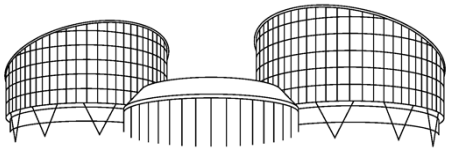

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF STOTT v. THE UNITED KINGDOM

(Application no. 26104/19)

JUDGMENT

Art 14 (+ Art 5) • Discrimination • Other status • Difference in treatment in early release eligibility between the applicant, a prisoner serving an extended determinate prison sentence (EDS), *vis-à-vis* standard determinate sentence prisoners and discretionary life sentence prisoners • Case concerned early release eligibility which may legitimately depend on policy as well as factual considerations and not, as *Clift v. the United Kingdom*, the purely factual assessment of the actual risk posed by the prisoner • Criteria for determining eligibility for early release are not, or should not be, in principle the same for all categories of prisoner • Seriousness of offending and degree of dangerousness plainly relevant to considerations of early release eligibility • Prisoners sentenced to an EDS not sufficiently similar to prisoners under the different sentencing regimes who may present different degrees of offending and dangerousness • Legitimate aim pursued by different sentencing regimes, of which early release provisions formed part, to cater for different combinations of offending and risk in appropriate ways • Difference of treatment objectively justified • Impugned legislative measures proportionate and not outside wide margin of appreciation enjoyed by Contracting States in matters of prisoners and penal policy

STRASBOURG

31 October 2023

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Stott v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Gabriele Kucsko-Stadlmayer*, President*,
Tim Eicke,
Faris Vehabović,
Armen Harutyunyan,
Anja Seibert-Fohr,
Ana Maria Guerra Martins,
Sebastian Răduleţu*, judges*,
and Andrea Tamietti, *Section Registrar,*

Having regard to:

the application (no. 26104/19) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr Frank Stott ("the applicant"), on 7 May 2019;

the decision to give notice to the United Kingdom Government ("the Government") of the application;

the parties' observations;

Having deliberated in private on 10 October 2023,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The applicant complains that the early release provisions applicable in his case are discriminatory and in breach of Article 14, taken together with Article 5 of the Convention.

THE FACTS

2. The applicant was born in 1968 and is detained in HMP Full Sutton, York. He was granted legal aid and was represented by Mr M. Purdon, a solicitor practising in Newcastle-upon-Tyne.

3. The Government were represented by their Agent, Mr M. Boulton, of the Foreign, Commonwealth and Development Office.

4. The facts of the case may be summarised as follows.

I. THE BACKGROUND FACTS

5. On 3 May 2013 the applicant was convicted of various sexual offences, including eleven counts of rape of a child under thirteen. He had previously pleaded guilty to other offences.

6. On 24 May 2013, the Crown Court sentenced him to an extended determinate sentence ("EDS") under section 226A of the Criminal Justice Act 2003 ("the 2003 Act" – see paragraphs 40-44 below). The sentence comprised a custodial term of twenty-one years' imprisonment and an extended licence period of four years.

7. The Court of Appeal subsequently refused the applicant permission to appeal against his sentence.

8. Pursuant to the applicable early release provisions, the applicant will become eligible for parole once he has served two-thirds of his custodial term (see paragraph 44 below). The Parole Board will be able to direct his release after this point and before the expiry of the custodial term if it is satisfied that the imprisonment of the applicant is no longer necessary for the protection of the public.

II. THE DOMESTIC PROCEEDINGS

A. Proceedings before the Administrative Court

9. The applicant brought judicial review proceedings challenging the applicable early release provisions. He argued that had a discretionary life sentence been imposed, he would have been eligible for parole at an earlier point. He therefore contended that the relevant provisions were discriminatory and in breach of his rights under Article 14 of the Convention, in conjunction with Article 5.

10. The judgment of the Administrative Court was delivered on 15 February 2017. The court found that it was constrained by an earlier judgment of the House of Lords (*R (Clift) v. Secretary of State for the Home Department* [2006] UKHL 54), to find against the applicant on the issue of whether he enjoyed "other status" (see this Court's subsequent judgment in *Clift v. the United Kingdom*, no. 7205/07, §§ 15-21, 13 July 2010). It therefore rejected the applicant's submission that his differential treatment was on the ground of "other status" for the purposes of Article 14. However, recognising that the applicant might be successful in reversing the House of Lords ruling in *R (Clift)* in light of this Court's subsequent judgment in that case, the court went on to examine whether the applicant could be considered to be in an analogous position to other relevant prisoners and whether there was justification for the differential treatment of EDS prisoners.

11. It found that the argument of the Secretary of State as to the substantive differences between an EDS and a life sentence "ignores the principle of sentencing practice ... that both sentences involve a period identified for punishment and deterrence and, potentially, further detention (albeit in the case of an EDS for a finite time) based on risk to the public". The court continued:

"44. ... Both must accept the period for punishment and then address the issue of risk; what is at issue is the question of eligibility for consideration for release not merely the mechanism whereby issues of release are decided."

12. It further compared the position of EDS prisoners with prisoners serving determinate sentences and sentences for offenders of particular concern ("SOPC" – see paragraphs 45-47 below). It explained:

"45. The position is underlined by a consideration of determinate sentences alone. Take the case of a crime which, applying the relevant guideline, justifies a sentence of 12 years' imprisonment. For an offender in respect of whom there is no concern that he is a risk to the public, that will be the determinate term: as the law stands, he will serve six years and then be entitled to be released on licence (from which he can be recalled to prison for breach up to the end of the 12-year term). For another offender, deserving the same sentence but who, perhaps by reason of his mental condition, constitutes a risk to the public, the court might take the view that he requires an extended period on licence. If he was sentenced to an EDS with a custodial term of 12 years (i.e. the same as the first offender, their crimes being of equal gravity) with a two-year extension (for the purposes of extending supervision over him), he would only be eligible for consideration of parole after 8 years. The gravity of their crimes is identical and their positions (in so far as punishment and deterrence is concerned) seem, to me at least, to be analogous ...

46. Quite apart from these examples, an EDS in this case is clearly analogous to the sentence for which provision is made in the newly inserted s. 236A of the 2003 Act [the SOPC]. An offender given a special custodial sentence for offenders of particular concern may well have committed precisely the same offences as that committed by this offender, and yet will be eligible for release after one half of the determinate term: see s. 244A ..."

13. As to whether there was objective justification, the court noted the Secretary of State's argument that the justification for the EDS was that the offender had committed serious offences and had been found to be dangerous. It continued:

"48. Neither the evidence nor the explanation addresses the crucial issue of the distinction between the punitive element of any sentence and that part of the sentence designed to cater for risk. The fact that those eligible for EDS have committed serious offences does not provide any rational basis to alter the extent of the punitive element of a sentence. The offender, who is made the subject of a [SOPC], will have committed a very serious offence as will many offenders who are subject to determinate terms (for whom the dangerousness provisions will not be triggered because of the length of the determinate sentence). All are eligible for release ... at the expiry of one half of the custodial term. Similarly, the calculation of the minimum term to be served by those sentenced to discretionary life sentences will usually be one half of the determinate term that would otherwise have been appropriate. Those offenders will be released at the half way point of the custodial term. Furthermore, the sentence which EDS was intended to replace, imprisonment for public protection, itself involved the setting of a minimum term based on half the notional determinate term.

