Case No. CO/1855/2014

Neutral Citation Number: [2015] EWHC 782 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Tuesday, 3 February 2015

B e f o r e:
LORD JUSTICE LAWS

MR JUSTICE WILLIAM DAVIS

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Between:

THE QUEEN ON THE APPLICATION OF ABEDIN **Claimant**

v

SECRETARY OF STATE FOR JUSTICE **Defendant**

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Mr H Southey QC and **Mr J Bunting** (instructed by Birnberg Peirce) appeared on behalf of the

Claimant

Mr S Grodzinski (instructed by the Treasury Solicitors) appeared on behalf of the **Defendant**

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J U D G M E N T (Approved)

LORD JUSTICE LAWS:

1. This is an application for relief by way of judicial review following permission granted by Bean J (as he then was) on 17 June 2014. The claimant is a severing prisoner, having been sentenced to 20 years' imprisonment on 27 February 2002. He was released on licence in August 2012 but is said to have broken his licence conditions and was recalled to custody in February 2013. His complaint is as to the effect in these circumstances of section 50A of the Criminal Justice Act 1991 (which came into force on 14 July 2008) and subsequent provisions contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). Their effect is that the claimant's automatic release date is now at the end of the full term of his sentence whereas at the time he was sentenced in 2002 his automatic release date would have been upon the expiry of three quarters of his sentence, that is to say 5 years earlier. I shall say a little more about the legislative provisions shortly. This result, it is said, involves a violation of Articles 5 and 7 of the European Convention on Human Rights and cannot stand with the decision of the European Court of Human Rights in Del Rio Prada v Spain (2014) 58 EHRR 37.
2. The offence for which the claimant was sentenced at the Birmingham Crown Court on 27 February 2002 was doing an act with intent to cause explosions likely to endanger life, for which the maximum sentence is imprisonment for life prescribed by section 3 of the Explosive Substances Act 1883. He was released on licence on 14 August 2012. When on licence he is said to have used a laptop computer and then "forensically wiped" its contents. This is said to have been a breach of a condition of his licence which prohibited him from using a computer. His licence was revoked. He was recalled to prison under section 254 of the Criminal Justice Act 2003. He brought judicial review proceedings to challenge his recall but that application was dismissed by Collins J on 29 January 2014 (see [2014] EWHC 78 (Admin)). The claimant's recall was referred to the Parole Board pursuant to section 254 and on 31 October 2014, as I understand it after earlier hearings, the Parole Board decided that he was not suitable to be released again. His sentence and licence expiry date is in November 2020.
3. I turn to the legislation. The statutory picture is complex because there have been successive legislative changes. For the purposes of this application the following summary suffices. The claimant was sentenced under provisions contained in the Criminal Justice Act 1991 as amended by the Crime and Disorder Act 1998. By force of section 33(5) of the 1991 Act he was classed as a long-term prisoner. As such he might be released on licence at the discretion of the Secretary of State on the recommendation of the Parole Board at the halfway point in his licence (section 35(1)). He would be entitled to be released at the three-quarter point if he had been released earlier and then recalled to custody (see section 33(3)). That is the especially material provision in the circumstances of this case operative at the time he was sentenced.
4. On 4 April 2005 sections 33 and 35 of the Criminal Justice Act 1991 were repealed by Part 7 of Schedule 37 to the Criminal Justice Act 2003 subject to transitional and saving provisions. However, the earlier regime of section 33 continued in force as respects the claimant because his sentence had been imposed for an offence committed before 4 April 2005. Any recall of

the claimant if he were released on licence after that date would be governed, as indeed it proved to be, by section 254 of the 2003 Act.

5. Section 33 of the Criminal Justice Act 1991, which as I have said entitled the claimant on the face of it to be released at the three-quarter point in his sentence, ceased to apply to him on 14 July 2008 when the Criminal Justice and Immigration Act 2008 came into force. This act introduced section 50A into the Criminal Justice Act 1991. Its upshot was that if a prisoner in the claimant's position was recalled after being released on licence he would not be automatically released again at the three-quarter point, he was be detained until the end of his sentence unless released earlier by the Parole Board.

