Trinity Term
[2014] UKSC 39
On appeal from: [2012] EWCA Civ 1374

JUDGMENT

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

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Kerr
Lord Carnwath
Lord Hughes

JUDGMENT GIVEN ON

2 July 2014

Heard on 26 March 2014

Appellant	*Respondent*
Hugh Southey QC Amanda Weston (Instructed by Chivers Solicitors)	Nathalie Lieven QC Alison Chubb (Instructed by Treasury Solicitors Department)

LORD NEUBERGER (with whom Lord Kerr, Lord Carnwath and Lord Hughes agree)

Introductory

1. On 5 October 2010, the appellant, Stuart Whiston, was sentenced to 18 months in prison for robbery. He was entitled to automatic release on licence after serving half his sentence, ie on 5 July 2011. However, on 21 February 2011, he was released on licence under a so-called home detention curfew pursuant to section 246 of the Criminal Justice Act 2003. On 7 April 2011, the Secretary of State decided to revoke the licence under section 255 of the 2003 Act, because the appellant's whereabouts could no longer be monitored in the community, and he was recalled to prison. The decision of the Secretary of State was not subject to any statutory judicial control or review.

2. The question raised on this appeal is whether a person released from prison on a home detention curfew, and then recalled to prison under section 255 of the 2003 Act, has rights pursuant to article 5(4) of the European Convention of Human Rights. More broadly, the appeal raises the issue of how far it is open to a person who is still serving a sentence imposed by a court to invoke article 5(4).

The relevant domestic law

3. All the statutory provisions relevant to this appeal are in the 2003 Act, but, as has been regrettably familiar in the field of criminal law, the provisions have been successively amended or added to by subsequent legislation. As these amendments and additions do not affect the analysis of the arguments or the outcome, I shall describe the provisions in their current form, namely as amended most recently by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

4. Where a person has been convicted and given a determinate prison sentence of twelve months or more (a "sentence period"), section 244(1) provides that, subject to certain specified exceptions, once he has served half his sentence, "it is the duty of the Secretary of State to release him on licence". Section 244(3) defines the first half of the sentence period as the "requisite custodial period", at the end of which he is thus entitled to be released on licence.

5. A prisoner may also be released on licence during the requisite custodial period under section 246(1), which, so far as is relevant, is in the following terms:

> "Subject to subsections (2) to (4), the Secretary of State may release on licence under this section a fixed-term prisoner at any time during the period of 135 days ending with the day on which the prisoner will have served the requisite custodial period….."

Subsection (2) limits this power in relation to short sentences, and subsection (4) excludes the operation of subsection (1) in certain other cases, including cases where "(aa) the sentence is for four years or more" and "(g) the prisoner has been released on licence under this section at any time and has been recalled to prison under section 255(1)(a)".

6. Section 250(4) states that any licence "(a) must include the standard conditions", which are stated to be "such conditions as may be prescribed", and "(b) may include" (i) any condition authorised by certain other statutes, and "(ii) such other conditions of a kind prescribed by the Secretary of State … as [he] may for the time being specify in the licence".

7. Section 250(5) provides that a licence granted under section 246 must be subject to a curfew condition in accordance with section 253, which is in the following terms:

> "(1)…. [A] curfew condition is a condition which—
>
> > (a) requires the released person to remain, for periods for the time being specified in the condition, at a place for the time being so specified ….. and
> >
> > (b) includes requirements for securing the electronic monitoring of his whereabouts during the periods for the time being so specified.
>
> (2) The curfew condition may specify different places or different periods for different days, but may not specify periods which amount to less than 9 hours in any one day ….
>
> (3) The curfew condition is to remain in force until the date when the released person would (but for his release) fall to be released … on licence under section 244."

Thus, a curfew condition cannot operate beyond the end of the requisite custodial period, the point at which the prisoner would in any event be entitled to be released. The place specified in a person's licence is normally his home, and for that reason a licence under section 246 is often known as "home detention curfew".

8. By virtue of section 249, a licence, whether under section 244 or 246, remains in place until the end of the sentence period, unless the licence is revoked and the person subject to the licence (the "licensee") recalled. The Secretary of State has the power to revoke a licence and recall a licensee back to prison pursuant to two different statutory provisions.

9. First, section 254(1) of the 2003 Act gives the Secretary of State a general power to revoke any licence and to recall the licensee to prison. Where the power of revocation is exercised under section 254(1), the licensee is entitled pursuant to section 254(2) to be told the reasons for his recall and to make representations to the Secretary of State, who can cancel the revocation of the licence under section 254(2A). Sections 255A-255C contain provisions which apply when a licence is revoked under section 254(1) and the revocation is not cancelled. In general terms, in such an event, the Secretary of State may release the former licensee, if satisfied that he "will not present a risk of serious harm to the public", and, if she is not so satisfied, she must refer the case to the Parole Board for a binding ruling within that period if the prisoner makes representations. If there is no such release, the Secretary of State must refer the question of the former licensee's release to the Parole Board within 28 days of his return to custody – see sections 255B(4) and 255C(4).