49. As for the argument that the dangerousness of the offender sentenced to EDS itself constitutes justification for the different release provision, that is to confuse punishment and deterrence with risk. Dangerousness under ... the 2003 Act is assessed by reference to future risk, and it is only at the point of potential release that the risk

> will be assessed ... If relevant risk to the public remains, the offender will remain in prison. If not, it will be appropriate to release him. There is no rational justification for setting a later and arbitrary point for parole eligibility (at which risk is to be assessed) for EDS prisoners, as opposed to life sentence prisoners, or prisoners serving a [SOPC]."

14. The court concluded that the difference in treatment consequent upon risk between those sentenced to determinate sentences and those sentenced to EDS, SOPC or discretionary life sentences was entirely justified for the purpose of protecting the public. However, the difference in the term to be served for punishment and deterrence was not. Had it not been for the binding precedent of *R (Clift)* (see paragraph 10 above), the court would have made a declaration that the early release provisions relating to EDS prisoners were incompatible with Article 14 of the Convention.

B. Proceedings before the Supreme Court

15. The Supreme Court granted the applicant permission to appeal. On 28 November 2018, it dismissed the applicant's appeal by a majority of three justices, with Lady Hale and Lord Mance dissenting.

16. The leading judgment for the majority was given by Lady Black. Taking into account the Court's judgment in *Clift* (cited above), she concluded that the difference in the treatment of EDS prisoners in relation to early release was a difference within the scope of Article 14, being on the ground of "other status".

17. As regards the question whether the applicant was in an analogous situation to life or standard determinate sentence prisoners, Lady Black began by addressing the question whether determinate sentences – like life sentences – could be said to compromise two separate components, namely a period for punishment and deterrence and a further period based on risk. She considered that the Secretary of State was correct to differentiate between determinate and indeterminate sentences in this connection. She said:

> "133. Having reviewed the authorities, it seems to me fairly clear that the Strasbourg jurisprudence is against the two component analysis, so far as determinate sentences are concerned. Viewing the whole term as punitive would also be consistent with the generally applicable purposes of sentencing set out in section 142(1) of the 2003 Act [see paragraphs 31-32 below], and with the embargo on the sentencing judge having regard to the early release provisions when deciding what period of imprisonment to impose, save in particular defined circumstances."

18. That said, she accepted that as a matter of practice domestic criminal courts did see determinate sentences as having distinct punitive and risk-based elements. Even if it were correct that a sentence should not actually be analysed in this way, it remained the "stark fact" that some prisoners had to serve a greater proportion of their overall sentence before becoming eligible for release on licence than others. Notably, EDS prisoners had to

serve a greater proportion of their sentence than others before they could try to persuade the Parole Board that they no longer posed a risk. She continued:

> "135. ... Whatever the correct answer to the two component debate, this differential wait for the chance to approach the Parole Board demands attention ..."

19. She considered, however, that it was important to put the differential wait argument into proper context. Although the 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 had "an initial attraction", it was, she said, less compelling if the rest of the prisoners were not, in fact, in step with each other. She explained:

> "136. ... 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 SOPC prisoner 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)."

20. 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 [see paragraphs 52-54 below]. 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."

21. Recognising that there were valid arguments both ways as to whether the groups could be considered analogous, she 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 took the view that the applicant's comparison of EDS prisoners with those serving determinate terms was "less persuasive" than was the comparison with indeterminate sentence prisoners. She observed that the Secretary of State's "fundamental answer" to the claim was that there were different categories of sentence, tailored to the particular characteristics of the offenders and striking a balance between the interests of public protection and the interests of the individual prisoner. In the view of the Secretary of State, all EDS prisoners were dangerous and the legitimate aim was to protect the public by ensuring that they served a greater proportion of their custodial term than other categories of prisoners. She noted:

"150. ... This is comprehensible when the position of an EDS prisoner is compared with a standard determinate term prisoner, in relation to whom there is no equivalent requirement to find specifically that there is a significant risk of serious harm to the public through further specified offences. It works less easily in relation to indeterminate sentences. True it is that there is not a universal requirement for a finding of dangerousness, before the imposition of an indeterminate sentence, but, as I implied earlier, it is not a great leap from the conditions that have to be satisfied before the sentence can be passed to the conclusion that by far the majority of indeterminate sentence prisoners will pose a risk to the public. Nevertheless ..., in contrast to the release provisions in relation to an EDS, the release provisions in relation to indeterminate sentences must cater for prisoners who are not dangerous, and might be suitable for release sooner. Moreover, [counsel for the Secretary of State] invites us to

> consider each sentence as a whole, when considering justification, because it is artificial to compare release provisions only. Of crucial importance is the fact that the indeterminate sentence prisoner may never be released at all, whereas the EDS prisoner will be released at the end of his custodial term, even if he fails to satisfy the Parole Board on the question of risk, and also the difference in the duration of the licence in each case."

22. Lady Black accepted that, in general terms, the aim of the EDS provisions was legitimate. 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."

23. She 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. Lady Black considered that there was a "readier comparison" between an EDS and an indeterminate sentence than between a standard determinate term sentence and an EDS, but observed that they were "by no means a complete match", leaving aside the differences in parole eligibility. She continued:

> "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 ..."

24. 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 (see paragraph 21 above). However, she concluded that having looked at the matters again in the context of justification, and considered the complete picture, she had come to the view 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."

25. Lord Carnwath and Lord Hodge agreed that the appeal should be dismissed. Lord Carnwath took the view that the applicant did not have "other status". On the remaining questions, he agreed with the reasons given by Lady Black and Lord Hodge. Lord Hodge accepted that the applicant had "other status" but considered that he was not in an analogous situation to prisoners sentenced under a different sentencing regime and, for the same reasons, that any difference in treatment was justified. He noted in particular:

> "193. 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 [see paragraphs 52-54 below], which does not require a finding that the offender was dangerous, although it is likely that in most cases he will be ... 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))."

26. Lady Hale, dissenting, considered that the real question in the case was whether the difference in treatment could be justified as a proportionate means of achieving a legitimate aim. Protecting the public was undoubtedly a legitimate aim. As for proportionality, she expressed her view as follows:

> "216. ... The public will be better protected if [an EDS prisoner] is required to serve more of his sentence in prison and can only be released during the rest of his custodial term if the Parole Board determines that this will be safe. The criterion for imposing the sentence would therefore appear to justify the difference in treatment between an EDS prisoner and a prisoner serving a standard determinate term, even though their actual offences may be commensurate.
>
> 217. The same could be said of offenders serving a special custodial sentence for 'certain offenders of particular concern' (Criminal Justice Act 2003, section 236A). Here the criterion is not the dangerousness of the particular offender, but the dangerousness of the offence which he has committed ... These prisoners may be let out at half time, but only if the Parole Board decides that this will be safe. These prisoners have not been held to be dangerous in themselves in the same way that prisoners sentenced to an EDS have been held to be dangerous. Nevertheless, this comparison is getting closer to the bone, given the intrinsically dangerous nature of the offences listed in Schedule 18A (most of which have a terrorist connection).

