Neutral Citation Number: [2019] EWCA Civ 229

Case No: C1/2017/1180

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
MR JUSTICE TURNER
[2017] EWHC 729 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/02/2019

Before:

LORD JUSTICE LEGGATT
LORD JUSTICE HADDON-CAVE
and
LADY JUSTICE NICOLA DAVIES DBE

- -

Between:

THE QUEEN (on the application of SHIMEI YOUNGSAM)	**Appellant**
- and -	
THE PAROLE BOARD	**Respondent**
- and -	
THE SECRETARY OF STATE FOR JUSTICE	**Interested Party**

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- -

Nick Armstrong (instructed by **Bhatt Murphy Solicitors**) for the **Appellant**
Tim Buley (instructed by **Government Legal Department**) for the **Respondent**
David Lowe (instructed by **Government Legal Department**) for the **Interested Party**

Hearing date: 13 December 2018

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Approved Judgment

Lady Justice Nicola Davies DBE:

1. This is an appeal from the decision of Turner J who concluded that article 5(4) of the European Convention on Human Rights ("ECHR") did not apply to the recall from parole licence of determinate sentence prisoners. The judge also found that there was no breach of the common law duty of the Parole Board to make decisions concerning the liberty of offenders without undue delay. Permission to appeal was granted by the single judge.

2. The primary legal issue in this appeal is whether article 5(4) of the ECHR applies to determinate sentence prisoners who are recalled to prison following release on parole licence. A further ground of appeal challenges the judge's factual conclusion that there had not been unlawful delay, at common law or pursuant to article 5(4), in listing the appellant's Parole Board recall hearing.

Background facts

3. On 18 January 2002 the appellant was sentenced to a determinate sentence of 18 years for the offence of attempted murder. The appellant was released on licence on 28 March 2013. He was recalled to custody on 3 July 2013 following his arrest for breach of conditions of his licence. On 2 September 2014 he was again released on licence. On 28 May 2015 the appellant was recalled following an incident the previous day in which he was shot when inside the area of Brent, an exclusion zone under the terms of his licence.

4. On 3 July 2015 the respondent received an initial referral from the interested party. It was passed for a Member Case Assessment ("MCA"). On 7 July 2015 a member of the Board made a direction for no release. The parties were notified on 11 July 2015. On 12 July 2015 the appellant's solicitors asked for the case to be re-referred on the basis that their representations had not been available to the Board when the case was initially considered for MCA. The case was re-referred and on 21 July 2015 the MCA directed that an oral hearing should take place. On 27 July 2015 the respondent sent an email to various parties which did not include the appellant's solicitors, it stated that:

> "Mr Youngsam's parole review will shortly be submitted for listing at an oral hearing.
>
> The Parole Board now urgently needs to receive witness non-availability dates to ensure that the case is listed on a day when all witnesses can attend.
>
> Can the following witnesses reply to this email providing dates that they are NOT available to attend an oral hearing between November 2015-January 2016…
>
> All non-availability dates must be provided by **03 August 2015**."

5. On 28 July 2015 the Offender Manager ("OM") informed the respondent that she was due to have surgery later that year but had not been given a date. In a reply of the same day the respondent asked the OM to provide details of the probation officer who would stand in for her should she be unable to attend the hearing. No reply was received. On

14 September 2015 the respondent chased the lack of response. On 16 September 2015 the OM replied stating that she would not be available until mid-January 2016. On 10 November 2015 the parties were notified of the oral hearing date, namely 25 January 2016. On 12 January 2016 the respondent received an email from the Probation Service advising that the allocated OM was on long-term sick leave but that a new OM had been appointed. At the hearing on 25 January 2016 the OM did not attend nor was a written report filed. As a result the Panel adjourned the hearing to 8 February 2016. As a result of further developments, adjournments occurred with the result that the hearing was not held until 16 June 2016. The result of the hearing was that the respondent made no direction for the release of the appellant.

