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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

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IN THE MATTER OF AN APPLICATION BY KYLE AIKEN
FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE NORTHERN IRELAND PRISON SERVICE

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Before: Stephens LJ, Treacy LJ & Sir Paul Girvan

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Mr Southey QC with Mr Heraghty BL for the Applicant
Mr McGleenan QC with Mr McQuitty BL for the Respondent

TREACY LJ ***(Delivering the Judgment of the Court)***

Introduction

[1] This is an appeal against the refusal of an application by McCloskey J to amend the Appellant's Order 53 statement to include a challenge to alleged differential treatment by the Northern Ireland Prison Service in relation to the provision of rehabilitative courses contrary to Article 14 ECHR read in conjunction with Article 5 ECHR. Specifically, the Appellant wishes to insert a ground of challenge contending that he, as a prisoner serving an extended custodial sentence, was treated less favourably than a prisoner serving an indeterminate sentence. We previously dismissed the appeal and now give our written reasons.

Factual Background

[2] On 24 December 2010 the Appellant committed the offence of wounding his partner with intent to do grievous bodily harm contrary to Section 18 of the Offences against the Persons Act 1861. He was also in possession of a Class B drug (Cannabis).

[3] The Section 18 offence was both a serious offence within Schedule 1 paragraph 7 of the Criminal Justice (Northern Ireland) Order 2008 and a specified violent offence within Schedule 2 paragraph 6 of that Order. Accordingly, the judge when sentencing the Appellant had to consider the predictive risk, that is, whether there was a significant risk to members of the public of serious harm occasioned by the commission by the Appellant of further specified offences. If there was a predictive risk then the sentencing court is required to impose a life sentence, an indeterminate custodial sentence or an extended custodial sentence.

[4] On 12 October 2012, the Trial Judge imposed an extended custodial sentence ("ECS") of 8 years' custody and 3 years on licence on the Appellant. The effect of this sentence is that the Appellant was subject to a custodial term of eight years followed by a licence period of three years. The three year period after the custodial term during which the Appellant is subject to licence is the period which the Judge considered necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the Appellant of further specified offences.

[5] Article 18 of the 2008 Order provides that a prisoner subject to an ECS should be released after half of the custodial sentence has elapsed if the Parole Commissioners so direct. If the Parole Commissioners do not so direct, an ECS prisoner is to be released on licence at the conclusion of the custodial term.

[6] An ECS prisoner therefore must be released at the conclusion of his custodial sentence regardless of the risk assessed to be posed by that prisoner at that time. Once released, he will be subject to licence for a defined period. In contrast, prisoners serving either indeterminate custodial sentences or life sentences may be held in prison indefinitely following the conclusion of the custodial elements of their sentences if the Parole Commissioners do not direct their release on the basis that it is no longer necessary for the protection of the public from serious harm that they should be confined.

[7] In relation to each class of prisoner, one of the means by which the Parole Commissioners can satisfy themselves that the prisoner no longer poses a risk of serious harm to the public is by the prisoner's participation in rehabilitative programmes.

Relevant Statutory Provisions

[8] The relevant statutory provisions provide as follows:

"**Criminal Justice (Northern Ireland) Order 2008**

Life sentence or indeterminate custodial sentence for serious offences

13.—(1) This Article applies where—

(a) a person is convicted on indictment of a serious offence committed after the commencement of this Article; 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.

(2) If—

(a) the offence is one in respect of which the offender would apart from this Article 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,

the court shall impose a life sentence.

(3) If, in a case not falling within paragraph (2), the court considers that an extended custodial sentence 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, the court shall—

(a) impose an indeterminate custodial sentence; and

(b) specify a period of at least 2 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 of the combination of the offence and one or more offences associated with it.

(4) An indeterminate custodial sentence is—

(a) where the offender is aged 21 or over, a sentence of imprisonment for an indeterminate period,

(b) where the offender is under the age of 21, a sentence of detention for an indeterminate period at such place and under such conditions as the Secretary of State may direct,

subject (in either case) to the provisions of this Part as to the release of prisoners and duration of licences.

(5) A person detained pursuant to the directions of the Secretary of State under paragraph (4)(b) shall while so detained be in legal custody.

(6) An offence the sentence for which is imposed under this Article is not to be regarded as an offence the sentence for which is fixed by law.

(7) Remission shall not be granted under prison rules to the offender in respect of a sentence imposed under this Article.

Extended custodial sentence for certain violent or sexual offences

14.—(1) This Article applies where—

(a) a person is convicted on indictment of a specified offence committed after the commencement of this Article; 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; and

(ii) where the specified offence is a serious offence, that the case is not one in which the court is required by Article 13 to impose a life sentence or an indeterminate custodial sentence.