218. The comparison with a discretionary life sentence is more difficult to understand. It is well-established that, in the absence of exceptional circumstances, the specified period which the prisoner must serve before he can be considered for release on licence should be fixed at half of the notional determinate sentence which he would have received for the offence had he not been subject to a life sentence because of his dangerousness ... Given that a discretionary life sentence prisoner is even more dangerous than an EDS prisoner, how can it be justified that the former can be considered for release on licence after serving half of what would have been an appropriate determinate sentence, whereas the latter must wait until he has served two thirds of the appropriate determinate sentence? The public's need for protection is likely to be greater in the case of the 'lifer' than in the case of the EDS prisoner. But in any event, neither can be released on licence until the Parole Board has determined that it will be safe to do so. The public is equally well protected in each case.

219. It is, of course, the case that there are ways in which the EDS prisoner is better off than the 'lifer'. He must be released on licence at the end of his appropriate custodial term, even if the Parole Board has not determined that this would be safe, whereas the 'lifer' must only be released if this is adjudged safe. Once released on licence, he can only be returned to prison during the period of his extended sentence, whereas the 'lifer' will remain on licence, and thus subject to return to prison, for the whole of his natural life. This is the essence of the 'package' element which was pressed on us as a justification for the difference in their early release regimes. The package should not be 'salami sliced' into its component parts for the purpose of deciding whether each difference in treatment can be justified.

220. In the end, however, it is easy to see how the additional disadvantages (from the prisoner's point of view) of a discretionary life sentence are justified by the considerations which led the court to impose the sentence in the first place. It is hard to see how, alone of all four types of prisoner considered here, it is thought necessary to insist that an EDS prisoner stays in prison for more than half the custodial term appropriate to the seriousness of his offending. One would have thought that, if anything, a discretionary life prisoner would be even less likely to be fit for release at the half way point. But the speed of rehabilitation is notoriously difficult to predict at the outset. That is why the decision is left to the Parole Board when the time comes to consider release. And the protection which the Parole Board offers to the public is the reason why it is not necessary, for that purpose, to insist that EDS prisoners spend a larger proportion of the appropriate term in prison."

27. Lord Mance, also dissenting, said:

"244. Applying similar reasoning to that of the ECtHR in *Clift,* Parliament could be taken to have considered that this risk [to members of the public of serious harm occasioned by the commission by the offender of further specified offences] was in the case of an EDS prisoner sufficiently significant (a) to require release on licence during the currency of the appropriate custodial term to depend on a Parole Board recommendation, (b) to require two-thirds of such term to have run, before the Parole Board considered whether to make such a recommendation and (c) to require an extended period on licence after expiry of the appropriate custodial term. In contrast, release on licence is, in the case of an ordinary determinate prisoner, automatic once he has served the 'requisite custodial period' consisting of half their nominal sentence: section 244. The Administrative Court ... was not persuaded that there was any justification for a distinction which necessarily assumes that EDS prisoners remain as a class a significant risk until the two-thirds point, depriving them of even the chance of demonstrating their safety for release on licence until that point, whereas all ordinary determinate prisoners are assumed to be safe for automatic release at the half way stage.

I see the force of the Administrative Court's view, but in the light of the ECtHR's approach in *Clift* and my conclusions regarding the comparison with indeterminate prisoners in the ensuing paragraphs, I do not base my judgment on it.

245. It is, on any view, even more difficult to understand the logic of an apparently more stringent regime for EDS prisoners, when compared with discretionary life prisoners, in circumstances where the offending was, by definition, not of such a seriousness as to attract a life sentence. The tariff period for a discretionary life prisoner is, barring exceptional circumstances, set at half the notional determinate period. Once that tariff period has expired, the life prisoner has a right to require the Secretary of State to refer his case to the Parole Board, and to be released on licence if the Parole Board is satisfied that such release is, in short, safe ...

246. A prisoner serving an EDS, therefore, is likely to be in a significantly worse position, as regards consideration by the Parole Board and release on licence, than a discretionary life prisoner, although the latter is likely to have committed a more serious, or no less serious, offence. It is true that in other respects a life prisoner is treated more severely: if the Parole Board is not satisfied as to the safety of his release, he may remain in prison indefinitely and, if he is released, he remains on licence and may be recalled throughout his life. But this is inherent in the nature of a discretionary life sentence, and, if anything, suggests that one would expect a more, rather than less, severe regime of review for release on licence to apply to life prisoners. It is also the case that some life prisoners may be less dangerous and safer at an earlier stage for release than some prisoners serving an EDS. But that is not the general position. None of these factors explains why life prisoners are in the great generality of cases likely to be eligible for consideration of their safety for release on licence by the Parole Board at a considerably earlier point than prisoners serving an EDS can hope for. Eligibility for consideration for release is merely the gateway to consideration by the Parole Board of safety for release on licence. It does not prejudge that question. No real explanation or justification has been given for a difference in treatment, which has important practical consequences for the prisoners affected and must seem a palpable anomaly."

28. He concluded that prisoners serving an EDS were in a significantly worse position as regards eligibility for consideration by the Parole Board and release on licence when compared with discretionary life prisoners, that no convincing explanation or justification for this difference had been shown and that section 246A(8)(a) of the 2003 Act (see paragraph 44 below) was therefore incompatible with Article 14 read with Article 5 of the Convention in so far as it required two-thirds of the relevant custodial period to have expired before any such eligibility arose.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. INTRODUCTION

29. At the time of the domestic proceedings in the present case, the provisions applicable to sentencing could be found in the Criminal Justice Act 2003 ("2003 Act"). The sentencing regime in England was subsequently consolidated by the Sentencing Act 2020, which repealed the sentencing provisions set out in the 2003 Act but did not change the sentences that could

be imposed. This judgment refers to the provisions of the 2003 Act under which the applicant was sentenced and which were referred to by the Supreme Court in the domestic proceedings in his case. Subsequent relevant amendments are also described.

30. The provisions concerning early release are set out in the 2003 Act. There have been a number of legislative amendments since the conclusion of the domestic proceedings in the applicant's case and these are set out briefly.

II. SENTENCING PURPOSES

31. The general purposes of sentencing adult offenders were set out in section 142(1) of the 2003 Act, which provided:

> "Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing–
>
> (a) the punishment of offenders,
>
> (b) the reduction of crime (including its reduction by deterrence),
>
> (c) the reform and rehabilitation of offenders,
>
> (d) the protection of the public, and
>
> (e) the making of reparation by offenders to persons affected by their offences."

