Michaelmas Term

[2018] UKSC 59

On appeal from: [2017] EWHC 214 (Admin)

JUDGMENT

R (on the application of Stott) (Appellant) v Secretary of State for Justice (Respondent)

before

Lady Hale, President

Lord Mance

Lord Carnwath

Lord Hodge

Lady Black

JUDGMENT GIVEN ON

28 November 2018

Heard on 18 January 2018

Appellant	Respondent
Hugh Southey QC	James Eadie QC
Jude Bunting	Rosemary Davidson
	Jason Pobjoy
(Instructed by Michael Purdon Solicitor)	(Instructed by The Government Legal Department)

LADY BLACK:

1.

Extended determinate sentences were imposed on Frank Stott in May 2013, pursuant to section 226A of the Criminal Justice Act 2003 ("the 2003 Act") for sexual offences. This appeal concerns the provisions of section 246A of the 2003 Act which deal with early release from prison of those serving extended determinate sentences. The effect of the provisions is that Mr Stott will not be eligible to apply for release until he has served two-thirds of his custodial term, in contrast to other categories of prisoner who can apply for release at an earlier point in their custodial term. He contends that the provisions of section 246A are discriminatory and in violation of article 14 of the Convention for the

Protection of Human Rights and Fundamental Freedoms ("ECHR" or "the Convention") taken together with article 5 of the Convention.

The facts

2.
The appellant was convicted at trial of 20 offences, including multiple offences of raping an eight year old child. Prior to the trial, he had pleaded guilty to other counts relating to indecent photography of a child. On 23 May 2013, he was sentenced to an extended determinate sentence ("EDS") in respect of ten counts of rape. An EDS comprises two elements, namely an "appropriate custodial term", and a further period for which the offender is to be subject to a licence ("the extension period"), see section 226A(5) at para 85 below. Mr Stott's appropriate custodial term has been fixed at 21 years, with an extension period of four years. He was also sentenced to various determinate sentences of imprisonment to be served concurrently. He was refused permission to appeal against his sentence, see R v Stott [2016] EWCA Crim 172.

3.
A prisoner serving an EDS can be released before the end of his term of imprisonment. It will be necessary to look further at the statutory provisions governing release later but, in broad outline, section 246A of the 2003 Act requires, in most cases, that the EDS prisoner be released on licence as soon as he has served the "requisite custodial period" and the Parole Board has directed his release. The requisite custodial period is two-thirds of the appropriate custodial term specified by the sentencing court, so Mr Stott would have to serve 14 years before becoming eligible for parole. Other categories of prisoner are, in contrast, eligible for parole at the half-way point in their sentences. If these rules had applied to Mr Stott, he would have been eligible for parole once he had served ten and a half years. He complained that there was no justification for this difference in treatment in relation to eligibility for parole, and that it was unlawful discrimination within article 14. He brought judicial review proceedings.

4.
In February 2017, a Divisional Court of the Queen's Bench Division dismissed his claim [2017] EWHC 214 (Admin). However, it granted a certificate pursuant to section 12 of the Administration of Justice Act 1969 to permit Mr Stott to appeal directly to the Supreme Court, should permission to appeal be granted by the Supreme Court, which in due course it was.

Article 5 and article 14 of the ECHR

5.
As the focus in this case is upon articles 5 and 14 of the ECHR, it will be convenient to set them out immediately.

6.
Article 5 of the ECHR secures the "right to liberty and security" of person. So far as is material to the present case, it provides:

"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;"

“4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

7.
Article 14 prohibits discrimination, providing:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

The approach to an article 14 claim

8.
In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or “other status”. Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking. It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations. Lord Nicholls of Birkenhead captured the point at para 3 of R (Carson) v Secretary of State for Work and Pensions [2005] UKHL 37; [2006] 1 AC 173. He observed that once the first two elements are satisfied:

“the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court’s scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.”

The issues

9.
In this case, it is accepted that the right to apply for early release, upon which Mr Stott relies, falls within the ambit of article 5. The debate is about the application of article 14. Two issues have been identified. The first issue (“Issue 1” or “the status issue”) is whether the different treatment of Mr Stott is on a ground within the meaning of “other status” in article 14. The second issue (“Issue 2”) requires determination only if Issue 1 is answered in the affirmative. It has two parts:

(a)
Are EDS prisoners in an analogous situation to either indeterminate sentence prisoners or other determinate sentence prisoners, these being the two categories of prisoner with which Mr Stott seeks to compare his own position?

(b)
If so, is there an objective justification for the difference in treatment between the categories of prisoner?

10.
Mr Stott argues that his differential treatment was on the ground of “other status”, that he was in an analogous situation to other prisoners who were treated differently, and that there was no objective justification for the different treatment. The Secretary of State argues that Mr Stott fails on the status issue, so Issue 2 does not arise. However, if that is wrong, the Secretary of State argues that Mr Stott’s sentence is not analogous to the other sentences under consideration, and that there is in any event an objective justification for treating the different categories of prisoner differently.

The central importance of R (Clift) v Secretary of State for the Home Department [2007] 1 AC 484 (“R (Clift)”) and Clift v United Kingdom (Application No 7205/07)

11.
At the heart of the appeal are the decisions of the House of Lords and of the European Court of Human Rights (“ECtHR”) concerning Mr Clift, a prisoner who was serving a sentence of 18 years’ imprisonment for very serious crimes, including attempted murder, and complained that the early release provisions in respect of his sentence gave rise to a violation of article 14. In 2006, in R (Clift), the House of Lords held that Mr Clift’s classification, as a long-term prisoner serving a determinate sentence of 15 years or more, did not amount to an “other status”, and accordingly there was no infringement of article 14. In 2010, in Clift v United Kingdom (Application No 7205/07), the ECtHR took the contrary view, holding that Mr Clift did come within article 14 and that there was no objective justification for the different release provisions applied to prisoners in his category.

12.
The decision of the House of Lords in R (Clift) dictated the Divisional Court’s decision in the present case. The Divisional Court only rejected Mr Stott’s argument that his differential treatment was on the ground of “other status”, because it was constrained to do so by R (Clift). Had it not been so bound, it would have found that “other status” was established, and would then have gone on to find section 246A of the 2003 Act incompatible with article 14. It now falls to this court to determine whether the decision of the House of Lords in R (Clift) should continue to be followed, in the light of the subsequent ECtHR decision in Clift v United Kingdom, and of the article 14 jurisprudence as a whole.

Issue 1: the status issue

13.
Before turning to look at R (Clift) and Clift v United Kingdom in some detail, the decision of the ECtHR in Kjeldsen, Busk Madsen and Pedersen v Denmark (1976) 1 EHRR 711 (“Kjeldsen”) needs to be introduced, because one paragraph from the court’s judgment features regularly in decisions of the ECtHR, and the domestic courts, when the question of status in article 14 is being considered.

Kjeldsen, Busk Madsen and Pedersen v Denmark (1976) 1 EHRR 711

14.
Kjeldsen concerned sex education in Danish schools. The applicants were parents who objected to sex education being compulsory in state primary schools and complained that, whereas parents could have their children exempted from religious instruction classes, they could not do so in relation to sex education classes. They claimed, unsuccessfully, that this was discriminatory treatment contrary to article 14 taken with article 2 of First Protocol (right to education). The passage about status to which courts return repeatedly is at para 56:

"The court first points out that article 14 prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other."

Regina (Clift) v Secretary of State for the Home Department (above)

15.
As I have said, Mr Clift was a prisoner serving a sentence of 18 years' imprisonment. Some way into his period of imprisonment, the Parole Board recommended his release on parole. Had Mr Clift been serving a term of less than 15 years, or life imprisonment, the Secretary of State would have had a statutory obligation to comply with the recommendation of the Parole Board. However, by virtue of various statutory provisions and the Parole Board (Transfer of Functions) Order 1998 (SI 1998/3218), the final decision in relation to prisoners serving determinate terms of 15 years or more lay with the Secretary of State, who rejected the recommendation. Mr Clift contended that the early release provisions discriminated against him in breach of his rights under articles 5 and 14 of the ECHR by denying him the right, that other long-term prisoners enjoyed, to be released if the Parole Board recommended it.

16.
Mr Clift was able to establish that his rights in relation to early release were within the ambit of article 5. Although there is no issue about article 5 in the present case, a brief resumé of how the House of Lords approached it will set the article 14 issues in a proper context. As Lord Bingham of Cornhill said at para 17, the ECHR does not require member states to establish a scheme for early release, and prisoners may, consistently with the Convention, be required to serve the entirety of the sentence passed, if that is what the domestic law provides. However, where the domestic law in fact provides for a right to seek early release, that right is within the ambit of article 5. In relation to long-term prisoners serving determinate terms, the law of England and Wales did confer a right to seek early release, setting a time at which a prisoner must be released as of right, and an earlier time at which he might be released if it was judged safe to do so. Accordingly, as Lord Bingham said at para 18, differential treatment, in relation to early release, of one prisoner as compared with another, otherwise than on the merits of their respective cases, gave rise to a potential complaint under article 14.

17.
However, the discrimination which article 14 prohibits is 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." Not falling within any of the named grounds, Mr Clift could only bring himself within the protection of article 14 if his differential treatment could be said to be on the ground of "other status". He argued that this requirement was satisfied on the basis that his treatment was on the ground that he was a prisoner sentenced to a determinate term of 15 years or more. Lord Bingham (with whom there was general agreement, although some other members of the House added reasons of their own) rejected this argument, but he did so "not without hesitation", and influenced by the fact that the Strasbourg jurisprudence had not endorsed a status of this kind as falling within article 14. Lord Hope of Craighead too, having put the arguments for and against Mr Clift being able to lay claim to status, was mindful of the need for "a measure of self-restraint", so as not to outstrip Strasbourg. What each would have said, had they known what the ECtHR was going to decide in Clift v United Kingdom in 2010, is unknown, although one cannot avoid the sense that the outcome might well have been different. However, in order to give proper

consideration to what, if any, continuing influence R (Clift) should have, it is necessary to isolate the strands of reasoning which went to make up the conclusion of the House:

i)
There was agreement that the words “or other status” in article 14 (in French “toute autre situation”) are far from precise, but that they are not intended to cover differential treatment on any ground whatever, because in that case, the list of grounds which precede them would be otiose (paras 27, 43, and 56).

ii)
Reliance was placed on the passage quoted above from para 56 of Kjeldsen, and the search was for something in the nature of a “personal characteristic by which persons or groups of persons are distinguishable from each other” (paras 27, 28, 42, and 56 for example).

iii)
It was accepted that, as the specific grounds of discrimination listed in article 14 show, protection is extended not only to characteristics over which a person has no control, such as race or birth, but also to acquired characteristics, such as religion or political opinion (paras 28 and 45).

iv)
Lord Bingham and Lord Hope both advanced the proposition that, to qualify, the personal characteristic in question must exist independently of the treatment of which complaint is made. Lord Bingham said, at para 28, that he did “not think that a personal characteristic can be defined by the differential treatment of which a person complains”, without giving any explanation, or authority, for this view. He did not appear to consider that Mr Clift would fall foul of this, as he was not complaining of the sentence passed on him, but of being denied a definitive Parole Board recommendation. Lord Hope agreed, at para 47, that “[i]t must be accepted, as Lord Bingham points out, that a personal characteristic cannot be defined by the differential treatment of which a person complains.” Although he similarly did not spell out the foundation for his view, it may lie in his observation, at para 45, that each of the specific grounds shared a feature in common, namely that “they exist independently of the treatment of which complaint is made” and “[i]n that sense, they are personal to the complainant.” The remainder of para 47 is not entirely easy to understand, but might indicate that Lord Hope shared Lord Bingham’s opinion that this was not an area of difficulty for Mr Clift. It reads:

“It is plain too that the category of long-term prisoner into which Mr Clift’s case falls would not have been recognised as a separate category had it not been for the Order which treats prisoners in his group differently from others in the enjoyment of their fundamental right to liberty. But he had already been sentenced, and he had already acquired the status which that sentence gave him before the Order was made that denied prisoners in his group the right to release on the recommendation of the Parole Board. The question which his case raises is whether the distinguishing feature or characteristic which enables persons or a group of persons to be singled out for separate treatment must have been identified as a personal characteristic before it is used for this purpose by the discriminator.”

v)
There was an examination of the ambit of article 14 as demonstrated by decisions of the ECtHR and the domestic courts in various factual contexts. Baroness Hale included a particularly detailed list of authorities at para 58, which led her to make the observation that in the “vast majority of Strasbourg cases where violations of article 14 have been found, the real basis for the distinction was clearly one of the proscribed grounds or something very close”. Examples were given of cases in which the

grounds for the discrimination were not within article 14 (see, for example, paras 27, 45, 59-61), including prisoners who were treated differently because of the legislature's view of the gravity of their offences (Gerger v Turkey 8 July 1999, para 69, and see also Budak v Turkey (Application No 57345/00) (unreported)). And there was discussion of R (S) v Chief Constable of the South Yorkshire Police [2004] 1 WLR 2196 where the House of Lords held that article 14 did not cover differential treatment on the basis that a person had previously been investigated by the police and provided fingerprints; the possession of fingerprints and DNA samples by the police in that situation was simply a matter of historical fact, not attributable to the personal characteristics of those who had provided them.

18.
Having referred earlier to the rather qualified terms in which Lord Bingham and Lord Hope expressed their conclusions, I should set out rather more fully what they actually said. Baroness Hale also dealt with the topic, but Lord Carswell and Lord Brown of Eaton-under-Heywood simply agreed with Lord Bingham on the issue without adding anything.

19.
Lord Bingham's conclusions are to be found in para 28:

"28. … Is his classification as a prisoner serving a determinate sentence of 15 years or more (but less than life) a personal characteristic? I find it difficult to apply so elusive a test. But I would incline to regard a life sentence as an acquired personal characteristic and a lifer as having an 'other status', and it is hard to see why the classification of Mr Clift, based on the length of his sentence and not the nature of his offences, should be differently regarded. I think, however, that a domestic court should hesitate to apply the Convention in a manner not, as I understand, explicitly or impliedly authorised by the Strasbourg jurisprudence, and I would accordingly, not without hesitation, resolve this question in favour of the Secretary of State and against Mr Clift."

20.
As for Lord Hope, he also acknowledged the case for the length of Mr Clift's sentence conferring a status on him which can be regarded as a personal characteristic. From para 46 onwards, he can be seen considering the arguments, beginning thus:

"46. It could be said in Mr Clift's case that the length of his sentence did confer a status on him which can be regarded as a personal characteristic. This is because prisoners are divided by the domestic system into broadly defined categories, or groups of people, according to the nature or the length of their sentences. These categories affect the way they are then dealt with throughout the period of their sentences. As a result they are regarded as having acquired a distinctive status which attaches itself to them personally for the purposes of the regime in which they are required to serve their sentences. This is most obviously so in the case of prisoners serving life sentences and where distinctions are drawn between short-term and long-term prisoners serving determinate sentences. It is less obviously so in the case of long-term prisoners serving determinate sentences of different lengths."

21.
He thought that, given that the function of article 14 was to secure Convention rights and freedoms without discrimination on grounds which, having regard to the underlying values of the Convention, must be regarded as unacceptable, "a generous meaning" should be given to "or other status" (para 48). In his view, "the protection of article 14 ought not to be denied just because the distinguishing feature which enabled the discriminator to treat persons or groups of persons differently in the

enjoyment of their Convention rights had not previously been recognised", by which he seems, I think, to have meant "previously recognised by the ECtHR". But, ultimately, two factors seem to have influenced his rejection of Mr Clift's case. The first was that he accepted that it was "possible to regard what he has done, rather than who or what he is, as the true reason for the difference of treatment". The second was caution about outstripping Convention jurisprudence. So, he said, "I am persuaded, with some reluctance, that it is not open to us to resolve the [other status point] in Mr Clift's favour" (para 49).

22.
Baroness Hale did not express hesitation or reluctance in concluding that the difference of treatment between Mr Clift and people sentenced to shorter determinate sentences or to life sentences was a difference in treatment based on the seriousness of the offences concerned, and therefore outside article 14. As she put it, "[t]he real reason for the distinction is not a personal characteristic of the offender but what the offender has done" (para 62).

Clift v United Kingdom (above)

23.
It is necessary to look in similar detail at the ECtHR's reasons for concluding that the differential treatment of Mr Clift was on the ground of "other status" for the purposes of article 14. The court began its assessment, at para 55, by observing that article 14 does not prohibit all differences in treatment, but only "those differences based on an identifiable, objective or personal characteristic, or 'status', by which persons or groups of persons are distinguishable from one another", citing para 56 of Kjeldsen, Busk Madsen and Pedersen (above), Berezovskiy v Ukraine (dec) (Application No 70908/01), 15 June 2004, and paras 61 and 70 of Carson v United Kingdom (2010) 51 EHRR 13. But, equally, it confirmed (para 55) that the list of specific grounds in article 14 is illustrative and not exhaustive, and recalled (para 56) that "the words 'other status' (and a fortiori the French 'toute autre situation') have generally been given a wide meaning".

24.
Noting the Government's argument that "other status" should be more narrowly construed, ejusdem generis with the specific examples in article 14, it demonstrated (paras 56 to 59) that not all the listed grounds could be said to be "personal" in the sense of being innate characteristics or inherently linked to the identity or personality of the individual. It commented on the inclusion of "property" as one of the grounds, and observed that it was a ground which had been construed broadly by the court as demonstrated by James v United Kingdom (1986) 8 EHRR 123 (difference in treatment between different categories of property owners) and Chassagnou v France (1999) 29 EHRR 615, paras 90 and 95, (distinction between large and small landowners).

25.
It went on, at para 58, to give a list of other cases in which a violation of article 14 had been found because of different treatment based on characteristics which were not personal in the sense of being innate or inherent, namely: Engel v The Netherlands (1976) 1 EHRR 647 (distinction based on military rank), Pine Valley Developments Ltd v Ireland (1991) 14 EHRR 319 (distinction between those who held outline planning permission and benefited from new legislation and those who held outline planning permission but did not), Larkos v Cyprus (1999) 30 EHRR 597, para 21 (distinction between tenants of the State and tenants of private landlords), Shelley v United Kingdom (2008) 46 EHRR SE16 (being a convicted prisoner could be an "other status"), Sidabras and Dziautas v Lithuania (2004) 42 EHRR 104 (implicitly accepted that status as a former KGB officer fell within article 14),

and Paulík v Slovakia (2006) 46 EHRR 10 (a father whose paternity had been established by judicial determination had a status which could be compared to putative fathers and mothers in situations where paternity was legally presumed but not judicially determined). Accordingly, the court concluded (para 59), even if the Government's ejusdem generis argument was correct (upon which no pronouncement was made either way), it would not necessarily preclude Mr Clift's claim.

26.
The argument that the treatment of which the applicant complains must exist independently of the "other status" upon which it is based was advanced, but the court rejected it, citing Paulík (2008) 46 EHRR 10 as undermining it. It said:

"60. Further, the court is not persuaded that the Government's argument that the treatment of which the applicant complains must exist independently of the 'other status' upon which it is based finds any clear support in its case law. In Paulík, cited above, there was no suggestion that the distinction relied upon had any relevance outside the applicant's complaint but this did not prevent the court from finding a violation of article 14. The question whether there is a difference of treatment based on a personal or identifiable characteristic in any given case is a matter to be assessed taking into consideration all of the circumstances of the case and bearing in mind that the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see Artico v Italy, 13 May 1980, para 33, Series A no 37; and Cudak v Lithuania [GC], no 15869/02, para 36, 23 March 2010). It should be recalled in this regards that the general purpose of article 14 is to ensure that where a state provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified."