(2) The court shall impose on the offender an extended custodial sentence.

(3) Where the offender is aged 21 or over, an extended custodial sentence 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 and which is of such length 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.

(4) In paragraph (3)(a) "the appropriate custodial term" means a term (not exceeding the maximum term) which—

(a) is the term that would (apart from this Article) be imposed in compliance with Article 7 (length of custodial sentences); or

(b) where the term that would be so imposed is a term of less than 12 months, is a term of 12 months.

(5) Where the offender is under the age of 21, an extended custodial sentence is a sentence of detention at such place and under such conditions as the Secretary of State may direct for a term 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 and which is of such length 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.

(6) In paragraph (5)(a) "the appropriate custodial term" means such term (not exceeding the maximum

term) as the court considers appropriate, not being a term of less than 12 months.

(7) A person detained pursuant to the directions of the Secretary of State under paragraph (5) shall while so detained be in legal custody.

(8) The extension period under paragraph (3)(b) or (5)(b) shall not exceed—

(a) five years in the case of a specified violent offence; and

(b) eight years in the case of a specified sexual offence.

(9) The term of an extended custodial sentence in respect of an offence shall not exceed the maximum term.

(10) In this Article "maximum term" means the maximum term of imprisonment that is, apart from Article 13, permitted for the offence where the offender is aged 21 or over.

(11) A court which imposes an extended custodial sentence shall not make an order under section 18 of the Treatment of Offenders Act (Northern Ireland) 1968 (c. 29) (suspended sentences) in relation to that sentence.

(12) Remission shall not be granted under prison rules to the offender in respect of a sentence imposed under this Article.

Duty to release prisoners serving indeterminate or extended custodial sentences

18.—(1) This Article applies to a prisoner who is serving—

(a) an indeterminate custodial sentence; or

(b) an extended custodial sentence.

(2) In this Article—

"P" means a prisoner to whom this Article applies;
"relevant part of the sentence" means—

(a) in relation to a indeterminate custodial sentence, the period specified by the court under Article 13(3) as the minimum period for the purposes of this Article;

(b) in relation to an extended custodial sentence, one-half of the period determined by the court as the appropriate custodial term under Article 14.

(3) As soon as—

(a) P has served the relevant part of the sentence, and

(b) the Parole Commissioners have directed P's release under this Article,

the Department of Justice shall release P on licence under this Article.

(4) The Parole Commissioners shall not give a direction under paragraph (3) with respect to P unless—

(a) the Department of Justice has referred P's case to them; and

(b) they are satisfied that it is no longer necessary for the protection of the public from serious harm that P should be confined.

(5) P may require the Department of Justice to refer P's case to the Parole Commissioners at any time—

(a) after P has served the relevant part of the sentence; and

(b) where there has been a previous reference of P's case to the Parole Commissioners, after the expiration of the period of 2 years beginning with the disposal of that reference or such shorter period as the Parole Commissioners may on the disposal of that reference determine;

and in this paragraph "previous reference" means a reference under paragraph (4) or Article 28(4).

(6) Where the Parole Commissioners do not direct P's release under paragraph (3)(b), the Department of Justice shall refer the case to them again not later than the expiration of the period of 2 years beginning with the disposal of that reference.

(7) In determining for the purpose of this Article whether P has served the relevant part of a sentence, no account shall be taken of any time during which P was unlawfully at large, unless the Department of Justice otherwise directs.

(8) Where P is serving an extended custodial sentence, the Department of Justice shall release P on licence under this Article as soon as the period determined by the court as the appropriate custodial term under Article 14 ends unless P has previously been recalled under Article 28

(9) The Department of Justice may by order provide that the reference in paragraph (b) of the definition of "relevant part of the sentence" in paragraph (2) to a particular proportion of a prisoner's sentence is to be read as a reference to such other proportion of a prisoner's sentence as may be specified in the order.

Duration of licences: prisoners serving indeterminate custodial sentences

22.—(1) This Article applies where a person who is serving an indeterminate custodial sentence is released on licence under Article 18 or 20.

(2) The licence shall, subject to any revocation under Article 28 or order under this Article, remain in force for the remainder of the prisoner's life.

(3) In this Article "qualifying period" means the period of 10 years beginning with the date of the prisoner's release.

(4) Where

(a) the qualifying period has expired, and

(b) the Parole Commissioners direct the Department of Justice to do so,

the Department of Justice shall order that the licence is to cease to have effect.

(5) Where—

(a) the qualifying period has expired; and

(b) if the prisoner has made a previous application under this paragraph, a period of at least 2 years has expired since the disposal of that application, or such shorter period as the Parole Commissioners may have recommended on the disposal of the last previous such application,

the prisoner may make an application to the Parole Commissioners under this paragraph.