32. These purposes did not apply to life sentences imposed under sections 224A (life sentence for second listed offence) or 225 (life sentence for serious offence) (see paragraphs 50-54 below).

33. When determining the custodial sentence in a particular case, the judge was not to take account of the early release provisions. However, the early release provisions were taken into account, in sentencing, in fulfilling the requirement of section 82A(3) of the Powers of Criminal Courts (Sentencing) Act 2000 when fixing the minimum term to be served in respect of a discretionary life sentence (see the opinion of Lady Black, § 107 of the Supreme Court's judgment delivered in the applicant's case).

III. DETERMINATE SENTENCES

34. Pursuant to section 152 of the 2003 Act, a discretionary determinate custodial sentence could only be imposed where the sentencing court was of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence could be justified for the offence. Under section 153, discretionary determinate sentences had to be for the shortest term commensurate with the seriousness of the offence.

A. Standard determinate sentences

35. For the purposes of this judgment, a standard determinate sentence is a sentence to a fixed term of imprisonment other than an EDS or SOPC (see paragraphs 40-47 below).

36. Pursuant to section 244 of the 2003 Act, at the relevant time the majority of standard determinate sentence prisoners were entitled to be released on licence once they had served one half of their sentence ("the requisite custodial period"). After release, these prisoners continue to serve their sentence until the end of the licence period and are liable to be recalled to custody if they failed to comply with their licence conditions.

37. Section 246 provides for home detention curfew ("HDC") for standard determinate sentence prisoners sentenced to less than four years' imprisonment. This enables release on licence at any time during the period of 135 days ending with the day on which the prisoner would have served the requisite custodial period. The conditions of the licence include a curfew (section 250).

38. Section 260 of the 2003 Act provides for the early removal from custody ("ERC") of foreign national determinate sentence prisoners for the purposes of deportation. At the relevant time, these prisoners could be removed from custody up to 270 days prior to their automatic release date.

39. Since 2020, a number of legislative amendments have been introduced in respect of determinate sentences. Specific arrangements were put in place for terrorist offenders, first under the Terrorist Offenders (Restriction of Early Release) Act 2020, introducing a new section 247A into the 2003 Act, and subsequently by the Counter-Terrorism and Sentencing Act 2021. The effect of these changes is that offenders who have committed a relevant terrorist offence are not entitled to automatic early release. Some will become eligible for release upon a recommendation of the Parole Board at the two-thirds point of their sentence but the prospect of early release has ended completely for some prisoners convicted of serious terrorism offences. New arrangements have also been put in place for certain serious violent and sexual offenders, first under The Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 and subsequently by the insertion of a new section 244ZA into the 2003 Act by the Police, Crime, Sentencing and Courts Act 2022 ("the 2022 Act"). The overall effect of these changes is to require a number of such prisoners on whom standard determinate sentences have been imposed to serve two thirds of their sentences before becoming entitled to release. Moreover, a new section 244ZB of the 2003 Act allows the Secretary of State in certain circumstances to refer to the Parole Board the case of a prisoner who would otherwise have been entitled to early release, thus rendering early release subject to the Parole Board's findings as to the risk posed by that prisoner upon release.

B. Extended determinate sentences ("EDS" – section 226A)

40. Section 226A provided:

> "(1) This section applies where–
>
> (a) a person aged 18 or over is convicted of a specified offence (whether the offence was committed before or after this section comes into force),
>
> (b) The court considers 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,
>
> (c) The court is not required by section 224A or 225(2) to impose a sentence of imprisonment for life, and
>
> (d) Condition A or B is met."

41. A "specified offence" was a violent or sexual offence listed in Schedule 15 to the 2003 Act. Condition A was that, at the time the offence was committed, the offender had been convicted of an offence listed in Schedule 15B (offences generally of a violent or sexual nature). Condition B was that, if the court were to impose an extended sentence of imprisonment, the term that it would specify as the appropriate custodial term would be at least four years.

42. An EDS comprises two elements: (i) the appropriate custodial term, and (ii) a licence extension "for a period 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" (section 226A(5)-(7)). The appropriate custodial term was defined as the length of the determinate sentence of imprisonment that would have been imposed but for the extended sentence (see section 226A(6) and paragraph 34 above). The licence extension could be for a period of up to five years in the case of a specified violent offence and up to eight years in the case of a specified sexual offence (section 226A(8)).

43. The Court of Appeal in *Attorney General's Reference* (No 27 of 2013; *R v. Burinskas*) ([2014] EWCA Crim 334) explained:

> "26. As is plain from the terms of the legislation, an extended sentence does not involve the imposition of a custodial term longer than is commensurate with the seriousness of the offence. The extension is to the period of licence ... Inherent in those provisions is the principle that it is the extended period of licence that provides protection to the public."

44. The applicable early release provisions are set out in section 246A of the 2003 Act. In most cases, the Secretary of State is required to refer the prisoner to the Parole Board once he has served the requisite custodial period, which is two-thirds of the appropriate custodial term (section 246A(8)(a)). The Parole Board may only direct release if satisfied that imprisonment is no longer necessary for the protection of the public. If the Parole Board does not

direct release prior to the expiry of the appropriate custodial term, then the Secretary of State must release the prisoner at that point.

C. Special custodial sentences for certain offenders of particular concern ("SOPC" – section 236A)

45. Section 236A entered into force in 2015, after the applicant had been sentenced. It provided for the imposition of a SOPC on an adult offender convicted of an offence listed in Schedule 18A (which listed a number of terrorism offences and the offences of rape of a child under the age of 13 and assault of a child under 13 by penetration) if the court did not impose a life sentence or an EDS.

46. An SOPC has two elements: the appropriate custodial term and a further period of one year for which the offender is subject to a licence. The aggregate of these two elements must not exceed the term that, at the time the offence was committed, was the maximum term permitted for the offence. In the context of an SOPC, the "appropriate custodial term" was the term that, in the opinion of the court, ensured that the sentence was appropriate.

47. The release arrangements for SOPC prisoners are set out in section 244A of the 2003 Act. At the time of the domestic proceedings, an SOPC prisoner could apply to the Parole Board for discretionary release once he had served one half of his appropriate custodial term. The Secretary of State was required to release him once he has served the whole of the appropriate custodial term. These provisions were subsequently amended by the 2022 Act, which notably requires prisoners sentenced after the entry into force of that Act to have served two-thirds of the custodial term before eligibility for release arises.

D. Recall to prison after release

48. Section 254 of the 2003 Act confers a general power on the Secretary of State to revoke the licence of a determinate sentence prisoner and to recall the licensee to prison. Pursuant to section 255A, in the case of most standard determinate sentence and SOPC prisoners, the Secretary of State must consider whether the person is suitable for automatic release. A prisoner is suitable to be automatically released if the Secretary of State is satisfied that he or she will not present a risk of serious harm to members of the public if released at the end of the automatic release period.