10. Secondly, section 255(1) confers a specific power on the Secretary of State to revoke a section 246 licence or home detention curfew, and it provides as follows:

> (1) If it appears to the Secretary of State, as regards a person released on licence under section 246 –
>
> (a) that he has failed to comply with any condition included in his licence, or
>
> (b) that his whereabouts can no longer be electronically monitored at the place for the time being specified in the curfew condition included in his licence,
>
> the Secretary of State may, if the curfew condition is still in force, revoke the licence and recall the person to prison under this section."

Thus, the power of recall under section 255 can only be exercised whilst the curfew condition is in force - ie until the end of the requisite custodial period, when the licensee would have been entitled to be let out on licence as of right. (Thereafter, the licence can only be revoked under section 254). Further, section 255(2) provides for a licensee to be given the reasons for his recall and the opportunity to make representations to the Secretary of State, who can cancel the revocation pursuant to section 255(3). However, unlike the position in relation to the section 254 power of recall, there is no provision for review by the Parole Board of the exercise of the Secretary of State's section 255 power of recall.

11. Accordingly a prisoner can be recalled under section 255 even if he has fully complied with the conditions of the licence. The procedural safeguards are that the recalled prisoner must be given reasons for the recall and be able to make representations about them.

12. So the statutory position in relation to determinate sentences is, in outline, as follows:

a) All prisoners are entitled to release on licence after serving half their sentence;

b) If recalled, a prisoner is either entitled to re-release after 28 days or to referral to the Parole Board, whose decision on re-release is binding;

c) There may be discretionary release, sanctioned by the Secretary of State, for the limited period of up to 135 days before the prisoner becomes entitled to release at the half way mark in his sentence.

d) This discretionary release is also on licence but the licence must additionally incorporate Home Detention Curfew terms.

e) During the period of the discretionary release, the prisoner may be recalled not only for breach of licence or demonstrated risk to the public but also because the Home Detention Curfew system cannot be made to work in his case. He must be given the reasons and is permitted to make representations to the Secretary of State.

f) Such recall within the limited period of up to 135 days is not subject to Parole Board or court review, but

g) So soon as the half way stage in his sentence is reached, the automatic Home Detention Curfew terms fall away and the rules set out at (a) and (b) apply.

13. There are quite separate rules for prisoners serving indeterminate terms, where the criteria for release on licence, recall or re-release on licence are largely geared to current risk to the public; in such cases all decisions are referable to the Parole Board whose ruling is binding.

Article 5(4) of the Convention

14. The short point raised in this appeal is whether a recall to prison under section 255, without a right of review by the Parole Board or any other judicial body, is consistent with article 5(4) of the Convention.

15. Article 5(1)(a) of the Convention provides as follows:-

> "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 … ."

16. Article 5(4) states:

> "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."

17. As Elias LJ observed below in para 12, there is a close relationship between these two provisions. Article 5(1)(a) recognises the right to liberty, and provides that a person should not lose his liberty save by being lawfully detained following a conviction by a tribunal which is judicial in character. Article 5(4) confers an associated right on a detained person to challenge the lawfulness of his detention before a tribunal which is judicial in character, and to have effect given to the decision of that tribunal.

The parties' respective cases

18. The case for each party is simple. The appellant contends that, as a result of the licence granted on 21 February 2011, he regained his liberty, and the subsequent revocation of the licence and his consequent recall to prison on 7 April 2011 therefore constituted a deprivation of his liberty which infringed article 5(4), because, having been effected under section 255 pursuant to a decision of the Secretary of State, its "lawfulness" was not "decided speedily", or indeed at all, "by a court".

19. The Secretary of State, on the other hand, argues that, at least where, as in this case, the sentence in question is determinate, in any case where a prisoner, who has been released on licence, is recalled to prison during the currency of his sentence period, or at any rate during the requisite custodial period, the requirements of article 5(4) are satisfied by the original sentence lawfully passed by the court by which he was originally imprisoned.

20. Somewhat counter-intuitively, the appellant relies on domestic authority, and in particular on the decision of the House of Lords in *R (Smith and West) v Parole Board* [2005] 1 WLR 350 ("*West*"), whereas the Secretary of State relies on the jurisprudence of the Strasbourg court. In my opinion, it is right to start by considering the Strasbourg case law, and then turn to the domestic decisions.