27.
The court was not impressed, either, with the Government's argument that, as in Gerger (above), the distinction was between different types of offence, according to the legislature's view of their gravity, observing that the cases in which the approach in Gerger had been followed all concerned special court procedures or provisions on early release for those accused or convicted of terrorism offences in Turkey. It continued (para 61):

"Thus while Gerger made it clear that there may be circumstances in which it is not appropriate to categorise an impugned difference of treatment as one made between groups of people, any exception to the protection offered by article 14 of the Convention should be narrowly construed. In the present case the applicant does not allege a difference of treatment based on the gravity of the offence he committed, but one based on his position as a prisoner serving a determinate sentence of more than 15 years. While sentence length bears some relationship to the perceived gravity of the offence, a number of other factors may also be relevant, including the sentencing judge's assessment of the risk posed by the applicant to the public."

28.
At para 62, the court said:

"The court has frequently emphasised the fundamental importance of the guarantees contained in article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities (see, for example, Çakıcı v Turkey [GC], no 23657/94, para 104, ECHR 1999 IV). Where an early release scheme applies differently to prisoners depending on the length of their sentences, there is a risk that, unless the difference in treatment is objectively justified, it will run

counter to the very purpose of article 5, namely to protect the individual from arbitrary detention. Accordingly, there is a need for careful scrutiny of differences of treatment in this field."

29.
It concluded that in the light of all the considerations it had set out, Mr Clift did enjoy "other status" for the purposes of article 14.

30.
At paras 66 and 67, the court addressed the issue of whether Mr Clift was in an analogous position to the other prisoners with whom he compared himself, observing that what is required is that the applicant should demonstrate that, having regard to the particular nature of the complaint, his situation was "analogous, or relevantly similar"; it need not be identical. Mr Clift was in an analogous position to long-term prisoners serving less than 15 years and life prisoners, as the methods of assessing the risk posed by a prisoner eligible for early release, and the means of addressing any risk identified, were in principle the same for all categories of prisoner.

31.
The court went on to find that the differential treatment of prisoners in Mr Clift's position lacked objective justification. The Government had argued that it was justified on the basis of the risk posed by the category of prisoners in question, and by the need to maintain public confidence in the justice system. As to the first basis, the court accepted in principle that more stringent early release provisions could be justified on the basis that a group of prisoners posed a higher risk, but there had not been shown to be higher risk here. As to the second basis, it had not been demonstrated that requiring the approval of the Secretary of State would address concerns about risk on release, given that the assessment of the risk posed by an individual prisoner was a task without political content and one to which the Secretary of State could bring no superior expertise.

32.
There is much in the ECtHR's decision which is in harmony with the approach taken by the House of Lords in R (Clift). But it can be seen that there are respects in which the ECtHR either went further than the House of Lords or differed from its approach.

33.
It differed in that it was not persuaded that there was any support for the argument that the treatment of which the applicant complains must exist independently of the other status; on the contrary, the matter had to be assessed taking into consideration all of the circumstances of the case and bearing in mind that the aim of the Convention was to guarantee rights which are practical and effective.

34.
It also differed from the House of Lords in rejecting the idea that Mr Clift's complaint was about a difference in treatment based on the gravity of his offence, observing that a number of factors may be relevant to sentence length, as well as the perceived gravity of the offence. It also emphasised the particular context for the decision in Gerger and other cases in which the Gerger approach had been taken. And it stressed that any exception to the protection offered by article 14 should be narrowly construed, and that there needed to be careful scrutiny of differences of treatment where an early release scheme applied differently to prisoners depending on the length of their sentence, given that there was a risk that unless the difference was objectively justified it would run counter to the very purpose of article 5.

35.
It possibly went further than the House of Lords in relation to the nature of the characteristics which would be recognised, in that it observed that not all the grounds could be said to be inherently linked to the identity or personality of the individual, highlighting the inclusion of property as a specified ground, and giving examples of characteristics which had sufficed, but were not innate or inherent.

ECtHR decisions other than Clift v United Kingdom

36.
There have been many decisions of the ECtHR in relation to article 14 and it is unnecessary to refer to more than a few of them. The way in which that court is presently approaching the question of "other status" can be seen from three recent decisions, one in 2016 and two in 2017. They demonstrate, I think, that the approach has been relatively consistent over the years, and that there has been little change to the approach exhibited in Clift v United Kingdom.

37.
The 2016 decision is Biao v Denmark (2016) 64 EHRR 1 ("Biao"). This concerned the Danish provisions for family reunion which treated Danish born nationals differently from those who acquired Danish nationality later in life, a majority of whom were of foreign ethnic origin. This was said to amount to a violation of article 14 read with article 8. Citing earlier decisions of its own, including Kjeldsen, Carson v United Kingdom 51 EHRR 13, and Clift v United Kingdom, the court said:

"89. The court has established in its case law that only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of article 14. Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. Article 14 lists specific grounds which constitute 'status' including, inter alia, race, national or social origin and birth. However, the list is illustrative and not exhaustive, as is shown by the words 'any ground such as' and the inclusion in the list of the phrase 'any other status'. The words 'other status' have generally been given a wide meaning and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent."

38.
The first of the 2017 decisions is Khamtokhu and Aksenchik v Russia (Applications Nos 60367/08 and 961/11) ("Khamtokhu"), which concerned applicants who were sentenced to life imprisonment. They complained of discriminatory treatment, in violation of article 14 taken in conjunction with article 5, because they were treated less favourably than other categories of convicted offenders (women, juveniles, and men over 65) who were exempt from life imprisonment.

39.
The court said:

"61. Article 14 does not prohibit all differences in treatment, but only those differences based on an identifiable, objective or personal characteristic, or 'status', by which individuals or groups are distinguishable from one another. It lists specific grounds which constitute 'status' including, inter alia, sex, race and property. However, the list set out in article 14 is illustrative and not exhaustive, as is shown by the words 'any ground such as' (in French 'notamment') and the inclusion in the list of the phrase 'any other status' (in French 'toute autre situation'). The words 'other status' have generally been given a wide meaning, and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent (see Clift, cited above, paras 56-58; Carson v

United Kingdom [GC], no 42184/05, paras 61 and 70, ECHR 2010; and Kjeldsen, Busk Madsen and Pedersen v Denmark, 7 December 1976, para 56, Series A no 23).”

40.
There was no need, in Khamtokhu to labour over the question of status, as “sex” is explicitly mentioned in article 14 as a prohibited ground of discrimination, and the court had accepted in an earlier case that “age” was a concept also covered by the provision. Article 14, taken with article 5, was accordingly applicable. The applicants were in an analogous situation to other offenders convicted of the same or comparable offences, but their complaint failed because the government’s sentencing provisions had a legitimate aim and were proportionate.

41.
The second 2017 case is Minter v United Kingdom (2017) 65 EHRR SE6 (“Minter”). Mr Minter was sentenced to an extended sentence for sexual offences. This meant that he was subject to an extended licence period, and thus to a requirement to notify the police of various personal details indefinitely. Mr Minter complained that the application of the indefinite notification period was in breach of article 8 of the ECHR, either read alone or in conjunction with article 14. Although the notification requirement was an interference with his article 8 rights, it was not disproportionate, and the article 8 claim was manifestly ill-founded. However, Mr Minter argued that, by virtue of a change in the law, if he had been sentenced later, he would not have received an extended sentence and would not therefore have been subject to the indefinite notification period at all. That, he submitted, amounted to an unjustified difference in treatment based on “other status”, and to a violation of article 14 taken with article 8.

42.
The court rejected the article 14 complaint as manifestly ill-founded too. On the facts, it considered Mr Minter’s assertion that no indefinite notification requirement would have been imposed if he had been sentenced later to be entirely speculative. But even had there not been that obstacle, his claim would have failed. The court began its assessment of the issue in this way:

“66. In order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (see Khamtokhu and Aksenchik v Russia (60367/08 and 961/11) 24 January 2017 at para 64). As established in the court’s case law, only differences in treatment based on an identifiable characteristic, or ‘status’, are capable of amounting to discrimination within the meaning of article 14 (see Khamtokhu and Aksenchik (60367/08 and 961/11) 24 January 2017 at para 61). Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it 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 (Khamtokhu and Aksenchik (60367/08 and 961/11) 24 January 2017 at para 64).”

43.
The court was not persuaded by the applicant’s reliance on the Clift v United Kingdom decision. In a passage which exhibits, to my mind, the tendency (also seen elsewhere in the Strasbourg jurisprudence on article 14) for consideration of the issue of whether a difference in treatment is on the ground of “other status” to convert, almost seamlessly, into consideration of whether the applicant is in an analogous situation and/or whether the difference is justified, it distinguished the situation in Clift v United Kingdom:

“68. Furthermore, the court does not consider that Clift (7205/07) 13 July 2010 supports the applicant’s claim. It is true that in Clift the court accepted that the different treatment of different

categories of prisoners depending on the sentences imposed was based on ‘other status’ within the meaning of article 14 of the Convention. However, in the present case the different treatment complained of did not concern the length of the applicant’s sentence but rather the different sentencing regime applied to him as a consequence of a new legislation. As such, his article 14 complaint is indistinguishable from that which was declared inadmissible as manifestly ill-founded in Massey. Although Massey (14399/02) 8 April 2003 pre-dated Clift (7205/07) 13 July 2010, in Zammit and Attard Cassar (1046/12) 30 July 2015, a case which post-dated Clift by some four-and-a-half years, the court reaffirmed that no discrimination was disclosed by the selection of a particular date for the commencement of a new legislative regime.”

44.

Although the approach taken in the three cases can properly be described as consistent, in my view, it is interesting to note that Biao and Minter refer to “identifiable characteristic, or ‘status’”, whereas Khamtokhu is slightly more expansive, speaking of “identifiable, objective or personal characteristic, or ‘status’, by which individuals or groups are distinguishable from one another”. Biao and Khamtokhu both stress that the list in article 14 is “illustrative and not exhaustive”, and that the words “other status” have generally been given a wide meaning and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent.

The domestic case law on article 14 and status

45.

Article 14 has regularly been the subject of consideration in the Supreme Court and, before that, in the House of Lords. The House of Lords’ decisions pre-date the ECtHR’s decision in Clift v United Kingdom, of course, but are important in understanding how the approach to article 14 has evolved. After a review of them, I summarise, at para 56 below, the position that the domestic case law seems to have reached on “other status” by the time of the ECtHR’s Clift decision.

46.

R (S) v Chief Constable of the South Yorkshire Police (2004, above) was the case concerning fingerprints and DNA samples. Lord Steyn, with whom I do not think there was significant disagreement on this point, worked on the basis that the proscribed grounds in article 14 were not unlimited and was guided by Kjeldsen. Perhaps foreshadowing the ejusdem generis argument advanced in Clift, in summarising his conclusion that the requisite “status” had not been established, he observed (para 51) that the “difference in treatment is not analogous to any of the expressly proscribed grounds”.

47.

R (Hooper) v Secretary of State for Work and Pensions [2005] UKHL 29; [2005] 1 WLR 1681 concerned widowers who claimed that, in denying them benefits which would have been payable to widows, the Secretary of State had acted incompatibly with their rights under article 14 read with article 1 of Protocol 1 and article 8 of the ECHR. The decision is of interest for Lord Hoffmann’s treatment of the question of whether article 14 was infringed. He considered whether being a person who has started legal proceedings qualified as a status, and was not persuaded that it did. In explaining why, at para 65, he appeared to adopt and develop Lord Steyn’s “analogous” approach which he described as being “that article 14 required discrimination to be by reference to some status analogous with those expressly mentioned, such as sex, race or colour”.

48.

R (Carson) v Secretary of State for Work and Pensions (above), is an often-cited House of Lords decision. Each of the two claimants complained of a violation of their rights under article 14, read with article 1 of the First Protocol to the ECHR. One claimant complained of discrimination on the basis of country of residence, and the other on the basis of age. The first was entitled to a retirement pension, but, because she was resident in South Africa, was precluded from receiving the normal annual cost of living increase. The second received state benefits at a lower rate because she was under 25. Their claims failed because the differential treatment of them was rationally justified. However, they did manage to establish that they came within the scope of "other status" in article 14. In the case of the claimant who was resident in South Africa, this is of note because she succeeded in establishing that this was a personal characteristic, notwithstanding that it was in principle a matter of choice and was not immutable. This result was reached through the application of what Lord Walker of Gestingthorpe described as "the Kjeldsen test of looking for a personal characteristic" (para 54).

49.
In AL (Serbia) v Secretary of State for the Home Department [2008] 1 WLR 1434, Baroness Hale described Carson as unusual, commenting (para 26) that:

"In general, the list concentrates on personal characteristics which the complainant did not choose and either cannot or should not be expected to change. The Carson case is therefore unusual, because it concerned discrimination on the ground of habitual residence, which is a matter of personal choice and can be changed."

But the ECtHR subsequently confirmed, in Carson v the United Kingdom (2008) 48 EHRR 41, that ordinary residence should be seen as an aspect of personal status.

50.
R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening) [2009] AC 311 might also be considered to take a more expansive view of "status". It merits rather more detailed review because there was considerable discussion of the subject.

51.
The claimant's disability premium in his income support, which he received by reason of his incapacity for work through mental health problems, was stopped because he had become homeless. He claimed that the premium was a possession within article 1 of the First Protocol to the ECHR and that he had been discriminated against contrary to article 14. One of the questions for determination was whether homelessness fell within "other status" for the purposes of article 14. There was an argument as to whether it was necessary to show that it was a "personal characteristic" at all, and, if so, whether it was properly so described. It was held that it was indeed "a personal characteristic" and within the article, even if adopted by choice, although the claim failed because the regulation in question was justified.

52.
Lord Neuberger of Abbotsbury discussed whether "other status" must necessarily be based upon a "personal characteristic". He said (para 36) that there was no doubt that the House of Lords had consistently proceeded upon the assumption that that was required, basing that approach primarily on the Kjeldsen case. There was also, in his view, a strong case for saying that as a matter of language, article 14 (or at least the English version of it) "appears to envisage precisely this, given the specific grounds on which unjustifiable discrimination is prohibited" (para 37). No case to which the court had been taken supported an argument to the contrary. However, before ultimately adopting

that approach himself, Lord Neuberger did acknowledge that there may be a case for another interpretation, saying:

"39. None the less, it is fair to refer to the fact that the French version of article 14 (which has equal status with the English version - see article 59) ends with the words 'ou toute autre situation', which may suggest a rather wider scope than 'or other status'. Further, while the ECtHR judgments relied on by RJM do not establish that no consideration need be given in an article 14 case to the issue of whether the discrimination is by reference to a 'status' which can be characterised as a 'personal characteristic', some of those judgments could be read as suggesting a rather less structured approach than that which has been adopted by this House. In particular, in an allegation of article 14 infringement, the ECtHR may not always consider whether the alleged discrimination is on the ground of 'other status' as an entirely free-standing question: it sometimes appears to approach the overall allegation of infringement on a more holistic or 'broad brush' basis: see, for instance, the reasoning in Kjeldsen 1 EHRR 711, para 56, and Kafkaris 12 February 2008, paras 163-165, as well as Stubbings v United Kingdom (1996) 23 EHRR 213, paras 70-73."

53.
In deciding that homelessness could fairly be described as a "personal characteristic", Lord Neuberger proceeded upon the basis that a generous meaning should be given to "or other status", as would be expected in "enforcing anti-discrimination legislation in a democratic state" (para 42), and that "other status" "should not be too closely limited by the grounds which are specifically prohibited by the article" (para 43). He said (para 45) that "while reformulations are dangerous", he considered that the concept of "personal characteristics" "generally requires one to concentrate on what somebody is, rather than what he is doing or what is being done to him", and that, on that approach, homelessness was an "other status". He considered (para 46) that this characterisation also fitted with Lord Bingham's view in Clift that the personal characteristic could not be defined by the differential treatment of which the person complains. He considered (para 47) that the fact that homelessness was a voluntary choice (if it was) was not of much, if any, significance in determining whether it was a status for article 14; some of the specified grounds in the article were matters of choice too. Nor was it telling that homelessness was not a legal status.

54.
Lord Walker's observations about "personal characteristics" are also instructive:

"5. The other point on which I would comment is the expression 'personal characteristics' used by the European Court of Human Rights in Kjeldsen, Busk Madsen and Pedersen v Denmark (1976) 1 EHRR 711, and repeated in some later cases. 'Personal characteristics' is not a precise expression and to my mind a binary approach to its meaning is unhelpful. 'Personal characteristics' are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual's personality: gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion and politics may be almost innate (depending on a person's family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts); but all are regarded as important to the development of an individual's personality (they reflect, it might be said, important values protected by articles 8, 9 and 10 of the Convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within article 14 (Lord Neuberger instances military status, residence or domicile, and past employment in the KGB). Like him, I would include homelessness as falling within that range, whether or not it is regarded as a matter of choice (it is

often the culmination of a series of misfortunes that overwhelm an individual so that he or she can no longer cope). The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify. There is an illuminating discussion of these points (contrasting Strasbourg jurisprudence with the American approach to the Fourteenth Amendment) in the speech of Baroness Hale of Richmond in AL (Serbia) v Secretary of State for the Home Department [2008] 1 WLR 1434, paras 20-35."

55.

It looks from this passage as if Lord Walker was perhaps slightly more ready than Lord Neuberger to accept that what someone was doing, or what was being done to him, could be a personal characteristic, although observing that the "more peripheral or debateable" the characteristic, the easier it would be to justify differential treatment.

56.

Reviewing these decisions, together with R (Clift), I think it can be said (although acknowledging the danger of over-simplification) that prior to the decision in Clift v United Kingdom in 2010, the House of Lords had adopted the following position on "other status".

i)

The possible grounds for discrimination under article 14 were not unlimited but a generous meaning ought to be given to "other status";

ii)

The Kjeldsen test of looking for a "personal characteristic" by which persons or groups of persons were distinguishable from each other was to be applied;

iii)

Personal characteristics need not be innate, and the fact that a characteristic was a matter of personal choice did not rule it out as a possible "other status";

iv)

There was support for the view that the personal characteristic could not be defined by the differential treatment of which the person complained;

v)

There was a hint of a requirement that to qualify the characteristic needed to be "analogous" to those listed in article 14, but it was not consistent (see, for example, Lord Neuberger's comment at para 43 of R (RJM)) and it was not really borne out by the substance of the decisions;

vi)

There was some support for the idea that if the real reason for differential treatment was what someone had done, rather than who or what he was, that would not be a personal characteristic, but it was not universal;

vii)

The more personal the characteristic in question, the more closely connected with the individual's personality, the more difficult it would be to justify discrimination, with justification becoming increasingly less difficult as the characteristic became more peripheral.

57.

Following the decision of the ECtHR in Clift v United Kingdom, there has been further consideration, in the Supreme Court, of the issue of status in article 14. The issue of how R (Clift) should be viewed in the light of the ECtHR's different view has not been directly confronted, although the court made some comment on the ECtHR decision in R (Kaiyam) v Secretary of State for Justice [2014] UKSC 66; [2015] AC 1344. Apart from that case, of the cases singled out for mention below, it could be said that Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47; [2015] 1 WLR 3250 is the one which deals most fully with the question of status.