(6) Where an application is made under paragraph (5), the Parole Commissioners—

(a) shall, if they are satisfied that it is no longer necessary for the protection of the public from serious harm that the licence should remain in force, direct the Department of Justice to make an order under paragraph (4) that the licence is to cease to have effect;

(b) shall otherwise dismiss the application.

Life Sentences (Northern Ireland) Order 2001

Duty to release certain life prisoners

6.—(1) In this Order—

(a) references to a life prisoner to whom this Article applies are references to a life prisoner in respect of whom—

(i) an order has been made under paragraph (1) of Article 5; or

(ii) a direction under paragraph (4) or (5) of that Article has been given; and

(b) references to the relevant part of his sentence are references to the part of his sentence specified in the order or direction,

and in this Article "appropriate stage", in relation to such a direction, has the same meaning as in Article 5(6).

(2) But if a life prisoner is serving two or more life sentences—

(a) he is not to be treated for the purposes of this Order as a life prisoner to whom this Article applies unless such an order or direction has been made or given in respect of each of those sentences or such a direction will be required to be given at the appropriate stage; and

(b) the release provisions do not apply in relation to him until he has served the relevant part of each of them.

(3) As soon as—

(a) a life prisoner to whom this Article applies has served the relevant part of his sentence; and

(b) the Commissioners have directed his release under this Article,

it shall be the duty of the Department of Justice to release him on licence.

(4) The Commissioners shall not give a direction under paragraph (3) with respect to a life prisoner to whom this Article applies unless—

(a) the Department of Justice has referred the prisoner's case to the Commissioners; and

(b) the Commissioners are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined.

(5) A life prisoner to whom this Article applies may require the Department of Justice to refer his case to the Commissioners at any time—

(a) after he has served the relevant part of his sentence; and

(b) where there has been a previous reference of his case to the Commissioners, after the end of the period of two years beginning with the disposal of that reference; and

(c) where he is also serving a sentence of imprisonment or detention for a term, after the time when, but for his life sentence, he would be entitled to be released,

and in this paragraph "previous reference" means a reference under paragraph (4) or Article 9(4).

(6) In determining for the purpose of this Article whether a life prisoner to whom this Article applies has served the relevant part of his sentence, no account shall be taken of any time during which he was unlawfully at large, unless the Department of Justice otherwise directs.

(7) Where a person has been sentenced to one or more life sentences and to one or more terms of imprisonment or detention, nothing in this Order shall require the Department of Justice to release the person in respect of any of the life sentences unless and until the Department of Justice is required to release him in respect of each of the terms."

History of Proceedings

[9] The Appellant undertook various rehabilitative courses at HMP Magilligan which were interrupted in December 2013 when he was required to move to HMP Maghaberry for psychiatric treatment. He asserts that his mental health improved in July 2014 and that he was then placed on a waiting list for an IQ test. On 27 October 2014 a single Parole Commissioner decided that the Appellant should remain detained but recommended urgent assessment by psychology to determine appropriate offence related work.

[10] On 3 December 2015 the Appellant brought these judicial review proceedings alleging that there was a failure by NIPS to provide him with reasonable access to appropriate courses as from October 2014 and that this was in breach of Section 6 HRA 1998 and Article 5 ECHR. The Order 53 statement asserts that Article 5(4) ECHR confers on the Appellant a right to seek early release from an ECS and that

the means by which the Appellant may obtain early release would include the engaging in courses designed to address the risk of reoffending and causing serious harm.

[11] On 15 February 2016, Maguire J granted the Appellant leave to apply for judicial review but stated that the period during which the Appellant could contend that there was a breach of Article 5 was between 20 October 2015 and 15 February 2016.

[12] The Appellant appealed to this court in respect of the limitation imposed by Maguire J. On 8 November 2016 the court extended the period so that it started from October 2014 and ran until 15 February 2016.

[13] A hearing date of 23 October 2017 was vacated as Counsel for the Respondent was engaged before the Supreme Court.

[14] Following the judgment of the Supreme Court delivered in *Brown v Parole Board for Scotland* [2018] AC 1 the Appellant recognised at this point that his argument based on A5(4) ECHR could not be sustained. Around the same time the *Stott* case was given leave to appeal and the Appellant submitted that the outcome in that appeal could be material to the facts in the instant case. On the basis of the changing legal landscape the second full hearing date was vacated and the matter was taken out of the list.