The Strasbourg jurisprudence on article 5(4)

21. In *De Wilde, Ooms and Versyp v Belgium (No 1)* (1971) 1 EHRR 373, para 76, the Strasbourg court said this:

> [T]he purpose of article 5(4) is to assure to persons who are arrested and detained the right to a judicial supervision of the lawfulness of the measure to which they are thereby subjected …. Where the decision depriving a person of his liberty is one taken by an administrative body, there is no doubt that article 5(4) obliges the Contracting States to make available to the person detained a right of recourse to a court; but there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the latter case the supervision required by article 5(4) is incorporated in the decision; this is so, for example, where a sentence of imprisonment is pronounced after 'conviction by a competent court' …. It may therefore be concluded that article 5(4) is observed if the arrest or

> detention … is ordered by a 'court' within the meaning of [article 5(4)]."

22. This reasoning was distinguished by the court in *X v United Kingdom* (1982) 4 EHRR 188, para 51 in relation to indeterminate sentences, where the court held that, while this observation applied to an ordinary, determinate, sentence, "it does not purport to deal with an ensuing period of detention in which new issues affecting the lawfulness of the detention might subsequently arise". In *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443, para 47, the court pointed out that an indeterminate sentence involved "placing recidivists and habitual offenders at the Government's disposal", which required the Minister of Justice to "direct his mind to the need to deprive or continue to deprive the person concerned of his liberty". In such a case, article 5(4) was engaged, and it required "judicial review, at reasonable intervals, of the justification for the deprivation of liberty"

23. The effect of the reasoning in *De Wilde* is demonstrated by two admissibility decisions of the Strasbourg court. In *Ganusauskas v Lithuania* (Application No 47922/99, 7 September 1999), the applicant, who had been sentenced to six years in prison for obtaining property by deception, complained about the fact that the District Court permitted the prosecutor to appeal out of time against a decision to release him conditionally after he had served half his sentence as "a model prisoner" (a decision which the District Court then reversed). The Third Section rejected as inadmissible his contention that his rights under articles 5(1), 5(4) and 6 had been infringed. Relying on *De Wilde*, the court said that "article 5(4) only applies to proceedings in which the lawfulness of detention is challenged", and added that "[t]he necessary supervision of the lawfulness of the detention 'after conviction by a competent court', as in the present case, is incorporated at the outset in the applicant's original trial and the appeal procedures against the conviction and sentence".

24. In *Brown v United Kingdom* (Application No 986/04, 26 October 2004), the applicant, who had been sentenced to eight years in prison for supplying heroin, was released on licence after serving two-thirds of his sentence. He was then recalled on the grounds of changing his residence without approval and posing a risk to others. His representations to the Parole Board were rejected, as was his subsequent attempt to seek judicial review. His application, based on the contention that his rights under articles 5(1), 5(4), 6 and 8 had thereby been infringed, was rejected as inadmissible by the Fourth Section, which said this so far as article 5(4) is concerned:

> "[W]here an applicant is convicted and sentenced by a competent court to a determinate term of imprisonment for the purposes of

> punishment, the review of the lawfulness of detention is incorporated in the trial and appeal procedures. … No new issues of lawfulness concerning the basis of the present applicant's detention arose on recall and no right to a fresh review of the lawfulness of his detention arose for the purposes of article 5(4) of the Convention."

25. Mr Southey QC, for the appellant, argued that, in each of these two cases, the applicant's reliance on article 5(4) could have been rejected on the ground that he had had the opportunity to challenge his recall to prison (in opposition to the prosecutor's appeal to the District Court in *Ganusauskas*, and to the Parole Board and, arguably, through his application for judicial review, in *Brown*). That may well be right, but it does not in any way undermine the fact 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.

Domestic jurisprudence on article 5(4)

26. In *R (Giles) v Parole Board* [2004] 1 AC 1, the House of Lords held that article 5(4) was not infringed in a case where the appellant had been sentenced (under statutory provisions which have now been superseded) to a determinate but increased term to recognise the risk to the public which he represented. He had served what would have been the unincreased period but remained in prison. Relying on the reasoning in *De Wilde* and *Van Droogenbroeck*, it was held that, because the protective period had been imposed as part of the original sentence and was not subject to any control by the executive, but could be reviewed by the parole board, a judicial body, it did not infringe article 5(4).