58.
In R (Kaiyam) v Secretary of State for Justice, the issue was what duty the Secretary of State had to provide prisoners serving indeterminate sentences with opportunities for rehabilitation in order to facilitate their release. As part of his claim, one of the appellants, Mr Haney, invoked article 14, claiming that he had been discriminated against by the prison authorities in that they prioritised the movement to open prisons of prisoners whose tariff periods had already expired, whereas his had not. The Supreme Court had to decide whether it should recognise the difference between those whose tariff periods had and had not expired as a difference of status for the purposes of article 14. At para 52, Lord Mance and Lord Hughes, with whom there was unanimous agreement, noted the decision of the House of Lords in R (Clift), and the different view taken by the ECtHR in that case. They observed:

"53. In the light of the European court's decision, we see some force in the submission that the difference between pre- and post-tariff prisoners should now be taken to represent a relevant difference in status."

But they did not need to determine the question of Mr Haney's status finally because the difference in treatment was clearly justified.

59.
Para 52 suggests that they might have felt a degree of caution about Clift v United Kingdom (see para 26 above for the passage from para 60 of Clift v United Kingdom to which reference is made):

"52. … The question of law is whether the Supreme Court should recognise the difference between those whose tariff periods had and had not expired as a difference of status for the purposes of article 14 of the Convention. The House in R (Clift) v Secretary of State of the Home Department [2007] 1 AC 484 was, in the absence of clear Strasbourg authority, not prepared to accept the difference between prisoners serving determinate sentences over 15 years and life prisoners or prisoners serving determinate sentences of less than 15 years as a difference in status. The European court in Clift v United Kingdom (Application No 7205/07) given 13 July 2010 took a different view, and expressed itself at one point (at the end of para 60) in terms which might, literally read, eliminate any consideration of status."

60.
Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47; [2015] 1 WLR 3250 concerned a child with disabilities whose parents received disability living allowance until he had been an in-patient in a National Health Service hospital for more than 84 days. He appealed against the suspension of the benefit on the ground that it was in breach of his right not to be discriminated against under article 14 read with article 1 of the First Protocol to the ECHR. One of the arguments in the Supreme Court was as to whether, if there was discrimination in the treatment of him, it was on the ground of "other status". It was held that this ground was applicable either by virtue of his status as "a severely disabled child in need of lengthy in-patient hospital treatment" (para 23), or by virtue of his status as "a child hospitalised free of charge … in a NHS … hospital … for a period longer than 84

days" (para 60). At para 21, Lord Wilson said that the prohibited grounds in article 14 extend well beyond innate characteristics, as demonstrated by R (RJM) v Secretary of State for Work and Pensions [2009] AC 311. Looking at the approach of the ECtHR in Clift, Lord Wilson considered it "clear that, if the alleged discrimination falls within the scope of a Convention right, the Court of Human Rights is reluctant to conclude that nevertheless the applicant has no relevant status" (para 22).

61.
In R (Tigere) v Secretary of State for Business, Innovation and Skills (Just for Kids Law intervening) [2015] 1 WLR 3820, immigration status was recognised as an "other status" within article 14, (consistently with the decision of the ECtHR in Bah v United Kingdom (2011) 54 EHRR 773), but as the point was conceded, there was no discussion about it in the judgments.

62.
R v Docherty (Shaun) [2016] UKSC 62; [2017] 1 WLR 181 concerned a prisoner who was sentenced on 20 December 2012 to imprisonment for public protection for offences to which he had pleaded guilty in November 2012. Imprisonment for public protection had been abolished prior to him being sentenced, but not for those convicted before 3 December 2012. Amongst other things, he claimed that the differentiation between him and a person convicted of an identical offence on 4 December 2012 was unlawful under article 14. At para 63, Lord Hughes dealt with the question of status and, as will be seen, returned to the idea that it will not be possible to bring oneself within article 14 unless the proposed status exists independently of the treatment about which complaint is made:

"The appellant submits that this discriminates objectionably against him on grounds of 'other status', namely either (i) his status as a convicted person prior to 3 December or (ii) his status as a prisoner who is subject to an indeterminate sentence. Assuming for the sake of argument that status as a prisoner subject to a particular regime can in some circumstances amount to sufficient status to bring article 14 into question (Clift v United Kingdom (Application No 7205/07) The Times, 21 July 2005), it cannot do so if the suggested status is defined entirely by the alleged discrimination; that was not the case in Clift. For that reason, the second suggested status cannot suffice. As to the first, even if it be assumed in the appellant's favour that the mere date of conviction can amount to a sufficient status, which is doubtful, the differential in treatment is clearly justified. All changes in sentencing law have to start somewhere. It will inevitably be possible in every case of such a change to find a difference in treatment as between a defendant sentenced on the day before the change is effective and a defendant sentenced on the day after it. The difference of treatment is inherent in the change in the law. If it were to be objectionable discrimination, it would be impossible to change the law. There are any number of points which may be taken as triggering the change of regime. The point of conviction is clearly one, and the point of sentence is another. Neither is, by itself, irrational or unjustified."

63.
Returning to the list of propositions derived from the House of Lords' decisions which is to be found at para 56 above, it seems to me that the subsequent authorities in the Supreme Court could be said to have continued to proceed upon the basis of propositions (i) to (iii), which have also continued to be reflected in the jurisprudence of the ECtHR. Proposition (iv) lives on, in R v Docherty, but perhaps needs to be considered further, in the light of its rejection in Clift v United Kingdom (see further, below). The "analogous" point, which features at proposition (v), is reminiscent of the ejiusdem generis argument advanced in Clift v United Kingdom, but not addressed head-on by the ECtHR. That court's answer to the argument was, it will be recalled, to give quite wide-ranging examples of situations in which a violation of article 14 had been found. With the continued expansion of the range of cases in which "other status" has been found, in domestic and Strasbourg decisions, the search for

analogy with the grounds expressly set out in article 14 might be thought to be becoming both more difficult and less profitable. However, that should not, of course, undermine the assistance that can be gained from reference to the listed grounds, taken with examples of "other status" derived from the case law. It may not be helpful to pursue proposition (vi) abstract; whether it assists will depend upon the facts of a particular case. Proposition (vii) comes into play when considering whether differential treatment is justified, rather than in considering the "other status" question, and need not be further considered at this stage.

Submissions in relation to status

64.
Mr Southey QC and Mr Bunting for the appellant submit that the decision of the House of Lords in Clift can no longer be considered a reliable guide to the meaning of "other status" in article 14. The words should be given a generous meaning, they submit. They invite attention to the range of situations which have been held, either by the ECtHR or by the domestic courts, to be within the category. Legally acquired statuses have been accepted as sufficient, as demonstrated, for example, by Larkos v Cyprus and Pine Valley Developments Ltd v Ireland, Bah v United Kingdom (all above) and Krajisnik v United Kingdom (2012) 56 EHRR SE7 (status as a prisoner convicted by the International Criminal Tribunal for former Yugoslavia). They also invite attention to the fact that homelessness has been held to be covered, even if it is a matter of choice, (R (RJM) v Secretary of State for Work and Pensions above), and to the status recognised in Mathieson v Secretary of State Work & Pensions (above). And, of course, they rely on the ECtHR's decision in Clift itself.

65.
It is submitted that there has been nothing in the decisions of the Supreme Court post-dating the ECtHR's decision in Clift (particularly R (Kaiyam) v Secretary of State for Justice, R v Docherty, and Mathieson) which has undermined the authority of that judgment, and the approach which is there set out should be followed. Thus, life sentences, extended sentences and determinate sentences can all be considered to give rise to "other status".

66.
For the Secretary of State, Sir James Eadie QC, Ms Davidson and Mr Pobjoy recognise that the court is bound to take into account the ECtHR's decision in Clift and to consider whether to depart from the House of Lords' decision in that case. However, this should not, in their submission, lead to the conclusion that Mr Stott can lay claim to "other status".

67.
They invite the court to consider the scope of Clift against the background of the other cases in which the "other status" category has been considered by the ECtHR, the House of Lords and the Supreme Court. Whilst this collection of authority establishes that a generous meaning should be given to the words, it also establishes that "other status" is not a catch-all category, see most recently para 61 of Khamtokhu. The central question, so the Secretary of State submits, is whether the basis or reason for the differential treatment is a "personal characteristic by which persons or groups of persons are distinguishable from each other". In the Secretary of State's submission, article 14 protects "personal characteristics" which are analogous to those expressly mentioned in the article, see para 65 of R (Hooper) v Secretary of State for Work and Pensions and para 51 of R (S) v Chief Constable of the South Yorkshire Police. And, it is said, although the concept of a personal characteristic is not a precise one, and is not limited to something innate or inherent, it will typically be more concerned with who a person is, than with what he or she does, see paras 5 and 45 of RJM. Furthermore, the

personal characteristic must be independent of the treatment about which complaint is made (para 28 and 45 of Clift in the House of Lords, and para 63 of R v Docherty).

68.
It is further submitted, on behalf of the Secretary of State, that Clift is distinguishable from the present case. The classification of Mr Clift was based upon the length of his sentence, not the nature or gravity of his offence. That set his case apart from cases such as Gerger v Turkey and Budak v Turkey. Mr Stott's case is different, it is said, because he is not relying on the length of his sentence but on the fact that he is subject to a particular sentencing regime in light of the gravity of his crime and the risk he poses to the community. It is said that the importance of this distinction was affirmed in Minter. Furthermore, unlike with Mr Clift, the treatment of which Mr Stott complains does not exist independently of the characteristic on which he bases his complaint of discrimination, because the release conditions about which he complains flow from his status as a prisoner serving an extended determinate sentence. Mr Clift had already been sentenced, and had thus already acquired his status, before the order was made which led to the different treatment of his group for the purposes of release.

69.
Furthermore, the Secretary of State submits that "there is no authority for the proposition that any form of sentencing regime constitutes an 'other status' for the purposes of article 14" and says that the implication of such a finding would be that every convicted prisoner would automatically fall within the scope of article 14, and authority establishes that that is not the case.

Conclusions in relation to status

70.
The different view taken by the ECtHR in Clift v United Kingdom has to be taken into account when considering whether R (Clift) should continue to influence the approach to article 14 status in cases such as the present. For my part, I would now depart from the determination, in R (Clift), that different treatment on the basis that a prisoner was serving imprisonment of 15 years or more could not be said to be on the ground of "other status". I am influenced by the ECtHR's reasoned decision to the contrary, notwithstanding that it was not a decision of the Grand Chamber, but of a section of the court. I am also influenced by the hesitation apparent in the speeches of the House of Lords in R (Clift), which disclose the constraint that was felt in the absence of any recognition by the ECtHR of a status such as that for which Mr Clift contended. Although one can only speculate as to how the decision would have gone if the ECtHR had already led the way, it is clear that the House could see the force of arguments advanced in Mr Clift's favour.

71.
If R (Clift) is left to one side, at least as to its result, that does not mean that the question of how to approach "other status" is free of domestic authority. In considering the decisions of the House of Lords which pre-date Clift v United Kingdom, it is necessary to keep in mind the ways in which the ECtHR ultimately differed from the House, which I have attempted to set out, commencing at para 33 above. The Supreme Court authorities can be taken to have been decided with Clift v United Kingdom in mind.

72.
Perhaps the clearest difference between R (Clift) and Clift v United Kingdom was in relation to whether the treatment of which the applicant complains must exist independently of the other status. Counsel for the Secretary of State continue to rely upon this as part of their argument, and they are

correct to point out that it features as part of Lord Hughes' analysis in R v Docherty. The first difficulty about the independent existence condition is the uncompromising rejection of it by the ECtHR, which went on to say that, on the contrary, the matter had to be assessed taking into consideration all the circumstances of the case and bearing in mind that the aim of the Convention was to guarantee practical and effective rights. It cited Paulík in support of its stance. The applicant in Paulík was a man who, in 1970, was found by a court to be the father of a girl, paternity then being disproved by a DNA test in 2004. He wanted the finding of paternity overturned, but, unlike fathers whose paternity had been established otherwise than through a court, and mothers, he had no means to achieve this under domestic law. He complained of various breaches of the ECHR, including that he had been discriminated against in the enjoyment of his article 8 and article 6 rights. There was found to be a violation of article 14 taken with article 8. It seems there was no dispute as to the applicability of article 14 (para 51), the dispute having centred on whether the various categories of people were in analogous situations, and whether the difference was justified. Nonetheless, in light of the specific endorsement, in Clift v United Kingdom, of Paulík on the question of status, it is clear that the ECtHR saw the case as an example of a characteristic which did not exist independently of the treatment complained of and yet approved of its categorisation as an "other status".

73.
The second difficulty with the independent existence condition is that it made its appearance in R (Clift) unsupported by much, if anything, by way of explanation or supportive authority. Lord Hope might have been building upon his observation, at para 45, that the specific grounds all existed independently of the treatment of which complaint was made. However, whilst some of the grounds named in article 14 clearly will always exist independently of the complaint, I am not at all sure that the same can be said of all of them. "Property" might be a ground which would not always exist independently, and I think there are probably other examples.

74.
The third difficulty is that the independent existence condition is not at all easy to grasp. Mr Clift satisfied it, because he relied upon being a prisoner serving a determinate term of 15 years or more, and his complaint was about the fact that, by virtue of a subsequent Order, he required the Secretary of State's approval for his release, rather than automatically being released if the Parole Board recommended it. The homeless person in RJM, who complained about losing his benefits, also satisfied it. However, it was not satisfied, according to Docherty, where the prisoner was relying upon being a prisoner subject to an indeterminate sentence, and complained that he had been discriminated against by virtue of the fact that he could not have been given that sentence had he been convicted after 3 December 2012. Even with these practical examples, it is a challenge to make general sense of the concept, and things do not improve when one takes into account the width of the approach taken in Strasbourg to the ambit of article 14.

75.
In all these circumstances, I would be cautious about spending too much time on an analysis of whether the proposed status has an independent existence, as opposed to considering the situation as a whole, as encouraged by the ECtHR in Clift v United Kingdom. In any event, it can properly be said that the status upon which Mr Stott relies exists independently of his complaint, which is about the provisions concerning his early release. By way of example, his extended determinate term of imprisonment does not only dictate the point at which he is eligible for release on parole; it dictates the period he will spend in prison if parole is not granted, and it brings with it also a licence extension.

76.
A second respect in which the ECtHR differed from the House of Lords was as to whether Mr Clift's complaint was based upon the gravity of his offence; it said not. The Secretary of State argues that Mr Stott's case is not the same as Mr Clift's, as Mr Stott's complaint is not based on length of sentence, as in Mr Clift's case, but on his particular sentencing regime, which is dictated by the seriousness of what he did and the risk he poses.

77.
I am not persuaded by the Secretary of State's attempt to liken the case to Gerger and Budak, rather than Clift v United Kingdom, and to exclude the extended determinate term prisoner on the basis that the differential treatment in his case is because of what he has done and the risk he poses. The ECtHR dealt with the Gerger cases in para 61 of Clift v United Kingdom, and explained them as all being concerned with special provisions for those accused or convicted of terrorism offences. They also stressed that any exception to the protection offered by article 14 should be narrowly construed. True it is that an extended determinate sentence will only be imposed where there is a particular combination of gravity of offence and risk, but within the category of those serving extended determinate sentences, there will be various types of offence of varying seriousness. Putting it another way, what Mr Stott did has led to him receiving an extended determinate sentence, but, once imposed, that extended determinate sentence exists independently of what he did. If a life sentence is capable of constituting an "acquired personal status", as Lord Bingham was understandably disposed to think it was (para 28 of R (Clift)), and a determinate term of 15 years is also (Clift v United Kingdom), it is difficult to see why an extended determinate sentence should be viewed differently.

78.
I do not think that reliance on Minter assists the Secretary of State in relation to this issue. The complaint in Minter related to a new legislative regime being introduced, which did not benefit the applicant. The selection of a particular date for the commencement of a new legislative regime did not give rise to discrimination when those who were covered by it were treated differently from those who were subject to the old regime. Given the conflating of the various issues of status, analogous situation and justification, in the passage in Minter to which reference is made, it is difficult to be sure whether, in fact, the ECtHR was rejecting the "other status" argument or not, but in any event, the present case does not involve the commencement of a new sentencing regime.

79.
So, whilst the attributes of the sentencing regime to which Mr Stott is subject will be of central relevance to Issue 2 in due course, for the purposes of determining status, in my view the distinction that the Secretary of State seeks to make between Mr Clift as a prisoner serving 15 years or more and Mr Stott as a prisoner serving an extended determinate term is not a real one. It follows that the decision of the ECtHR in Clift v United Kingdom is potentially influential in evaluating the present case.

80.
As to the argument that the characteristic needs to be analogous to those listed in article 14, this is difficult to pursue too far in the light of the ECtHR's acceptance that a prison sentence of a particular length can be within the article. I have no difficulty in accepting that when considering an as yet unconsidered characteristic, a court will have in mind the nature of the grounds it was thought right to list specifically, but the case law that the court cited in Clift v United Kingdom demonstrates that a strict ejusdem generis interpretation would be unduly restrictive.

81.
Bearing in mind that, although not open-ended, the grounds within article 14 are to be given a generous meaning, bearing in mind the warning of the ECtHR that there is a need for careful scrutiny of differential early release schemes, lest they run counter to the very purpose of article 5, and considering all of the case law, I would conclude that the difference in the treatment of extended determinate sentence prisoners in relation to early release is a difference within the scope of article 14, being on the ground of "other status".

Issue 2: Analogous situation and justification

82.
In order to address the issues concerning the third and fourth elements of the article 14 claim (see para 8 above), it is necessary to understand the sentencing regime to which Mr Stott is subject, and also the other sentences with which he invites comparison. Some of the fine detail of the sentencing regimes is irrelevant for present purposes and has been omitted. Unless otherwise specified, in what follows, references to statute are to the 2003 Act.

The sentencing framework: general

83.
Section 142(1) sets out the purposes of sentencing adult offenders, applicable fairly generally except in relation to life sentences. It provides that a sentencing court must have regard to:

"(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."

The sentencing framework: EDS

84.
The EDS was introduced by the Legal Aid Sentencing and Punishment of Offenders Act 2012, as one of the sentences for dangerous offenders replacing the sentence of Imprisonment for Public Protection, and is to be found in section 226A, which was added to the 2003 Act.

85.
Section 226A provides (in the version relevant to this case):

226A Extended sentence for certain violent or sexual offences: persons 18 or over

"(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.

(2) Condition A is that, at the time the offence was committed, the offender had been convicted of an offence listed in Schedule 15B.

(3) Condition B is 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.

(4) The court may impose an extended sentence of imprisonment on the offender.

(5) An extended sentence of imprisonment is a sentence of imprisonment the term of which is equal to the aggregate of -

(a) the appropriate custodial term, and

(b) a further period (the 'extension period') for which the offender is to be subject to a licence.

(6) The appropriate custodial term is the term of imprisonment that would (apart from this section) be imposed in compliance with section 153(2).

(7) The extension period must be 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, subject to subsections (8) and (9).

(8) The extension period must not exceed -

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

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

(9) The term of an extended sentence of imprisonment imposed under this section in respect of an offence must not exceed the term that, at the time the offence was committed, was the maximum term permitted for the offence.