[15] Following the Supreme Court decision in *R (Stott) v SOS for Justice* [2018] 3 WLR 1831 the Appellant applied to amend the Order 53 statement. This application was dismissed. The primary reason given by the trial judge for refusing the amendment was his conclusion that the application lacked merit.

The Decision

[16] The proposed amendment of the Order 53 statement sought declarations that:

> "The repeated and ongoing failure to provide access to courses has resulted in a breach of the Applicant's rights protected by article 14 of the European Convention on Human Rights (read with article 5) and amounts to an unlawful act contrary to section 6 of the Human Rights Act 1998 ('the HRA')
>
> The failure to provide rights equivalent to Article 5 rights has resulted in a breach of the Applicant's rights protected by article 14 of the European Convention on Human Rights (read with article 6) and amounts to an unlawful act contrary to section 6 of the Human Rights Act 1998 ('the HRA')."

[17] The above declarations were sought on the following grounds:

> "Article 5(4) of the European Convention on Human Rights confers upon a prisoner serving an indeterminate sentence a right to release if risk is reduced sufficiently.
>
> The means by which such a prisoner serving an indeterminate sentence may obtain early release would include engaging in courses designed to address the risks of re-offending and causing serious harm. An unreasonable denial of such courses is a violation of Article 5 of the Convention and/or domestic law with a right to compensation following violation.
>
> Article 14 of the European Convention entitles the Applicant to equivalent rights.
>
> The Prison Service has failed to provide the Applicant with reasonable access to the courses that he would have been entitled to if Article 5 applied.
>
> There has been serious delay in the provision of access to the ETS and offence focused courses. The extent of the delay is unreasonable in all the circumstances.
>
> As a result of the aforementioned failings, the Applicant's prospects of attaining parole were materially damaged.
>
> It is a premise of the sentencing scheme that the Prison Service will provide persons such as the Applicant with a reasonable opportunity to demonstrate to the parole commissioners that they are no longer at high risk of re-offending and no longer present a risk of serious harm to the public which will in turn facilitate their release from custody. The means by which the Prison Service must provide the Applicant with the aforementioned opportunity is by providing reasonable access to appropriate courses.
>
> The Prison Service is under a public law duty to provide the Applicant with reasonable access to appropriate programmes and/or courses. The failure to make appropriate courses available to the Applicant has resulted in a breach of its public law duty to make such courses available under the sentencing scheme in place.

The Prison Service continued to breach that duty on an ongoing basis.

In all likelihood the aforementioned breach has already resulted in the Applicant spending more time in custody than would otherwise have been the case, thereby breaching his rights pursuant to Article 14 of the Convention and therefore acting unlawfully and contrary to section 6 of the HRA. However, although such delay is relevant to damages, it is neither necessary to establish a breach of Article 14 or a right to damages."

[18] McCloskey J found as follows at para [2] of his judgment:

> "Article 14, in every case in which it is raised, gives rise to certain elementary principles and considerations. These are, typically, questions of differential treatment, status, ambit, a suitable comparator and justification. The fundamental question raised is whether there is an adequate evidential foundation for the assertion of differential treatment on the part of the Applicant. That is a question of evidence. It is not a matter for argument and a legal submission in either an evidential vacuum or against the context of a deficient evidential framework. I conclude that there is no sufficient evidential foundation for the Applicant's assertion of differential treatment and that, of course, is fatal to the quest to secure the amendment that is hereby pursued."

The Grounds of Appeal

[19] The judgment has been appealed on the following grounds:

> "1. The Learned Judge erred by concluding that the claim lacked an adequate evidential foundation. The Applicant was entitled to point to how he had actually been treated, which was evidenced. He was then entitled to compare that with the treatment that others could have expected if treated lawfully.
>
> 2. The Learned Judge erred by concluding that *R(Stott) v Secretary of State for Justice* [2018] 3 WLR 1831 undermined the Appellant's arguments.
>
> 3. The learned judge erred by concluding that the application was academic.

4. Alternatively, if the application was academic, the learned judge erred by concluding that the importance of the issues did not justify the arguments regarding article 14 being considered.

5. The learned judge erred by concluding that there had not been a discharge of the duty of candour that justified the orders:

   (a) There was no breach of the duty of candour. It was never alleged by the Respondent that there was a breach of the duty of candour.

   (b) In any event, any breach of the duty of candour did not justify the orders made.

6. The learned judge erred by concluding that there had been material non-compliance with orders. Without prejudice to the generality of those submissions, the learned judge erred by relying on orders that had not been served on the parties.

7. The learned judge erred by concluding that there had been a lack of prosecution. Without prejudice to the generality of that submission, the learned judge erred by failing to take proper account of the need to adjourn the application while litigation in the higher courts was pending."