27. In his opinion (with which the other members of the committee agreed), at para 40, Lord Hope described the effect of the Strasbourg jurisprudence (which he analysed in the thirteen preceding paragraphs) as being that:

> "[A] distinction is drawn between detention for a period whose length is embodied in the sentence of the court on the one hand and the transfer of decisions about the prisoner's release or re-detention to the executive. The first requirement that must be satisfied is that according to article 5(1) the detention must be 'lawful'. That is to

> say, it must be in accordance with domestic law and not arbitrary. The review under article 5(4) must then be wide enough to bear on the conditions which are essential for a determination of this issue. Where the decision about the length of the period of detention is made by a court at the close of judicial proceedings, the requirements of article 5(1) are satisfied and the supervision required by article 5(4) is incorporated in the decision itself. That is the principle which was established in *De Wilde, Ooms and Versyp*. But where the responsibility for decisions about the length of the period of detention is passed by the court to the executive, the lawfulness of the detention requires a process which enables the basis for it to be reviewed judicially at reasonable intervals."

28. Lord Hope expanded on the effect of this distinction at para 51, in these terms:

> "Where the prisoner has been lawfully detained within the meaning of article 5(1)(a) following the imposition of a determinate sentence after his conviction by a competent court, the review which article 5(4) requires is incorporated in the original sentence passed by the sentencing court. Once the appeal process has been exhausted there is no right to have the lawfulness of the detention under that sentence reviewed by another court. The principle which underlies these propositions is that detention in accordance with a lawful sentence passed after conviction by a competent court cannot be described as arbitrary. The cases where the basic rule has been departed from are cases where decisions as to the length of the detention have passed from the court to the executive and there is a risk that the factors which informed the original decision will change with the passage of time. In those cases the review which article 5(4) requires cannot be said to be incorporated in the original decision by the court. A further review in judicial proceedings is needed at reasonable intervals if the detention is not to be at risk of becoming arbitrary."

29. Lord Hutton (with whom the other members of the committee also agreed) expressed the same view after analysing the Strasbourg jurisprudence in paras 65-79.

30. In *West* [2005] 1 WLR 350, the two appellants were licensees who had been recalled to prison for alleged breaches of their respective licences, which had been granted under what was effectively the statutory predecessor of section 244(1). Thus, they had each served a sufficient proportion of their respective

sentences to be entitled to be released on licence. In each case, the Parole Board had decided not to recommend re-release, having refused to grant an oral hearing to consider the contention that the revocation of the licence was unjustified and that the licensee should be re-released. The primary decision of the House of Lords was that the Parole Board had a common law duty to act fairly, both substantively and procedurally, when considering whether the revocation of a licence was justified, and that this would normally require an oral hearing where questions of fact were in issue – see per Lord Bingham at paras 28-35.

31. However, as Mr Southey rightly says, the House of Lords did consider the applicability of article 5. In para 36, Lord Bingham held that article 5(1) did not apply as "the sentence of the trial court satisfies article 5(1) not only in relation to the initial term served by the prisoner but also in relation to revocation and recall". In para 37, he turned to article 5(4), and appears simply to have assumed that it applied to the proceedings before the Parole Board, and went on to hold that the requirements of the article were satisfied by its statutory power, "provided it is conducted in a manner that meets the requirement of procedural fairness already discussed". In para 37, Lord Bingham does not appear to have considered the effect of *Ganusauskas* or *Brown*, although he specifically cited and relied on them in para 36 in relation to article 5(1) – and indeed in relation to article 6 in paras 40 and 42.

32. Lord Hope agreed with Lord Bingham and while he also referred in para 81 to *Ganusauskas* and *Brown* in connection with article 6, he similarly appears to have assumed, at paras 72-75, that article 5(4) applied without considering whether that was consistent with those admissibility decisions – or indeed with what he had said in *Giles* (which was cited in argument but not relied on in the judgments –see [2005] 1 WLR 350, 351-352). Lord Walker and Lord Carswell simply agreed with Lord Bingham. Lord Slynn, who dissented in part, described his "initial view" as being that "there are not two formal orders for detention" as that "recall from conditional release was itself empowered by the initial sentence of the court", but said that he had "been persuaded by Mr Fitzgerald that this is too restrictive an approach" – paras 54-55. He justified this conclusion by reference to the decision of the Strasbourg court in *Weeks v United Kingdom* (1987) 10 EHRR 293, para 40.

