and an extended licence period of four years. Mr Stott, as an EDS prisoner, was entitled to automatic release at the end of the 21-year "appropriate custodial term", and to apply for early release once he had served two thirds of that term, which meant after 14 years. Had his risk been assessed by the sentencing judge to be lower, he would likely have received a determinate sentence and would therefore

have been entitled to automatic release at the half-way point of his sentence, namely ten and a half years. Had his risk been assessed to be higher, he might have received a discretionary life sentence. Prisoners serving discretionary life sentences become eligible for parole after serving their specified minimum term which, in England and Wales, is usually fixed at half the determinate sentence which they would have received had they not been subject to a life sentence. Accordingly, if Mr Stott had been sentenced to a discretionary life sentence, he would have been entitled to apply for early release at the half-way point of his notional determinate sentence (which would have been set as the minimum term), namely ten and a half years. The complaint was that this difference in treatment as between EDS prisoners on the one hand and determinate sentence prisoners and discretionary life sentence prisoners on the other, was discriminatory and could not be justified.

(a) The majority judgments in this court in R (Stott)

120. In this court the leading judgment for the majority was given by Lady Black. She stated that there was "an initial attraction" in Mr Stott's assertion that the requirement for an EDS prisoner to serve two thirds of his sentence before becoming eligible for parole was out of step with comparable prisoners. However, she said that the assertion was less compelling if the rest of the prisoners were not, in fact, in step with each other. She explained, at para 136, that:

> "... The argument proceeds on the basis that other prisoners *are* eligible for release/parole at the half-way point in their sentence, but on closer examination, it can be seen that this is by no means universal. Standard determinate sentence prisoners are entitled to (automatic) release at the half-way point. Most life sentence prisoners (excepting those where a whole life term has been imposed) are eligible to apply for release once they have served their minimum term, and in most cases this minimum term will be the equivalent to half of the notional determinate term, but that is not universal even for discretionary life sentences ... Accordingly there are other prisoners who serve longer than half of their sentences before they have a chance of release on licence. Conversely, there are some prisoners who serve less than half. Home Detention Curfew can enable determinate sentence prisoners to achieve their release before the half-way point, and an ['offender of particular concern'] is eligible to apply for release from the half-way point of his appropriate custodial term, and not the half-way point in his overall sentence (which will be the aggregate of the custodial term plus the licence tacked on to it)."

121. Lady Black considered it important to recognise "the complexity and detail of the provisions governing the various sentences that can be imposed". She explained that "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, the early release provisions being part and parcel of the rules". Some sentences could only be imposed if there was a significant risk of the offender causing serious harm to members of the public by committing further offences; some sentences could only be imposed where the offender had already committed offences of a particular type. For some sentences, there was automatic early release on licence; for others, release on licence was dependent on the Parole Board. Those serving indeterminate terms remained on licence and thus liable to be recalled to prison for the rest of their lives, whereas other offenders would be on licence for a finite period only. She continued:

> "145. ... All of 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. Subject of course to sentencing guidance, the judge selects the sentence which matches the attributes of the case before him, and fixes the term of any period of imprisonment, extended licence 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, the same regime that is sufficiently distinct to justify taking the view that his complaint is on the ground of 'other status'. 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.
>
> 146. Weight is added to this when some of the detail of the EDS regime is compared specifically with other sentences. Of the determinate sentences, only an EDS requires a finding of significant risk to members of the public of serious harm. The Secretary of State points out that, in contrast to EDS prisoners, not all discretionary life sentence prisoners have been found to be dangerous, such a finding not being required for the imposition of life sentences under section 224A. That submission, whilst literally correct, is significantly weakened when one considers the nature of the listed offences which are a pre-requisite to the imposition of such a life sentence ...

> 147. There are important differences between an EDS and a discretionary life sentence, however. There are respects in which a discretionary life sentence must undoubtedly be viewed as having more serious consequences for the offender, notwithstanding that he may have an earlier opportunity to approach the Parole Board. An EDS involves imprisonment for a specified period which will necessarily come to an end, whether or not the prisoner's release is directed by the Parole Board, but a prisoner serving a discretionary life sentence may remain in detention for the rest of his life. If he is released, he remains on licence (and liable to recall) for life, whereas the EDS prisoner is on licence for a finite period only."