The Appellant's Arguments

[20] The Appellant submits at para 2(b) of his skeleton argument:

> 'In principle there is no need for evidence. An applicant can point to a difference in the legal regime. In this case the court had sufficient evidence for leave to be granted on article 5 grounds. In light of these matters, the Court had and has sufficient evidential material.'

[21] The Appellant submits that the decision in the *Stott* case enabled him to rely on Article 14 because he can now claim that he has a status for the purposes of Article 14. He further notes that until *Brown* he had no need to rely on Article 14.

[22] The Appellant argues that Article 14 is breached if a prisoner serving an ECS is denied the offending behaviour work offered to a prisoner serving an

indeterminate sentence. Prisoners serving an indeterminate sentence can expect compliance with Article 5. If there is a breach of Article 5, they will be compensated. There is no justification for providing an ECS prisoner with less offending behaviour courses or compensation for a failure to provide those courses bearing in mind the prisoner needs to undertake these to be released.

[23] The Appellant notes that the following elements must be established in order to make good an Article 14 discrimination complaint:

> "(a) The circumstances must come within the ambit of a substantive Convention right;
>
> (b) The applicant must be able to demonstrate "other status";
>
> (c) There must be a difference in treatment.
>
> (d) The applicant must be analogous to the comparator individual;
>
> (e) There must be no adequate justification for the difference in treatment."

[24] In relation to (a), the Appellant submits that it is long established that where a state creates a right to apply for early release, that right is within the ambit of Article 5 *(R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484).

[25] In relation to (b), the Appellant submits that *Stott* is authority for the position that difference in the treatment of extended determinate sentence prisoners is a difference on the ground of 'other status'.

[26] The Appellant submits that there has been a difference in treatment on the following grounds:

> "A prisoner serving a life sentence is entitled to the offending behaviour work necessary to comply with article 5. It must be assumed that public authorities will comply with their duties and provide a prisoner with the offending behaviour [sic] that they are entitled to. The state cannot argue that there is no difference in treatment because in the case of prisoners serving a life sentence it breaches article 5. If it were to breach article 5, article 5 could be enforced through the courts. Non-compliance could be compensated through an award of damages. There would be a right to a finding of a breach. In contrast, following Brown, an EDCS prisoner enjoys none

> of these rights. That is despite the fact that the grant of leave implies that it is arguable that the Applicant was denied offending behaviour [sic] that would have been required to be provided if article 5 applies."

[27] The Appellant submits that the comparator prisoner relied upon by the Appellant is a life sentence prisoner. He submits that ECS and life sentence prisoners make their respective applications for release on licence in accordance with statutory provisions which are materially identical and that, as a consequence, the ECS and life sentence prisoners have the same interest in offending behaviour work. Their position is therefore analogous.

[28] The Appellant submits that there is no objective justification for the difference in treatment.

[29] The Appellant concludes at paragraph 14 of his submission:

> "The matters above demonstrate that there was no need for additional evidence from the Applicant. In particular:
>
> (a) In principle article 14 does not necessarily require evidence from an applicant other than that necessary to demonstrate standing. That is because, as in cases like Stott, it is possible for an applicant to point to a legal framework as being discriminatory. Here there was evidence of standing. There was evidence that the Applicant was an ECS prisoner who was arguably denied the offending behaviour work that he would have been entitled to if article 5 applied. The fact that he was an ECS prisoner was sufficient to give him status. (Burden v UK (2008) 47 EHRR 38 at [34])
>
> (b) The legal framework governing prisoners serving a life sentence demonstrated that there was a difference in treatment.
>
> (c) It is for the state to put forward a justification (R(Quila) v Secretary of State [2012] 1 AC 621 at [44], R (DA) v Secretary of State [2019] 1 WLR 3289 at [66] and Re Stach, 10 January 2020 at [92]."

[30] The Appellant was asked by the Court to respond to certain questions. The first was:

> 'If there is any evidence in the papers supporting the factual contention that "a prisoner serving an ECS is denied the offending behaviour work offered to a prisoner serving an indeterminate sentence" or that "an ECS prisoner (is provided) with less offending behaviour courses or compensation" than a prisoner serving an indeterminate sentence then that evidence should be identified in writing…'

[31] In response to that question, the Appellant set out certain facts *'as justifying the finding that it was arguably that he was denied the offending behaviour that would be provided if article 5 applies'*. These facts comprised:

- The delay in the assessment of the Appellant's intellectual ability.

- The delay before his first contact with the psychology department.

- The recommendations by the Parole Commissioner on 27 October 2014 that he should *'continue to engage with the psychology department … in progressing in sentence planning and to address the issues related to his offending behaviour'* and that *'Consideration should be given as a matter of priority to the completion of the necessary assessments by the Psychology department to enable [the Appellant] to avail of the appropriate programmes and/or other work towards the reduction of his risk'*.