(10) In subsections (1)(a) and (8), references to a specified offence, a specified violent offence and a specified sexual offence include an offence that -

(a) was abolished before 4 April 2005, and

(b) would have constituted such an offence if committed on the day on which the offender was convicted of the offence.

(11) Where the offence mentioned in subsection (1)(a) was committed before 4 April 2005 -

(a) subsection (1)(c) has effect as if the words 'by section 224A or 225(2)' were omitted, and

(b) subsection (6) has effect as if the words 'in compliance with section 153(2)' were omitted.

(12) [offenders aged at least 18 but under 21]."

86.
From this, it can be seen that an EDS can only be imposed if the four pre-conditions set out in section 226A(1) are satisfied. The offender must be 18 or over and must have been convicted of a "specified

offence” (section 226A(1)(a)); a “specified offence” is defined by section 224 as a specified violent offence (specified in Part 1 of Schedule 15 to the Act) or a specified sexual offence (specified in Part 2 of that Schedule). Secondly, the court must consider 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 (section 226(1)(b)). Thirdly, a life sentence must not be required by section 224A or section 225(2) (section 226A(1)(c)). Fourthly, either Condition A, or Condition B, must be met (section 226A(1)(d)).

87.

Condition A (section 226A(2)) is that at the time the index offence was committed, the person had been convicted of an offence specified in Schedule 15B (offences generally of a violent and sexual nature). Condition B (section 226A(3)) relates to the term that the court would specify as the “appropriate custodial term” if it did impose an extended sentence. By virtue of section 226A(6), the “appropriate custodial term” is the term of imprisonment that would, apart from section 226A, be imposed in compliance with section 153(2). Section 153(2) governs custodial sentences where there is discretion as to the length of sentence, setting out that, as a general rule, the sentence must be for the shortest term commensurate with the seriousness of the offence or combination of offences. Condition B will only apply if the appropriate custodial term that the court would impose would be at least four years.

88.

The nature of an extended sentence appears from section 226A(5). It is a sentence of imprisonment with a term equal to the aggregate of the appropriate custodial term and a further period, called the “extension period”, during which the offender is on licence. Subject to maximum periods set out in section 226A(8), the length of the extension period has to be fixed according to what the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the offender committing further specified offences. However, by section 226A(9), the term of the extended sentence (appropriate custodial term and extension period) must not exceed the maximum term for the offence (section 226A(9)).

89.

Release on licence of a prisoner serving an EDS is governed by section 246A. In most cases, the section requires that the Secretary of State refer the case to the Parole Board as soon as the prisoner has served the “requisite custodial period”, which is two-thirds of the appropriate custodial term. The Parole Board can only direct the release of the prisoner if it is satisfied that it is no longer necessary for the protection of the public that he should be confined. If the Parole Board does not direct the release of the prisoner, he must be released on licence at the expiry of the appropriate custodial term.

The sentencing framework: standard determinate sentences

90.

A standard determinate custodial sentence will be for the shortest term commensurate with the seriousness of the offence or combination of offences (section 153(2)). There is no “extension period” as there is with an EDS. The majority of standard determinate sentence prisoners are entitled to be released on licence automatically, once they have served “the requisite custodial period”, which is one half of their sentence (section 244).

91.

Home Detention Curfew (sections 246 and 250(5)) is available as a means of releasing a prisoner before the half-way point in his sentence, on a licence coupled with a curfew condition. Whether this route is taken depends upon the Secretary of State’s discretion, which can be exercised at any time

during the 135 days ending with the day on which the prisoner will have served the requisite custodial period. Amongst the prisoners not eligible are EDS prisoners and those serving a sentence imposed under section 236A, as to which see below.

92.
Foreign national prisoners can also be removed from custody early for the purposes of deportation (section 260).

Sentencing framework: special custodial sentences for certain offenders of particular concern

93.
Section 236A (as inserted by Schedule 1 to the Criminal Justice and Courts Act 2015) provides for special custodial sentences to be passed in relation to certain offenders of particular concern ("an SOPC sentence"). The conditions for the imposition of such a sentence are that the offender was over 18 when the offence was committed, that he has been convicted of an offence listed in Schedule 18A to the 2003 Act (as also so inserted), and that the court does not impose a life sentence or EDS. Schedule 18A lists offences under the headings "Terrorism offences", and "Sexual offences" (rape of a child under 13, and assault of a child under 13 by penetration).

94.
An SOPC sentence has two elements: the appropriate custodial term ("the term that, in the opinion of the court, ensures that the sentence is appropriate", see section 236A(3)) 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. It is worth noting that the "appropriate custodial term" for the SOPC provisions differs from the "appropriate custodial term" for the EDS provisions. The focus is on the overall sentence, the aggregate of the two elements, which has to be commensurate with the seriousness of the offence. In contrast, an EDS comprises a custodial term commensurate with the offence plus a specified licence period, and can truly be described as an "extended" term.

95.
Release arrangements for an SOPC prisoner are to be found in section 244A (as also so inserted). The Secretary of State must refer his case to the Parole Board as soon as he has served one half of the appropriate custodial term, and must release him on licence if the Board directs, which it can only do if satisfied that it is not necessary for the protection of the public for the prisoner to be confined. If the Board does not direct release, the prisoner will have to serve the appropriate custodial term before he is released on licence.

Sentencing framework: indeterminate sentences

96.
A life sentence must be imposed for murder (Murder (Abolition of the Death Penalty) Act 1965); this is referred to as a "mandatory life sentence". There are also three other situations in which a life sentence (referred to as a "discretionary life sentence") may be imposed, namely (a) life sentences for serious offences (section 225) (b) life sentences for second listed offences (section 224A) and (c) life sentences where the offence carries life as a maximum penalty. It is well understood that, generally, life sentences are sentences of last resort, see for example R v Burinskas (Attorney General's Reference (No 27 of 2013)) (Practice Note) [2014] EWCA Crim 334; [2014] 1 WLR 4209, para 18.

97.

A life sentence must be imposed under section 225, on an offender over 18, if certain conditions are satisfied:

i)
The offender has been convicted of a serious offence committed after 3 December 2012; a “serious offence” is defined in section 224 as an offence specified in Schedule 15 to the 2003 Act (certain violent and sexual offences) which is punishable with life imprisonment.

ii)
The court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences.

iii)
The court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a life sentence; section 143 deals with factors to be considered in gauging seriousness, including the offender’s culpability and the harm, or potential harm, caused by the offence.

98.
In Burinskas, the Court of Appeal explained how the judge should approach the sentencing of offenders who may be considered dangerous, where a sentence under section 225 or one of the allied provisions of the 2003 Act might be required. In relation to section 225, it spelled out (para 22) that consideration of iii) above requires consideration of the seriousness of the offence itself on its own or taken with other offences associated with it, the offender’s previous convictions, the level of danger he poses to the public and whether there is a reliable estimate of the length of time that he will remain a danger, and the available alternative sentences.

99.
Life sentences for second listed offences are dealt with in section 224A. The (cumulative) criteria for imposing a life sentence under that section are:

i)
The offender is over 18 and has been convicted of an offence, committed after 3 December 2012, which is listed in Part 1 of Schedule 15B to the 2003 Act; Part 1 includes certain offences of serious violence and of terrorism, certain offences relating to weapons, and certain serious sexual offences.

ii)
Apart from the section, the court would impose a sentence of imprisonment of ten years or more, disregarding any extension period under section 226A.

iii)
The “previous offence condition” is met, that is, at the time the offence was committed, the offender had already been convicted of an offence listed in Schedule 15B and been sentenced to a relevant life sentence or a relevant sentence of imprisonment (the sentences which are relevant being, in essence, sentences of significant length).

100.
If the criteria are met, the court is obliged to pass a life sentence unless it is of the opinion that there are particular circumstances, which relate to the offence, to the previous offence, or to the offender, and which would make it unjust to do so in all the circumstances. It is to be noted that, as the Court of Appeal observed at para 8 of Burinskas, there is no requirement under section 224A for the offender

to have been found to be dangerous within the meaning of the 2003 Act, although it is likely that in most cases he will be.

101.
A life sentence may also be imposed where the offence has a maximum penalty of life imprisonment. Two criteria for the imposition of such a life sentence were identified in Attorney General's Reference (No 32 of 1996) [1997] 1 Cr App R(S) 261, 264, namely that the offender has been convicted of a very serious offence, and there are good grounds for believing that he may remain a serious danger to the public for a period which cannot be reliably estimated at the date of the sentence.

102.
In the case of a mandatory life sentence, unless the seriousness of the offence or offences leads the court to disapply the early release provisions, section 269 requires the judge to determine the minimum custodial term that the offender must serve before he is eligible to apply for release. In setting the minimum custodial term, the court must take account of the seriousness of the offence, and of the effect of the provisions for credit for periods of remand in custody, or on certain types of bail, which would have applied "if it had sentenced him to a term of imprisonment". In assessing the seriousness of the offence, regard is to be had to the principles set out in Schedule 21 of the 2003 Act, which set statutory starting points for offences of murder and specify a range of aggravating and mitigating features, and also to any guidelines which are not incompatible with Schedule 21.

103.
In the case of discretionary life sentences, section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 (as inserted by section 60 of the Criminal Justice and Court Services Act 2000 and amended by the 2003 Act) 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. As the Court of Appeal said in R v Szczerba [2002] 2 Cr App R(S) 86, whether the specified part is half or two-thirds of the notional determinate term, or somewhere between the two, is essentially a matter for the sentencing judge's discretion. It gave examples, at para 33, of the sort of exceptional circumstances in which more than half may be appropriate.

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, whether under section 82A or

section 269 of the 2003 Act. 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.

The sentencing framework: recall of prisoners

106.
There are detailed provisions, commencing at section 244 of the 2003 Act, governing the release of prisoners on licence and the revocation of such a licence. For present purposes, it is sufficient to record the following:

i)
A determinate sentence prisoner who has been released early on licence (see para 90 above) will be liable, until the end of the determinate sentence, to be recalled to prison to serve the remainder of the sentence. Some prisoners (those the Secretary of State is satisfied will not present a risk of serious harm to members of the public if released) will be eligible for automatic release again within a short, stipulated period, and the Secretary of State has a discretion to release them sooner than that or the Parole Board can so direct.

ii)
An EDS prisoner who is recalled during the period of his licence, and other recalled determinate sentence prisoners who are not suitable for automatic release, may be released again by the Secretary of State, if the Secretary of State is satisfied that it is not necessary for the protection of the public that the prisoner should remain in prison. If the prisoner makes representations within 28 days of recall, or if not released by the Secretary of State within that period, he must be referred to the Parole Board which can direct immediate release.

iii)
Where a life sentence prisoner is released, it will be on a licence which, by virtue of section 31 of the Crime (Sentences) Act 1997, will remain in force until his death. He can be recalled to prison by the Secretary of State, whereupon his case will be referred to the Parole Board, which can direct his release. Otherwise, he continues to be detained pursuant to his sentence.

Sentencing: the relevance of the early release provisions

107.
When determining the custodial sentence in a particular case, the judge is not to take account of the early release provisions, see for example para 44 of R v Round [2009] EWCA Crim 2667; [2010] 2 Cr App R(S) 45. However, the early release provisions are taken into account, in sentencing, in fulfilling the requirement of section 82A(3) of the Powers of Criminal Courts (Sentencing) Act 2000, above, when fixing the minimum term to be served.

The Divisional Court’s reasoning

108.
The focus in the Divisional Court was particularly on the comparison between the EDS being served by Mr Stott, and a life sentence, but the court was conscious that there could also, legitimately, be a comparison between the EDS and other forms of determinate sentence (para 6). It contrasted the early release provisions applicable to an EDS, requiring the prisoner to serve two-thirds of the custodial term before becoming eligible for release, with the provisions for SOPC sentences (eligibility

after half of the custodial term), and for life sentences excepting mandatory life sentences for murder (eligibility once the minimum term has been served which, save in exceptional circumstances, will be equivalent to half-way through the notional determinate sentence). This led to the conclusion (para 30) that, “putting mandatory life sentences to one side, save exceptionally, in every other case save for those sentenced to EDS, the custodial term to be served is one half of the nominate determinate term.” Thus, the EDS prisoner is “treated differently in relation to release on licence as compared with almost all other prisoners serving a custodial sentence” (para 34).

109.
The Divisional Court was, of course, constrained by R (Clift) to find against Mr Stott on the issue of status, although Sir Brian Leveson, President of the Queen’s Bench Division made clear his view that it was high time that that decision be revisited. We do, however, have the benefit of the Divisional Court’s views as to whether Mr Stott was in an analogous position to other relevant prisoners and whether there was justification for the different treatment of EDS prisoners.

110.
The Secretary of State argued in the Divisional Court, as in this court, that an EDS prisoner cannot properly be compared to a life prisoner, because each sentencing regime has different features (para 43). This argument did not find favour with the Divisional Court, which considered the two prisoners to be in analogous situations. It considered it essential to have regard to “the principle of sentencing practice” that both an EDS and a life sentence “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” (para 44). It continued:

“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.”

111.
In the light of this, at para 45, attention was invited to the following comparison between a determinate sentence and an EDS:

“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 (ie 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 eight 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.”

112.
The court reinforced this view by reference to an offender given an SOPC, who may have committed precisely the same offences as those committed by an offender sentenced to an EDS, and yet be eligible for release after one half of the determinate term.

113.

As for justification (paras 47 to 50), the government had explained that it wished to introduce a tougher determinate sentence, designed to enhance public protection and to maintain public confidence in the sentencing framework, and relied upon the fact that an offender eligible for an EDS had committed a serious offence and had been found to be dangerous. The court was not persuaded that this explanation for the difference in treatment of prisoners addressed what was, in the court's view, "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 the offender had committed a serious offence did not, in the court's view, provide any rational basis for altering the extent of the punitive element of a sentence, which was, in its view, the result of deferring eligibility for release in the case of an EDS prisoner; other prisoners would also have committed very serious offences, but be eligible at an earlier stage. As for dangerousness, that did not justify the different release provisions because "that is to confuse punishment and deterrence with risk". This point is explained at para 49 as follows:

"Dangerousness under Part 12 of the 2003 Act [the sentencing provisions] is assessed by reference to future risk, and it is only at the point of potential release that the risk will be assessed (based, of course, on the history of the offender, progress in custody and resettlement plans). 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 sentence pursuant to section 244A of the 2003 Act."

114.
The requirement that some prisoners apply for parole, whereas others are automatically released at a certain point in their sentence, was justified as it was for the purpose of protecting the public from risk but, in the court's view, "the difference in the term to be served for punishment and deterrence is not". Had it not been for the status issue, the court would accordingly have found the provisions incompatible with article 14.

The appellant's submissions in relation to Issue 2

115.
The argument advanced on behalf of Mr Stott is a simple one, namely: although they are in an analogous situation, different classes of prisoner are treated differently with regard to eligibility for release, and there is no valid justification for this. If he had been given a determinate sentence, Mr Stott would have been entitled to release at the half-way point in his sentence, that is after ten and a half years, and, had he been given a life sentence, he would probably also have been eligible for release after ten and a half years. So, Mr Southey suggests, in relation to eligibility for release, Mr Stott would have been in a better position had he been given a life sentence, even though life sentences are reserved for the most serious cases, for offenders who are the highest risk or have the most serious criminal records.

116.
Mr Southey invites us, in considering whether the prisoners under consideration are in analogous positions, to put weight upon the decision in Clift v United Kingdom. He also invites us to recognise that people can be in an analogous position even if their situation is not identical, and to concentrate on the similarities between EDS prisoners and other prisoners. In terms of similarities, he emphasises that both EDS prisoners and indeterminate sentence prisoners depend, for their early release, on risk assessment by the Parole Board. Like the Divisional Court, he relies upon what he says is the sentencing principle that the period preceding eligibility for parole is "the punitive and deterrent

element of a sentence passed", whereas any further time spent in custody is "seen as pertaining to the risk to the public posed by the offender" (see, for example, R (Foley) v Parole Board for England and Wales [2012] EWHC 2184 (Admin)). In his submission, this is the same for each group of prisoners, and the Secretary of State's argument is wrong because it ignores that sentencing principle. Furthermore, he points out that determinate sentence prisoners, EDS prisoners, and those serving an indeterminate sentence all "share the same interest, namely in being released from custody".

117.
On justification, Mr Southey reminds us that it is the differential treatment that must be justified, not the EDS itself, and in his submission, it has not been. Considerations of relative risk cannot provide the required justification, he says. It can be assumed that the highest risk offenders, and the offenders who have committed the most serious offences, are serving a life sentence, and lower risk prisoners should not be treated less favourably in relation to early release. Risk is addressed through the Parole Board process, an EDS prisoner only being released if the Parole Board is satisfied that continued detention is not necessary for the protection of the public. There is no basis, submits Mr Southey, for concluding that the risk that an EDS prisoner poses at the half-way point in his sentence will necessarily be such as to require continued detention, and denying him the opportunity even to apply for release until two-thirds of the way through his sentence, when the prisoner serving an indeterminate term can apply at half-time. The effect of this is to impose a greater penalty without reason. Further, he says that there is no basis to distinguish between the EDS prisoner and the regular determinate sentence prisoner as both are equally culpable, and the punitive component of their sentence should be the same; differential risk is addressed by the involvement of the Parole Board in the case of the EDS prisoner.

The Secretary of State's submissions in relation to Issue 2

118.
The Secretary of State's case is that an EDS is not analogous either to other types of determinate sentence or to indeterminate sentences. It is submitted that it is in a class by itself, designed to address a particular combination of offending and risk. Although accepting that a life sentence can be viewed as comprising a period of detention justified by punishment and deterrent followed by detention justified solely by public protection, Sir James Eadie does not accept that a similar analysis applies to a determinate sentence. His submission is that the whole of a determinate sentence (and the whole of the custodial term of an EDS) is imposed for the purpose of punishment and deterrence.

119.
Further, Sir James submits that there is, in any event, no absolute rule that a prisoner is eligible for release at the half-way point of his sentence. Some prisoners have a right to release on licence at the half-way stage, but in some cases, the prisoner is entitled to apply for release sooner, and in some cases release requires the Parole Board's direction. In the case of life sentences, a prisoner may not always be eligible to apply to the Parole Board at what would be the half-way point in a determinate sentence, because the minimum term of a life sentence can be fixed at more than half of the notional determinate sentence (see Szczerba above). Accordingly, in the Secretary of State's submission, each type of sentence has release arrangements which have been tailored to meet the requirements of that particular sentence, justified by reference to the particular characteristics of the offenders on whom the sentence is imposed. The particular arrangements for EDS prisoners flow from the characteristics of that group of prisoners, in contrast to those serving ordinary determinate terms or indeterminate sentences.

120.
The Secretary of State draws a distinction between the present case and Clift v United Kingdom and Foley. Those cases were about relevantly similar release processes being applied differently, he says, whereas the complaint here is, in contrast, about the operation of different types of sentence, and whether the factors which justify the imposition of a particular sentence also justify the particular release arrangements that form part of the administration of the sentence. More assistance can be obtained from R (Bristow) v Secretary of State [2013] EWHC 3094 (Admin) (later affirmed in the Court of Appeal [2015] EWCA Civ 1170) and R (Massey) v Secretary of State for Justice [2013] EWHC 1950 (Admin).