Grounds of appeal 1 and 2

6. The essence of the appellant's argument is that the opinion of the majority of the Supreme Court in *Whiston v Secretary of State for Justice* [2015] AC 176, namely that article 5(4) did not apply to the recall from parole licence of determinate sentence prisoners, was *obiter*. This is said to conflict with the binding ratio of *Smith v West* [2005] 1 WLR 350 in which the House of Lords held that article 5(4) did apply to such recall. Turner J held that the statement of principle articulated by Lord Neuberger in *Whiston* as to the scope of article 5(4) was strictly speaking *obiter* but was intended to and should be followed by all courts of inferior jurisdiction. The appellant submits that the judge correctly found the statement of principle to be *obiter* but erred in stating that it should be followed by courts of inferior jurisdiction. It is the respondent's case that the judge erred in finding the statement of principle to be *obiter*: it contends that the reasoning represented the *ratio decidendi* of the case.

7. The facts of *Whiston* can be summarised as follows: the appellant was serving a sentence of 18 months' imprisonment. He was entitled to be released on licence having served half of his sentence. After he had served four and a half months of his sentence the Secretary of State released him on licence pursuant to section 246 of the Criminal Justice Act 2003 ("the 2003 Act"), pursuant to the Home Detention Curfew Scheme under which a prisoner could be released during the custodial period of his sentence. Some six weeks later the Secretary of State recalled the appellant to prison under section 255(1) of the 2003 Act on the ground that his whereabouts could no longer be electronically monitored at the place specified in the curfew conditions in his licence. The appellant sought judicial review of the decision on the grounds that since the exercise by the Secretary of State of the power to recall a prisoner under section 255 could not be reviewed by the Parole Board or any other judicial body, the decision to do so had breached his right to take proceedings to challenge the lawfulness of his detention under article 5(4) of the ECHR.

8. The claim was dismissed by the judge and by the Court of Appeal, it being held that section 255 of the 2003 Act did not engage article 5(4) since the lawfulness of the prisoner's detention had been determined by the original sentence. The Supreme Court, Baroness Hale dissenting in part, held that in accordance with the jurisprudence of the ECHR once a person had been lawfully sentenced by a competent court to a determinate term of imprisonment he could not, in the absence of unusual circumstances, challenge his loss of liberty during that term on the ground that it infringed article 5(4) of the ECHR. The reason being that for the duration of the sentence period, the lawfulness of the prisoner's detention had been decided by the court which had sentenced him to that term, so that he had already been deprived of his liberty in a way permitted by article

5(1)(a) for the term of the sentence. The notion that article 5(4) was satisfied by the original sentence was entirely principled and that accordingly when a prisoner who is serving a determinate sentence had been released on licence and was later recalled to prison during that sentence, article 5(4) did not apply.

The judgments in *Whiston*

9. Lord Neuberger PSC gave the judgment dismissing the appeal, with which Lord Kerr, Lord Carnwath and Lord Hughes JJSC agreed. Baroness Hale DPSC (as she then was) agreed that the appeal should be dismissed but stated that she wished to "sound a note of caution" about some of the reasoning which led Lord Neuberger to reach his conclusion.

10. At [2] Lord Neuberger identified the question and the issue raised by the appeal as follows:

> "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)"

At [15-16] the relevant provisions were identified:

> "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.'"

11. Lord Neuberger reviewed the Strasbourg jurisprudence in respect of article 5(4), within which it has been established that article 5(4) applies to the release on licence of a prisoner who is subject to an indeterminate sentence of imprisonment, the reasoning being that an indeterminate sentence does not fix the term of years that a prisoner must stay in prison once their tariff or minimum period has expired. As to whether article 5(4) applies to determinate sentence prisoners following release on licence, the authorities of *Ganusauskas v Lithuania* [1999] Prison LR 124 and *Brown v UK* (App 968/04) were considered by Lord Neuberger at [23-25]:

> "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 Hugh 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."