122. Recognising that there were valid arguments both ways as to whether the groups could be considered analogous, Lady Black turned to consider whether the differential treatment had a legitimate aim and whether the method chosen to achieve the aim was appropriate and not disproportionate in its adverse impact. She concluded that while the applicant had been treated differently on the grounds of "other status", there was an objective justification for the difference in treatment of EDS prisoners and his claim failed. That being the case, it was not necessary to give a definitive answer as to whether EDS prisoners could be said to be in an analogous situation to other prisoners. However, with the benefit of what Lord Hodge said in his judgment in relation to an analogous situation and having looked at the matters again in the context of justification, and considered the complete picture, she held that EDS prisoners could not be said to be in an analogous situation to other prisoners. She said:

> "155. ... Most influential in this conclusion is that, as I see it, rather than focusing entirely upon the early release provisions, the various sentencing regimes have to be viewed as whole entities, each with its own particular, different, mix of ingredients, designed for a particular set of circumstances."

123. Lord Carnwath and Lord Hodge agreed that EDS prisoners were not in an analogous situation to other prisoners. Lord Carnwath stated, at para 180, that:

> "… I agree that the EDS regime must be looked at as a whole and cannot be treated as analogous to regimes which have different purposes and different characteristics. 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."

124. Lord Hodge stated, at para 182, that:

> "… I would dismiss the appeal on the basis that the [EDS], which has been imposed on Mr Stott, is not sufficiently analogous to the sentences, which he puts forward as comparators, to bring him within article 14 of the [ECHR] and require the Government to justify his treatment."

At para 193 Lord Hodge noted in particular:

> "When assessing whether Mr Stott is in an analogous situation to other prisoners it is important to have regard to the reality that in England and Wales there are separate sentencing regimes which have different characteristics. It is appropriate to take a holistic approach to each sentencing regime in deciding whether or not one regime is analogous to another. Not all prisoners serving a discretionary life sentence will be more dangerous than a prisoner serving an EDS. There are prisoners who are serving a life sentence under section 224A of the 2003 Act, which does not require a finding that the offender was dangerous, although it is likely that in most cases he will be: *R v Burinskas (Attorney General's Reference (No 27 of 2013)) (Practice Note)* [2014] 1 WLR 4209, para 8. A prisoner serving an EDS is not eligible for release at the direction of the Parole Board at one half of his custodial term while a prisoner serving a discretionary life sentence is generally so eligible ... But that is far from the whole picture ... [A] life prisoner might have to wait for many years after his minimum term has expired before the Parole Board consider it safe to release him. By contrast, a prisoner serving an EDS is entitled to be released at the end of the custodial period without any further assessment of risk (section 246A(7)). Similarly, a person who has been given a life sentence remains on licence and subject to recall to prison for the rest of his life. By contrast, the licence provisions imposed on a person serving an EDS end on the expiry of the specified extension period (section 226A(5) and (8))."

125. As regards the question whether the difference in treatment was objectively justified, Lady Black, accepted, at para 152, in general terms, that the aim of the EDS provisions as a measure to enhance public protection was legitimate. The more stringent early release provisions were clearly aimed at offenders who posed a higher

risk to the public upon release than a prisoner subject to a determinate sentence of imprisonment, as an EDS could not be passed unless a risk condition was satisfied. Lady Black considered that the more difficult questions were whether the longer wait before the prisoner was eligible to apply to the Parole Board was an appropriate means of achieving this aim and whether it was disproportionate in its impact. She explained:

> "153. ... The starting point for a determination of these questions is that the ECtHR would allow a contracting state a margin of appreciation in assessing whether, and to what extent, differences in otherwise similar situations justify different treatment, and would allow a wide margin when it comes to questions of prisoner and penal policy, although closely scrutinising the situation where the complaint is in the ambit of article 5. This court must equally respect the policy choices of parliament in relation to sentencing."

126. Lady Black was ultimately persuaded that the proper way to look at the issue was by considering each sentence as a whole. The sentencing judge imposed the sentence that complied with the statutory conditions prescribed by Parliament and the sentencing guidelines and, within that framework, best met the characteristics of the offence and the offender. The early release provisions were to be seen as part of the chosen sentencing regime. She stated:

> "155. ... Counter-balancing the indeterminate prisoner's earlier eligibility for parole is the lack of any guaranteed end to his incarceration, and the life licence to which he is subjected. This fundamentally undermines the argument that the difference in treatment between the two prisoners in relation to early release is disproportionate, or putting it more plainly, unfair. I would accept that, on the contrary, bearing in mind the EDS sentencing package as a whole, the early release provisions are justified as a proportionate means of achieving the government's legitimate aim ..."

127. Lady Black concluded that while the applicant had been treated differently on the grounds of "other status", there was an objective justification for the difference in treatment of EDS prisoners and his claim failed. Lord Carnwath and Lord Hodge agreed.