49. EDS prisoners and, pursuant to recent legislative amendments, serious terrorism prisoners as well as those whose case was previously referred to the Parole Board under section 244ZB (see paragraph 39 *in fine* above) are not eligible to be considered for automatic release after recall. Under section 255C of the 2003 Act, the Secretary of State has a discretion to release recalled EDS prisoners and other recalled determinate sentence prisoners not

suitable for automatic release. Where that discretion is not exercised, they must refer the case of the prisoner to the Parole Board, which has the power to make a binding release direction if satisfied as to the risk posed by the prisoner upon release.

IV. DISCRETIONARY INDETERMINATE SENTENCES

A. Life sentence for serious offences (section 225)

50. Pursuant to section 225 of the 2003 Act, an offender convicted of a "serious offence" had to be sentenced to a life sentence if: the court was of the opinion that there was a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences; the offence of which the offender been convicted carried a maximum sentence of life imprisonment; and the court considered that the seriousness of the offence, or of the offence and one or more offences associated with it, was such as to justify the imposition of a life sentence. A "serious offence" was one specified in Schedule 15 to the 2003 Act (see paragraph 41 above) and punishable by imprisonment for life or ten years or more.

51. In *Burinskas* (cited above), the Court of Appeal explained:

> "22. In our judgment ... the question in s.225(2)(b) as to whether the seriousness of the offence (or of the offence and one or more offences associated with it) is such as to justify a life sentence requires consideration of:–
>
> i) The seriousness of the offence itself, on its own or with other offences associated with it in accordance with the provisions of s.143(1). This is always a matter for the judgment of the court.
>
> ii) The defendant's previous convictions (in accordance with s.143(2)).
>
> iii) The level of danger to the public posed by the defendant and whether there is a reliable estimate of the length of time he will remain a danger.
>
> iv) The available alternative sentences."

B. Life sentence for a second listed offence (section 224A)

52. Section 224A of the 2003 Act applied to adult offenders convicted of an offence listed in Part 1 of Schedule 15B (see paragraph 41 above) where the "sentence condition" and the "previous offence condition" were met. These two conditions were set out in section 224A as follows:

> "(3) The sentence condition is that, but for this section, the court would, in compliance with sections 152(2) and 153(2), impose a sentence of imprisonment for 10 years or more, disregarding any extension period imposed under section 226A.
>
> (4) The previous offence condition is that–
>
> (a) at the time the offence was committed, the offender had been convicted of an offence listed in Schedule 15B ('the previous offence'), and

(b) a relevant life sentence or a relevant sentence of imprisonment or detention for a determinate period was imposed on the offender for the previous offence."

53. A sentence was relevant if it was for ten years or more or, in the case of a life sentence, had a minimum term of at least five years.

54. Where these conditions were met, the court was required to impose a sentence of imprisonment for life unless the court was of the opinion that there were particular circumstances which related to the offence, to the previous offence or to the offender and would make it unjust to impose a life sentence in all the circumstances.

C. Other discretionary life sentences

55. A life sentence could also be imposed where the offence had a maximum penalty of life imprisonment. In *Attorney General's Reference (No. 32 of 1996)* ([1997] 1 Cr App R(S) 251), Lord Bingham explained that a person should only be given a life sentence if they had been convicted of a very serious offence and there were good grounds for believing that they might remain a serious danger to the public for a period of time that could not be reliably estimated at the time of sentencing.

D. Minimum term and release provisions

56. The minimum term and release provisions for life sentences were explained in detail by Lady Black in the judgment of the Supreme Court in the applicant's case:

"103. In the case of discretionary life sentences, section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 ... requires the court to address the question of early release. There is again provision for the court to disapply the early release provisions in light of the seriousness of the offence or offences. Otherwise, the court is required to specify the part of the sentence which has to be served before the early release provisions apply. The part of the sentence specified shall be 'such as the court considers appropriate' taking into account the seriousness of the offence or offences, provisions for crediting certain periods on remand, and (section 82A(3)(c)) 'the early release provisions as compared with section 244(1) of the Criminal Justice Act 2003'. The Court of Appeal explained, in *Burinskas*, how section 82A works:

'33. The effect of section 82A is to require the sentencing judge to identify the sentence that would have been appropriate had a life sentence not been justified and to reduce that notional sentence to take account of the fact that had a determinate sentence been passed the offender would have been entitled to early release.'

104. Normally, section 82A(3)(c) will result in the specified part of the sentence being equivalent to one half of the determinate sentence that would have been imposed had a life sentence not been justified. This is not, however, an invariable rule ...

105. Section 28 of the Crime (Sentences) Act 1997 governs the release of life prisoners where the court has made a determination of the minimum term that is to be served ... Once he has served the minimum term, the prisoner may require the Secretary of State to refer his case to the Parole Board, and the Parole Board directs release if

satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."

57. The 2022 Act has amended the method for calculating the minimum term to be served by those sentenced to discretionary life imprisonment. The starting point for setting the minimum term in most cases is now the two-thirds point of the notional determinate sentence.

E. Recall to prison after release

58. In cases where a life sentence prisoner is released from custody pursuant to section 28 of the Crime (Sentences) Act 1997 ("the 1997 Act"), the sentence itself continues in the form of a "life licence" pursuant to section 31(1) of the 1997 Act. The recall provisions are contained in section 32 of the 1997 Act, which confers a discretion on the Secretary of State to revoke the licence of any prisoner released under section 28. Such a prisoner is entitled to be informed of the reasons for his recall, to make representations in writing and to have their case referred to the Parole Board which has the power to make a binding direction to release.

THE LAW

ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, TAKEN TOGETHER WITH ARTICLE 5

59. The applicant complained that as an EDS prisoner he had been treated differently from standard determinate and discretionary indeterminate sentence prisoners as regards eligibility for early release. He contended that the difference in treatment was in breach of Article 14 taken together with Article 5 of the Convention.

60. In so far as relevant, these provisions read as follows:

Article 5

"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 ..."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] 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."

A. Admissibility

61. The Government did not contest the admissibility of the application.

62. As the question of applicability is an issue of the Court's jurisdiction *ratione materiae* (see *Denisov v. Ukraine* [GC], no. 76639/11, § 93, 25 September 2018), the Court will examine at the admissibility stage whether the provisions invoked by the applicant are applicable in the present case. In connection with this, it recalls that Article 14 of the Convention complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Article of the Convention, for which the State has voluntarily decided to provide (see *Molla Sali v. Greece* [GC], no. 20452/14, § 123, 19 December 2018). It is therefore necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Convention Articles (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 63, ECHR 2010; and *Konstantin Markin v. Russia* [GC], no. 30078/06, § 124, ECHR 2012 (extracts)).

63. It is clear, and it was not disputed by the Government, that the provisions concerning early release from detention fall within the ambit of Article 5 of the Convention (see *Clift v. the United Kingdom*, no. 7205/07, § 42, 13 July 2010). Article 14 is accordingly applicable and the application is compatible *ratione materiae* with the Convention.