33. In *R (Black) v Secretary of State for Justice* [2009] 1 AC 949, the House of Lords considered a case where the respondent, who, after having been sentenced to 24 years in prison, had become eligible to be considered for discretionary release on licence. Under the statutory scheme then in force, he was eligible for discretionary release on licence after serving half his determinate sentence, but became entitled to it only after serving two-thirds. Although the Parole Board recommended that he be released, the Secretary of State decided that the risk of re-offending was too great. By a majority of four to one, the House

rejected the respondent's contention that his rights under article 5(4) were infringed. In the course of their reasoning, the Law Lords had to grapple with the argument that the decision in *West* in relation to article 5(4) was inconsistent with the reasoning of the Strasbourg court in *Ganusauskas* and *Brown*, as explained by Lord Hope in *Giles.*

34. Lord Rodger, with whom Baroness Hale agreed, said that he agreed with Lord Brown, but "explain[ed] shortly how [he saw] the position in the light of t[the English and Strasbourg] cases" – para 37. Relying on "the constant jurisprudence of the European Court of Human Rights conveniently summarised by Lord Hope" in *Giles* at para 40, he held that the answer to "the question … whether article 5(4) gives a long-term prisoner, with a determinate sentence …, the right to take legal proceedings at the halfway stage of his sentence, to determine the lawfulness of his continued detention" was "No" – paras 45-46. Lord Carswell referred to Lord Hope's observations in *Giles*, and then contrasted cases such as *Van Droogenbroeck*, where "the executive authority possessed a discretion over the time when the prisoner would be released, which was not fixed at the outset by any judicial decision", with cases such as *Ganusauskas* and *Brown*, where "the lawfulness of the detention was incorporated at the outset in the applicant's original trial and the appeal procedures against conviction and sentence" – para 57.

35. Lord Brown, with whom Baroness Hale agreed, considered the Strasbourg jurisprudence at paras 66-71, explaining at paras 66-67 that, so far as article 5 was concerned, "the Strasbourg court has consistently appeared to treat determinate sentences quite differently" from indeterminate sentences. He then considered the domestic decisions, including *Giles* and *West*, at paras 71-77. He next turned to his "[c]onsiderations and conclusions", which he set out in paras 78-84. He stated at para 81 that "[t]here is nothing intrinsically objectionable (certainly in Convention terms) in allowing the executive, subject to judicial review, to take the parole decision". He then said that the fact that, by statute, the UK "had chosen to give the Parole Board a role in the process, and statutory directions as to how to approach that role, and has chosen to fix precisely the period within a determinate sentence during which the prisoner is to be considered for parole …[did not] mean that article 5(4) is necessarily thereby engaged so that the board's decision must be final" – paras 82-83. He explained this in para 83, where he said that "[t]he administrative implementation of determinate sentences does not engage article 5(4); the decision when to release a prisoner subject to an indeterminate sentence does".

36. However, in the course of his discussion of the domestic cases, Lord Brown did refer to the apparent conflict between *Ganusauskas* and *Brown* on the one hand and *West* on the other, in para 74, where he said this:

> "Inescapably it follows from *West* that contrary to the view expressed in the Strasbourg court's admissibility decision in *Brown*, a prisoner's recall for breach of his licence conditions *does* raise, 'new issues affecting the lawfulness of the detention' such as to engage article 5(4). And that seems to me clearly correct: it would not be lawful to recall a prisoner unless he *had* breached his licence conditions and there could well be an issue as to this. I wonder, indeed, if the European Court would have decided *Brown* as they did had it followed, rather than preceded, the House's decision in *West*. Be that as it may, recall cases certainly so far as domestic law goes, are to be treated as akin both to lifer cases in the post-tariff period and to the *Van Droogenbroeck*-type of case where, upon the expiry of the sentence, a prisoner is subjected to an executive power of preventive detention."

37. Lord Phillips, who dissented, effectively relied on the reasoning in *West*, on the basis that:

> "This decision is in direct conflict with the reasoning of the Strasbourg court in *Brown v United Kingdom*. Lord Brown considers that its effect should be confined to the decision whether to release a prisoner after recall. I can see no reason for so confining it; the reasoning is applicable to any decision whether to release a prisoner on licence." (para 28)

Discussion

38. If one limits oneself to the decisions of the Strasbourg court to which I have referred, and the reasoning in *Giles* quoted above, the law appears to me to be clear. Where a person is lawfully sentenced to a determinate term of imprisonment by a competent court, there is (at least in the absence of unusual circumstances) no question of his being able to challenge his loss of liberty during that term on the ground that it infringes article 5(4). This is because, for the duration of the sentence period, "the lawfulness of his detention" has been "decided … by a court", namely the court which sentenced him to the term of imprisonment.

39. That does not appear to me to be a surprising result. Once a person has been lawfully sentenced by a competent court for a determinate term, he has been "deprived of his liberty" in a way permitted by article 5(1)(a) for the sentence term, and one can see how it follows that there can be no need for "the lawfulness of his detention" during the sentence period to be "decided speedily by a court",

as it has already been decided by the sentencing court. If that is the law, it would follow that Mr Whiston's appeal in this case must fail.