12. Domestic jurisprudence in respect of article 5(4), in particular the authorities of *R (Giles) v Parole Board* [2004] 1 AC 1, *R (Smith and West) v Parole Board* [2005] 1 WLR 350 and *R (Black) v Secretary of State for Justice* [2009] AC 949, were also considered by Lord Neuberger. In *Giles* the House of Lords held that article 5(4) was not infringed in a case where the appellant had been sentenced to a determinate but increased term the purpose of which was to recognise the risk to the public which he represented. Lord Hope, in an opinion with which the other members of the committee agreed, analysed the Strasbourg jurisprudence. Lord Neuberger at [27-28] identified the reasoning of Lord Hope as follows:

> "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.'"

13. The key to the conclusions reached by Lord Hope is set out in the first three sentences of [51] of his judgment. His reasoning was clear, namely that article 5(4) does not apply to release during the currency of a fixed-term sentence.

14. Lord Neuberger considered the authority of *West* at [30-32] as follows:

> "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* (1988) 10 EHRR 293, para 40."

15. *Black* was a case in which the respondent, having been sentenced to 24 years in prison, had become eligible to be considered for discretionary release on licence. Pursuant to this sentencing regime the prisoner became eligible for discretionary release at the half-way point but only to mandatory release at the two-thirds point. A majority (Lord Phillips dissenting) rejected the respondent's contention that his rights under article 5(4) were infringed. At [34-37] Lord Neuberger references extracts from the judgments in *West.* Lord Brown at [83] of *West* stated that "the administrative implementation of determinate sentences does not engage article 5(4); the decision when to release a prisoner subject to an indeterminate sentence does". However, at [36] Lord Neuberger, referencing Lord Brown, stated:

> "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.'"

At [38-39] Lord Neuberger stated:

> "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."

16. At [41] Lord Neuberger observes that the issue is complicated by the decision in *West* that article 5(4) was engaged because if his legal analysis is correct article 5(4) would not have been engaged in *West*. He states that the decision in *West* appears to him to be unsatisfactory in relation only to article 5(4). Lord Neuberger expands upon that view in this way:

> "41. … 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."

17. As to *Black* he describes the position as being "yet murkier" and poses the question as to what should be done about "this unsatisfactory state of affairs". He addresses the point at [43-48]:

> "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.
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> 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."

18. It is clear from the above that Lord Neuberger was holding that:

    i) Article 5(4) does not apply to any fixed-term prisoner during the currency of his sentence, whether he is entitled to be released on licence or not; the reasoning being that the necessary supervision of the lawfulness of the detention of such a prisoner following conviction by a competent court is incorporated at the outset in the original trial and any appeal procedure in respect of conviction and sentence;

    ii) *West* was *per incuriam* in relation to article 5(4) because of the failure to consider the authorities of *Giles, Brown* and *Ganusauskas*;

iii) Lord Brown's observations in *Black* that article 5(4) would apply at the point of recall mandatory release were *obiter* and wrong.

19. Baroness Hale stated at [57] that the present law drew 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. Baroness Hale reviewed the authorities of *Brown, Giles, West, Black* and others. She concluded at [59] as follows:

> "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*."

20. It is clear that Baroness Hale would have decided *Whiston* on the narrower basis that article 5(4) does not apply to early, discretionary release but either that it does apply following mandatory release or that the issue should be left open.

Ratio decidendi

21. In *R (Kadhim) v Brent LBC* [2001] QB 955 Buxton LJ approved the statement of Professor Cross in Cross and Harris, *Precedent in English Law* (4th edition) 1991 page 72, namely;

> "The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him."

22. In my view the key words contained in the statement of Professor Cross are "treated by the judge as a necessary step in reaching his conclusion". In *Whiston* Baroness Hale would have reached the same outcome as the majority but would have done so upon the basis of a narrower proposition of law, namely that article 5(4) does not apply to recall from early release. Lord Neuberger and the remaining members of the Supreme Court decided the question upon the basis of a wider proposition of law, namely that article 5(4) does not apply to determinate sentence prisoners. In *Whiston* Lord Neuberger carefully and clearly analysed the Strasbourg and domestic jurisprudence. His analysis provided the basis for his reasoning that article 5(4) could not be invoked by Mr Whiston as long as his sentence period was running as it had been satisfied by the sentence which was imposed at his original trial.