121.
Sir James emphasises the wide margin of appreciation afforded to states with respect to prisoner and penal policy, although acknowledging that this court will exercise close scrutiny in relation to measures that result in detention. Here, the policy choices made by Parliament, with respect to the release arrangements for an EDS prisoner, are well within its discretion when striking a balance between the interests of public protection and the interests of the individual prisoner. Unlike in Clift v United Kingdom, the differences in treatment are all justified by the risk that EDS prisoners pose in comparison to other prisoners, and the early release provisions achieve the legitimate aim of protecting the public.

Discussion

122.
I need to start with a consideration of the fundamental difference between the parties in relation to whether a determinate sentence can be said to comprise two separate components, a period for punishment and deterrence, and a further period based on the risk posed by the offender to the public, particularly as this featured significantly in the decision of the Divisional Court.

123.
The Secretary of State accepts that it has long been established that life sentences incorporate two such periods, but does not accept that that is so with regard to determinate sentences, relying on a number of decisions of the domestic courts and the ECtHR, which it is said call the “two component” analysis into question. It will be seen that the observations to which our attention has been invited have tended to be made in the context of determining an issue as to whether article 5(4) of the ECHR requires a review, during the course of a particular sentence, of the lawfulness of detention.

124.
In my view, the Secretary of State is correct to differentiate between determinate and indeterminate sentences in this connection. The ECtHR does make a distinction, treating the post-tariff phase of an indeterminate sentences as directed at managing risk, whereas the whole of a determinate sentence is viewed as punishment. In R (Black) v Secretary of State for Justice [2009] 1 AC 949, Lord Brown (in the majority) remarked on the distinction, commenting (para 67) that, throughout its case law, the Strasbourg court “has consistently appeared to treat determinate sentences quite differently, time and again contrasting them with the indeterminate cases”, with article 5(4) being engaged in the determination of the length of post-tariff detention in life sentence cases, but not in decisions regarding early or conditional release from a determinate term of imprisonment (para 83). So, in Mansell v United Kingdom (Application No 32072/96, 2 July 1997), Ganusauskas v Lithuania (Application No 47922/99, 7 September 1999), and Brown v United Kingdom (Application No 968/04,

26 October 2004), the ECtHR held article 5 challenges to determinate sentences to be manifestly ill-founded, the sentences being justified throughout the prison term as punishment for the offence.

125.
A brief look at Mansell will illustrate the approach in the Strasbourg cases. The applicant had been sentenced to a longer custodial sentence than would have been commensurate with the seriousness of the offence, because the court considered it necessary to protect the public from serious harm (section 2 of the Criminal Justice Act 1991). He argued that his sentence consisted of a "punitive part" and a "preventive part", and that he should have been entitled to a proper review of the lawfulness of his continued detention, with an oral hearing, as soon as he had served the period that he would have served under the normal punitive sentence. The ECtHR observed that, in contrast to indeterminate sentences, there was no question of the sentence being imposed because of factors that were susceptible to change with the passage of time, such as dangerousness or mental instability. The whole of the fixed term was "a sentence which was imposed as punishment for the offences committed". The necessary judicial control was therefore incorporated in the original conviction and sentence.

126.
In R (Whiston) v Secretary of State for Justice [2015] AC 176, which concerned a determinate sentence prisoner released on Home Detention Curfew, then recalled to prison, Lord Neuberger, with whom three of the court of five agreed, also reviewed the Strasbourg case law. His observation at para 25, made in connection with Ganusauskas and Brown, might perhaps lend a modicum of further support to the Secretary of State's argument against the two component analysis. He said that:

"in each case, the court rejected the article 5.4 complaint on the ground that the article did not apply at all in circumstances where the recall to prison occurred during the period of a determinate sentence imposed for the purposes of punishment. I would add that the reference to punishment cannot have been intended to mean solely for punishment: determinate prison sentences are imposed for a mixture of reasons, each of which should, at least normally, be treated as applicable to the whole of the sentence period." (Emphasis added)

127.
It appears from para 53 that Lady Hale, who wished to "sound a note of caution about some of the reasoning" by which Lord Neuberger had reached his conclusion in the appeal, might not have been entirely in agreement with what he said on this particular point, but she did comment upon the fact that the sentencing judge imposes the sentence which is thought to be correct, without regard to the right to early release, and followed that with the observation that the "whole of the sentence is intended as punishment".

128.
Brown v Parole Board for Scotland [2017] UKSC 69; [2018] AC 1 might also be taken as providing some support for the Secretary of State's position on punishment/risk, particularly what is said at para 60, which I set out below. The case was concerned with an extended sentence imposed under section 210A of the Criminal Procedure (Scotland) Act 1995 (as inserted by section 86 of the (inserted by Crime and Disorder Act 1998)), but there are similarities between such a sentence and an EDS. The sentence comprised a custodial term of seven years followed by an extension period of three years on licence. The prisoner was released on licence after serving two-thirds of the custodial term, but then recalled. He complained of a breach of article 5, on the basis that he had not been provided with appropriate rehabilitation courses, during the period of his recall, to enable him to achieve his

release, by demonstrating to the Parole Board that he no longer posed a risk to the public. Although the court took the opportunity to modify the article 5 jurisprudence by departing from R (Kaiyam) v Secretary of State for Justice (above), his action failed because he had, in fact, been provided with a range of appropriate rehabilitative measures. Lord Reed gave a judgment with which the remaining members of the court were all in agreement, and, although the issue for the court was different, some passages have some relevance to the present case.

129.
At para 49, Lord Reed noted that, in fixing the custodial term of the extended sentence, as in fixing an ordinary sentence of imprisonment, the court "will take account of all matters relevant to sentencing and have regard to all the accepted objectives of a custodial sentence, including punishment, deterrence, public protection and rehabilitation". The same can be said of the present case, as these objectives form part of the sentencing process in England and Wales as well, featuring in section 142(1) of the 2003 Act as "purposes of sentencing" (above). Section 142(1) is in very general terms, applying to "any court dealing with an offender in respect of his offences", making no difference between periods of the sentence which will be spent in custody and periods which the offender can expect to spend on licence. No doubt this is unsurprising, given that the sentencing judge is not to have regard to the early release provisions when fixing the appropriate sentence.

130.
At para 50, Lord Reed made an observation about release on licence, which must also be relevant to release on licence in England and Wales, and does perhaps underline that a licence may not only be there to protect the public, although plainly that can be significant part of its purpose and, of course, the extension period in an EDS is indeed expressly for that purpose (section 226A(7) of the 2003 Act). He said:

"Release on licence is intended to ensure that the process of transition from custody to freedom is supervised, so as to maximise the chances of the ex-prisoner's successful reintegration into the community and minimise the chances of his relapse into criminal activity."

131.
It is of note that Lord Reed drew a clear distinction between the custodial term of the extended sentence, including any period spent on licence during it, and the extension period. In the following passage from para 60, he proceeded upon the basis that the custodial term addressed the punitive aspect of the sentence, in contrast to the extension, which was for the protection of the public:

"60. … the purpose of detention during the extension period is materially different from that of a determinate sentence. In terms of section 210A(2)(b) of the 1995 Act, the extension period is 'of such length as the court considers necessary for the purpose mentioned in subsection (1)(b)', namely 'protecting the public from serious harm from the offender'. … The punitive aspect of the sentence has already been dealt with by the custodial term, which is 'the term of imprisonment … which the court would have passed on the offender otherwise than by virtue of this section': section 210A(2)(a). Where a prisoner serving an extended sentence is detained during the extension period, other than by virtue of an order made under section 16 or another sentence, his continued detention is therefore justified solely by the need to protect the public from serious harm."

132.
The Secretary of State relies also upon a body of case law concerning article 7 of the ECHR (no heavier penalty to be imposed than the one that was applicable at the time the criminal offence was committed). It is pointed out that post-sentence changes to early release provisions are not treated as

altering the penalty for the offence, see for example R v Docherty (above) at para 65, and the cases there cited. It is argued that this is not consistent with Mr Stott's case. If the punitive element of a determinate sentence ends upon early release, or eligibility to apply for release, then a change in the release provisions would potentially impermissibly increase the penalty imposed for the offence.

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 would also be consistent with the generally applicable purposes of sentencing set out in section 142(1) of the 2003 Act, 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.

134.
If the two component analysis is inappropriate, there must be force in the Secretary of State's submission that, when looking to compare that part of an EDS which is imposed for punishment and deterrence, with the equivalent part of another sentence, it requires a comparison between the appropriate custodial term of the EDS and:

i)
in the case of a standard determinate sentence and an SOPC, the whole term of imprisonment;

ii)
in the case of an indeterminate sentence, the minimum term.

135.
Having said that, I can entirely accept that, as a matter of practice, the domestic criminal courts do see determinative sentences as having distinct punitive and risk-based elements, see the Divisional Court in the present case for example. And, even if the Secretary of State is correct that a sentence should not actually be analysed in this way, it remains the stark fact that some prisoners have to serve a greater proportion of their overall sentence before becoming eligible for release on licence than others. The category in relation to which this is perhaps most challenging to explain, is where release requires the Parole Board to be satisfied on the question of risk. Some prisoners, notably for present purposes, the EDS prisoner, have to serve a greater proportion of their sentence than others, before they can try to persuade the Parole Board on that issue. Whatever the correct answer to the two component debate, this differential wait for the chance to approach the Parole Board demands attention. Accordingly, there might not be much value in pursuing the two component debate further.

136.
It is important to put the differential wait argument into proper context however. Whilst the assertion that the requirement for an EDS prisoner to serve two-thirds of his sentence before becoming eligible for parole is out of step with comparable prisoners has an initial attraction, it is less compelling if the rest of the prisoners are not, in fact, in step with each other. 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 (see Szczerba above), and in the case of mandatory life sentences, the period is not fixed by reference to a

notional determinate term. 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).

137.
I turn then, rather more directly, to the twin questions of whether an EDS prisoner is in an analogous position to other prisoners serving either determinate or indeterminate sentences ("Issue 2A"), and whether the differences in treatment that there undoubtedly are between EDS prisoners and other prisoners are justified ("Issue 2B"). As is apparent from the authorities concerning article 14, it is not at all easy to separate these two questions into watertight compartments, but I will at least begin with Issue 2A.

138.
In determining whether groups are in a relevantly analogous situation for article 14, regard has to be had to the particular nature of the complaint that is being made, see for example para 66 of Clift v United Kingdom.

139.
Mr Stott relies upon Clift v United Kingdom, on the basis that it involved a similar complaint to his own. However, the Secretary of State submits that it does not assist here, because it concerned a complaint about similar release provisions being operated differently whereas Mr Stott's complaint is about the operation of different types of sentence.

140.
Clift v United Kingdom can properly be described, I think, as concerning a complaint about similar release provisions being operated differently. The prisoners under consideration there, all required a recommendation from the Parole Board before they could achieve early release. But for those, like Mr Clift, who were serving determinate terms of 15 years or more, the final decision on early release lay with the Secretary of State, whereas for the other prisoners the Parole Board's recommendation was enough. The ECtHR considered the prisoners to be "relevantly similar". The key was that, in each case, it was all about determining whether the prisoner posed too much of a risk to be released. So, at para 67, the court observed that a refusal of early release was "not intended to constitute further punishment but to reflect the assessment of those qualified to conduct it that the prisoner in question poses an unacceptable risk upon release". As "the methods of assessing risk and the means of addressing any risk identified are in principle the same for all categories of prisoners", it considered that there was no distinction to be drawn between the prisoners, who were in analogous positions.

141.
I do not see the present case as entirely on all fours with Clift v United Kingdom. R (Foley) v Parole Board for England and Wales (above), upon which Mr Southey also relies, is possibly a step closer to the present case than Clift, because it concerned the substance of the release arrangements, rather than simply the mechanism of release ie who made the final decision. The claimant had been given a determinate sentence of 18 years. She was eligible for release at the half-way point in the sentence if the Parole Board recommended it, and for automatic release at the two-thirds point. The test that the Parole Board had to apply in her case was more onerous than the test that would have been applicable had she been given a life sentence. She therefore argued that there was a violation of article 14. Her

claim failed because R (Clift) meant that she could not establish that the different treatment was on the ground of other status, but the court went on to set out what it would have decided had there not been that obstacle. Although acknowledging that there were differences between the sentences, Treacy J (with whom Thomas LJ agreed, adding a few words) accepted, at para 71, that the situation of the claimant was analogous to an indeterminate sentence prisoner, saying:

"Whilst it is obvious that an offender serving a determinate sentence has the benefit of having a finite limit on the reach of the law in relation to that sentence, I do not think that constitutes a material difference. Both types of sentence now in reality are divided into a punitive element which may be followed by a period of risk based detention. So, in my view, the identified differences between a determinate and an indeterminate sentence do not prevent their treatment as analogous."

142.
The court's conclusion was that there was no objective justification for the difference. Treacy J considered the reasoning in Clift v United Kingdom pertinent, because it was also about "the imposition of different early release requirements". Release during Ms Foley's sentence and during an indeterminate sentence both involved a risk assessment exercise, and consideration of risk by the same body, but significantly different tests were applied. Treacy J's analysis proceeded upon the basis that the punitive element of a determinate sentence lasted up to the half-way point, leading him to conclude that there was no good reason why "those who ex hypothesi are to be regarded as less dangerous because they have received a determinate rather than an indeterminate sentence, should be subject to greater punishment … [or] … why both types of offender should not become eligible for release subject to questions of risk at the same point in their sentence" (see paras 69 and 76).

143.
The Secretary of State would distinguish Foley because of the significant part played in the court's approach by the two component (punitive/risk) analysis. Sir James invites us to set more store by R (Massey) v Secretary of State for Justice [2013] EWHC 1950 (Admin) because, although Massey involved an IPP prisoner seeking to compare himself with the later EDS regime, the complaint in both that case and this one was in essence that prisoners with different characteristics, serving different sentences, have different release provisions. The situation was not found to be analogous in Massey, and the following reasoning found at para 25 of the judgment of Moses LJ is equally applicable here, it is submitted:

"however he cloaks his application, the real complaint he advances is a challenge to his original sentence. … The reality of his argument is that he was sentenced under a different regime. It is not coherent then to allege discrimination when compared to other offenders sentenced under a different regime. They are not in an analogous situation precisely because they were sentenced under a different regime …"

144.
Like the reasoning of the Divisional Court in the present case, the view of the Divisional Court in Foley cannot be dismissed lightly, given the enormous experience that the judges involved in those two decisions have in criminal work, but, for the reasons I gave earlier, I would question the two-component analysis upon which the courts proceeded. Massey should also be treated with a little caution, given that it concerned a complaint derived from a change in the sentencing legislation, and differential treatment caused purely by the commencement of a new legislative regime does not constitute discrimination, see, for example, Minter v United Kingdom (above). At the least, however, Massey serves as an introduction to my consideration of whether Mr Stott's complaint is also, in fact,

about the sentencing regime to which he has been consigned rather than, discretely, about the early release provisions that are part of it.

145.

It seems to me important to recognise the complexity and detail of the provisions governing the various sentences that can be imposed. It was, in part, for that reason that I set these out as fully as I did earlier. From that review of the statutory provisions concerning EDS, standard determinate sentences, SOPC, and indeterminate sentences, it can be seen 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 can only be imposed if there is a significant risk of the offender causing serious harm to members of the public by committing further offences, for example. Some sentences can only be imposed where the offender has already committed offences of a particular type. For some, there is automatic early release on licence, but, for others, release on licence is dependent on the Parole Board. Those serving indeterminate terms remain on licence (and liable to be recalled to prison) for the rest of their lives, whereas other offenders will be on licence for a finite period only. 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. 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. As we have seen, Mr Southey's submission that life sentences are "reserved for offenders who are the highest risk or have the most serious criminal records", for "the most serious cases", reflects the view that Treacy J took of relative dangerousness in Foley.

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.

148.
Recognising that there are valid arguments both ways in relation to Issue 2A, it seems appropriate to act on the wise suggestion of Lord Nicholls, in R (Carson) v Secretary of State for Work and Pensions (above), that sometimes, lacking an obvious answer to the question whether the claimant is in an analogous situation, it may be best to turn to a consideration of whether the differential treatment has a legitimate aim, and whether the method chosen to achieve the aim is appropriate and not disproportionate in its adverse impact (Issue 2B), although I will in fact return to Issue 2A again thereafter.

149.
Behind the detailed argument focusing on the particular features of particular sentences, both sides have a simple argument to advance in relation to justification. Mr Southey proceeds upon the basis that life sentences are given to the prisoners who are the highest risk or have committed the most serious offences. Those serving a determinate sentence, including an EDS, are therefore lower risk/ less serious offenders, and there cannot be any justification for treating them less favourably in relation to early release than life prisoners. Relative risk cannot justify this, he says, because neither category of prisoner will be released before the Parole Board directs it, having considered the question of risk, and both categories will be on licence upon early release. Although Mr Southey also complains that there is no basis for distinguishing between those serving an EDS and those serving a determinate term, I find the comparison less persuasive than is the comparison with indeterminate sentence prisoners, given the conditions for the imposition of an EDS, which differentiate EDS prisoners from standard determinate term prisoners. The comparison may have had more force, had the two-component punitive/risk analysis been unassailable. In that event, it could have been questioned how it was justified to require the EDS prisoner to serve a longer punishment period (as opposed to a longer period of detention dependent upon risk) than a standard determinate term prisoner. However, I have explained my reservations about the two component analysis earlier.

150.
The Secretary of State’s fundamental answer is that there are 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. All EDS prisoners are dangerous, and the legitimate aim is to protect the public by ensuring that they serve a greater proportion of their custodial term than other categories of prisoner, which may include prisoners who are not dangerous. 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, it is correctly pointed out on behalf of the Secretary of State that, 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, Sir James 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.

151.
It may be apparent, by now, that I find the arguments in relation to Issue 2 finely balanced. Concentrating upon justification, for the present, it is necessary to decide whether the different treatment of EDS prisoners has a legitimate aim, and whether the method selected for achieving the aim is appropriate, and not disproportionate in its adverse impact.

152.
I do not have much difficulty in accepting that, in general terms, the aim of the EDS provisions is legitimate. Ms Foulds, an official from the Ministry of Justice who describes herself as "the policy lead on adult custodial sentencing policy", says in her witness statement of September 2016 that the government introduced a "tougher, extended determinate sentence" as a "measure designed to enhance public protection and maintain public confidence in the sentencing framework". The ECtHR in Clift v United Kingdom was not impressed with the public confidence argument, but accepted (para 74) that more stringent early release provisions "may be justified where it can be demonstrated that those to whom they apply pose a higher risk to the public upon release". Given that it cannot be passed unless a risk condition is satisfied, an EDS is clearly aimed at offenders of this sort.

153.
The questions that are more difficult are whether the longer wait before the prisoner is eligible to apply to the Parole Board is an appropriate means of achieving this aim and whether it is disproportionate in its impact. 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.

154.
In the end, the answer depends significantly, I think, upon whether one concentrates entirely upon the early release provisions in the EDS and other sentences, or looks up from the detail to consider the various sentencing regimes as complete regimes. Ultimately, I am persuaded that the proper way to look at the issue is by considering each sentence as a whole, as the Secretary of State invites us to do. The sentencing judge imposes the sentence that complies with the statutory conditions prescribed by parliament, and the sentencing guidelines, and, within that framework, best meets the characteristics of the offence and the offender. The early release provisions have to be seen as part of the chosen sentencing regime, and the question of whether there is an objective justification for the differential treatment of prisoners in relation to earlier release, considered in that wider context.