6. In 2012 LASPO pulled all the release and recall provisions together in one statute. Section 121 repealed Part 2 of the Criminal Justice Act 1991 including section 50A. However the 1991 Act regime, including section 50A, is retained for certain classes of prisoner including the claimant (see Schedule 20B to the Criminal Justice Act 2003 inserted by LASPO). Accordingly the claimant remains liable to be detained until the expiry of his sentence in November 2020 as he has been since 14 July 2008 when section 50A came into force.

7. The material provisions of the European Convention on Human Rights are very familiar. Article 5 provides so far as relevant:

> "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 7 provides so far as relevant:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

8. I will first address the claimant's claim under Article 7, to which Mr Southey QC has addressed the majority of his submissions this morning. The key argument is that the provisions regulating release on licence as they apply to the claimant (that is section 33(3) of the 1991 Act before 14 July 2008; section 50A thereafter) are or must be treated as integral to the meaning of "penalty" in Article 7 and therefore the change effected by section 50A constituted a "heavier penalty" within the meaning of the Article. Some English learning is prayed in aid but the primary arrow in Mr Southey's quiver is the Strasbourg case of Del Rio Prada v Spain. This submission on the face of it is contrary to a long line of Strasbourg authority which draws a distinction between the penalty imposed and the means of its enforcement or execution. Thus in Del Rio Prada itself the court said this at paragraph 83:

> "Both the Commission and the Court in their case-law have drawn a distinction between a measure that constitutes in substance a 'penalty' and a measure that concerns the 'execution' or 'enforcement' of the 'penalty'. In consequence, where the nature and purpose of a measure relate to the remission of a sentence or a change in a regime for early release, this does not form part of the 'penalty' within the meaning of Article 7."

A footnote in the text cites Strasbourg cases going back to 1986. It is right that it is also stated (paragraph 85) in Del Rio Prada that the distinction between penalty and enforcement is not always clear-cut. Mr Southey however places emphasis on paragraph 89, which in part reads as follows:

> "In the light of the foregoing, the Court does not rule out the possibility that measures taken by the legislature, the administrative authorities or the courts after the final sentence has been imposed or while the sentence is being served may result in the redefinition or modification of the scope of the 'penalty' imposed by the trial court. When that happens, the Court considers that the measures concerned should fall within the scope of the prohibition of the retroactive application of penalties enshrined in Article 7 1 in fine of the Convention. Otherwise, States would be free - by amending the law or reinterpreting the established regulations, for example - to adopt measures which retroactively redefined the scope of the penalty imposed, to the convicted persons detriment, when the latter could not have imagined such a development at the time when the offence was committed or the sentence was imposed."

9. This distinction between penalty and enforcement is also given in English authorities. In **R (Robinson) v Secretary of State** [2010] 1 WLR 2380 the Court of Appeal had to consider a judicial review claim by a prisoner who asserted that section 50A of the Criminal Justice Act 1991 was incompatible with his right under Article 6 of the Human Rights Convention. Like the claimant in the present case the appellant there had been sentenced for an offence committed before 14 July 2008. He was released on licence on 8 July 2008 and recalled some time after 14 July 2008 when section 50A came into force. His argument was that Article 6 was violated because section 50A involved a legislative rather than a judicial lengthening of his original sentence. Giving the first judgment in the Court of Appeal Moses LJ, after a detailed exposition of earlier authority, said this at paragraph 32:

> "In this appeal the appellant was sentenced to a period of five years' imprisonment. That sentence remains unchanged. The legislature changed the conditions relating to his release and recall on breach of licence but they did not interfere with the sentence that had been passed."

Munby LJ and Lord Neuberger, Master of the Rolls agreed with Moses LJ and added no reasoning of their own. Accordingly, the appeal in that case was dismissed.

10. I n his skeleton argument, Mr Southey QC says that this case was wrongly decided; alternatively, that its ratio is not binding on this court and he has treaded delicately in relation to these submissions this morning.