23. Not only did Lord Neuberger analyse the previous authorities he stated that "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." That is what Lord Neuberger did at [46] when he stated:

> "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."

24. The remarks of Baroness Hale at [59] should be accorded the greatest respect, however they are *obiter*. Moreover, I regard it as highly unlikely that such remarks were intended to give a lower court licence to depart from the majority, still less that a lower court would be bound to follow earlier case law.

25. Given the detailed analysis by Lord Neuberger of relevant authorities and the clarity of the identified basis of his reasoning, I do not believe there can be any doubt that the majority of the court treated the wider proposition, namely that article 5(4) never applies to fixed-term prisoners, as a necessary and decisive step in explaining their conclusion that the appeal should be dismissed. As such it represented the *ratio decidendi* of the case. Further, the court's reasoning makes clear that it recognised no distinction between early release and mandatory release on this issue.

26. Accordingly, I accept the respondent's submission that the judge erred in finding that the principle enunciated by the majority in *Whiston* was *obiter*. Notwithstanding that finding the judge correctly held that the majority view was binding upon inferior courts.

Authorities subsequent to *Whiston*

27. Subsequent to the decision of Turner J, the Supreme Court in *Brown v Parole Board for Scotland* [2017] UKSC 69, [2018] 1 AC 1 considered the decision of the majority in *Whiston*, namely that article 5(4) is not engaged by the recall of determinate sentence prisoners during their licence period (save perhaps in exceptional circumstances). The decision in *Brown* is contained in the single judgment of Lord Reed with whom the other justices agreed. *Brown* concerned a Scottish prisoner detained pursuant to an extended sentence of ten years' imprisonment comprising a custodial period of seven years and an extended licence period of three years. The issue before the Supreme Court was whether there had been any breach of the duty under article 5 of the ECHR to provide a reasonable opportunity for rehabilitation to Mr Brown. The duty to provide such an opportunity (the rehabilitation duty) had been recognised as applying to prisoners serving life sentences and sentences of imprisonment for public protection by the Strasbourg Court in *James v UK* [2012] 56 EHRR 12 and by the Supreme Court in *Kaiyam v Secretary of State for Justice* [2014] UKSC 66, [2015] AC 1344. At [1] Lord Reed identified the "principal issue" in *Brown* as being whether that duty also applied to prisoners serving extended sentences. At [56-64] the court considered the application of the rehabilitation duty to extended sentence prisoners. It concluded that the duty to provide a reasonable opportunity for rehabilitation does not apply to extended sentence

prisoners during their custodial term but it does apply to them during the extension period. In summary this was because:

i) During the custodial period there is no risk of detention becoming arbitrary and thus in breach of article 5(1) since the detention had already been authorised by a court; and

ii) By contrast during the extension period the risk of arbitrary detention does arise.

At [58] Lord Reed stated:

> "Prisoners who are detained during the custodial term, or during a period ordered to be served under section 16 of the 1993 Act (as explained in para 55 above), are during that period in an analogous position to prisoners serving determinate sentences. They are serving a period of imprisonment of a term of years which the court has stipulated as appropriate for the offence committed. If they are released on licence and then recalled during that period, they continue to serve the period of imprisonment imposed by the court. It follows, according to the Strasbourg jurisprudence relating to determinate sentences, and the majority view in *Whiston*, that the order of the court imposing that period of imprisonment is sufficient to render their detention during the custodial term 'lawful' for the purposes of article 5(1)(a), and the judicial supervision required by article 5(4) is incorporated in the original sentence."

This followed a passage at [46] where Lord Reed had affirmed the inapplicability of the rehabilitation duty to those serving ordinary determinate sentences of imprisonment in which he stated:

> "All the cases so far discussed in which this court, or the European court, has found there to be an obligation to provide an opportunity for rehabilitation have concerned life or IPP sentences. They can be contrasted with cases concerned with ordinary determinate sentences of imprisonment, in which both the European court and this court have treated the sentence as in itself rendering the detention lawful for the duration of the sentence period: see, for example, *R (Whiston) v Secretary of State for Justice* [2014] UKSC 39; [2015] AC 176, and the cases cited there. The question which arises in the present appeal is whether, and if so how, the obligation to provide an opportunity for rehabilitation applies to a prisoner sentenced to an extended sentence."