155.
For reasons that I have set out above, there is a readier comparison between the EDS and an indeterminate sentence, than between a simple determinate term and an EDS. But the EDS and the indeterminate sentence are by no means a complete match, leaving aside the difference in parole eligibility. 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. Thus, although I would accept that Mr Stott has been treated differently on the grounds of "other status" within article

14, there being an objective justification for the difference in treatment of EDS prisoners, his claim must fail. It is not in fact necessary in those circumstances to give a definitive answer as to whether EDS prisoners can be said to be in an analogous situation to other prisoners. However, there is a significant overlap between the considerations that are relevant to Issue 2A and to Issue 2B, and having looked at those matters again in the context of Issue 2B, and considered the complete picture, with the benefit also of what Lord Hodge has to say on the subject in his judgment, I have come to the view that EDS prisoners cannot be said to be in an analogous situation to other prisoners. 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.

156.
For these reasons, which are, of course, different from those of the Divisional Court, I would dismiss the appeal.

LORD CARNWATH:

157.
I agree that the appeal should be dismissed. I gratefully adopt Lady Black's exposition of the legal and factual background.

Status

158.
The first question under article 14 of the Convention is whether the alleged difference of treatment is attributable to a relevant "status". As to that, the Divisional Court was bound by House of Lords authority to hold that it is not: R (Clift) v Secretary of State for the Home Department [2007] 1 AC 484; [2006] UKHL 54. As Lady Black explains, that issue now falls to be reconsidered by this court, in the light of the contradictory decision of the Fourth Section of the ECtHR in Clift v United Kingdom (Application No 7205/07), 13 July 2010.

159.
Sir James Eadie QC for the Secretary of State argues that the decision in Clift does not justify departing from the principles governing the definition of "status" in this context, as established by a long line of Strasbourg case law, starting with the often-cited decision in Kjeldsen, Busk Madsen and Pedersen v Denmark (1976) 1 EHRR 711, para 56, stating that:

"Article 14 prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other."

160.
He relies also on Lord Neuberger's pithy summary of the effect of subsequent case law in R (RJM) v Secretary of State for Work and Pensions [2009] AC 311 para 45:

"I consider that the concept of 'personal characteristic' (not surprisingly, like the concept of status) generally requires one to concentrate on what somebody is, rather than what he is doing or what is being done to him . Such a characterisation approach appears not only consistent with the natural meaning of the expression, but also with the approach of the ECtHR and of this House to this issue." (Emphasis added)

Lord Neuberger cited Gerger v Turkey (Application No 24919/94) (unreported) 8 July 1999, in which the ECtHR had held that article 14 had no application to a law under which people committing terrorist offences were treated less favourably than other prisoners with regard to automatic parole. Sir James Eadie also points to the potentially far-reaching effects of the widening of the scope of "status" in other areas of the law, for example immigration: cf R (HC) v Secretary of State for Work and Pensions (AIRE Centre intervening) [2017] 3 WLR 1486, para 31, where this court held that differences in immigration status did not give rise to issues under article 14.

161.
In respectful disagreement with the other members of the court, I consider that these submissions are broadly correct. To explain why, and at the risk of some repetition, it is necessary to look again at the treatment of this issue in Clift both here and in Strasbourg.

Clift in the House of Lords and Strasbourg

The background

162.
I start by considering the background to the decisions in Clift including the facts and the applicable legislation. The latter is set out most fully in the judgment of the ECtHR (paras 23ff).

163.
Mr Clift had been sentenced in 1994 to 18 years' imprisonment for serious crimes including attempted murder, which carried a maximum sentence of life imprisonment. In March 2002 the Parole Board recommended his release on parole taking account of reduced risk and the scope for addressing it by other means. Under the legislation then in force, for prisoners serving determinate sentences of more than 15 years, release in line with a Parole Board recommendation remained in the discretion of the Secretary of State; for prisoners serving shorter sentences (and for prisoners serving indeterminate sentences) release was mandatory. In October 2002 the Secretary of State rejected the recommendation of the Parole Board in Mr Clift's case on the grounds that his release would present an unacceptable risk to the public.

164.
The distinction between automatic and discretionary release, depending on whether the sentence was more or less than 15 years, arose not directly from the primary legislation itself, but from a statutory order made under it by the Secretary of State. Section 35 of the Criminal Justice Act 1991 provided a discretionary power to release long-term prisoners before the two-thirds point of their sentence, if recommended by the Parole Board. Section 50 gave power to reduce the effective period of detention by converting the discretionary power under section 35 into a duty in relation to specified classes of prisoners. The Secretary of State exercised that power by the Parole Board (Transfer of Functions) Order 1998 (SI 1998/3218), which applied to prisoners serving a sentence of imprisonment for a term of less than 15 years. For those serving sentences of 15 years or more, the order left in place the discretion to order early release between the service of half and two-thirds of the sentence.

165.
In the House of Lords Lord Bingham (para 33) described the discretion so given to the Secretary for State as "an indefensible anomaly". That was because, following the decision of the ECtHR in Stafford v United Kingdom (2002) 35 EHRR 1121, it had become clear that assessment of the risk presented by any individual prisoner was "a task with no political content and one to which the Secretary of State could not (and did not claim to) bring any superior expertise". A defence of justification would not

therefore have been sustainable. (That view was in due course adopted in terms by the ECtHR: para 77).

166.
However, justification would only become relevant under article 14, if his treatment amounted to discrimination on the grounds of “other status”. I turn to the consideration of that issue, first in the House of Lords and then in the ECtHR.

“Status” - The House of Lords

167.
Lord Bingham (with whom all his colleagues agreed) started from the premise that the word “status” in this context could be equated with “personal characteristic” (following Kjeldsen above). He did not think that a personal characteristic could be “defined by the differential treatment of which a person complains”. However, Mr Clift was not complaining “of the sentence passed upon him, but of being denied a definitive Parole Board recommendation”. Having described the “personal characteristic” criterion as “elusive”, he continued:

“But I would incline to regard a life sentence as an acquired personal characteristic and a lifer as having an ‘other status’, and it is hard to see why the classification of Mr Clift, based on the length of his sentence and not the nature of his offences, should be differently regarded.”

However, while clearly sympathetic to the claim, he was unwilling to uphold it in the absence of support, explicit or implicit, from the Strasbourg jurisprudence (para 28).

168.
Lord Hope spoke to similar effect, agreeing that a personal characteristic cannot be defined by the differential treatment of which a person complains:

“It is plain too that the category of long-term prisoner into which Mr Clift’s case falls would not have been recognised as a separate category had it not been for the Order which treats prisoners in his group differently from others in the enjoyment of their fundamental right to liberty. But he had already been sentenced, and he had already acquired the status which that sentence gave him before the Order was made that denied prisoners in his group the right to release on the recommendation of the Parole Board. The question which his case raises is whether the distinguishing feature or characteristic which enables persons or a group of persons to be singled out for separate treatment must have been identified as a personal characteristic before it is used for this purpose by the discriminator.” (para 47)

Like Lord Bingham he was sympathetic to the claim, but unwilling to uphold it, the issue not yet having been addressed by the Strasbourg jurisprudence. He noted also Lady Hale’s observation that it was possible to regard “what he has done, rather than who or what he is, as the true reason for the difference of treatment in Mr Clift’s case” (paras 48-49).

169.
Lady Hale expressed agreement with Lord Bingham’s reasons, but (as I read her judgment) with a rather different emphasis. In the course of a detailed review of the Strasbourg authorities on the grounds of discrimination covered by article 14, she referred (para 60) to the example “pertinent to this case” of “differences in the treatment of different criminal offences”, exemplified by Gerger v Turkey (above):

“… the court deduced from the fact that people convicted of terrorist offences would be treated less favourably with regard to automatic parole ‘that the distinction is made not between different groups of people, but between different types of offence, according to the legislature’s view of their gravity’: para 69.”

Similarly, in Budak v Turkey (Application No 57345/00) (unreported), 7 September 2004, the court had repeated the “personal characteristic” test from Kjeldsen , and had held that a distinction in procedure and sentences for offences tried before the state security court from those tried before other courts was made, again, “not between different groups of people but between different types of offence”.

170.
In conclusion on this aspect, having noted the Secretary of State’s acceptance that a different parole regime for foreigners liable to deportation, as compared to those with the right to remain here, fell within the proscribed grounds, she said:

“But a difference in treatment based on the seriousness of the offence would fall outside those grounds. The real reason for the distinction is not a personal characteristic of the offender but what the offender has done.

The result is that the difference of treatment between Mr Clift and people sentenced either to shorter determinate sentences or to life imprisonment is not covered by article 14 at all …” (paras 62-63).

She acknowledged that the law might “look odd”, but it was not for the court “to declare legislation which Parliament has passed incompatible with the Convention rights unless the Convention and its case law require us so to do” (para 63).

“Status” - the ECtHR

171.
The Fourth Section conducted a detailed review of the previous ECtHR authorities on the meaning of “other status” (in French “toute autre situation”). Its conclusions are set out in paras 55-63 of the decision. It accepted that many of the cases related to “personal” characteristics, “in the sense that they are “innate characteristics or inherently linked to the identity or the personality of the individual”. However, there were others where that approach could not be applied. It gave (para 58) six examples which I list below with the court’s comments:

i)
Engel v The Netherlands (No 1) (1976) 1 EHRR 647:

“the court held that a distinction based on military rank could run counter to article 14, the complaint in that case concerning a difference in treatment as regards provisional arrest between officers on the one hand and non-commissioned officers and ordinary servicemen on the other.”

ii)
Pine Valley Developments Ltd v Ireland (1991) 14 EHRR 319:

“the court found a violation where there was a difference in treatment between the applicants and other holders of planning permissions in the same category as theirs. Although the court did not specifically address the question of the relevant ‘status’ in that case, it would appear that the distinction of which the applicants complained was between holders of outline planning permission who benefited from new legislation and holders of outline planning permission who did not (in that

case, by virtue of the fact that the applicants' planning complaint had already been determined by the court and that the outline planning permission had been found to be invalid - see para 26 of the judgment)."

iii)
Larkos v Cyprus (1999) 30 EHRR 597:

"the court found a violation of article 14 as a result of a distinction between tenants of the state on the one hand and tenants of private landlords on the other, the parties did not dispute that article 14 applied and the court saw no reason to hold otherwise."

iv)
Shelley v United Kingdom (2008) 46 EHRR SE16:

"the court considered that being a convicted prisoner could fall within the notion of 'other status' in article 14."

v)
Sidabras and Dziautas v Lithuania (Application Nos 55480/00 and 59330/00), ECHR (2004) 42 EHRR 104 VIII:

"the court did not specifically address the question of 'other status' but in finding a violation of article 14 and article 8 implicitly accepted that status as a former KGB officer fell within article 14."

vi)
Paulík v Slovakia (2006) 46 EHRR 10:

"the court accepted that the applicant, a father whose paternity had been established by judicial determination, had a resulting 'status' which could be compared to putative fathers and mothers in situations where paternity was legally presumed but not judicially determined."

172.
The court went on (paras 60-61) to address two particular points made by the House of Lords, and adopted in the UK Government's argument: first, that the treatment of which the applicant complains must exist independently of the "other status" upon which it is based; and, secondly, reliance on Gerger to support the argument that no separate "status" arises where the distinction is made, not between different groups of people, but "between different types of offence, according to the legislature's view of their gravity".

173.
For the former argument the court found no clear support in its case law. It said:

"In Paulík , cited above, there was no suggestion that the distinction relied upon had any relevance outside the applicant's complaint but this did not prevent the court from finding a violation of article 14. The question whether there is a difference of treatment based on a personal or identifiable characteristic in any given case is a matter to be assessed taking into consideration all of the circumstances of the case and bearing in mind that the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective. ... It should be recalled in this regards that the general purpose of article 14 is to ensure that where a state provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified." (para 60)

174.
Of the argument based on Gerger it said:

"The court observes that the approach adopted in Gerger has been followed in a number of cases, but all concerned special court procedures or provisions on early release for those accused or convicted of terrorism offences in Turkey. … Thus while Gerger made it clear that there may be circumstances in which it is not appropriate to categorise an impugned difference of treatment as one made between groups of people, any exception to the protection offered by article 14 of the Convention should be narrowly construed. In the present case the applicant does not allege a difference of treatment based on the gravity of the offence he committed, but one based on his position as a prisoner serving a determinate sentence of more than 15 years. While sentence length bears some relationship to the perceived gravity of the offence, a number of other factors may also be relevant, including the sentencing judge's assessment of the risk posed by the applicant to the public." (para 61)

Discussion

175.
With respect to the Fourth Section, I do not find its reasoning in Clift convincing. It is difficult to extract any principle from the disparate list of cases in its para 58. They have very little in common, other than the fact that in none of them, it seems, was the issue of status a matter for detailed consideration because it was not contested. Equally unconvincing is the reliance on Paulík to counter the view that the treatment complained of must be distinct from the status. That proposition is no more than the ordinary reading of the words of article 14 itself. Paulík was an unusual case on very special facts. The claim succeeded under article 8 in any event, and no issue was taken about status in the consideration of article 14. I note that both Lady Hale and Lord Mance share my doubts as to the weight placed on this decision by the court in Clift .

176.
Finally the Fourth Section's discussion of Gerger is hard to follow. It is accepted that there "may be" cases where it is not appropriate to treat an impugned difference as "one made between groups of people". But there is no indication as to why Gerger itself fell into that category of cases, or by reference to what criterion. Further, while it is of course true that sentence length may reflect factors other than the perceived gravity, it is not clear why such factors (which are likely to be special to the circumstances of the particular offender and his case) strengthen the reasons for treating the difference as one between "groups".

177.
It is true that in Clift in the House of Lords, Lord Bingham was willing in principle to regard the imposition of a particular form of sentence as conferring an acquired "status" for these purposes. However, as is apparent from a comparison with Lady Hale's speech, his approach does not appear to take full account of decisions like Gerger . That in turn formed the basis of the more limited approach subsequently taken by the House in R (RJM) . Lord Neuberger (para 46), while noting that Lord Bingham would have been "inclined to regard a life sentence as an acquired personal characteristic and a lifer as having an 'other status'", observed that this was "in the absence of decisions such as Gerger …". I am conscious that in Mathieson v Secretary of State for Work and Pensions [2015] 1 WLR 3250 the authority of the approach of the Fourth Section in Clift v United Kingdom was accepted without question by this court. However, the factual context was very different. The key to the decision can be found in the rhetorical question posed by Lord Wilson at the conclusion of his discussion of "status":

"Disability is a prohibited ground: Burnip v Birmingham City Council [2013] PTSR 117. Why should discrimination (if such it be) between disabled persons with different needs engage article 14 any less than discrimination between a disabled person and an able-bodied person? ..." (para 23)

178.
I am grateful for Lady Black's comprehensive review of the authorities on this issue. It shows that the courts both here and in Strasbourg have been struggling with difficulty over a long period to find a rational criterion for defining and limiting the scope of "status" in article 14. It is true, as she says (para 44), that in more recent cases the Strasbourg court has moved beyond simple reference to a "personal characteristic", to more expansive phrases such as "identifiable, objective or personal characteristic". However, the decision in Minter v United Kingdom (2017) 65 EHRR SE6, noted by her at paras 41-43, suggests a tendency to restrict the scope of the decision in Clift itself, at least in the context of different sentencing regimes. I note Lady Hale's suggestion that sentencing criteria "concentrate upon the dangerousness of the offender, itself a personal characteristic". That may be so, but I find it hard to accept that "dangerousness", whether a personal characteristic or not, is a status deserving of special protection under article 14.

179.
In conclusion on this issue, short of confirmation by the Grand Chamber, I would not for myself regard the decision of the Fourth Section in Clift (or the other more recent decisions reviewed by Lady Black) as requiring us to depart from the more restrictive approach to the concept of "status" reflected in the actual decision of the House in Clift , and confirmed in R (RJM) . I would need considerable persuasion that the authors of the Convention intended mere conviction of a criminal offence, or subjection to a particular custodial regime, to entitle the recipient to specially protected status under human rights law. More generally, it is important that article 14 is kept within its proper role within the Convention, and outside the core protected areas is not allowed to develop into a means of bypassing the carefully defined limits applicable to the individual rights.

Analogy and justification

180.
I can deal with these issues shortly, because I agree with the reasons given by Lady Black and Lord Hodge for dismissing the appeal. In particular I agree that the EDS regime must be looked at as a whole and cannot be treated as analogous to regimes which have different purposes and different characteristics. It is wrong to isolate the particular feature of the provisions for release on parole, and to compare it with other release provisions without regard to their context. In this respect the case is clearly distinguishable from Clift where there was a direct analogy between the sentence as applied respectively to those serving more and less than 15 years. As Lord Hope pointed out, the difference was not part of the original sentence as prescribed by Parliament, but was imposed subsequently by Ministerial order.

181.
I am also fortified in this conclusion by the consideration that, even if Mr Stott's sentencing regime gives him a relevant "status" for the purposes of article 14, it is on the outer edge of the "concentric circles" described by Lord Walker in the passage cited by Lady Black (para 54). Consistency in sentencing policy is an important objective, but it does not impinge on the core values which article 14 is designed to protect. Short of irrationality or (in Strasbourg terms) manifest unreasonableness, the courts should not allow themselves to be drawn into detailed consideration of the lines drawn by the legislature between the treatment of different categories of offender.

LORD HODGE:

182.
I am very grateful to Lady Black for setting out the facts, the legal background and the legal issues so comprehensively and clearly. I can therefore state my views briefly. I agree with her that the appeal should be dismissed. But I would dismiss the appeal on the basis that the extended determinate sentence (“EDS”), which has been imposed on Mr Stott, is not sufficiently analogous to the sentences, which he puts forward as comparators, to bring him within article 14 of the European Convention on Human Rights (“the ECHR”) and require the Government to justify his treatment. If, contrary to my view, it is necessary to proceed to consider justification, I would hold that the difference in treatment of a prisoner detained under an EDS is justified principally because of the differing natures of the regimes for imprisonment.

183.
It is not disputed that Mr Stott’s complaint is within the ambit of article 5 of the ECHR so that article 14 can be invoked if there has been unjustified discrimination in relation to a rule adopted by the United Kingdom concerning the early release of convicted prisoners. The questions on the applicability of article 14 relate to (i) status, (ii) analogy, and (iii) justification.

Status

184.
I agree with Lady Black that Mr Stott as a prisoner sentenced to an EDS has the required status to invoke article 14 of the ECHR. That article speaks of the ECHR rights being secured without discrimination “on any ground such as” and then lists specific grounds, including “or other status”. As Lady Black has shown in paras 13-35 of her judgment, there has been a difference of view between the House of Lords and the European Court of Human Rights (“ECtHR”) as to the meaning of the phrase “other status” in article 14, which was manifested in the speeches in the House of Lords in R (Clift) v Secretary of State for the Home Department [2007] 1 AC 484 (“ Clift (HL) ”) and in the judgment of the 4th Section of the ECtHR in Clift v United Kingdom (Application No 7205/07, 13 July 2010) (“ Clift (ECtHR) ”). Questions are likely to arise as to the boundaries of “any other status” absent further guidance by the Grand Chamber of the ECtHR and I would not seek to make any general statement as to those boundaries. But I am satisfied that Mr Stott has the requisite status for the following four reasons.