11. I have to say that in my judgment both of them are doomed to failure. The second, that the decision is not binding, rests on the circumstance that Robinson was a challenge based on Article 6, whereas this case looks to Articles 5 and 7. But the court's conclusion at paragraph 32 was one of principle. Section 50A did not interfere with the sentence, the Article 7 penalty, passed on the appellant before that provision was enacted. That proposition, if binding on this court, is fatal to the claim. In my judgment we are plainly bound by Robinson. It has not been overturned or doubted in the Supreme Court. Whatever the effect

of Del Rio Prada, to which I will turn shortly, the Human Rights Act 1998 does not authorise or require any change in the law of stare decisis by which a decision of the Court of Appeal binds the High Court.

12. Out of deference to the argument I should consider other materials that have been referred to. The case of R (Uttley) v Secretary of State for the Home Department is instructive though somewhat dismissed in the course of Mr Southey's submission this morning. We have before us the judgment of the Court of Appeal [2003] 1 WLR 2590; the House of Lords [2004] 1 WLR 2278 and the Strasbourg court application number 36946/03. The decision of the English courts in that case were crisply summarised by Moses LJ in Robinson as follows:

> "23.... The court in that case [that is Uttley] considered the imposition of licence conditions on the release of a prisoner who had committed offences before the 1991 Act came into effect. Had he been convicted before the provisions came into effect, there would have been no licence requirements and he would not, on release, have been subject to a period of licence. The Court of Appeal took the view that the imposition of a period of licence after release was part of the sentence passed. In reality, it is said, the effects of the licence were to impede his freedom of action; they were potentially more onerous and amounted to the retrospective imposition of a penalty heavier than that available at the time the offences were committed, since the offences were committed long before the 1991 Act came into force. Thus the imposition of a period of license was contrary to Article 17(1). See the judgment of Pill LJ at paragraph 15.
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> 24. The House of Lords reversed that decision on the basis that the maximum sentence was life ... Since the maximum sentence was life, no heavier penalty was imposed following the introduction of the provisions of the 1991 Act. Their Lordships did not therefore consider it necessary to reach a conclusion as to whether the fact that the prisoner could only be released on licence amounted to a heavier penalty than the one that would have been imposed on him had he been entitled to release without the imposition of a license."

However, Moses LJ immediately went on to state that "the decision of the Court of Appeal in the Uttley case cannot stand with the jurisprudence of the Strasbourg court."

13. In its admissibility decision in Uttley the European Court of Human Rights said this:

> "Although, as the Court of Appeal found in the present case, the licence conditions imposed on the applicant on his release after eight years can be considered as 'onerous' in the sense that they inevitably limited his freedom of action, they did not form part of the 'penalty' within the meaning of Article 7, but were part of the regime by which prisoners could be released before serving the full term of the sentence imposed.
>
> Accordingly, the application to the applicant of the post-1991 Act regime for early release was not part of the 'penalty' imposed on him, with the result that no comparison is necessary between the early release regime before 1983 and that after 1991. As the sole penalties applied were those imposed by the sentencing judge, no 'heavier' penalty was applied than the one applicable when the offences were committed."

14. The claimant, by Mr Southey, places some reliance on the decision of this court in R (Foley)

v Parole Board & Anor [2012] EWHC 2184 (Admin). The question there was whether it was repugnant to Article 14 of the Convention read with Article 5 for the Parole Board to apply different risk-based tests when deciding on the release of indeterminate and determinate sentenced prisoners respectively. In a series of references at paragraphs 67 to 69 the court emphasised that in the case of a determinate sentence the first half represented the "punitive element". That was significant for the reasoning in that case but in my judgment it casts no light here. The case had nothing to do with Article 7, more particularly the description of the first half of a determinate sentence as the punitive element tells one nothing whatever about the scope of the term penalty in Article 7.

15. I turn then to Del Rio Prada. Spanish legislation had imposed a maximum term of 30 years' imprisonment for a single set of multiple offences. The applicant had been convicted of a large number of murders, attempted murders and other serious offences in eight separate sets of criminal proceedings. The court in Spain decided to group the applicant's offences together and apply the 30-year rule. This fixed the applicant's release date at 27 June 2017. However, before this she had been granted very considerable periods of remission of sentence in a series of judicial decisions in recognition of study and of voluntary work undertaken by her in the prison. In consequence the prison authorities proposed a release date of 2 July 2008.