- The delay between the above recommendations and the holding of a multi-disciplinary meeting to discuss them

- The notification on 16 April 2015 that key courses were suspended due to resource issues.

- The single commissioner's recommendations on 18 August 2015 that the Appellant '… *should now progress and undertake offence-focussed work'* and *'be assessed by psychology, as a matter of priority, to determine the appropriate offence-focussed work that should be undertaken… to address his risk factors'*.

- The panel's written decision of 20 October 2015 (by which time the enhanced thinking skills course had not been completed). This decision expressed the belief that not all of the risk factors pertaining to the Applicant which resulted in the attack had been identified and recommended that a dynamic risk should be carried out.

[32] The Appellant concludes this recital of relevant facts:

> "These observations and recommendations indicate that some 10 months after parole eligibility date, 12 month after the first parole decision, three years after sentence and five years after the offence and initial remand into custody, the rudimentary step of identifying the Applicant's risk factor in order that appropriate programmes can be identified in order that in turn, the Applicant might be given an opportunity to lower his risks and thereby secure his own release, had not been carried out."

[33] The Appellant continues:

> "If the Appellant was denied offending behaviour that he would have been provided had article 5 applied, that means either:
>
> A. He is treated differently to life sentence prisoners because there is compliance with article 5 in their case. Article 5 applies to live sentence prisoners and so it would be unlawful to fail to comply with it (Brown). The fact that their differential treatment results from the application of article 5 is no answer (Clift v UK app 7205/07 at [75].
>
> B. He is treated the same as life sentence prisoners because there is no compliance with article 5 in their case. If that were to be the case, the life sentence prisoners would be being treated unlawfully. As a matter of Principle, it cannot be right for the Respondent to rely on their own illegality. If that is wrong, the Respondent must at least serve evidence demonstrating that. How can the Appellant be expected to obtain evidence that other prisoners are treated lawfully. It must be sufficient for him to point to the legal framework (as happened, for example, in R(Stott) v Secretary of State for Justice [2018] 3 WLR 1831). Once he has done that, there must be a presumption that prisoners are treated accordance with that legal framework. If it can be demonstrated that life sentence prisoners are treated in breach of article 5, there would still be a difference in treatment as the Appellant would not be entitled to compensation.

> It should be remembered that the Appellant is entitled to challenge the legal framework on the basis that he was an ECS prisoner… That is essentially what he is doing. Albeit, he also points to the fact that it is arguable that his treatment was inconsistent with article 5."

[34] The Appellant resubmits the above response to the first question as answer to the second question of the Court which was:

> "The affidavit of 15 January 2020 asserts in paragraph 4 that there is not a deficient evidential framework but states that submissions will be made about that matter at the hearing of this appeal. Those submissions should now be made in writing…"

The Respondent's Arguments

[35] The Respondent submits that the Court of Appeal will only rarely interfere with the exercise of discretion exercised by a judge at first instance (relying on *Re Farrell's Application* [1999] NIJB 143 (CA)) and that this would include the learned trial judge's exercise of his discretion in refusing the application to amend. Furthermore, the Court of Appeal should also be slow to reverse factual findings at first instance (DB [2017] UKSC 7).

[36] The Respondent submits that the trial judge's decision to refuse leave for want of merit was entirely appropriate and should not be disturbed. The Respondent also submits that the judge was also entirely justified in basing that decision on the *complete* lack of evidence in support of the amended case.

[37] The Respondent notes that the argument now made before the Court of Appeal was not made before the trial judge and that this fact alone would justify this court concluding that it should not disturb the trial judge's decision.

[38] The Respondent describes the Appellant's main argument as follows:

> "The Appellant appears to contend that because one group of prisoners is protected by Article 5, it must inexorably follow that any group for whom Article 5 is not engaged, following Brown [2018] AC 1, will inevitably be discriminated against contrary to their rights under Article 14. Thus, says the Appellant, there is no need to produce any evidence to the court of any actual difference in treatment between the groups of prisoners, let alone any evidence directly related to this Appellant in comparison with another category of prisoner."