28. The majority decision in *Whiston* was expressly affirmed by the Supreme Court on two occasions in *Brown*. The affirmation was not *obiter*, it formed a critical part of the court's reasoning as Mr Brown had argued that the rehabilitation duty under article 5 of the ECHR applied during the custodial period of his sentence. This argument was rejected by the court for the reasons given in [46] and [58], namely that during the custodial period extended sentence prisoners are in an analogous position to

determinate sentence prisoners who cannot, following *Whiston*, complain of any breach of article 5(4) at any time during their sentence because detention during the whole of their sentence has been approved by the court imposing the original sentence.

29. Mr Armstrong, on behalf of the appellant, also referred the court to the authority of *R (Stott) v Secretary of State for Justice* [2018] UKSC 59, [2018] 3 WLR 1831, which considered the provisions of section 246A of the 2003 Act in respect of the early release from prison of those serving extended determinate sentences. The sentence in this appeal has no extension period, it is a determinate sentence. Moreover, the claim was primarily in respect of article 14 ECHR. With respect to the detail of the judgments in *Stott* they do not undermine the principle or reasoning of the majority in *Whiston*.

30. During the course of the appeal the appellant sought to rely upon the decision of the Fourth Section of the Strasbourg Court dated 30 January 2018, *Etute v Luxembourg* (App No 18233/16), which concerned a prisoner who had the benefit of conditional release under article 100 of the Luxembourg Criminal Code. Article 100 confers a power of release exercisable by the State General Prosecutor during the course of a determinate sentence and where the conditional release is later revoked the individual serves the remainder of the custodial term outstanding from the date of the conditional release.

31. The approach of the Fourth Section is set out at [33]:

> "The applicant's re-incarceration with effect from 4 November 2015, for the purpose of serving the portion of sentence remaining at the time when he was released subject to conditions, depended on a new decision, namely that to cancel the conditional release. This decision specifically arose from the observation that the Applicant was no longer respecting the conditions attached to his conditional release, namely not to commit a new offence and to stop frequenting places where drugs were present…. In these circumstances, the Court considers that the question concerning respect of the conditions imposed on the applicant under the conditional release was crucial in determining the legality of his detention from 4 November 2015. The Court considers that this is a new question regarding the reincarceration following cancellation of the conditional release. The internal court order should therefore allow the applicant access to a judicial appeal that satisfies the requirements of article 5(4) of the Convention to resolve this question."

32. At [25] the court reaffirmed the proposition that "in the case of detention following a 'sentence issued by a competent court' … the control required by article 5(4) is incorporated into the judgment." It held, however, that the principle did not prevent the applicability of article 5(4) in the circumstances of *Etute* where, after the sentence had been imposed, a subsequent decision was taken by the State General Prosecutor in accordance with the relevant law that the claimant could be released on conditions. It noted at [17] that "time spent on conditional release is not assigned to the duration of the sentence … a convicted person who benefits from conditional release that is subsequently revoked shall serve the rest of his sentence".

33. The factual position in *Etute* is fundamentally different from that of a prisoner who is released pursuant to UK law, who continues to serve his sentence on licence following release at the half-way point and who undergoes no release, conditional or otherwise, from the requirement to serve the sentence. Further, it does not begin to demonstrate a "clear and constant" line of Strasbourg authority to the effect that article 5(4) would apply to the facts of this case.

34. I listened to and read the submissions of the parties as to the definition and reach of the concept of *ratio decidendi*. Interesting and well-made as the submissions were, in my view, *Whiston* represents a clear case of the Supreme Court laying down a firm principle (as to the non-applicability of article 5(4) ECHR to determinate sentence prisoners), having expressly considered all the relevant authorities upon which the appellant relies. Given the clarity of the reasoning in *Whiston*, together with the subsequent affirmation of *Whitson* by the Supreme Court in *Brown*, for the purpose of this judgment, I do not consider it necessary to further examine any conflicting theories as to the meaning of *ratio decidendi*.