16. But this proposal was rejected by the court Audiencia Nacional. That was because of a precedent set in 2006 by the Supreme Court known as the Parot doctrine. Under this rule or precedent remissions such as those earned by the applicant were not applied to the new sentence of 30 years maximum but only to the original individual sentences. The result was that the applicant was deprived of the benefit of the remission. The Strasbourg court, by a majority, found a violation of Article 7. The majority noted (paragraph 88) that the term "impose" used in Article 7 could not be interpreted as excluding from the scope of the Article "all measures introduced after the pronouncement of the sentence". Their essential conclusions material to this case are as I see it at paragraphs 103 and 107 to 109. At paragraph 103:

> "In the light of the foregoing the Grand Chamber considers, like the Chamber, that at the time when the applicant committed the offences that led to her prosecution and when the decision to combine the sentences and fix a maximum prison term was taken, the relevant Spanish law, taken as a whole, including the case-law, was formulated with sufficient precision to enable the applicant to discern, to a degree that was reasonable in the circumstances, the scope of the penalty imposed on her, regard being had to the maximum term of thirty years provided for in Article 70.2 of the Criminal Code of 1973 and the remissions of sentence for work done in detention provided for in Article 100 of the same Code (contrast Kafkaris, cited above, 150). The penalty imposed on the applicant thus amounted to a maximum of thirty years imprisonment, and any remissions of sentence for work done in detention would be deducted from that maximum penalty."

At paragraphs 107 to 109:

> "107. The Court notes that the application of the 'Parot doctrine' to the applicants situation deprived of any useful effect the remissions of sentence for work done in detention to which she was entitled by law and in accordance with final decisions by the judges responsible for the execution of sentences. In other words, the applicant was

initially sentenced to a number of lengthy terms of imprisonment, which were combined and limited to an effective term of thirty years, on which the remissions of sentence to which she was meant to be entitled had no effect whatsoever. It is significant that the Government have been unable to specify whether the remissions of sentence granted to the applicant for work done in detention have had -or will have - any effect at all on the duration of her incarceration.

108. That being so, although the Court agrees with the Government that arrangements for granting adjustments of sentence as such fall outside the scope of Article 7, it considers that the way in which the provisions of the Criminal Code of 1973 were applied in the present case went beyond mere prison policy.

109. Regard being had to the foregoing and to Spanish law in general, the Court considers that the recourse in the present case to the new approach to the application of remissions of sentence for work done in detention introduced by the 'Parot doctrine' cannot be regarded as a measure relating solely to the execution of the penalty imposed on the applicant as the Government have argued. This measure taken by the court that convicted the applicant also led to the redefinition of the scope of the 'penalty' imposed. As a result of the 'Parot doctrine', the maximum term of thirty years imprisonment ceased to be an independent sentence to which remissions of sentence for work done in detention were applied, and instead became a thirty-year sentence to which no such remissions would effectively be applied."

17. In my judgment this reasoning is very specifically geared to the facts of the case. There is no erosion in principle of the well-established distinction between the penalty imposed and the means of its enforcement or execution. Del Rio Prada, notwithstanding Mr Southey's submissions this morning, is not as I see it authority for anything like a general proposition to the effect that any detrimental change to provisions concerning release on licence if it is not foreseeable at the time of sentence alters the meaning of the penalty for the purpose of Article 7. The general remarks at paragraphs 91 to 93 (which I have not read) certainly produce no such conclusion nor does the specific passage at paragraph 111 and following dealing with the question whether the Parot doctrine was reasonably foreseeable.

18. In the present case there has been nothing approaching a redefinition of the scope of the penalty imposed for the claimant's offence. **Del Rio Prada** does not assist him. Moreover, it is in any event to be remembered that our duty is, and is only, to take account of this jurisprudence. In my judgment it says nothing which should persuade us that the enactment of section 50A of the Criminal Justice Act 1991 as it applied to the claimant's case remotely constituted a violation of Article 7.

