NOTES AND COMMENTARIES

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Stott, status and *stare decisis*

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In November 2018 the UK Supreme Court issued an important decision on the discriminatory treatment of prisoners, *R (Stott) v Secretary of State for Justice*.[1] The issues involved were clearly difficult for the five Justices, since their judgments were not issued until more than 10 months after the appeal hearing had taken place, and in the end there were two prominent dissenters – the Court's President, Lady Hale, and its Deputy President, Lord Mance. The leading judgment for the majority was written by Lady Black, a relative newcomer to the court. In terms of paragraphs hers was the second longest judgment issued by any Supreme Court Justice during 2018 and the fifth longest issued since the Court was established in 2009.[2]

Mr Stott's claim was that he had been the victim of unlawful discrimination on the ground of his status because, as a prisoner serving an 'extended determinate sentence' (EDS) for a series of rapes,[3] he would become eligible for parole only after serving two-thirds of the 'appropriate custodial term',[4] which in his case was 21 years, whereas other categories of prisoners serving determinate sentences were eligible for parole after serving just one-half of their sentence. He claimed that this differential treatment amounted to a violation of Article 14 of the European Convention on Human Rights (ECHR), taken together with Article 5, which protects the right to liberty. Article 14 provides that: '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,

1 [2018] UKSC 59, [2018] 3 WLR 1831.

2 Lady Black's judgment was 156 paragraphs. In *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27, [2019] 1 All ER 173 Lord Kerr's judgment was 197 paragraphs. In *Lehman Brothers Holdings Inc v The Joint Administrators of Lehman Brothers International (Europe)* [2017] UKSC 38, [2018] AC 465 Lord Neuberger wrote a judgment of 187 paragraphs; in *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 Lord Collins wrote 177 paragraphs; in *R (Walumba Lumba (Congo)) 1 and 2 v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 Lord Dyson wrote 169 paragraphs.

3 Imposed under the Criminal Justice Act 2003, s 226A, which was inserted by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 124, and amended by the Offender Rehabilitation Act 2014, s 8(2). EDS replaced the much maligned 'indefinite sentence for public protection' (IPP); IPP prisoners were entitled to automatic release on licence after serving one-half of their custodial sentence.

4 Criminal Justice Act 2003, s 246A, inserted by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 125(3), and amended by the Criminal Justice and Courts Act 2015, s 4(2) and (3).

religion, political or other opinion, national or social origin, association with a national minority, property, birth *or other status*' (emphasis added).

'Status' and precedent

At first instance the Divisional Court rejected the argument that the differential treatment was on the ground of Stott's 'status', but only because it felt constrained to do so by the doctrine of precedent. In *R (Clift) v Secretary of State for the Home Department*[5] the House of Lords had held that the different treatment of a prisoner serving a sentence of 15 years or more could not be said to be on the ground of his 'status'. As the Court of Appeal might have held that it too was bound by what the House of Lords had said in *Clift*, Stott was permitted to appeal directly to the Supreme Court under the leapfrog procedure.[6]

By four to one (Lord Carnwath dissenting), though without expressly referring to the 1966 Practice Statement governing the top court's approach to its own previous decisions,[7] the Supreme Court decided that the precedent in *Clift* should be set aside, largely because when the case was taken to Strasbourg the European Court of Human Rights (ECtHR) had ruled that Mr Clift *did* have a 'status' for the purposes of Article 14 of the ECHR and that he *had* suffered discrimination.[8] In *Stott* Lady Black helpfully summarised the respects in which the ECtHR had gone further than the House of Lords in *Clift*, and she examined three more recent decisions of the ECtHR, two of which also involved prisoners,[9] concluding that they confirmed the ECtHR's approach in *Clift*. Lady Black then analysed how the term 'status' had been dealt with by the House of Lords and Supreme Court in cases other than *Clift*. There were four such decisions prior to that case,[10] from which she extracted seven propositions. After looking at four further decisions issued after *Clift*[11] she remarked that just one of the seven propositions was no longer valid, namely the proposition that a person could have a 'status' only if he or she had a personal characteristic separate from the differential treatment being complained about. In *Clift* the ECtHR had made it clear that differential treatment could itself confer a 'status'.

This acceptance by the Supreme Court of a new approach to the concept of 'status' is significant because it greatly extends the potential of Article 14 to address instances of inequality. 'Status' no longer needs to be something analogous to the characteristics expressly mentioned in Article 14 as bases for discrimination claims. Not only is being a prisoner a 'status', being a particular type of prisoner can be a 'status' too. Lord Carnwath,

5 [2006] UKHL 54, [2007] 1 AC 484.

6 Administration of Justice Act 1969, ss 12–16. There are usually only two or three such appeals each year.

7 [1966] 1 WLR 1234. In *Austin v Southwark LBC* [2010] UKSC 28, [25] Lord Hope said, with the agreement of his four colleagues in that case, that the Practice Statement 'has as much effect in this Court as it did before the Appellate Committee in the House of Lords'.