64. The Court further notes that the application is not manifestly ill-founded or inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

65. The applicant explained that, as an EDS prisoner, he was entitled to apply for early release once he had served two thirds of his "appropriate custodial term", which meant after fourteen years. He was entitled to automatic release at the end of the "appropriate custodial term", namely after twenty-one years' imprisonment. 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 in which case 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. This difference in treatment was, in his submission, discriminatory and could not be justified.

(i) Whether there was other status

66. The applicant argued that he enjoyed "other status" for the purposes of his complaint. He pointed out that the domestic courts had accepted that this was the case in view of this Court's judgment in *Clift* (cited above). He did not accept the arguments of the Government seeking to limit the scope of "other status" so as to exclude it in his case (see paragraphs 78-81 below).

(ii) Whether the applicant was in an analogous position to others treated more favourably

67. The applicant further contended that he was in an analogous situation to life sentence and other determinate sentence prisoners as regards early release provisions. He highlighted that the Administrative Court had found this to be the case, as had the then President and Deputy President of the Supreme Court (see paragraphs 11-12 and 26-27 above).

68. Citing *D.H. and Others v. the Czech Republic* ([GC], no. 57325/00, § 175, ECHR 2007-IV) and *Petrov v. Bulgaria* (no. 15197/02, § 53, 22 May 2008), he underlined that "analogous" did not mean identical in every way: what mattered was whether there was a difference in the treatment of people in "relevantly" or "substantially" similar situations. The differences between shorter-term or life prisoners on the one hand and the applicant in *Clift* on the other had not precluded the application of Article 14 in that case. The Court there had noted that the complaint concerned provisions regulating the early release of prisoners and that the decision whether to allow early release was a risk assessment exercise. It had considered that there was no distinction to be drawn between long-term prisoners serving less than fifteen year, long-term prisoners serving fifteen years or more and life prisoners and that the methods of assessing risk and the means of addressing any risk identified were in principle the same for all categories of prisoners. This was, in the applicant' submission, relevant because it meant all prisoners had the same interests in the procedures adopted. He contended that *Khamtokhu and Aksenchik v. Russia* ([GC], nos. 60367/08 and 961/11, § 67, 24 January 2017) reflected this approach.

69. The applicant argued that the majority of the Supreme Court had erred in focussing on a minute analysis of the circumstances of the relevant sentences and in failing to ask whether the various types of prisoners had similar interests in the subject matter of the claim. He relied on Lady Hale's minority opinion, where she expressed the view that for all prisoners serving a sentence of imprisonment – whatever the category of sentence – the most important question in their lives was "When will I get out?" (see paragraph 26

above). The fact that each group of prisoners – discretionary life sentence, standard determinate sentence and EDS – was subject to a different "package" of answers to this question did not mean that their situations were not analogous. All three groups of prisoners shared the same interest in being released from custody. Moreover, the process of release was substantially similar.

70. The majority of the Supreme Court had also fallen into error in treating the issue of whether the three types of sentence could be split into two components, a punitive part followed by a preventive part, as being determinative of the question of analogous situation. What mattered was that the differences between them as regards early release had significant advantages or disadvantages for the relevant prisoners which, once identified, called for justification

71. There were, in the applicant's submission, three further problems with the Government's case. First, it was clear that determinate and indeterminate sentences both involved a punitive terms and a period where further detention could be justified by reasons of risk alone. Release was automatic at the halfway stage for the majority of determinate sentences. Once released, standard determinate sentence and EDS prisoners could be recalled to custody where risk required it. Once recalled, the same public protection test applied when considering the further detention of standard determinate sentence and EDS prisoners. The public protection test was the same as the test applied to the release of post-minimum term indeterminate sentence prisoners. The sentencing objectives in section 142 of the 2003 Act (see paragraph 31 above) included "the protection of the public", which purpose was equal in importance to punishment and deterrence.

72. Second, excluding mandatory life sentences and other exceptional circumstances, a prisoner served one half of the actual or notional determinate term in all cases except EDS prisoners. HDC (see paragraph 37 above) was reserved for the least serious type of offences and was a form of administrative release that did not assist the arguments of principle. ERC (see paragraph 38 above) was a measure to facilitate immigration control and arose only because of an offender's immigration status. SOPC prisoners were also in practice eligible for release at the halfway point of the notional determinate term, since the "appropriate custodial term" as defined in section 236A(3) of the 2003 Act was the term that would have been imposed had there been no licence extension. While indeterminate sentence and SOPC prisoners might not actually be released at the halfway point, because their release depended on the decision of the Parole Board, this did not undermine the applicant's central argument since from that point onward they were detained on the basis of risk.

73. Finally, he argued that it was often better to focus on the justification for the measure and in this case there was no justification for the difference in treatment.

(iii) Whether there was objective justification for the difference in treatment

74. Citing *Clift* (cited above, § 73), the applicant emphasised that where liberty was in issue, there was a need for particularly close scrutiny of the justification pleaded. The Government were wrong to focus on perceived differences in the overall sentence regimes between the three categories of prisoner to justify the differential treatment. No real explanation or justification had been given for the difference in treatment as regards the release eligibility date, which was the "key question".

75. According to the applicant, it could be assumed that the highest risk prisoners or those who had committed the most serious offences were serving life sentences. Lower risk prisoners ought not to be treated worse than higher risk prisoners in relation to early release. Prisoners who did not deserve the most draconian sentences should not be treated worse than those who did. While risk might justify a harsher release regime for all prisoners or for those who were highest risk, it could not justify a particularly harsh regime for prisoners who were not the highest risk. In any event, an EDS prisoner would only be released into the community if the Parole Board approved their release, and release would be on licence until the end of their extended licence period.

76. The applicant also reiterated in this context that the approach to life sentences implied that the period of custody required to penalise a prisoner serving a life sentence was half of the equivalent determinate sentence. An EDS prisoner was automatically held beyond that point despite the fact that there was no reason why they should receive a greater penalty and there was no basis for concluding that the risk they posed at the halfway point would necessarily be sufficient to justify continued detention. As a result, there could be no basis for the differential treatment.

77. The applicant concluded that reliance upon the "overall package" (see the Government's argument summarised in paragraph 85 below) was unpersuasive. The reality was that from a prisoner's point of view obtaining his or her liberty was key. Referring to the judgment of the Administrative Court (see paragraph 12 above), the applicant argued that there was an obvious unfairness if a prisoner remained imprisoned while his co-defendant was released despite committing the same offence, unless risk justified the differential treatment. Risk was for the Parole Board to assess. Prisoners serving an EDS and those serving a standard determinate sentence were equally culpable. There was therefore no basis for different minimum periods of custody. While an EDS prisoner posed a high risk, this could be catered for by the role of the Parole Board in determining whether continued detention was necessary.

