making public *any* information about proceedings. Instead, "the open justice principle may well require *some* information about proceedings which are quite properly taking place in private being put into the public domain" (at [175], emphasis added). The Court, therefore, upheld the challenge to the vires of Rule 25, commenting that it was for the Secretary of State to determine how the Rule should be reformulated.

Revised Rules came into force on 22 May 2018. Rule 25(1) now obliges the Board to provide summaries for victims of the reasons why a decision was taken. The Board Chair can only refuse in "exceptional circumstances". Rule 25(2) provides a broader duty to supply a summary to members of the public unless disclosure is not in the public interest. Naming panel members and expert witnesses has the potential to compromise their safety or to make them more risk-adverse. These fears are allayed by Rule 25(4), which prohibits the disclosure of the names of those involved unless they are parties to the proceedings. A broader consultation is currently taking place (Ministry of Justice, *Reconsideration of Parole Board Decisions: Creating a New and Open System*, Cm. 9612 (April 2018)).

The legacy of *Radford* will therefore be systemic. Parole decision-making has already become more transparent, and this is welcome. As 25,000 decisions are taken by the Board every year, this represents a major reform in criminal procedure. The then Chair of the Parole Board, Nick Hardwick, had long championed greater transparency but was forced to resign over the ruling following shameful political pressure. It is vital that the Board's independence is recognised and respected. The political aftermath of *Radford* does not inspire confidence. In future the Parole Board will face equally challenging decisions and must be able to release individuals who satisfy the legal test even if there is likely to be a public backlash. It was reported on 19 November 2018 that a new panel had determined that Radford was not suitable for release or for progression to an open prison.

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WHEN WILL I GET OUT?

THE Supreme Court heard the arguments in *R. (Stott) v Secretary of State for Justice* [2018] UKSC 59, [2018] 3 W.L.R. 1831, on 18 January, but the judgments were not handed down until 28 November 2018. The justices clearly found it very difficult to answer what should be a simple question: is a prisoner serving an extended determinate sentence (EDS) unlawfully discriminated against on the basis that he or she faces less advantageous

https://doi.org/10.1017/S0008197319000163 Published online by Cambridge University Press

rules on release than those serving either discretionary life sentences or determinate sentences? An EDS is a determinate, fixed term, sentence, with a period of extended supervision in the community at the end (when the offender is supervised, and liable to recall to prison). In May 2013, Mr. Stott had been sentenced to an EDS, of which the "appropriate custodial term" was fixed at 21 years, with a period of extended supervision of four years. Because of s. 246A of the Criminal Justice Act 2003 (added by s. 125 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, and since amended by s. 4 of the Criminal Justice and Courts Act 2015), his case will not be considered by the Parole Board until he has served two-thirds of the "appropriate custodial term" (14 years). If he had received a determinate sentence of 21 years, he would have been released at the half way point. Had he received a discretionary life sentence, the "minimum term" would have been half of 21 years, after which the Parole Board would have considered his eligibility for release.

Leveson L.J. in the Divisional Court of the High Court [2017] EWHC (Admin) 214 clearly thought the system was discriminatory. He only rejected the application because he was constrained to do so by *R. (Clift) v Secretary of State for the Home Department* [2007] 1 A.C. 484 (noted [2007] C.L.J. 255), where the House of Lords had held that different treatment of a prisoner serving a sentence of 15 years or more could not be said to be on the ground of "other status", under Article 14 of the European Convention on Human Rights. Article 14 makes it illegal to discriminate on a wide range of grounds including "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Leveson L.J. was clear (at [50]) that there was no rational justification for setting a later and arbitrary point for parole eligibility for EDS prisoners:

> the difference in treatment consequent upon risk between those sentenced to determinate sentences and those sentenced to EDS … or to discretionary life sentences … is entirely justified for the purpose of protecting the public. To my mind, however, the difference in the term to be served for punishment and deterrence is not. Furthermore, it will legitimately generate a real grievance in relation to offenders sentenced at the same time for joint offences where the term for punishment and deterrence is markedly different for reasons only associated with risk.

Disappointingly, the majority of the Supreme Court, despite agreeing (at [70] and [237]) to "depart from" the decision in *Clift*, disagreed with Leveson L.J. and dismissed the appeal. The judgments run to 87 pages (and 249 paragraphs). What an unnecessarily complex mess!