128. The majority of the court held that there had been no violation of article 14 ECHR taken in conjunction with article 5.

(b) The judgment of the ECtHR in Stott v UK

129. The judgment of the ECtHR in *Stott v UK* was handed down after this court heard submissions from the parties in this case. The parties were subsequently invited to, and did, file written submissions in respect of that judgment.

130. At paras 94–96 the ECtHR set out general principles in relation to a complaint of unjustified discrimination under article 14 ECHR. It stated that:

> (a) For an issue to arise under article 14 there must be a difference in the treatment of persons in "analogous or relevantly similar situations"; this does not mean that the comparator groups must be identical (see *Molla Sali v Greece* (Application No 20452/14) (unreported) 19 December 2018 at para 133). The fact that the applicant's situation is not fully analogous to that of other prisoners and that there are differences between the various groups does not of itself preclude the application of article 14. The applicant must demonstrate that, having regard to the particular nature of his complaint, he was in a relevantly similar situation to others treated differently (see *Clift v United Kingdom* (Application No 7205/07) (unreported) 13 July 2010 at para 66).
>
> (b) Once a difference in treatment has been demonstrated, the burden is on the respondent to show that there was an objective and reasonable justification for it such that it was not incompatible with article 14. Justification is lacking where the different treatment 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.
>
> (c) The contracting states enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Molla Sali*, at paras 135-37). While in principle a wide margin of appreciation applies in questions of prisoner and penal policy, the court must nonetheless exercise close scrutiny where there is a complaint that domestic measures have resulted in detention which was arbitrary (see *Clift*, at para 73).

131. At para 98 the ECtHR explained that Mr Stott "must demonstrate that having regard to the particular nature of his complaint, there were others in a relevantly similar situation to him who were treated differently." The ECtHR also explained that Mr Stott "has identified two groups of prisoners with whom he seeks to compare himself in respect of his complaint about eligibility for early release, namely standard determinate sentence prisoners and discretionary life sentence prisoners." The ECtHR concluded that EDS prisoners, standard determinate sentence prisoners and

discretionary life sentence prisoners were not in an analogous situation. The ECtHR stated:

> "104. In the present case, the Court is satisfied that the applicant's status as a prisoner serving an EDS is closely connected to his complaint about eligibility for early release. The EDS was imposed on the applicant because he had committed serious offences and was deemed to be dangerous. As already noted … both the seriousness of the offending and the degree of dangerousness are plainly relevant to considerations of eligibility for early release. *Since determinate sentence prisoners and discretionary life sentence prisoners may present different degrees of offending and dangerousness, these groups are not sufficiently similar to prisoners sentenced to an EDS.*
>
> 105. Moreover, having regard to the complexity of the sentencing regimes in England … and the variations in terms of the criteria for their imposition, eligibility for early release, the extent of licence provisions, entitlement to release and arrangements for release after recall, *the Court is 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*." (Emphasis added.)

132. Having determined that EDS prisoners, standard determinate sentence prisoners and discretionary life sentence prisoners were not in an analogous situation the ECtHR also held, at para 106, that "In any event … the difference in treatment between the different groups of prisoners as regards eligibility for early release was objectively justified." The ECtHR identified, at para 106 that "[the] aim pursued by the different sentencing regimes, of which the early release provisions form part, is to cater for different combinations of offending and risk in appropriate ways." The ECtHR accepted that this aim was a legitimate one. Furthermore, the ECtHR stated, at para 107, that "… in view of the margin of appreciation enjoyed by the respondent State in this field, it cannot be said that there was not a reasonable relationship of proportionality between the aim pursued and the legislative measures put in place to realise it." In arriving at that conclusion, the ECtHR considered the overall arrangements in respect of the standard determinate sentence, EDS and discretionary life sentence. Thus:

> "… discretionary life prisoners were, at the relevant time, generally eligible for early release at an earlier point in their

> sentences than EDS prisoners sentenced for a similar offence… However, EDS prisoners enjoyed the significant advantage of having a date at which they had to be released if not released earlier, as well as the certain prospect of being free from licence conditions at the end of the extended licence period."

133. The ECtHR held that there had been no violation of article 14 ECHR taken in conjunction with article 5.

(c) Application of the general principles in relation to analogous situation to the facts of this case

134. This appeal concerns provisions relating to the revocation of a licence and the recall to prison of a DCS prisoner. The appellant's complaint is about the operation of different practices by the Parole Commissioners and the ORU when recommending or deciding to revoke a licence and recall a prisoner to prison. The different practices are in respect of different categories of prisoners, to whom different sentencing regimes apply.