40. On this approach, article 5(4) could not normally be invoked in a case where domestic discretionary early release provisions are operated by the executive in relation to those serving determinative terms. I accept that, in the absence of the clear Strasbourg jurisprudence, there would be an argument for saying that article 5(4) should apply in such cases. However, as already observed, the notion that the article is not engaged because of the original sentence appears entirely principled, and the consequence that a person under such a regime has to rely on his domestic remedies, at least unless other Convention rights are engaged, seems to me to be not unreasonable in practice.

41. However, the issue is complicated by the decision of the House of Lords that article 5(4) was engaged in *West*, because, if the legal analysis just summarised were correct, article 5(4) would not have been engaged in *West.* I am bound to say that the decision in *West* appears to me to be unsatisfactory in relation to article 5(4) - and, it should be emphasised, only in relation to article 5(4). First, although the relevant Strasbourg cases were cited in the judgments they were not followed on this point, and, save in the opinion of Lord Slynn, there was no explanation why not. Secondly, although *Giles* was referred to in argument, it was not cited in any opinion, and therefore no consideration appears to have been given to the observations of Lord Hope quoted above. Thirdly, at least in the four majority judgments it was not so much decided that article 5(4) was engaged; rather, it seems to have been simply assumed. Fourthly, in the fifth judgment, Lord Slynn's explanation as to why he departed from his initial view that article 5(4) was not engaged was, with respect, plainly unsatisfactory, as the Strasbourg decision he relied on, *Weeks*, was a case involving an indeterminate sentence.

42. When one turns to *Black*, the position can be said to be yet murkier. In their opinions, Lord Rodger (although he agreed with Lord Brown) and Lord Carswell steered clear of *West*, and simply treated the law on article 5(4) to be as stated by Lord Hope in *Giles*, para 40 (and, in the case of Lord Carswell, by the Strasbourg court in *Van Droogenbroeck*, *Ganusauskas*, and *Brown*). Lord Brown and Lord Phillips both considered that, so far as article 5(4) was concerned, *West* was inconsistent the Strasbourg jurisprudence. Lord Phillips (dissenting in the result) preferred to follow *West*, whereas Lord Brown in an *obiter* observation, preferred to limit the scope of *West.*

43. The question, then, is what we should do about this unsatisfactory state of affairs. Mr Southey argues that we should follow Lord Brown's approach in his *obiter dictum* in *Black* at para 73, and to conclude that article 5(4) applies in this

case because Mr Whiston is seeking to be released after recall. Ms Lieven QC, for the Secretary of State, argues that we should follow the Strasbourg jurisprudence, as explained and applied in *Giles*, and hold that Mr Whiston cannot invoke article 5(4), as, so long as his sentence period was running, it had been satisfied by the sentence which was imposed at his trial.

44. I have reached the clear conclusion, in agreement with the Court of Appeal, that we should reach the conclusion advocated by Ms Lieven. As already explained, it clearly appears to be the conclusion which the Strasbourg court would reach. The fact that *Ganusauskas* and *Brown* were admissibility decisions strengthens their force rather than weakens it: in each case, the court considered the applicant's argument on article 5(4) to be so weak, for the reasons it gave, that it was not even worth proceeding to a decision.

45. I have some difficulty with the notion, implied by Lord Brown in para 74 of *Black*, that a court in this country should hold that the reach of article 5(4) is, as it were, longer than the Strasbourg court has held. Assuming (as may well be right, and will no doubt have to be considered in a future case) that a United Kingdom court could, in principle, decide that article 5(4) applied in Mr Whiston's case in the face of clear Strasbourg jurisprudence that it would not, I am quite unconvinced that it would be appropriate to do so. Unless and until I am persuaded otherwise on the facts of a particular case, it seems to me that the common law should be perfectly well able to afford appropriate protection to the rights of people in the position of Mr Whiston without recourse to the Convention. The decision in *West* demonstrates that the common law affords protection in such circumstances, and Lord Brown's actual conclusion in *Black* underlines the very limited nature of any exception which he had in mind in his *obiter* observations.

46. It would be wrong not to confront squarely the decision in *West* on article 5(4) and Lord Brown's *obiter dictum* in *Black*, para 74. As Elias LJ said at [2014] QB 306, para 1, there is "a growing number of cases which have bedevilled the appellate courts on the question whether and when decisions affecting prison detention engage" article 5(4). As he added, "[p]roblems arise because of the combination of general and imprecise Strasbourg principles and the complexity of English sentencing practices". I believe that this makes it particularly important that we grasp the nettle and hold that (i) the decision in *West* was *per incuriam* so far as it involved holding (or assuming) that article 5(4) was engaged, and (ii) the *obiter dictum* of Lord Brown in *Black*, para 74 is wrong in so far as it suggests that the law of the UK in relation to article 5(4) differs from the Strasbourg jurisprudence as summarised by Lord Hope in *Giles*, paras 40 and 51.