[39] The Respondent argues that the above argument seeks to subvert the settled approach to the determination of Article 14 claims and runs contrary to the decision off the Supreme Court in *Brown.*

[40] The Respondent submits (relying on Stach [2020] NICA*)* that the Appellant must establish first *'… if the other status hurdle is overcome,* [whether] *the Appellant* [is] *the victim of differential treatment when compared with others in an analogous situation.'* The Respondent argues that this necessarily demonstrates *some* actual evidence of a difference in treatment. The Respondent submits that in this case there is no such evidence and argues that *'abstract inference will not suffice otherwise there can be no manageable boundary to Article 14 claims based on "other status"'.* The Respondent further notes that *'it is difficult to imagine how any respondent would, in practical terms, be able to advance any meaningful justification defence in response to a case formulated on some hypothesised difference of treatment.'*

[41] The Respondent argues that the Supreme Court in *Brown* concluded that Article 5 did not apply to all prisoners in the same way. Specifically, it concluded that the Article 5 obligation applied to extended sentence prisoners but only where they were detained during the extension period. The Respondent notes *'[t]here was no concern expressed by the Supreme Court that they were, by their decision, creating a situation that would automatically result, by inference, in discrimination against all other prisoners for whom Article 5 was not engaged.'*

[42] The Respondent does not accept that the Appellant has demonstrated his *'other status'* and observes that *Stott* relates to the application of specific legislative provisions that in fact created a difference in treatment between classes of prisoners. The Respondent notes that no equivalent claim is made in the instant proceedings. The Respondent argues that *Stott* is not authority for the proposition that ECS status will, in all circumstances of claimed discrimination, amount to an *'other status'* for the purpose of Article 14.

[43] The Respondent argues that, even if the Appellant does fall within '*other status'* for the purposes of Article 14, his claim must fail because ECS prisoners and lifers are not in an analogous position for the purposes of comparison. The Respondent notes two differences, first that the Prison Service will have a longer period of time within which to work with a life sentence prisoner as they will usually be serving a longer custodial sentence. Second, an ECS prisoner will be eligible for release once they have completed 50% of the custodial part of their sentence, while a lifer is only eligible for release upon completion of the entire custodial part of their sentence. In *Stott*, the Supreme Court concluded that ECS prisoners were not analogous to other prisoners.

[44] The Respondent's basic position is that access to courses between the different groups of prisoners in Northern Ireland is determined by reference to contemporaneous risks and needs assessment in the context of each individual

prisoner, irrespective of their particular status. The Respondent argues that the Appellant has not provided any evidence to contradict or even call into question this basic position.

[45] The Respondent submits in conclusion that the Appellant cannot demonstrate any *'other status'*, that a lifer is not an analogous comparator and that, in any event, there has been no material difference of treatment between the groups of prisoners all of which is compounded by the evidential vacuum in which the Appellant's case is advanced. Absent any evidence of the claimed discrimination, it is further submitted that the Appellant cannot demonstrate any victim status pursuant to sections 6 and 7 of the Human Rights Act 1998.

[46] In relation to the Appellant's response to the Court's questions, the Respondent notes that the Appellant has been unable to identify any evidence of any difference in treatment between the Appellant and any comparator prisoner/group of prisoners. The Respondent notes that the onus of proof is on the Appellant.

[47] The Respondent submits that, in lieu of evidence, the Appellant now advances an elaborately argued hypothetical discrimination case based on assumptions arising from the engagement of Article 5 obligations in respect of life sentence prisoners. In relation to the Appellant's submission, the Respondent argues:

(a) A hypothesis is no substitute for evidence. The assertions made by the Appellant in paragraphs 1-2 of the submission do not meet the requirements in Re SOS (NI) Limited [2003] NIJB 253.

(b) The argument advanced before the Court of Appeal in paragraphs 1 and 2 of the response to the Court's questions is not reflected in any pleaded ground of challenge in the case as it was pleaded before the trial judge. The Appellant cannot legitimately seek to advance such an argument by way of an appeal when this was not a ground of challenge pleaded in his case as advanced before the trial judge.

(c) The argument now made bears little resemblance to the argument advanced before the trial judge.

[48] The Respondent argues that it is untenable for the Appellant to suggest that the original grant of leave on Article 5 grounds provides the evidential foundation for the new claim under Article 14.

Discussion

[49] The Appellant sought to amend his Order 53 statement to include a ground alleging a breach of Article 14 read with Article 5.

[50] Specifically, he seeks to argue that he has been less favourably treated by virtue of his status as an extended custodial sentence prisoner when compared with an indeterminate sentence prisoner by virtue of the delay in providing him with offence based work in order to demonstrate to the parole commissioners that his risk of reoffending had reduced which may, in turn, have secured his early release from the midway point of the custodial part of his sentence.

[51] The Appellant has produced no evidence of this alleged less favourable treatment. Instead, he says that prisoners serving an indeterminate sentence are protected by an Article 5 obligation to provide offence-based work. As indeterminate sentence prisoners are protected by this obligation he claims that it must therefore be the case that indeterminate sentence prisoners would be provided with offence-based work more urgently than he has been or that, if an indeterminate sentence prisoner was *not* provided with such work, that prisoner would still be in a better position as they would be entitled to damages.