35. This court is bound by *Whiston* and the later authority of *Brown*. There is nothing in *Etute* which alters the analysis of Lord Neuberger in *Whiston*, still less does it entitle or require this court to depart from that authority. Accordingly, I dismiss grounds of appeal 1 and 2.

Ground of appeal 3

36. The delay relied upon by the appellant extends to 25 January 2016, the appellant does not rely on any delay after that date. In considering this further challenge to article 5(4) the judge at [45-55] identified the relevant facts, the majority of which are set out at [3-5] above. At [54] and [55] the judge stated:

> "54. Furthermore, notwithstanding subsequent problems relating to the availability of the OM, it is rightly pointed out on behalf of the claimant that the e-mail of 27 July 2015 had already identified a proposed oral hearing date of November 2015 to January 2016 which, of course, was longer than 12 weeks away. Thus the issue concerning the OM would appear to have run in parallel with a significantly unambitious timetable set from the outset. This email was not sent to the claimant's solicitors.
>
> 55. In my view, although relevant to the determination of the lawfulness of procedural progress, the PSI should not be afforded a quasi-regulatory status breach of the terms of which automatically give rise to a presumption of public law irrationality. I accept that the Parole Board could and, ideally, should have been more proactive in progressing the matter to an oral hearing both at the outset and later when the OM failed timeously to respond to the request that a replacement should be identified. Nevertheless, I am satisfied that the consequent delay was not of such duration, when measured against the background circumstances of this case, to give rise to a breach of the common law duty to act within a reasonable time. I would also add, for the sake of completeness, that, in accordance with my reasoning

> in paragraph 44 above, I would have reached the same conclusion even had I found that article 5(4) applied."

37. The essence of the appellant's case is that the judge failed to take into account a material matter, namely an email dated 27 July 2015 and failed properly to give effect to the timetable set out in Prison Service Instruction PSI 30/2014.

38. As to the first point, the judge did take account of the email of 27 July which requested witness availability by 3 August 2015. As to the second, the twelve-week timetable set out in PSI 30/2014 is an instruction which is identified in the document as applying to NOMS HQ, prisons and providers of probation services. It is not an instruction to the Parole Board, the Parole Board is not bound by it. It is regrettable that delay occurred but there is nothing in the appellant's case which begins to undermine the factual findings of the judge nor his conclusion at [55]. In my judgment, this ground of appeal also fails.

Lord Justice Haddon-Cave:

39. I agree with the judgment of Lady Justice Nicola Davies. In the light of the unequivocal and pellucid nature of Lord Neuberger's judgment in *Whiston* (see paragraphs 6-25 above), as well as the subsequent affirmation of *Whiston* by the Supreme Court in *Brown* (see paragraphs 27-28 above), in my view, it is not necessary for this Court to utter further *obiter dicta* on the meaning of *ratio decidendi* in the present case. The well-known and time-honoured statement in Professor Cross in Cross and Harris, *Precedent in English Law* (cited at paragraph 21 above) amply suffices to determine this matter. I agree the appeal should be dismissed.

Lord Justice Leggatt:

40. In *Broome v Cassell & Co Ltd* [1972] AC 1027, 1054, Lord Hailsham LC, found it necessary to remind the Court of Appeal that:

> "... in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers."

But as Lord Denning MR (to whom this reminder was principally directed) later observed, this raises the question: "what do you mean by the 'decision' of the higher court?": *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 AC 854, 873. The doctrine of precedent, which is a structuring principle of the common law, presupposes that what a court decides extends beyond the particular dispute before it and that, from analysis of a past case, a general proposition can be derived which has the force of law in later cases. Such a proposition is known as the *ratio decidendi* (or *ratio*) of the case. Statements made by judges in the course of giving reasons for their decisions which do not form part of the *ratio*, known as *obiter dicta*, may be strongly persuasive – particularly when they are the carefully considered observations of eminent judges. But it is generally accepted that the *ratio decidendi* is alone binding as a precedent: see e.g. *Halsbury's Laws of England*, vol 11 (2015), para 25. Hence the ability to identify the *ratio* of a case and to distinguish it from *obiter dicta* is an indispensable skill for any common lawyer.