47. So far as *West* is concerned, I have already identified certain problems in para 41 above. Furthermore, and importantly, it is not as if the actual decision in *West* thereby stands in any way impugned. As the headnote records, at [2005] 1 WLR 350-351, the conclusion reached by the House of Lords was primarily based on the appellant's common law rights, as is reflected in Lord Bingham's opinion, which devotes nine paragraphs to the common law and one to article 5(4). I suspect that the reason that the appellant's Convention rights were considered was that one of the appellants had not relied on the common law in the Court of Appeal (see para 33). Properly analysed, all five opinions in *Black* support the view that *West* was *per incuriam* to the extent I have suggested. Lord Phillips and Lord Brown both expressly said it is inconsistent with the Strasbourg jurisprudence, and Lord Rodger and Lady Hale agreed with Lord Brown. Lord Rodger (with whom Lady Hale also agreed) and Lord Carswell each made it clear that they regarded the law as accurately set by Lord Hope in *Giles*, which is inconsistent with *West* so far as the applicability of article 5(4) is concerned.

48. As to Lord Brown's observation in *Black* at para 74, apart from being no more than an *obiter dictum*, it is inconsistent with the analyses of Lord Rodger and Lord Carswell in the same case. I must also confess that, in agreement with Lord Phillips, it seems rather hard to reconcile the reasoning which led Lord Brown to dismissing the appeal with his observations in para 74. It is true that Lord Rodger and Baroness Hale agreed with Lord Brown, but I do not think it would be right to take such a general agreement as approving every sentence in Lord Brown's opinion, at least in so far as a sentence is not part of his "[c]onsiderations and conclusions". Quite apart from that, it does not appear to have been argued in *Black* that it was wrongly held or assumed in *West* that article 5(4) was engaged, and therefore it is unsurprising that, in so far as they considered *West*, the opinions in *Black* proceeded on the basis that it was rightly decided. Indeed, the inconsistencies and uncertainties on this issue engendered by the opinions in *Black* appear to me to support the view that *West* was wrong in so far as it held or assumed that article 5(4) was engaged.

49. Having had the benefit of reading Lady Hale's judgment, I would add that it may be that the Strasbourg court would want to reconsider their jurisprudence, but, at the moment, it appears to me that it has the effect discussed above.

Conclusion

50. For these reasons, which reflect the reasons expressed in the very clear judgment of Elias LJ in the Court of Appeal, I would dismiss this appeal.

LADY HALE

51. I agree that this appeal should be dismissed but I wish to sound a note of caution about some of the reasoning which has led Lord Neuberger to reach that conclusion. In my view, the present law draws a principled distinction between those determinate prisoners who have reached the point in their sentence at which they are entitled to be released on licence and those who have not. If the former are recalled from their licence, and their representations to the Secretary of State fall on deaf ears, they are entitled to have their case referred to the Parole Board. The latter, whose release on licence was discretionary, are not.

52. In *Brown v United Kingdom* (unreported, Application No 986/04, 26 October 2004) the Strasbourg court pointed out that there was a crucial distinction between prisoners serving a determinate sentence of imprisonment and those serving a life sentence. Once the latter had served the punishment part of their sentences, the reason for detaining them was not to punish them for their original offence but because they posed a continuing risk to the public. Hence article 5(4) required that their continued imprisonment had be subject to periodic judicial scrutiny. A determinate sentence, on the other hand, had been imposed by a court as punishment for the offence and that justification continued for its duration. "The lawfulness of his detention does not depend, in Convention law terms, on whether or not he ceases to be at risk of re-offending" (page 5).

53. The court went on to say that "The fact that the applicant before the end of the sentence may expect to be released on licence does not affect this analysis" (page 5). However, the position in our law is rather stronger than an expectation of release on licence. The prisoner is legally entitled to be released at a certain point in his sentence. This is irrespective of the risk that those responsible for his imprisonment may consider that he poses to the public. In a very real sense, therefore, the sentence imposed by the court as punishment for the offence is half the actual term pronounced by the judge (and indeed the judge has to explain this to him when imposing it). I appreciate, of course, that the judge imposes the sentence which he or she thinks correct, without regard to the right to early release. The whole of the sentence is intended as punishment. Once released at the nine month point, the prisoner remains liable to recall for the remainder of the term. However, the reasons for his recall could then be subject to scrutiny by the Parole Board, which will focus upon whether or not he poses a risk of re-offending or otherwise endangering the public. Thus it can be said that, once a prisoner has passed the point of mandatory release on licence, the basis for any later recall and detention is the risk of reoffending rather than the original order of the court, and article 5(4) applies.