185.
First, the opening words of the relevant phrase, “on any ground such as”, are clearly indicative of a broad approach to status. Secondly, there is ample authority in the ECtHR, the House of Lords and the Supreme Court to support the view that the words “any other status” should not be interpreted narrowly. Thus, in Clift (HL) para 48, Lord Hope of Craighead stated that “a generous meaning” should be given to the words “or other status” while recognising that “the proscribed grounds are not unlimited”. Similarly, in R (RJM) v Secretary of State for Work and Pensions [2009] AC 311 (“ RJM ”), Lord Neuberger of Abbotsbury at para 42 spoke of “a liberal approach” to the grounds on which discrimination was prohibited. In Clift (ECtHR) , paras 55 and 56, the ECtHR spoke of the listed examples of status as being “illustrative and not exhaustive” and suggested that a wide meaning be given to the words “other status”. In Biao v Denmark (2016) 64 EHRR 1, the ECtHR again spoke of giving those words “a wide meaning” and in Khamtokhu and Aksenchik v Russia (Application Nos 60367/08 and 961/11) the Grand Chamber repeated that view at para 61. It appears, as Lord Neuberger stated in RJM (para 39) that the ECtHR interprets article 14 on a “holistic or broad-brush

basis". Thirdly, the Supreme Court in Mathieson v Secretary of State for Health [2015] UKSC 47; [2015] 1 WLR 3250, para 22, has accepted the judgment in Clift (ECtHR) . While, like Lord Carnwath, I would welcome further guidance from the Grand Chamber, I am persuaded that the weight of authority currently supports the view that Mr Stott has the required status under article 14 because he has been sentenced to a particular sentence of imprisonment, namely an EDS.

Analogy

186.

Where I find myself in respectful disagreement with the experienced judges of the Divisional Court is that I am persuaded by Sir James Eadie QC that it is wrong to focus solely on the arrangements for early release and to disregard the existence of distinctive and separate sentencing regimes. Lady Black has helpfully set out the different types of sentence which a judge in England and Wales can impose in paras 84-105 of her judgment. I agree with her analysis in paras 123-134 of her judgment that a determinate sentence cannot be divided into a part relating to punishment and deterrence on the one hand and the avoidance of risk on the other. The idea that the punitive and deterrent part of a determinate sentence ends at the point of entitlement to, or at least eligibility for consideration for, early release is central to Mr Southey's case and the reasoning of the Divisional Court. In my view that idea is not correct.

187.

Section 142(1) of the 2003 Act sets out five purposes of sentencing. They are (i) the punishment of offenders, (ii) the reduction of crime (including its reduction by deterrence), (iii) the reform and rehabilitation of offenders, (iv) the protection of the public, and (v) the making of reparation by offenders to persons affected by their offences. Purpose (v) is not relevant to a sentence of imprisonment but purposes (i) to (iv) inclusive may co-exist throughout the term of a determinate prison sentence: R (Whiston) v Secretary of State for Justice [2015] AC 176, para 25, per Lord Neuberger.

188.

In fixing the appropriate sentence of imprisonment of a convicted person, the judge does not take account of the statutory provisions for early release. In R v Round [2010] 2 Crim App R(S) 45, para 44, Hughes LJ described this requirement to disregard early release in fixing a sentence of imprisonment was "a matter of principle of some importance". The Court of Appeal in R v Burinskas (Attorney General's Reference (No 27 of 2013)) (Practice Note) [2014] 1 WLR 4209, paras 38-39 endorsed his statement. This disregard is unsurprising as the purposes of the early release regimes include matters such as economy and the relief of over-crowding in prisons, as well as the public interest in re-integrating a prisoner into society with the benefit of supervision. As a result, each of the four purposes of imprisonment in section 142(1) of the 2003 Act may be relevant justifications of the prisoner's continued detention throughout the custodial sentence which the judge has imposed. It follows that a determinate sentence of imprisonment is not to be divided by reference to its relevant early release provisions into a period for punishment, deterrence and rehabilitation on the one hand and a period when the only purpose is the protection of the public. There is no "punitive part" and "preventive part" in a determinate sentence of imprisonment. As Lady Black has shown (paras 124-125 of her judgment), judgments of the ECtHR, which address the requirement allowing the detained person access to judicial determination of the lawfulness of his detention in article 5(4) of the ECHR, have repeatedly recognised this characteristic of the determinate sentence. I therefore find myself in respectful disagreement with the Divisional Court in R (Foley) v Parole Board for England and Wales [2012] EWHC 2184 (Admin) in so far as it reasoned (para 68-69) that the reality was that

the punitive element of a determinate sentence ended at the half way point. The reality is that that element continues and would justify the detention of a prisoner if he were recalled to prison after early release.

189.
Mr Southey in his submission on behalf of Mr Stott asserts: “[t]he point at which prisoners become eligible for release is the point which represents the expiry of the punitive and deterrent element of their sentences. For determinate sentence prisoners, the half way point represents the punitive element.” (appellant’s case para 4.5.2). The Divisional Court appears to have accepted this submission in paras 44-45 and 48 of its judgment. I respectfully disagree in relation to determinate sentences for the reasons set out in the preceding two paragraphs. Similarly, in relation to SOPC sentences, which Lady Black discusses at paras 93-95 of her judgment, punishment and deterrence remain relevant grounds of detention throughout the “appropriate custodial term”.

190.
An EDS, which is a form of determinate sentence, similarly does not have two component parts in its custodial term. An EDS is very similar to the extended sentence in Scots law which this court discussed in Brown v Parole Board for Scotland [2017] UKSC 69; [2018] AC 1. In Lord Reed’s judgment, with which the other Justices agreed, punishment and deterrence were relevant purposes throughout the custodial term (paras 49 and 60). The provisions for early release and the period on licence (if any) before the expiry of the custodial term serve the purpose of assisting a prisoner to resume his life in the community with the assistance of supervision (para 50). The early release provisions when applied to a determinate sentence in English law or to an EDS serve a similar purpose. The period on licence after the expiry of the custodial term of an extended sentence, on the other hand, is to protect the public from serious harm (paras 53 and 60).

191.
It is only in the sentencing framework relating to indeterminate sentences, which Lady Black discusses in paras 96 to 105 of her judgment, that the sentencing judge in fixing the minimum term is required to take account of the early release provisions and to split the sentence into a part which is for punishment and deterrence and another part in which retention in custody is justified only if the prisoner remains a risk to the public. Such considerations are also not relevant to mandatory life sentences.

192.
In relation to the date of early release there is also a less consistent picture than the appellant suggests. Lady Black has discussed this in paras 136 and 145 of her judgment. As she states, there are prisoners serving discretionary life sentences who are not eligible to apply for release because their minimum term imposed under section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 (“the 2000 Act”) exceeds one half of the notional determinate term (R v Szczerba [2002] 2 Cr App R(S) 86). Further, the minimum term for prisoners on mandatory life sentences is not fixed by reference to early release provisions applicable to a notional determinate term (section 269 of and Schedule 21 to the 2003 Act). On the other hand, SOPC prisoners under section 236A of the 2003 Act are eligible to apply for release once they have served one half of the appropriate custodial term, which is less than their overall sentence, and the overall sentence is the sentence that is commensurate with the seriousness of the offence (section 236A(3)). Other prisoners on determinate sentences can achieve release before they have served one half of their sentence at the discretion of the Secretary of State by being placed on a curfew at a specified location (sections 246 and 250(5)).

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, which does not require a finding that the offender was dangerous, although it is likely that in most cases he will be: Burinskas at para 8. 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 when the court exercises its discretion under section 82A of the 2000 Act. But that is far from the whole picture. As the Court of Appeal recognised in Burinskas (para 36), 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)).

194.

Sir James Eadie also drew support for his submission that different sentencing regimes were not analogous from two judgments of the Divisional Court and one of the ECtHR. In R (Massey) v Secretary of State for Justice [2013] EWHC 1950 (Admin) a prisoner serving a sentence of imprisonment for public protection ("an IPP") complained that he had been discriminated against compared with a prisoner who was sentenced to an EDS after the new sentences introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 because he was subject to an indeterminate period of imprisonment while the EDS prisoner was not. Moses LJ rejected this claim, stating (at para 25) that the claimant and the EDS prisoner were "not in an analogous situation precisely because they were sentenced under a different regime." In R (Bristow) v Secretary of State for Justice [2013] EWHC 3094 (Admin) the Divisional Court held that a claimant was not in an analogous situation to prisoners under a previous legislative regime and (para 16) that prisoners who were subject to discretionary release were not in an analogous situation to prisoners under an automatic release scheme. In Minter v United Kingdom (2017) 65 EHRR SE 6 in which an applicant complained of being subjected to an indefinite notification requirement, the ECtHR held that there was no discrimination as the applicant had been subjected to a different sentencing regime which was the consequence of new legislation (para 68). There is some force in Mr Southey's response that the cases were concerned with changes in sentencing policy which were effected by legislation. This weakens their utility to Sir James Eadie to some extent. But the cases, and R (Massey) in particular, provide some support for his submission that one should have regard to the characteristics of each regime as a whole and not just to its provisions for early release when judging whether a claimant is in an analogous situation to someone sentenced under a different regime.

195.

In summary, I am not persuaded that a prisoner serving an EDS is in an analogous situation to prisoners under different regimes of imprisonment in relation to his eligibility for early release. This is, first, because there is no split between the punitive/deterrent part and the risk-related part of a custodial term in a determinate sentence (including an EDS) at the point at which a prisoner becomes eligible for early release. This contrasts with the position of prisoners serving discretionary life

sentences. The supposed existence of this split played a fundamental part in Mr Southey's argument and appears to have influenced the judgment of the Divisional Court, giving rise to a focus only on whether a prisoner remained dangerous after a spell in prison. It is, secondly, because there is no principle that a prisoner is entitled to be released or is eligible at the discretion of the Parole Board to be released once he has served one half of his custodial term. The position is, as I have stated, more complex. Thirdly, it is because a prisoner sentenced to an EDS is sentenced under a statutory regime which, when viewed in the round, has materially different characteristics from other determinate sentences and from life sentences, both discretionary and mandatory. In my view, the obvious and relevant differences between the sentencing regimes are sufficient to prevent prisoners serving sentences under these different sentencing regimes from being in an analogous situation.

Justification

196.
Having reached this conclusion on issue 2A, it is not strictly necessary to consider the issue of justification. But as the ECtHR frequently wraps the issues of analogous situation and justification together, it is appropriate that I state my view briefly.

197.
The Secretary of State has explained, through the witness statement of Ms Alison Foulds, that Parliament introduced the EDS as a part of a suite of new sentencing regimes to replace the previous sentence of the IPP, which was an indeterminate sentence for dangerous offenders and which had been shown to have unsatisfactory characteristics. Ms Foulds explained that offenders eligible for an EDS have committed serious offences, which merit a custodial sentence of at least four years, and been found to be dangerous and would in the past have been eligible for an IPP but not necessarily a life sentence. She stated:

"In replacing the indeterminate IPP sentence, the Government committed to introducing a tougher, extended determinate sentence requiring the offender to serve at least two-thirds of the custodial term rather than one half. This was a measure designed to enhance public protection and maintain public confidence in the sentencing framework."

198.
When the court considers the justification of different treatment under article 14 of the ECHR it gives a wide margin of appreciation to the democratic legislature in its determination of criminal sentencing policy but exercises close scrutiny where the allegation is that detention is arbitrary or unlawful: Clift (ECtHR) para 73.

199.
As I have stated, the early release provisions relating to a sentence do not determine what is the appropriate part of a sentence for the punitive and deterrent purposes set out in section 142. They are the result of other considerations such as economy and the prevention of overcrowding in prisons (see para 188 above). In repealing the provisions which established the IPP and in creating a particular regime for the imprisonment of persons convicted of serious offences and who are also dangerous Parliament is entitled to have regard both to public protection and to the maintenance of public confidence in criminal sentencing. The preservation of public confidence is a legitimate aim, at least in the context in which the custodial term which is appropriate for the offence has not expired: Clift (ECtHR) para 74.

200.

The three considerations, which have persuaded me that an EDS prisoner is not in an analogous situation (para 195 above), are relevant to the question of the appropriate means of achieving those aims and need not be repeated. In my view one must look at the early release provisions in the context of the individual sentencing regimes which may have positive and negative features as far as the prisoner is concerned. The EDS prisoner, convicted of a serious offence and who is dangerous at the time of sentencing, has a longer wait before he is eligible for consideration for parole than many other offenders who are subject to different regimes of imprisonment, but he also has the benefit of a defined custodial term and a defined period during which he is subject to licence thereafter, in contrast to prisoners who have received life sentences. Those are the components of the particular sentencing regime which cannot be described as arbitrary. Sir James Eadie in his submissions has not provided any separate justification for the requirement of an EDS that the prisoner serve two-thirds of his sentence before he is eligible to be considered for parole rather than some other proportion, beyond saying that the offender has committed a serious offence and is dangerous at the time of sentencing. But, in my view, he does not require to do so because the EDS is a separate sentencing regime which is neither arbitrary nor unlawful.

201.
I therefore conclude in relation to issue 2B that the difference in treatment of EDS prisoners resulting from the potentially more onerous early release provisions of section 246A is justified. Accordingly, there has been no breach of article 14 taken with article 5 of the ECHR.

202.
In so concluding, I do not overlook the observation of Lord Brown of Eaton-under-Heywood in Clift (HL) at para 66:

“where the penal system includes a parole scheme, liberty is dependent no less upon the non-discriminatory operation of that than on a fair sentencing process in the first place.”

The interest of a prisoner in obtaining early release should not be underestimated. In this case, however, access to the parole scheme depends on the terms of the particular sentencing regime and differential access to that scheme as between discrete sentencing regimes is not per se discriminatory.

203.
I am also aware that there is a real potential for a sense of unfairness about differential eligibility for early release where two people are jointly convicted of the same offence and one receives a determinate sentence while the other, because he is dangerous, receives an EDS. The grievance this would generate was a matter of concern to the judges of the Divisional Court who referred to it in paras 45 and 50 of their judgment. That is clearly not the situation in Mr Stott’s case. It will not be the situation in many cases and it is not a sufficient basis for calling into question the justification for the early release provisions of the EDS generally. Article 14 of the ECHR does not in my view provide an answer to this problem; not every anomaly in sentencing is a breach of ECHR rights. I am left wondering whether in future the common law might be developed by creating an exception to the principle in R v Round where it was necessary to achieve comparative justice in such a case of joint offenders. But as parties have not had any opportunity to discuss this matter, I will say no more about it.

Conclusion

204.

I would dismiss the appeal.

LADY HALE:

205.
I am most grateful to Lady Black for having discussed the authorities in such depth. It has enabled me to stand back and look at the basics. The claim is that the early release provisions relating to prisoners serving an extended determinate sentence (EDS) unjustifiably discriminate against such prisoners in the enjoyment of their right to liberty, contrary to article 14 of the European Convention on Human Rights read with article 5. The basic fact about any sentence of imprisonment is that it takes away the prisoner's liberty: that is the right protected by article 5. The first thing that the prisoner (and indeed anyone else) wants to know is "how long for"? So let us take three prisoners who have committed the same, very serious, offence: one receives an ordinary determinate sentence of, say, 21 years; another qualifies for an EDS and receives an EDS of, say 21 years, with an extended licence period of four years on top of that; and another qualifies for and receives a discretionary life sentence, with a minimum custodial period of ten and a half years. The first prisoner will automatically be released on licence after ten and a half years; the second prisoner will only be considered for release on licence after 14 years; the third prisoner will be considered for release on licence after ten and half years. Is this most basic disparity in the treatment of these three prisoners compatible with the convention rights of the less favourably treated one?

206.
The English version of article 14 reads:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The equally authentic French text reads:

"La jouissance des droits et libertés reconnus dans la présente Convention doit être assurée, sans distinction aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation."

Thus, for the English "without discrimination", the French reads "sans distinction aucune", but the European Court of Human Rights has said that outlawing any distinction could lead to absurd results, and the French text should be read in the light of the more restrictive text of the English version (Belgian Linguistic case (No 2) (1968) 1 EHRR 252, para 10). On the other hand, for "other status", the French reads "toute autre situation", which has led the court to take an expansive view of what counts as an "other status" (see Carson v United Kingdom (2010) 51 EHRR 13, para 70).

207.
In article 14 cases it is customary in this country to ask four questions: (1) does the treatment complained of fall within the ambit of one of the Convention rights; (2) is that treatment on the ground of some "status"; (3) is the situation of the claimant analogous to that of some other person who has been treated differently; and (4) is the difference justified, in the sense that it is a proportionate means of achieving a legitimate aim?

208.

Question (1) stems from the subsidiary nature of article 14. Unlike article 1 of the 12th Protocol to the Convention (to which the United Kingdom is not a party), it does not prohibit discrimination in the enjoyment of "any right set forth by law" but only in the enjoyment of the Convention rights. But of course there does not have to be a breach of one of those rights - otherwise the article would add nothing. The rights have to be enjoyed equally. So the facts have to fall within the ambit of one of the rights or relate to one of the ways in which one of the rights is secured within the member state. In this case it is common ground that a sentence of imprisonment falls within the ambit of article 5, which regulates the circumstances in which a person may be deprived of his liberty. Equally it is common ground that there is no breach of article 5, because article 5(1)(a) permits "the lawful detention of a person after conviction by a competent court".

209.
Question (2) directs attention to the ground on which one person has been treated differently from another in the enjoyment of a Convention right. It is clearly intended to add something to the requirement of discrimination or a difference in treatment: otherwise article 14 would simple have said that "the enjoyment of the Convention rights shall be secured without (unjustified) discrimination (between persons in an analogous situation)". "Status" has usually been said to refer to a "personal characteristic" of the person concerned (beginning with Kjeldsen, Busk Madsen and Pedersen v Denmark (1976) 1 EHRR 711, but see also, for example, Maktouf and Damjanovic v Bosnia and Herzegovina (2013) 58 EHRR 11, para 83, and Magee v United Kingdom (2000) 31 EHRR 35, para 50, where differences in treatment between different courts or different parts of the United Kingdom were held not to be contrary to article 14 as they were not based upon personal characteristics). But it is not limited to innate qualities such as sex, race, colour, birth status or sexual orientation. It includes acquired qualities such as religion, political opinion, marital or nonmarital status, or habitual residence. But in Clift v United Kingdom (Application No 7205/07, judgment of 13 July 2010, inexplicably only reported in The Times, 21 July 2010), the court pointed out that not all the listed qualities are a personal characteristic, giving property as an example. Not only that, the court has not given an ejusdem generis interpretation to "other status" and has adopted a very broad approach: applying article 14, for example, to different categories of property owners (James v United Kingdom (1986) 8 EHRR 123, para 74), large and small landowners (Chassagnou v France (1999) 29 EHRR 615, para 95), and non-commissioned officers and ordinary soldiers (Engle v The Netherlands (No 1) (1969) 1 EHRR 647).

210.
In Clift v United Kingdom, the court also declared itself "not persuaded that the Government's argument that the treatment of which the applicant complains must exist independently of the 'other status' upon which it is based finds any clear support in its case law" (para 60). Paulík v Slovakia (2006) 46 EHRR 10 was cited as an illustration: a man who had been adjudged father of a child in legal proceedings complained that there was no way of correcting the record when DNA tests proved that he was not the father, whereas fathers whose paternity had been established on other grounds, and mothers, did have such a possibility (Paulík, para 48). With respect, this is not a good illustration, for two reasons. First, the applicability of article 14 was not disputed and so there is no discussion of "other status" in the judgment. Second, and more important, while it may well be the case that there was no other difference in treatment between the applicant and the others with whom he compared himself, his status, as a man who had been adjudged father in legal proceedings, was obviously different from the status of those fathers who had not, and even more different from the status of mothers. In other words, his status was not defined by the difference in treatment complained of. That, it seems to me is the true principle: the "status" must not be defined solely by the difference in

treatment complained of, for otherwise the words “on any ground such as …” would add nothing to the article.