The appellant's case

41. The main ground of appeal in the present case depends on how this crucial distinction is drawn. The appellant, Mr Youngsam, claims that the delay which occurred before the Parole Board considered whether he should be re-released on licence after being recalled to prison for a breach of his licence conditions violated article 5(4) of the European Convention on Human Rights, which entitles a person who is deprived of his liberty by detention to have the lawfulness of his detention decided speedily by a judicial authority. The respondent's case, which the judge accepted, is that article 5(4) was not applicable, as the lawfulness of Mr Youngsam's detention for the full term of his sentence had already been decided when his sentence was passed and no new right under article 5(4) arose when he was recalled to prison during that term, having previously been released on licence. The respondent relies as binding authority for this conclusion on the decision of the Supreme Court in *R (Whiston) v Secretary of State for Justice* [2014] UKSC 39; [2015] AC 176.

42. There is no doubt that in *Whiston's* case the majority of the Supreme Court expressed the clear opinion that article 5(4) does not apply (at least in the absence of unusual circumstances) in any case where a person who has been sentenced to a fixed term of imprisonment is released on licence and is then recalled to prison during that term. If this proposition represents the *ratio* of *Whiston's* case, it is not in dispute that all lower courts are bound by it and that the claim based on article 5(4) in the present case must fail. On its facts, however, *Whiston's* case was not one where, as here, the claimant had been released on licence as a matter of right under section 244 of the Criminal Justice Act 2003 after serving the "requisite custodial period" of his sentence. Mr Whiston had been released under the home curfew detention scheme in the exercise of a discretion under section 246 of the Act, before he had completed the "requisite custodial period". Lady Hale, while agreeing with Lord Neuberger and the other members of the Supreme Court that article 5(4) was not applicable, expressed the view that the position would have been different if Mr Whiston had been recalled to prison after mandatory release on licence. She ended her judgment by stating, at para 59, 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 PSC's judgment are, strictly speaking, *obiter dicta*."

43. That is the starting-point for Mr Youngsam's argument. His counsel, Mr Armstrong, submits that in so far as the views expressed in Lord Neuberger's judgment relate to prisoners, such as Mr Youngsam, who are recalled after mandatory release on licence, those views are *obiter dicta*, which are accordingly not binding on this court.

44. This conclusion, if correct, would not prevent lower courts from treating such *obiter dicta* as strongly persuasive, but Mr Armstrong has a second limb to his argument. He submits that, in these circumstances, the High Court and Court of Appeal remain bound by the earlier decision of the House of Lords in *R (West) v Parole Board* [2005] UKHL 1; [2005] 1 WLR 350. In that case, like this one, the appellants had been released on licence as of right before their recall to prison. The House of Lords accepted that article 5(4) was applicable and made a declaration that the appellants' rights under article 5(4) had been breached. Mr Armstrong submits that the proposition that article 5(4) applies

to such prisoners forms part of the *ratio* of *West's* case, binding on lower courts. That is so, he maintains, even though Lord Neuberger in *Whiston's* case, at para 46, said that it "would be wrong not to confront squarely the decision in *West* on article 5(4)" and that, in light of a growing number of cases on the question whether and when decisions affecting prison detention engage article 5(4) which had "bedevilled the appellate courts", it was "particularly important that we grasp the nettle and hold that … the decision in *West* was *per incuriam* so far as it involved holding (or assuming) that article 5(4) was engaged …" Mr Armstrong submits that, as the question whether *West's* case was rightly decided did not arise for decision in *Whiston*, Lord Neuberger's observations about it were again *obiter dicta*, which cannot displace the binding *ratio* of *West's* case.