[52] It clearly does not follow from the Article 5 obligation that indeterminate sentence prisoners in general, or some indeterminate sentence prisoner in particular, necessarily accessed offence-related courses more promptly than the Appellant.

[53] In any event, the nature and extent of the Article 5 obligation to provide a *'real opportunity for rehabilitation'* is one that must be considered with *'regard to the detention as a whole'* (*James v United Kingdom* (20120 56 EHRR 12)). That is, a delay in accessing offence-based courses will not in all cases create an Article 5 breach. At paragraph 21 of *Brown v Parole Board for Scotland* Lord Reed recites a number of cases in which a delay in accessing offence-based work *did not* result in a finding that Article 5 had been breached:

> "21. Examples include Hall v United Kingdom …..., where there was a post-tariff delay of over a year in providing a particular course, but where the applicant had nevertheless been provided with a reasonable opportunity to rehabilitate himself by courses throughout his detention; Dillon v United Kingdom …., where a nine-month delay between the expiry of the tariff and assessment for a particular course was considered to be not unreasonable having regard to the access to courses which the applicant had previously enjoyed, the continued efforts to ensure his further progress through the prison system, and his overall progression throughout the period of his detention; and Thomas v United Kingdom …, where a six month delay in commencing a course was not considered unreasonable having regard both to resource considerations and to the progress that the applicant had already made. A further example, decided after R(Kaiyum) v Secretary of State for Justice

> [2015] AC 1344, is Alexander v United Kingdom …., where there was a post-tariff delay of around 14 months in being assessed for a recommended course, and a further delay of about 18 months in obtaining a place, but where prompt steps had nevertheless been taken to begin the applicant's progression through the prison system, and he had been given access to a wide range of rehabilitative courses which enabled him to present evidence of risk reduction… There does not appear to be any case since the James case 56 EHRR 12 in which a complaint under article 5.1 arising from lack of access to courses has succeeded."

[54] The delay in accessing offence-based courses by the Appellant in this case is some 16 months. It is by no means clear that a delay of this length would constitute a breach of Article 5 in relation to an indeterminate sentence prisoner. This further undermines the Appellant's argument that the Article 5 obligation owed to indeterminate sentence prisoners must inexorably lead to a difference in treatment of those prisoners when compared with extended custody sentence prisoners.

[55] The Appellant's argument that he has been discriminated against must therefore fail as there is no evidence of any differential treatment.

Is an ECS prisoner at the halfway point of his custodial sentence in an analogous position to an indeterminate sentence prisoner?

[56] While the Appellant's argument must fail for the reasons outlined above, it would also fail on the basis that he is not in an analogous position to an indeterminate sentence prisoner.

[57] The Article 5 duty to a prisoner serving an indeterminate sentence only arises after that prisoner has completed the 'tariff' part of his sentence. The tariff part of the sentence is primarily directed at punishment. The post-tariff period is primarily directed at protecting the public and his continued detention is based solely on an assessment of the risk presented by the prisoner. An Article 5 duty arises because if the prisoner is not given the opportunity to demonstrate that his risk his reduced, his continued detention may fall into arbitrariness. During the tariff period, no Article 5 duty rises because that period was specified by the sentencing court.

[58] An indeterminate sentence prisoner becomes eligible for release on licence only after he has served the tariff part of his sentence and then only once a parole commissioner is satisfied that it is no longer necessary for the protection of the public that he continue to be detained. The prisoner may be confined indefinitely until he satisfies a parole commissioner in relation to his risk. An ECS prisoner becomes eligible for parole *during* the punitive part of his sentence. While the test that must be satisfied to attain release is the same as that which must be met by an

indeterminate sentence prisoner, the nature of the release is different. The Prison Service will have a longer period of time to work with a life sentence prisoner because they will usually be serving a longer custodial sentence. Further, an ECS prisoner will be eligible for release once they have completed 50% of the custodial part of their sentence, while a lifer is only eligible for release upon completion of the entire custodial part of their sentence. Therefore, an ECS prisoner and an indeterminate sentence prisoner are not in an analogous position as the ECS prisoner is securing a reduction of the tariff part of his sentence which is not a provision which is available to an indeterminate sentence prisoner. This conclusion is consistent with the decision of the reasoning of the Supreme Court in *Scott*.

Conclusion

[59] We agree that the Appellant's claim under Article 14 was rightly dismissed by the trial judge by the refusal of leave to amend the Appellant's case. The claim lacked merit and was not arguable.

[60] For the above reasons we dismiss the appeal.