135. By way of contrast the complaint in *Clift v United Kingdom* concerned provisions relating to release on licence rather than, as in this appeal, revocation of a prisoner's licence and their recall to prison. In essence the complaint in *Clift* was about whether the final decision to release on licence was made by the Parole Board, as for some prisoners, or by the Secretary of State in relation to prisoners, such as Mr Clift, serving determinate terms of 15 years or more. However, the appellant's complaint in this appeal is not about the same or similar revocation and recall provisions being operated differently. Rather, it is about the different practices adopted by the Parole Commissioners and the ORU under which different tests are applied in relation to the revocation of a licence and recall to prison of DCS prisoners on the one hand and ICS and ECS prisoners on the other.

136. To establish that this different treatment amounts to a violation of article 14 there must be a difference in the treatment of persons in "analogous or relevantly similar situations". This does not mean that the comparator groups must be identical. However, the appellant must demonstrate that, having regard to the particular nature of his complaint, he was in a relevantly similar situation to others treated differently.

137. As in *R (Stott)* the assertion that the practice in relation to the revocation of a DCS prisoner's licence and their recall to prison is out of step with comparable prisoners has an initial attraction. However, as Lady Black stated, the initial attraction is less compelling if the rest of the prisoners are not, in fact, in step with each other. In

considering whether the rest of the prisoners are in step with DCS prisoners the focus should not be entirely upon the revocation and recall provisions. Rather, the sentencing regimes must be viewed as whole entities, each with its own particular, different, mix of ingredients, designed for a particular set of circumstances: see *R (Stott)* at paras 155, 180 and 193. Accordingly, the revocation and recall provisions about which the appellant complains should not be looked at on their own, but as a feature of the regime under which he has been sentenced. Furthermore, when assessing whether the appellant is in an analogous situation to other prisoners, in addition to taking a holistic approach, it is important to have regard to the reality that the statutory regime in Northern Ireland establishes separate sentencing regimes which have different characteristics.

138. Also, as in *R (Stott)* it is "important to recognise the complexity and detail of the provisions governing the various sentences that can be imposed." From the review set out above of the statutory provisions concerning DCS, ICS, ECS, mandatory and discretionary life sentences, it can be seen that, 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, the revocation of the prisoner's licence and recall to prison being part and parcel of the rules. 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, for example. Some sentences can only be imposed where the offender has already committed offences of a particular type. For some, there is automatic early release on licence, but, for others, release on licence is dependent on the Parole Commissioners. Those serving mandatory or discretionary life sentences remain on licence (and liable to be recalled to prison) for the rest of their lives, whereas other offenders will be on licence for a finite period only. Each sentence is tailored to a particular category of offender, addressing a particular combination of offending and risk. Subject of course to sentencing guidance, the judge selects the sentence which matches the attributes of the case before them, and fixes the term of any period of imprisonment, the length of the minimum term under a mandatory or discretionary life sentence, the length of the minimum period under an ICS, the length of the "appropriate custodial period" under an ECS, the length of any extension of the licence under an ECS, the length of the "custodial period" under a DCS, and any recommendations as to licence conditions in respect of a DCS.

139. I consider that looking at the regimes holistically, as *R (Stott)* and *Stott v UK* require, the regimes applying to DCS prisoners are not analogous to the regimes applying to ECS and ICS prisoners. The difference in relation to revocation and recall simply represents another facet of the overall different regimes. Rather, the reality of the appellant's argument is that he was sentenced under one regime, and it is incoherent then to allege discrimination when compared to other offenders sentenced under a different regime. They are not in an analogous situation precisely because they were sentenced under a different regime. The appellant's complaint, properly analysed, is about the sentencing regime to which he has been consigned.

140. The lack of an analogous situation can also be illustrated by the appellant's submission that serious harm, which is an aspect of the sentencing regime for ICS and ECS prisoners, should form part of the test for the revocation of a DCS prisoner's licence and their recall to prison: see paras 2 and 26 above. Ordinarily a DCS prisoner does not pose a risk of serious harm which means that the appellant's proposed practice of requiring a risk of serious harm before recalling a DCS prisoner would have the consequence that ordinarily they would never be recalled to prison. It would also mean that, absent a risk of serious harm, a DCS prisoner's licence could not be revoked even if none of the statutory purposes of post-release supervision were being or were likely to be achieved. The statutory purposes being (a) the protection of the public from *harm*; (b) the prevention of re-offending; and (c) the rehabilitation of the offender: see article 24(8) read with article 8(5) as explained at paras 47 and 52 above. The consequences of taking a test of serious harm from one sentencing regime and then applying it to a different regime graphically illustrates that the situation of ICS and ECS prisoners are not analogous to DCS prisoners.