19. Mr Southey referred to other Strasbourg authority this morning: M v Germany (2010) 51 EHRR 41 and Kafkaris v Cyprus (2001) 49 EHRR 35. In my judgment they cast no light on the question whether the application of section 50A in the claimant's case involves a violation of the claimant's Convention rights.

20. I turn briefly to Article 5. That too was held to have been violated on the facts in Del Rio Prada "in the light of the considerations that led it to find a violation of Article 7" (see paragraph 130). This does not I think assist the claimant. In his skeleton argument for the

Secretary of State Mr Grodzinski QC cites two authorities which, with respect, are worth noting. First, Lord Bingham in R (Smith & West) v Parole Board [2005] 1 WLR 350 said this at paragraph 36:

> "It seems to me plain that in cases such as the appellants' the sentence of the trial court satisfies article 5(1) not only in relation to the initial term served by the prisoner but also in relation to revocation and recall, since conditional release subject to the possibility of recall formed an integral component of the composite sentence passed by the court."

Then in Brown v United Kingdom (App No 968/04) the Strasbourg court said this:

> "Discretionary and mandatory lifers, after the expiry of the punitive element of their sentence, are detained on the basis of risk - the justification for their continued detention is whether it is safe for the public for them to live in the community once more...... The applicant however has been sentenced to a fixed prison term by a court as the punishment for his offence. The lawfulness of his detention does not depend, in Convention law terms, on whether or not he ceases to be at risk of re-offending. The fact that the applicant before the end of the sentence may expect to be released on licence does not affect this analysis. When such a prisoner is recalled his detention is again governed by the fixed term imposed by the judge conforming with the objectives of that sentence and thus within the scope of Article 5 (1)(a) of the Convention."

21. I acknowledge that there are cases in which there may be a violation of Article 5 because some provision relating to rights of release is not complied with by the prison authorities. That is a different kind of case and has no impact on the present application.

22. In my judgment for all these reasons this application must fail and I would dismiss it.

23. Mr Southey has submitted however (relying on Kay & Ors v Lambeth LBC [2006] 2 AC 465 at paragraph 43) that notwithstanding this conclusion we should consider granting permission to appeal so that consideration may be given hereafter to a view of section 50A that would be favourable to the claimant in light of Del Rio Prada. Had I considered that Del Rio Prada in truth offered material assistance to the claimant which might constitute a reason for taking a view favourable to his case of the bite of section 50A, that might have been the right course of action but that is not my view and as I have said I would dismiss the application.

24. MR JUSTICE WILLIAM DAVIS: I agree. I propose to add only this in view of my own personal experience of criminal jurisdiction. In the course of his submissions Mr Southey QC put this proposition: namely that judges in criminal courts when sentencing do to some extent take account of release provisions. That was the submission made. It is, with respect, plainly wrong. It flies in the face of what is set out at paragraph 20 in the judgment of Moses LJ in the case of Robinson already cited by my Lord. It also is contrary to any number of decisions of the Court of Appeal Criminal Division where even in cases where a judge has misapplied the release provisions in his explanation of the sentence, the sentence has not been interfered with (see for instance R v Bright [2008] EWCA Crim 419). The penalty imposed by a sentencing judge is the sentence he announces in court. Were he to attempt to reflect the release provisions in his sentence at any given time confusion and chaos would reign.

25. MR GRODZINSKI: My Lords, I seek the Secretary of State's costs subject to the usual

protection provided by the legal aid legislation.

26. LORD JUSTICE LAWS: Mr Southey?

27. MR SOUTHEY: My Lords, I do not think there is very much I can say in relation to that. There are two applications we would make. One is for the assessment of the claimant's publicly funded costs.

28. LORD JUSTICE LAWS: You are entitled to that.

29. MR SOUTHEY: The other would have been for permission to appeal but I think that has already been dealt with.

30. LORD JUSTICE LAWS: We rather preempted that. As far as you make that application, we would refuse it.

SMITH BERNAL WORDWAVE