(b) The Government

(i) Whether there was other status

78. The Government submitted that an individual's serving an EDS did not qualify as "other status". They argued, first, that the concept of "other status" had to be understood as encompassing characteristics that were personal to or identifiable with individuals in a sense broadly analogous to the specific grounds, consistently with the *ejusdem generis* principle of interpretation. The characteristics had to be connected with what the person was, rather than what he was doing or what was being done to him.

79. Second, turning to the facts of the case, the application of the EDS regime to the applicant was based on the gravity of his offence and the risk posed to the community. This could not be described as an identifiable characteristic in any sense that was coherent with the general principles underlying Article 14. To hold otherwise was to elevate "other status" to a residual catch-all category that covered differential treatment on almost any ground whatsoever, in contravention of the clear statements of the Court in *Molli Sali* (cited above, § 134) that "not every difference in treatment will amount to a violation of Article 14".

80. Third, the Government invited the Court to reconsider its judgment in *Clift* (cited above) and conclude that it went too far. Alternatively, they argued that *Clift* was distinguishable since it was concerned with classification by length of sentence, and not by gravity of the offending, as in the present case. They submitted that the present case fell squarely within *Gerger v. Turkey* ([GC], no. 24919/94, § 69, 8 July 1999).

81. Finally, the Government argued that the treatment of which the applicant complained, in contrast with the position in *Clift*, did not exist independently of the characteristic upon which he had based his complaint of discrimination. In light of the nature of his offences, the applicant had received an EDS, and the release conditions flowed from that status. An act could not be discriminatory with respect to a particular status if that act was itself the only basis for the existence of the status.

(ii) Whether the applicant was in an analogous position to others treated more favourably

82. The Government submitted the applicant was not in an analogous position to prisoners serving indeterminate sentences or prisoners serving standard determinate sentences. First, the EDS was a *sui generis* custodial sentence designed to address a particular combination of offending and risk. No meaningful comparison could therefore be drawn between the EDS and other sentences of imprisonment addressing different offending and different levels of risk. They relied on Lady Black's comment in this respect (see paragraph 20 above).

83. Second, as regards the comparison with determinate sentence prisoners, the key distinction was that all EDS prisoners had been found to be dangerous. The EDS, SOPC and standard determinate sentences were different types of sentence for different types of offenders, with early release being either automatic or discretionary, arising at the halfway point or otherwise, with or without input from the Parole Board, based on the characteristics of the offenders to whom they applied. The need for a finding of dangerousness to impose an EDS provided a clear basis for distinguishing EDS prisoners from all other determinate sentence prisoners such that no proper comparison could be drawn between them. Moreover, the whole of the custodial term in a determinate sentence was imposed for the purpose of punishment and deterrence and was therefore covered by Article 5 § 1 (a) of the Convention.

84. Third, there were a number of distinguishing features in discretionary life sentences which prevented any meaningful analogy being drawn with EDS. Life sentences were the most severe sentence that a court could impose and were imposed only in cases involving the most serious offending behaviour. The time spent in custody was indeterminate: life prisoners were never entitled to automatic release and there was therefore a very real possibility that they would spent significantly longer than their minimum term in detention. Even after release, as a result of the life licence the offender remained liable to be detained for the rest of his life. In addition, EDS prisoners were eligible to apply for release before the end of the punitive element of their sentence whereas life sentence prisoners were only eligible to apply for release once the punitive element of their sentence had been served. Furthermore, not all discretionary life sentence prisoners were dangerous: while the criteria for imposing such a sentence sometimes required a finding of dangerousness, this was not always the case. The Government referred, on this point, to section 224A of the 2003 Act (see paragraphs 52-54 above).

85. Fourth, there was no absolute rule that release was at the halfway point of a sentence. It was therefore not the case that the EDS constituted an exception to a general rule. Relying on Lady Black's comments (see paragraph 19 above), the Government argued that each type of sentence had release arrangements tailored to meet the requirements of the particular sentence, justified by reference to the particular characteristics of the offenders on whom the sentence was imposed. The early release provisions under each regime had to be regarded as part of a finely tailored sentencing package making provision for a range of combinations of measures to accommodate different sentencing considerations. It was not possible to make a meaningful comparison between sentencing regimes on the simple basis of eligibility to apply for early release.

86. Fifth, the present circumstances were clearly distinguishable from the case of *Clift*. The complaint here was not about relevantly similar release

processes being applied differently. It was about the operation of different types of sentence and whether factors that justified the imposition of a particular sentence also justified the particular release arrangements that formed part of the administration of that sentence. In essence, the applicant's complaint was that prisoners with different characteristics serving different types of sentence had different release arrangements. There was no principled basis for alleging discrimination in these circumstances.

87. Sixth, the fact that all prisoners had a shared interest in being released from custody did not in itself place them in relevantly or sufficiently similar situations for the purposes of Article 14. The logic of this argument would mean that an individual detained under mental health or immigration legislation would be analogously situated to an EDS prisoner simply on the basis that they shared an interest in being released from detention.

(iii) Whether there was objective justification for the difference in treatment

88. The Government underlined that Contracting States enjoyed a wide margin of appreciation in the context of prisoner and penal policy. They submitted that the differences in treatment between EDS prisoners and determinate and indeterminate sentence prisoners were objectively justified by the particular characteristics of the offenders who met the criteria for the imposition of an EDS, namely the requisite finding of dangerousness. This placed them in a different category to prisoners serving all other types of sentence. The policy choices made by Parliament with respect to the release arrangements for EDS sentences fell well within the discretion afforded to Contracting States to strike a balance between the interests of public protection and the interests of the individual prisoner for a number of reasons.

89. First, the early release provisions had to be considered as part of the broader sentencing regime and the package of measures applying to different categories of offender, rather than being considered in isolation. The Government referred, on this point, to the opinions of Lady Black and Lord Hodge summarised in relevant part at paragraphs 23-25 above.

90. The difference in release provisions between EDS and discretionary life sentence prisoners was a corollary of the composite packages tailored to each category of offender. The applicant's submission that prisoners who did not deserve the most draconian sentences should not be treated worse than those who did (see paragraph 75 above) misrepresented the overall character of each sentencing regime. It failed to take account of the fact that on any objective view a life sentence was a more serious sentence than an EDS since it was of an indefinite duration and the prisoner would if released be subject to a life licence, and therefore at risk of detention, for the remainder of his life. EDS prisoners, on the other hand, would be automatically released at the end of their appropriate custodial term. The two-thirds release point allowed prisoners who could show that they no longer posed a risk to the public to be released early, while the later release point provided additional reassurance

in circumstances where, unlike life sentence prisoners, the EDS licence was for a finite period. Moreover, the release provisions had to reflect the fact that some indeterminate sentence prisoners had not been found to be dangerous. Parliament had therefore struck a balance between managing the risk posed by many dangerous life sentence prisoners while ensuring that the release provisions were also appropriate for lower risk lifers.