The first question was whether Article 14 of the European Convention on Human Rights applied. Four justices (Lady Black, Lord Hodge, Lady Hale and Lord Mance) held that Mr. Stott had the requisite status for Article 14 to apply. They (understandably) struggled to find a rational criterion for

https://doi.org/10.1017/S0008197319000163 Published online by Cambridge University Press

interpreting the scope of "status" in Article 14, although Lord Mance concluded "without hesitation" that Mr. Stott had a relevant status (at [236]). Only Lord Carnwarth wanted to follow the House of Lords in *Clift* and dismiss the appeal simply because the treatment of EDS prisoners was not attributable to some "status" for the purpose of Article 14. He said he "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 special protected status under human rights law" (see [179]). The others were all swayed, after lengthy reviews of the European and domestic authorities, including *Clift v UK* (Application no. 7205/07) [2009] ECHR 718, by the argument that the words "other status" (and the French "toute autre situation") should be interpreted generously. They recognised the "need for careful scrutiny of differential early release schemes, lest they run counter to the very purpose of article 5" (Lady Black, at [81]).

More controversially, a majority of the Court (Lady Black, Lord Carnwarth and Lord Hodge) held that the differences between the sentencing regimes for those serving indeterminate (life) sentences, determinate sentences and extended sentences means that they are not in "analogous situations" and that even if they were, the difference of treatment would be objectively justified. This is because (at least for Lady Black, at [154]) courts must consider,

> each sentence as a whole .... The sentencing judge imposes the sentence that complies with the statutory conditions prescribed by parliament, and the sentencing guidelines, and, within that framework, best meets the characteristics of the offence and the offender. The early release provisions have to be seen as part of the chosen sentencing regime, and the question of whether there is an objective justification for the differential treatment of prisoners in relation to earlier release, considered in that wider context.

Lord Hodge too examined the different sentencing regimes, with their different characteristics. It seems contradictory, when the appellate courts have long maintained that sentencers should not take account of early release provisions in choosing the appropriate sentence, that this is what the Supreme Court decided must be done in this case. Sentencers are not permitted to reduce the custodial term of an EDS to reflect the fact that more of it has to be served: see *Burinskas* [2014] EWCA Crim 334, where the Lord Chief Justice reaffirmed what Hughes L.J. had said in *Round* [2009] EWCA Crim 2667, at [44]: "the general principle that early release, licence and their various ramifications should be left out of account upon sentencing is ... a matter of principle of some importance". This "matter of principle" appears to be largely pragmatic – the release rules change so often that taking them into account would be a risky business. But this decision may well force a re-thinking, given the Court's

https://doi.org/10.1017/S0008197319000163 Published online by Cambridge University Press

acceptance that early release provisions have to be seen as part of the chosen sentencing regime. Lord Hodge's suggestion (at [203]) that the common law might develop to create exceptions to *Round,* where necessary to achieve comparative justice between offenders, is welcome.

However, the minority opinions of Lady Hale and Lord Mance are more convincing. Unless the difference in treatment is objectively justified, it will run counter to the purpose of Article 5, namely to protect the individual from arbitrary detention. Lady Hale pointed out (at [214]) that the most important question for any prisoner is "when will I get out?". The minority saw no justification for the rule that an EDS prisoner must remain in prison for two-thirds of the appropriate custodial term, while a discretionary life sentence prisoner (who is likely to considered to be more "dangerous" than an EDS prisoner) is considered for release after serving half of this appropriate determinate sentence. They would therefore have issued a declaration of incompatibility, under section 4 of the Human Rights Act 1998.

There is much that is wrong with our current sentencing law. First, it is far too complicated. This is the latest in a long line of costly appeals. Another supposedly simple case was *R. (Noone) v Governor of Drake Hall Prison* [2010] UKSC 30, [2010] 1 W.L.R. 1743. In the Court of Appeal in *Noone*, the Master of the Rolls had complained that "the argument in this court lasted for the best part of a day, and the respondent's correct release date has only emerged in a careful reserved judgment" (at [60]). Yet the Supreme Court decided that the Court of Appeal had got it wrong! Lord Judge commented in the Supreme Court (at [87]):

> It is outrageous that so much intellectual effort, as well as public time and resources, have had to be expended in order to discover a route through the legislative morass to what should be, both for the prisoner herself, and for those responsible for her custody, the prison authorities, the simplest and most certain of questions – the prisoner's release date.

Secondly, and more importantly, many sentencing laws are perceived by prisoners (quite understandably) as unfair. Here we have one example – Parliament should amend the release provisions for the very large number of prisoners serving an EDS to make them eligible to apply for parole when they have served half of the custodial period. The Law Commission has just published a massive draft Sentencing Code (largely a consolidation of the current mountain of legislation), which does not cover the rules on release. Would that there might be a true codification of sentencing law, including not only the rules on getting into prison but also those on getting out.

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https://doi.org/10.1017/S0008197319000163 Published online by Cambridge University Press