8 *Clift v UK* App No 7205/07, judgment of 13 July 2010.

9 *Biao v Denmark* (2016) 64 EHRR 1; *Khamtokhu and Aksenchik v Russia* (GC) Apps Nos 60367/08 and 961/11, judgment of 24 January 2017; *Minter v UK* (2017) 65 EHRR SE6.

10 *R (S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196; *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681; *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434; *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311.

11 *R (Kaiyam) v Secretary of State for Justice* [2014] UKSC 66, [2015] AC 1344; *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250; *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, [2015] 1 WLR 3820, *R v Docherty (Shaun)* [2016] UKSC 62, [2017] 1 WLR 181.

who is known for being a rather conservative judge,[12] did not think that the ECtHR had gone as far as the majority thought it had in this area. Citing *Minter v UK*,[13] where the ECtHR decided an application was inadmissible because it was based on the flimsy argument that prisoners sentenced under a different regime from one used earlier were treated preferentially, he stated:

> I would need considerable persuasion that the authors of the Convention intended mere conviction of a criminal offence, or subjection to a particular custodial regime, to entitle the recipient to specially protected status under human rights law. More generally, it is important that Article 14 is kept within its proper role within the Convention, and outside the core protected areas is not allowed to develop into a means of bypassing the carefully defined limits applicable to the individual rights.[14]

Fortunately the majority in *Stott* clearly rejected Lord Carnwath's position, but the case as a whole provides further evidence of how careful the Supreme Court now is to locate its human rights decisions within the jurisprudence of the ECtHR. None of the Justices treated the position of the ECtHR as binding, especially as there was no Grand Chamber judgment on the point, but they all accorded it deep respect and tried to be consistent with it. In *Poshteh v Royal Borough of Kensington and Chelsea* the Supreme Court said that before it would change a domestic precedent in the light of the jurisprudence of the ECtHR it would await a full consideration of the matter by the Grand Chamber of that court.[15] However, as we know from the more recent decision in *R (Hallam) v Secretary of State for Justice*,[16] even when there is a Grand Chamber judgment in play Supreme Court Justices may still disagree about its import and may therefore remain reluctant to depart from one of their own precedents.

Analogous situations and justification

Having held in favour of Mr Stott on the status point, the court then found by three to two (Lady Hale and Lord Mance dissenting) that on the facts before them the discrimination in question was justified. In accordance with custom and practice all the judges dealt with the justification issue in two parts, even though the wording of Article 14 does not explicitly require such an approach. They first considered whether Mr Stott was in an 'analogous situation' to other prisoners who were treated differently. On this the majority's view was summed up by Lady Black in this fashion:

12 He was one of three dissenters in the Supreme Court's decision in the Brexit case, *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5, [2018] AC 61. Since 2015 he has also manifested a traditionalist streak when dissenting in *Airtours Holidays Transport Ltd v Commissioners for HM's Revenue and Customs* [2016] UKSC 21, [2016] 4 WLR 87, on the meaning of 'supplying services' for the purposes of VAT law; *Impact Funding Solutions Ltd v Barrington Support Services Ltd* [2016] UKSC 57, [2017] AC 73, on the interpretation of exemption clauses in insurance contracts; *Goldtrail Travel Ltd (In Liquidation) v Onur Air Tasimacilik AS* [2017] UKSC 57, [2017] 1 WLR 3014, on making an appeal conditional upon a payment into court; and *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57, [2018] 3 WLR 1603, on the reach of the law on easements.

13 See (n 9) above. *Minter* refers also to *Massey v UK* App No 14399/02, judgment of 8 April 2003, an application made by a prisoner who lost in the High Court: see *R (Massey) v Secretary of State for Justice* [2013] EWHC 1950 (Admin).

14 See (n 1) [179].

15 [2017] UKSC 36, [2017] AC 624.

16 [2019] UKSC 2, [2019] 2 WLR 440.

> . . . 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.[17]

That ruling would have been enough to reject Stott's appeal on the basis that he was not in an analogous situation to that of other prisoners, but the majority added that, even if it was in an analogous situation, the difference in how he was treated as far as eligibility for parole was concerned was objectively justifiable. They observed that EDS prisoners were different from other prisoners with determinate sentences because the former *must* first have been designated as presenting a significant risk of serious harm to members of the public.[18] Moreover, compared with prisoners serving indeterminate sentences, EDS prisoners were in at least one respect in a better position because they had a guaranteed end date to their incarceration.[19]

Lady Hale and Lord Mance thought that there was no justification for requiring EDS prisoners to remain in prison for two-thirds of the custodial term appropriate to the seriousness of their offending while discretionary life sentence prisoners were eligible for release after just one-half of what would have been the appropriate determinate sentence for their conduct. Lady Hale pointed out that a discretionary life sentence prisoner is even more dangerous than an EDS prisoner,[20] although Lord Hodge said that that was not necessarily the case.[21] She stressed that the most important question any prisoner wants an answer to is 'When will I get out?'