211.

There is a useful analogy here with the United Nations Convention relating to the Status of Refugees (1951) (Cmd 9171): to be recognised as a refugee, a person has to have a well-founded fear of persecution on one of the Convention grounds - race, religion, nationality, membership of a particular social group or political opinion. In Fornah v Secretary of State for the Home Department [2006] UKHL 46; [2007] 1 AC 412, the House of Lords affirmed the principle (also endorsed by the UN High Commissioner for Refugees) that a “particular social group” must exist independently of the persecution to which the group is subject: by this was meant that the group was not defined solely by the persecution it feared.

212.

That said, I have no difficulty in accepting that “The question whether there is a difference of treatment based on a personal or identifiable characteristic in any given case is a matter to be assessed taking into consideration all of the circumstances of the case and bearing in mind that the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective” (Clift v United Kingdom, para 60). Prisoners subject to an EDS can be identified as a distinct group, just as prisoners subject to an ordinary determinate sentence and prisoners subject to a life sentence, can be identified as a distinct group. They are defined by much more than the particular early release regime to which they are subjected. Indeed, the argument that this particular type of sentence is a distinct “package”, so persuasively put forward on behalf of the Secretary of State as a justification for the difference, confirms that fact. This is much clearer than the difference in Clift, which was simply between different lengths of determinate sentence. If further support for that conclusion were required, it could lie in the different criteria for the imposition of each type of sentence, which concentrate upon the dangerousness of the offender, itself a personal characteristic.

213.

Questions (3) and (4) are logically distinct but are often discussed together in the cases. As Lord Nicholls put it in R (Carson) v Secretary of State for Work and Pensions [2005] UKHL 17; [2006] 1 AC 173, para 3:

“… the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court’s scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.”

214.

There is no such “obvious, relevant difference” here. The three groups in question are all prisoners serving sentences of imprisonment. From their point of view, the most important question in their lives is “when will I get out?” Allied to that may be two subsidiary questions, “who will decide when I get out - will it be automatic or will I have to go before the Parole Board?” and “if I am let out, what will be the consequences of that?” Each group of prisoners under discussion here is subject to a different package of answers to those questions. But we must beware of treating the “package” which

means that each of these groups has a different status as meaning that their situations are not analogous for the purpose of needing a justification for the difference in their treatment. To take an obvious example, women have a different status from men for the purpose of article 14. But the obvious physical differences between men and women do not mean that their situations are not relevantly similar, for the purpose, for example, of their right to liberty or to respect for their family lives. We have to look to the essence of the right in question to ask whether men and women prisoners are in a relevantly similar situation. The essence of the right in question here is liberty. It would obviously be discriminatory to make one sex serve longer sentences for the same crime simply because of their gender (as opposed to other factors which might justify a difference in treatment).

215.
The real question in this case has always been whether the difference in treatment can be justified as a proportionate means of achieving a legitimate aim. The background is important here. The EDS was introduced in its current form when the indefinite sentence for public protection (IPP) was abolished. It was considered necessary to replace IPP with a sentence, reserved for those who posed a particular risk to the public, which was demonstrably tougher than an ordinary determinate sentence. As Alison Foulds, policy lead on adult custodial sentencing policy in the Ministry of Justice, explained in her witness statement:

"This was a measure designed to enhance public protection and maintain public confidence in the sentencing framework. Offenders eligible for an EDS have committed serious offences and been found to be dangerous, and would previously have been eligible for an indefinite sentence, an IPP, but not necessarily a life sentence. The longer period to be served in prison under the EDS is justified on these grounds, and distinguishes the sentence from a standard determinate sentence, and a special determinate sentence for offenders of particular concern, which provide for automatic release at the half way point, or discretionary release from the half way point, as appropriate."

216.
Protecting the public is undoubtedly a legitimate aim. Furthermore, the criteria for imposing an EDS include 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" (Criminal Justice Act 2003, section 226A(1)(b)). The public will be better protected if he 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: if he is convicted of an offence listed in Schedule 18A, and the court does not impose a life sentence or an EDS, the court must impose a special sentence which consists of the "appropriate custodial term" plus an extra year for which he is subject to a licence (section 236A(1), (2)). 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: see R v Szczerba [2002] 2 Cr App R(S) 86. 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.

221.
That conclusion is to my mind strengthened by the fact that, had he not been bound by the decision of the House of Lords in R (Clift) v Secretary of State for the Home Department [2007] 1 AC 484, it would also have been the conclusion of Sir Brian Leveson, President of the Queen's Bench Division, who has unrivalled experience in penal matters and would have recognised a justification if there was one.

222.
I would therefore allow this appeal and make a declaration of incompatibility. It would then be for Parliament to decide how, if at all, that incompatibility is to be rectified.

LORD MANCE:

Introduction

223.
I have had the advantage of reading in draft the judgments prepared by Lady Black and Lord Carnwath. They reach different conclusions on the issue whether a prisoner on whom an extended determinate sentence ("EDS") has been passed under section 226A of the Criminal Justice Act 2003 ("the 2003 Act") acquires a status on which he may rely for the purposes of a complaint about alleged discrimination under article 14 of the European Convention on Human Rights ("ECHR").

224.
An EDS consists of the appropriate custodial terms, specified in Mr Stott's case as 21 years, and a further extension period, specified in his case as four years, during which he was to be subject to a licence. The discrimination alleged is that, under section 246A of the 2003 Act, as introduced by section 125 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 and amended by section 4 of the Criminal Justice and Courts Act 2015, a prisoner subject to an EDS of ten years or more must serve a "requisite custodial term" of normally two-thirds of his specified appropriate custodial term, before being eligible for consideration by the Parole Board for release on licence. Serving an EDS of less than ten years, imposed prior to 13 April 2015, and not in respect of an offence listed in Parts 1 to 3 of Schedule 15B to the Criminal Justice Act 2003, are automatically released once they have served two-thirds of the requisite custodial period (section 246A(2) of the 2003 Act). Under his EDS, Mr Stott would thus have to serve 14 years, before being eligible for referral to the Parole Board for consideration.

225.
The comparisons which Mr Stott seeks to draw are with prisoners sentenced to both determinate and indeterminate sentences. The former (determinate sentence prisoners) are, as Lady Black explains (para 90), entitled to be released on licence automatically, once they have served a "requisite custodial sentence", which is in their case one-half of their sentence.

226.
It is worth noting, in parenthesis, that under the régime of extended sentences which was introduced by section 227 of the 2003 Act, was in force until 3 December 2003 and was the precursor of the régime presently in issue, a prisoner was also entitled to automatic release on licence once he had served half of the requisite custodial sentence. Further, under the special custodial sentence regime introduced by Schedule 1 to the Criminal Justice and Courts Act 2015 as amended by section 236A of the 2003 Act, whereby a court could impose the appropriate custodial sentence plus a further period on licence of one year, a prisoner was entitled to have his suitability for release on licence considered by the Parole Board after serving half such sentence. The special custodial regime was available for inter alia an offender who had raped a child under 13, which it happens was also offending for which Mr Stott was sentenced.

227.
In respect of prisoners serving indeterminate sentences, the judge will determine a minimum custodial sentence which the offender must serve before being eligible to apply for early release, although the court may disapply this provision if the seriousness of the offending justifies this course. In the case of a mandatory life sentence, the minimum custodial sentence must take account of various factors, none expressly linked with any notional determinate term. In the case of a discretionary life sentence, the court must, under section 82A of the Powers of Criminal Courts (Sentencing) Act 2000, identify what sentence would have been appropriate had a determinate

sentence been imposed and take account of the fact that the offender would then have been entitled to early release: see Lady Black, para 103. In practice, this normally leads to a "tariff" period of half the notional determinate period although, in exceptional circumstances requiring the giving of proper reasons, the sentencing judge may as a matter of discretion fix the tariff at half or two-thirds or somewhere in between: R v Szczerba [2002] 2 Cr App R(S) 86; R v Jarvis [2006] EWCA Crim 1985; R v Rossi [2015] 1 Cr App R(S) 15.

Status

228.
The first question in these circumstances is whether Mr Stott can claim to have an "other status" for the purposes of invoking article 14 of the ECHR. I agree with Lady Black that he can. I accept that the requirement of an "other status" cannot simply be ignored, or subsumed in the question whether any discrimination is unjustified. This is for at least three reasons. First, the language of article 14 states that there must be discrimination on a ground "such as" those specified, the last being "other status". There would be no point in this language, if the only question was whether there was discrimination.

229.
Secondly, the ECtHR has expressly accepted as much in Clift v United Kingdom (Application No 7205/07), paras 55 to 56, while at the same time stating, at para 61, that "any exception to the protection offered by article 14 ... should be narrowly construed". While it may be odd to speak of a criterion for the application of article 14 as an exception, the general idea is clear enough: (a) the concept of "status" should be construed broadly, but (b) not every difference in treatment is on the ground of status.

230.
Thus, a difference in treatment regarding automatic parole between terrorism-related and other offences was held not to be on the ground of status in Gerger v Turkey (Application No 24919/94). It was a difference based on the differing gravity of the offence, rather than on any status. For the same reason, a mere difference in the sentence imposed cannot of itself amount to a difference in status. This also explains the difference in treatment by Lord Hughes of the two arguments raised in favour of the existence of a status in R v Docherty (Shaun) [2016] UKSC 62; [2017] 1 WLR 181, para 63. As to the second argument, the mere imposition of an indeterminate sentence under the appropriate sentencing regime could not give the offender a different status. As to the first, however, Lord Hughes left open the possibility that the offender had a different status because he had been convicted prior to 3 December 2012, when the appropriate sentencing regime provided for an indeterminate sentence, rather than after 3 December 2012, when indeterminate sentences for public protection were abolished. He held instead that any discrimination on the ground of status was justified.

231.
That a mere difference in treatment does not by itself constitute a difference in status is a proposition which is difficult to fault in the light of Gerger and what I have already said. But problems have arisen from attempts to extend the application of such a proposition to cases beyond its scope. This is, I think, the root of the third difficulty expressed by Lady Black in the first sentence of para 74 of her judgment. There is no reason why a person may not be identified as having a particular status when the or an aim is to discriminate against him in some respect on the ground of that status. Thus, in Clift the categorisation of Mr Clift as a prisoner serving a sentence of more than 15 years' imprisonment (a bright-line distinction clearly associated in the legislature's mind with a significantly higher level of risk) was with a view to the discriminatory treatment about which Mr Clift complained, since it meant

that he would receive less favourable treatment (a) as regards early release, than life prisoners presenting on their face an even greater risk, and also (b) as regards prisoners serving sentences of less than 15 years, since his release would be subject to approval by the Secretary of State who could contribute nothing relevant to any evaluation of continuing risk. It is to my mind unsurprising that such categorisation was in these circumstances regarded as giving Mr Clift a relevant status. It was common ground in Clift that being a prisoner was a status, and it was a short step from that in the circumstances to accepting that being a particular type of prisoner, namely one serving a determinate sentence of 15 years of more and viewed accordingly as presenting a particular risk (which was however addressed in a discriminatory fashion), could also be identified as a status.

232.
Similarly, it is difficult to see any real problem about attributing a relevant status to the complainant in Paulík v Slovakia (2006) 46 EHRR 10. He had the status of a father whose paternity had been established by judicial determination, in contrast with the different status of a parent whose paternity was legally presumed without judicial determination. The discrimination between these two statuses was that in the latter case paternity could subsequently be disproved by a DNA test, whereas in the former case no such procedure existed under domestic law.

233.
The ECtHR in para 60 of its judgment in Clift rejected “the Government’s argument that the treatment of which the applicant complains must exist independently of the ‘other status’ upon which it is based”. It reasoned that in Paulík “there was no suggestion that the distinction relied upon had any relevance outside the applicant’s complaint”. One might question if that could really have been so: it seems, self-evidently, one thing to have to prove paternity in court and thereafter, whenever the need arose, to have to identify a valid and enforceable court decision establishing paternity, and another matter to be able simply to rely on a factual presumption. Leaving that thought on one side, however, Clift suggests that a difference in the basis of established paternity represented a sufficient difference in status, even though the only continuing effect of the distinction consisted in the discriminatory possibility in the one case and impossibility in the other of subsequent disproof of paternity by a DNA test.

234.
The same point can be tested by supposing a person who was discriminated against on the ground of some previously held, but now abandoned, religious belief or political or other opinion. That would surely be discrimination on an illegitimate ground within the language of article 14. It is likewise notable that article 14 expressly identifies “national or social origin” and “birth” as a prohibited ground of discrimination.

235.
Thirdly, article 14 addresses discrimination, whether deliberate or unconscious, having a “systematic” nature in the sense that it occurs on the ground of a characteristic or characteristics in some sense attributed to the victim, whether innately or as a matter of choice or against their will: see the discussion in Clift at paras 56 to 59; and see also Lady Black’s judgment at para 56(i) to (iii) and 63. Article 14 is not targeted at achieving complete equality of treatment. A firm which haphazardly treated different customers with different standards of attention because its different employees were not consistently trained to perform to the same standards could not be said to be discriminating on the ground of any status possessed by any of its customers. A person who refused to serve a customer within ordinary hours (or to stay open late out of hours, when normally he would have been prepared to do so) because he had a headache could not be said to be discriminating on the ground of any

status possessed by the or any customer. There would be no question of him having to justify his conduct by reference to the severity of his headache.

236.
In the present case, I conclude without hesitation that Mr Stott possesses a relevant status, independent of the difference in treatment about which he is complaining. He is subject to an EDS, which is a sentence distinct from and has characteristics differing from those of any ordinary determinate or indeterminate sentence. The difference of treatment about which he complains consists in one consequence of his being given an EDS, namely that he was and is subject to a different regime as regards eligibility for consideration for parole.

237.
Mr Southey QC representing Mr Stott felt, rightly, obliged to concede that the claim must fail before the Administrative Court on the issue of status, because of the decision of the House of Lords in R (Clift) v Secretary of State for the Home Department [2006] UKHL 54; [2007] 1 AC 484. It follows from what I have already said that, in my opinion, the Supreme Court should now depart from that decision, and follow the clear guidance given by the ECtHR in Clift v United Kingdom. I should add that, in reaching this conclusion, I have benefitted substantially from Lady Black's comprehensive analysis of the authorities on status. Save to the limited extent that appears from what I have said above, I have no comment on and see no reason to disagree with that analysis.

Analogous position and justification

238.
The decisive questions are therefore whether an offender like Mr Stott serving an EDS is in an analogous position to an offender serving a determinate or indeterminate sentence, and, if so, whether the difference in treatment of an EDS offender as regards parole is objectively justified. In this connection, I have come ultimately to a different conclusion to Lady Black and Lord Carnwath.

239.
First, the ECtHR in Clift had no difficulty in treating prisoners serving more and less than 15 years' imprisonment and life prisoners as all being in an analogous position, "insofar as the assessment of the risk posed by a prisoner eligible for early release is concerned": para 67. On this basis, the question is whether the differences in their treatment as regards release on licence are justified. Like Lady Black, I do not consider that this question is avoided by the argument, advanced by the Secretary of State, that the whole of all such sentences should be seen as imposed as punishment for the offences committed, rather than as having two components, a punitive part followed by a preventive part. However such sentences may in other contexts be analysed, it remains the case that the differences between them regarding early release have significant advantages or disadvantages for the relevant prisoners, which once identified call for examination and justification.

240.
Second, as regards justification, the ECtHR accepted in Clift that more stringent early release provisions could be justified where a particular group of prisoners could be demonstrated to pose a higher risk to the public upon release: para 74. On that basis, it accepted in principle that the application of more stringent early release provisions might "have to be dependent on a bright-line cut-off point" and considered "that such a bright-line distinction will not of itself fall foul of the Convention"; accordingly, the fact that different early release provisions applied to those serving determinate sentences of 15 years or more, compared to those serving less than 15 years, did not of itself suggest unlawful discrimination: para 76.

241.

The reason the ECtHR regarded the difference in Clift between treatment of, on the one hand, prisoners serving more than 15 years' imprisonment and, on the other hand, prisoners serving less than 15 years' imprisonment or serving indeterminate sentences as unjustifiable was the requirement for the Secretary of State to consent to implementation of any Parole Board recommendation for release in the case of the former: paras 77 to 78. The ECtHR said in this connection that:

"The differential treatment of prisoners serving 15 years or more, whose release continued to be dependent on the decision of the Secretary of State, had become an indefensible anomaly, as the assessment of the risk presented by any individual prisoner, in the application of publicly promulgated criteria, was a task which was at the relevant time recognised to have no political content and one to which the Secretary of State could not, and did not claim to, bring any superior expertise …"

242.

The ECtHR also held the difference in treatment in Clift between prisoners serving in excess of 15 years' imprisonment and life prisoners to be unjustified for a further reason. Life prisoners apparently presented a greater risk than a prisoner on whom a determinate sentence had been passed. Yet there was in their case no requirement that the Secretary of State consent to their release. Once release was recommended by the Parole Board, it was the Secretary of State's duty to direct their release on licence.

243.

By the same token, in the present case, a more stringent release regime for prisoners sentenced to an EDS could be regarded as justified, when compared with that applicable to prisoners sentenced to an ordinary determinate sentence. Any ordinary determinate sentence and the "appropriate" custodial term to be served under an EDS fall to be determined on the principle set out in section 153(2) of the Criminal Justice Act 2003, that they:

"must be for the shortest term (not exceeding the permitted maximum) that in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it."

One pre-condition to the imposition of an EDS is, however, that "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": section 226A(1)(b) of the 2003 Act. Another (at the relevant time) was that the court was "not required by section 224A or 225(2) to impose a sentence of imprisonment for life": section 226A(1)(c).

244.

Applying similar reasoning to that of the ECtHR in Clift, Parliament could be taken to have considered that this risk 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 in Sir Brian Leveson, President of the Queen's Bench Division's full and helpful judgment, 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: Crime (Sentences) Act 1997, section 28(5).

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.

247.

The position regarding mandatory life prisoners is less easy to compare with that of prisoners serving an EDS. As Lady Black explains in para 102, the sentencing judge determines, in the light of the seriousness of the offence and other circumstances, a minimum custodial period after the expiry of which the prisoner has a right to require the Secretary of State to refer him to the Parole Board and a right to be released on licence if the Parole Board so recommends. But there appears to be no general or normal rule as to the length of this period, as there is in the case of discretionary life sentences: see R v Szczerba, cited above.

248.

In the event, I conclude that prisoners serving an EDS are 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 has been shown and that section 246A(8)(a) of the Criminal Justice Act 2003 is for this reason incompatible with article 14 read with article 5 of the ECHR, in so far as it requires two-thirds of the relevant custodial period to have expired before any such eligibility arises. Since preparing this judgment on the issues of analogous situation and justification, I have also had the advantage of reading what Lady

Hale says in her paras 213 to 222, with which I find myself in agreement on these issues. It follows that, in my opinion, the appeal succeeds, and Mr Stott is entitled to succeed to a corresponding declaration of incompatibility.