141. I would dismiss this ground of appeal with the consequence that I would also dismiss the appeal.

10. Ground three: whether Colton J and the Court of Appeal erred in finding that there is an objective justification for the difference in treatment between DCS prisoners and ICS and ECS prisoners.

142. Having determined that the appellant is not in an analogous situation, it is not necessary to address the issue of objective justification. However, if contrary to my view, it is necessary to proceed to consider justification, then I would start by acknowledging that there is an initial superficial attraction in the submission that it is not possible to justify a less stringent practice for the revocation and recall of a DCS prisoner in comparison to the practice for the revocation and recall of ICS and ECS prisoners who pose higher risks. The initial thought must be that (a) in order to protect the public from those who pose a higher risk, such as ICS and ECS prisoners, the practice should apply a lower bar to revocation and recall so that they are more easily recalled; and (b) given the lower risks posed by DCS prisoners, a higher bar should be applied to them so that they are less easily recalled. However, I would hold that the difference in treatment in relation to the practice as between DCS, ICS and ECS prisoners as to the revocation of their licences and their recall to prison is objectively justified principally because of the different natures of the regimes for imprisonment. Objective justification is to be judged in the wider context of considering each of the sentencing regimes holistically.

143. Adapting the words used by the ECtHR in *Stott v UK*, at para 106, I consider that the aim pursued by the different sentencing regimes, of which the practice as to the revocation of a prisoner's licence and their recall to prison form part, is to cater for

different combinations of offending and risk in appropriate ways. I also consider this to be a legitimate aim.

144. For several reasons I consider that there is a reasonable relationship of proportionality between the aim pursued and measures put in place to realise it.

145. First, a DCS is appropriate for offenders who ordinarily do not present a risk of serious harm. Accordingly, the practice as to revocation and recall of DCS prisoners is appropriate for exactly that category of prisoners. The appellant contends that the Department of Justice "can and should require a risk of serious harm" before revoking the licence of a DCS prisoner and recalling them to prison. However, if that practice was adopted then DCS prisoners, who ordinarily do not present a risk of serious harm, would not be recalled to prison even though, as here, there was a constellation of factors such as those listed at (a) to (f) in para 18 above. The objective justification for the difference in treatment in relation to revocation of their licence and their recall to prison as between DCS prisoners and ICS and ECS prisoners is the particular characteristic of the offenders. The characteristic of a DCS prisoner is that ordinarily they do not present a risk of serious harm, whereas the characteristic of an ICS or ECS prisoner is that they must pose a significant risk of serious harm.

146. Second, the overall arrangements in respect of DCS, ICS and ECS can be said to correspond to the scale of seriousness of each sentence: see para 107 of *Stott v UK*. A DCS prisoner has the disadvantage of a less stringent practice in relation to recall but the higher risk ICS and ECS offenders are subject to other more stringent conditions which do not apply to offenders subject to a DCS. A DCS sentence is for a fixed term. A DCS prisoner will be automatically released on licence at the end of the custodial period and can be released on licence 135 days prior to the end of that period. A DCS prisoner's licence will come to an end on the expiry of the DCS. In contrast an ICS and a life sentence are indeterminate. An ICS prisoner can only be released on licence on the direction of the Parole Commissioners. If an ICS prisoner is released on licence, then their licence will continue for the rest of their life, unless the Parole Commissioners give a direction to the Department of Justice that the licence should end. This means that absent a direction from the Parole Commissioners they are subject to an interference with their private lives and are potentially subject to recall to prison indefinitely. The release on licence of an ECS prisoner between the half-way point and the expiry of the appropriate custodial term is not automatic but rather depends on an assessment of risk by the Parole Commissioners. In contrast to a DCS prisoner who is automatically released on licence at the expiry of the custodial period, an ECS prisoner may be incarcerated for the entirety of the appropriate custodial period. Furthermore, an ECS prisoner will be subject to licence conditions for an extended period with consequential interference with their private life and the potential for recall to prison.

147. Third, there is a margin of appreciation for the relevant authorities, namely the Parole Commissioners who are independent of the Department of Justice, and the ORU whose practice reflects that of the Parole Commissioners. I consider that the practice contained in the Parole Commissioner's Guidance with respect to the revocation of a prisoner's licence and their recall to prison is well within the discretion afforded to those authorities to strike a balance between the interests of public protection and the interests of the individual prisoner.

148. I would dismiss this ground of appeal.

11. Conclusion

149. I would dismiss the appeal.