91. Similarly, the dangerousness of EDS prisoners justified the difference in treatment between EDS prisoners and other determinate sentence prisoners. The EDS release provisions protected the public from dangerous offenders by allowing for EDS offenders to be kept in custody for a longer proportion of the penalty part of their sentence than non-dangerous offenders; incorporating a longer licence period for preventative purposes; and providing prisoners with more time in which to engage in work to address their offending behaviour so as to provide greater opportunity to reduce the risk that they posed to the community. Parliament was entitled to make legislative choices about how best to strike a balance between the interests of public protection and the interests of the individual prisoner. It was not unfair to require dangerous offenders to serve a greater proportion of their sentence in custody for the purpose of public protection.

92. Second, the present case could be distinguished from *Clift* (cited above) on two bases. The first point of distinction was that the differences in treatment in the present case were justified by the risk that EDS prisoners posed as compared to other prisoners. The second point of distinction was that the early release provisions in this case achieved the legitimate aim pursued, namely protecting the public, by providing for EDS prisoners to serve a greater proportion of their custodial term than other categories of prisoner that might include prisoners who were not dangerous.

93. Third and in any event, for the reasons identified as regards the question of analogous situation (see paragraphs 82-87 above), EDS prisoners were not in a relevantly similar position to lifers and other determinate sentence prisoners at the point of sentence. If they had been, then they would have received the same sentence. The very factors that justified the imposition of the EDS – dangerousness and ineligibility for the other sentences – justified the differences in the release arrangements in respect of the three types of sentences.

2. The Court's assessment

(a) General principles

94. 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*, cited above, § 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*, cited above, § 66).

95. Furthermore, only differences in treatment between the groups based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14. The words "other status" have generally been given a wide meaning in the Court's case-law and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent (see *Molla Sali*, cited above, § 134, and the authorities cited therein).

96. Once a difference in treatment has been demonstrated, the burden is on the Government 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. 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*, cited above, §§ 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*, cited above, § 73).

(b) Application of the general principles to the facts of the case

97. The Court found that the applicant prisoner in *Clift* (cited above, § 63) enjoyed "other status" for the purposes of Article 14. Having regard to that judgment, the Supreme Court accepted that the applicant in the present case had "other status" (see paragraphs 16 and 25-27 above). The Government have advanced a number of arguments challenging that finding and invite the Court to distinguish or depart from *Clift* (see paragraphs 78-81 above). However, in view of its conclusions below, the Court considers it unnecessary to address each of these arguments and is prepared to proceed on the basis that the present applicant enjoys "other status" in respect of his complaint.

98. As the Court explained (see paragraph 94 above), the applicant 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 applicant 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 (see paragraph 59 above).

99. The Court observes at the outset that the domestic legal provisions set out in paragraphs 34-58 above demonstrate that the arrangements for

sentencing and early release in England at the relevant time were complex. It notes the assessment of Lady Black in the Supreme Court 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" (see paragraph 20 above and see also the opinion of Lord Hodge summarised at paragraph 25 above). The Court is satisfied that the different sentences seek to cater for different levels of offending and risk in different ways.

100. The applicant contended that notwithstanding the differences in the applicable provisions, for the purposes of eligibility for release the different groups were in an analogous position. He relied on the Court's findings in *Clift* and *Khamtokhu and Aksenchik* (both cited above – see paragraph 68).

101. The Court notes that in *Clift*, it was concerned with the specific question of the actual assessment of the risk posed by a prisoner who was eligible for early release in the context of a requirement for a small group of prisoners to secure the approval of the Secretary of State following a recommendation to release from the Parole Board (see *Clift*, cited above, §§ 67-68 and 77). The Court held that "the methods of assessing risk and the means of addressing any risk identified are in principle the same for all categories of prisoners" (see § 67 *in fine*). For this reason, it found the applicant in *Clift* to be in an analogous position to the other groups of prisoners identified in that case.

102. By contrast, the present case concerns the point in the applicant's sentence at which he will become eligible to seek early release. This is a question of an entirely different nature and it is plainly not covered by the Court's comments on risk in *Clift*, since the Court there expressly limited its conclusions to "the assessment of the risk posed by a prisoner eligible for early release" (see *Clift*, cited above, § 67). Whereas the question whether a person eligible for early release posed a risk was, under the applicable framework in England, a purely factual one on which the length of the offender's initial sentence could have no bearing, the question whether and when a person ought to be eligible for early release at all is not. Its answer may legitimately depend on policy as well as factual considerations. The nature of the conviction and the sentence imposed may be relevant considerations. It cannot be said that the criteria for determining eligibility for early release are, or should be, in principle the same for all categories of prisoner (compare *Clift*, cited above, § 67 *in fine*, summarised at paragraph 101 above). On the contrary, the Government's argument that eligibility for early release should be tailored to dangerousness of particular offenders and the seriousness of their offences (see paragraph 85 above) is compelling.

103. Similarly, the Court's judgment in *Khamtokhu and Aksenchik* (cited above, § 67) does not assist the applicant. There, it was not disputed that the

applicants were in an identical situation to the comparator groups invoked but for the sex and age characteristics upon which they based their complaints of discrimination. The Court found that the applicants were in an analogous situation to all other offenders who had been convicted of the same or comparable offences, for the purposes of their complaint that only men over eighteen and under sixty-five could be given a life sentence. However, this cannot be seen as authority for the more general statement that all offenders convicted of the same or comparable offences must always be considered to be in an analogous situation in respect of any complaint they may make. As explained in paragraphs 94 and 98 above, the similarity of the situations must be assessed from the perspective of the nature of the complaint made.

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 in paragraph 102 above, 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 (see paragraph 99 above) 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.

106. In any event, for similar reasons the difference in treatment between the different groups of prisoners as regards eligibility for early release was objectively justified. 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 (see paragraph 99 above). The Court accepts that this aim is a legitimate one.

107. Furthermore, 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. The applicant's argument was, essentially, that there was a lack of coherence in the specific details of the different regimes in so far as they made provision for eligibility for early release. The Court accepts that the serious offending of EDS prisoners coupled with the risk posed by them provided a justification for the more stringent provisions applied to them as regards early release when compared to standard determinate sentence prisoners. It is true that 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 (see paragraph 56 above). 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. The overall arrangements in respect of the standard determinate sentence, EDS and discretionary life sentence can therefore be said to have corresponded to the scale of seriousness of each sentence to which the applicant referred (see paragraph 75 above). The Court acknowledges the comments made in this respect by the Administrative Court and by Lady Hale and Lord Mance in the Supreme Court (see paragraphs 13-14, 26 and 27 above). However, the Court considers that these issues relate to policy considerations best resolved by the authorities of the respondent State.

108. For these reasons, it cannot be said that, at the relevant time, the provisions applicable to the early release of EDS prisoners fell outside the wide margin of appreciation enjoyed by the Contracting States in matters of prisoners and penal policy (see paragraph 96 above).

109. Accordingly, there has been no violation of Article 14 of the Convention taken together with Article 5.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 14 of the Convention, taken in conjunction with Article 5.

Done in English, and notified in writing on 31 October 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti Registrar	Gabriele Kucsko-Stadlmayer President