54. Drawing this distinction is in fact consistent with the results of the domestic authorities. In *R (Giles) v Parole Board* [2004] 1 AC 1, Mr Giles had been sentenced to term of imprisonment totalling seven years which was "longer than commensurate" with the offences he had committed. He was entitled to be considered for parole after he had served half of this and to be granted parole after he had served two-thirds. His complaint related to the absence of automatic reviews once he had served whatever period the judge had thought commensurate with the gravity of his offending (which the judge was not required to and did not specify). The issue was whether a determinate sentence which was partly punitive and partly preventative was in the same category as an indeterminate sentence and thus incompatible with article 5(4) unless (at least after the commensurate part had been served) there was a review before a judicial body with power to order release. The issue was not whether a prisoner who had been released, still less a prisoner with the right to be released, had the same rights as an indeterminate prisoner if recalled. Furthermore, it is difficult to characterise the position after a prisoner has reached the point of mandatory release as simply the administration of the sentence which has been imposed by the court. Parliament has decided that the prisoner is entitled to release and the criteria for recall and re-release are quite different from those which led the judge to impose the original sentence.

55. In *R (West) v Parole Board* [2005] 1 WLR 350, Mr West and Mr Smith were recalled after their mandatory release. As with the more recent case of *R (Osborn) v Parole Board* [2013] UKSC 61, [2013] 3 WLR 1020, the case was concerned with the procedures to be adopted by the Parole Board when considering whether they should be re-released, and specifically whether the prisoner should be given an oral hearing. Although the opinions concentrate upon the common law requirements of fairness, I do not find it at all surprising that Lord Bingham appears to have taken it for granted that article 5(4) applied. Lord Slynn required to be convinced of that, but was persuaded by the analogy with the recall of a prisoner serving an indeterminate sentence. In *Weeks v United Kingdom* (1988) 10 EHRR 293, the Strasbourg court had held that article 5(4) applied. While I entirely accept that there is no analogy between a determinate and an indeterminate sentence, so as to require a review while the prisoner is still in prison, the analogy between the recall of a determinate sentence prisoner who was entitled to be released and the recall of an indeterminate sentence prisoner is much closer.

56. In *R (Black) v Secretary of State for Justice* [2009] UKHL 1, [2009] 1 AC 949, Mr Black had not yet reached the point in his sentence when he was entitled to be released on licence. He was arguing that article 5(4) applied once he became eligible for discretionary release, so that it was a violation of his rights for the Secretary of State to reject the Parole Board's recommendation that he be released. So his too was not a case of recall after mandatory release. Once again,

I do not find it surprising that Lord Brown considered that *West* was correctly decided; he was well aware of the difference between discretionary and mandatory release, but did not think that the opinions in *West* drew any distinction between them (para 73). I now think that this was a distinction which ought to have been given greater prominence and that it is a good reason for holding that their Lordships in *West* were correct in taking the view that article 5(4) applied.

57. The only case which is not consistent with this analysis is Strasbourg's admissibility decision in *Brown*. Lord Neuberger is, of course, correct to say that the decision was based on the fundamental distinction between determinate and indeterminate sentences; but the court appears not to have considered whether there might be a distinction between recall after mandatory and discretionary release; further, the case had been considered by the Parole Board, which had the power to order his release, although this was before *West*, and so there had not been an oral hearing. *Ganusauskas v Lithuania* (unreported, Application No 47922/99, 7 September 1999), in contrast, not only appears to be a case of a proposed discretionary early release, but also one which was considered by a court.

58. In this case, Mr Whiston was still serving the period of imprisonment which resulted from the sentence imposed upon him by the court: it is called "the requisite custodial period". He was not yet entitled to release. Discretionary release subject a home detention curfew enforced by electronic monitoring may or may not be regarded as a continued deprivation of liberty, depending upon the length of the curfew, but it is very close to it. The prisoner may be recalled for the purely practical reason that it is not possible to monitor him at his address, which is nothing to do with whether he still constitutes a risk. It is the original sentence which means that he is still a prisoner.

59. Hence it seems to me that our domestic law, which gives the Parole Board the power to decide upon the continued detention of a prisoner recalled after mandatory release on licence, but not after release on home detention curfew, draws a principled distinction. It is a distinction which is certainly consistent with the principles contained in article 5(1) and (4) of the European Convention. It is for that reason that, although agreeing with the *ratio* of the decision in this case, I would prefer it not to be taken further than the situation with which this case is concerned. I comfort myself that the views to the contrary expressed in Lord Neuberger's judgment are, strictly speaking, *obiter dicta*.