In truth, the requirement that a discrimination claimant must show that he or she is in an analogous situation to someone who is treated more advantageously seems to be an unnecessary addition to the requirement that any difference in treatment be justifiable. The latter should surely embrace the former, in the sense that if there is an objectively justifiable reason why two prisoners are treated differently it ought to be clearly explicable by those who are applying the treatment in the first place. Merely saying that the prisoners have been sentenced under different regimes should not be enough. The erection of additional hurdles which alleged victims of inequality have to overcome if they are to succeed in a discrimination claim is tantamount to reinforcing the systemic nature of some forms of inequality. Notoriously, systemic discrimination is the hardest kind of discrimination to combat because systems are often the product of ingrained assumptions and bureaucratic complacency. It is obvious that the sentencing of convicted criminals is a complicated process, one which inevitably requires a wide range of personal factors to be taken into account, but the process should not be made additionally complex by creating further differences between criminals based supposedly, but often spuriously, on penological grounds. The average onlooker, not to mention the average prisoner, would undoubtedly detect a fundamental unfairness in such an approach, especially if the difference manifests itself in the calculation of when the prisoner becomes eligible for release.

Although it was not an issue in *Stott*, UK discrimination law also suffers from maintaining the distinction between direct and indirect discrimination, a distinction which the ECtHR manages to do without. In recent years the UK Supreme Court has often been divided over whether particular forms of discrimination fall into the direct or

17 See (n 1) [155]. At [193] Lord Hodge agreed: 'It is appropriate to take a holistic approach to each sentencing regime in deciding whether or not one regime is analogous to another.'

18 Ibid [146]. See the Criminal Justice Act 2003, s 226A(1)(b).

19 Ibid [155].

20 Ibid [218].

21 Ibid [193].

indirect category, most noticeably in *R (E) v Governing Body of JFS*,[22] *Bull v Hall*[23] and *R (SG) v Secretary of State for Work and Pensions*.[24] One reason for the distinction is meant to be that there are some forms of discrimination which should never be justifiable (direct discrimination) and others which should occasionally be justifiable (indirect discrimination), but as well as introducing a demarcation line which is difficult to define this ignores the fact that in extreme cases even so-called direct discrimination is and should be permitted.[25]

When deciding whether discriminatory enjoyment of a right is justifiable the nature of the right in question surely matters. In *Stott* Lady Black conceded that because the right to liberty is such an important right differential early release schemes need to be carefully scrutinised lest they violate it.[26] If Messrs Clift or Stott had been complaining not about their additional loss of liberty but about their lesser entitlement to visits, enhanced 'pay' for prison labour or 'single cell occupancy', the majority's calculus as to whether such adverse treatment was justifiable may well have been different. In the assessment of justification more intense scrutiny is bound to be given to differential treatment affecting a person's liberty than to such treatment affecting the right to a private or family life. At the same time, although the right to liberty is not one of the qualified rights in the ECHR, it is not one of the absolute rights either: some prisoners may therefore enjoy a lesser right to liberty than others, as the outcome to the *Stott* case indicates. But it would be better if the differential right to liberty were expressed in the length of sentence imposed on prisoners in the first place, not in the rules on their eligibility for parole. If the explanation for requiring some prisoners to serve two-thirds of their sentence before being eligible for parole is public protection and public confidence in criminal sentencing,[27] those prisoners should be given a longer sentence in the first place. In *Stott* the majority unfortunately accepted, as the ECtHR has done, that courts should interfere with penal policy only if it renders the right to liberty arbitrary – a high threshold.[28]

For countries that have ratified Protocol 12 to the ECHR, which extends the Article 14 right not to be discriminated against in relation to enjoyment of 'the rights and freedoms set forth in this Convention' to enjoyment of 'any right set forth by law', there will be many other opportunities for claims to be made based on status, and there too justifiability will often be the key issue. Regrettably neither the UK nor Ireland has ratified Protocol 12, and there seems no immediate prospect of their doing so.[29]

22 [2009] UKSC 15, [2010] 2 AC 728.

23 [2013] UKSC 73, [2013] 1 WLR 3741.

24 [2015] UKSC 16, [2015] 1 WLR 1449.

25 An employer can discriminate against an employee directly on the basis of his or her age if the employer can show that this was a proportionate way of achieving a legitimate aim: Equality Act 2010, s 13(2). Moreover, non-disabled persons and single persons cannot claim discrimination on grounds of disability or marital status.

26 See (n 1) [81]. On this she cited the warning of the ECtHR in *Clift v UK* (n 8) above, paras 62 and 73.

27 These are the reasons given by Lady Black at [152]–[154] and Lord Hodge at [199].

28 See in particular Lord Hodge at [198]–[200], referring to *Clift v UK* (n 8) above, paras 73 and 74.

29 Twenty countries have so far done so, including Finland, the Netherlands and Portugal.