The judge's approach

45. Turner J accepted the premise of this argument but not the conclusion. Thus, he agreed that the remarks made by Lord Neuberger in *Whiston*, in so far as they concerned prisoners released on licence as a matter of statutory right, were indeed *obiter dicta*. But he nevertheless considered that, when a majority of the Supreme Court has in the clearest possible terms expressed the view that *West's* case was wrongly decided and has articulated a broad statement of principle on the scope of article 5(4) which was clearly intended to be followed in future, then those views – even though, strictly speaking, *obiter dicta* – ought to be followed by all courts of inferior jurisdiction in preference to what was previously decided in *West's* case.

46. Like Nicola Davies LJ, I agree with the judge's conclusion, but not with the route by which he reached it. In the sense in which I am using the terms, and which I believe is the sense in which they are generally understood by lawyers, it is axiomatic that only the *ratio decidendi* of a case has binding authority and that *obiter dicta* do not. That is the point of the distinction. The doctrine of precedent would be thrown into disorder if it were to be accepted that courts, even the Supreme Court, can in *obiter dicta* overrule otherwise binding decisions.

47. But in my view the observations of Lord Neuberger in *Whiston* on the status of *West's* case and on when detention following recall to prison engages article 5(4) were not *obiter dicta*. I agree with Nicola Davies LJ that they form part of the *ratio* of *Whiston's* case. In considering how this issue should be resolved, I have been greatly assisted by the excellent oral and written submissions of all three counsel.

Attempts to define ratio

48. The *ratio decidendi* is often described by judges and jurists as a reason or rule of law which is "necessary" to the court's decision. Conversely, *obiter dicta* are described as statements which are not "necessary" to the decision or which "go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand": see *Halsbury's Laws of England*, vol 11 (2015), para 26. In particular, we were referred in argument to the following statement in Cross and Harris on *Precedent in English Law* (4th edn, 1991) at 72, which was said by the Court of Appeal in *R (Kadhim) v Brent LBC* [2001] QB 955, 961, to provide "the clearest and most persuasive guidance" on the proper way of determining the *ratio* of a case:

> "The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him."

Accepting an amendment suggested by Professor MacCormick, Cross and Harris add that, strictly speaking, this formulation should refer to a "ruling on a point of law" rather than a "rule of law".

49. The description given by Cross and Harris is helpful in drawing attention to the fact that the *ratio* of a case must be a proposition of law, capable of extrapolation to other cases, and not a finding of fact, and in focusing attention on the reasoning which justifies the judge's conclusion. But the reference to "a necessary step" in reaching that conclusion – like other descriptions of the *ratio* as a rule or ruling which is "necessary" to the court's decision – is ambiguous. The word "necessary" is capable of bearing a range of meanings. On one view, it might be taken to suggest that a proposition of law cannot constitute a *ratio* unless it can be said that, had the court not endorsed that proposition, the court would have reached a different result. Yet such a test does not work. For example, it quite often happens that a judge gives rulings on two (or more) separate points of law, either of which would by itself be sufficient to justify the judge's conclusion. It is generally accepted that in such cases each ruling can have the status of *ratio* although it is manifest that the judge would still have reached the same conclusion even if that ruling were reversed. As Lord Simonds observed in *Jacobs v London County Council* [1950] AC 361, 369:

> "… there is in my opinion no justification for regarding as *obiter dictum* a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be *obiter*, then a case which *ex facie* decided two things would decide nothing."

50. Even where a judge gives only one reason for a decision, there is generally no warrant for supposing that the ruling contained in the judgment was treated by the judge as a necessary step in reaching his or her conclusion in the sense that the judge would have reached a different conclusion if he or she had not thought it appropriate to express the ruling as broadly, or as narrowly, as it was in fact expressed. As Professor Neil Duxbury has observed in his insightful book *The Nature and Authority of Precedent* (2008) at 78:

> "No doubt judges will expressly or impliedly treat particular rulings as necessary to particular conclusions; but it is just as likely that they will sometimes treat particular rulings as their preferred means by which to reach particular conclusions. Necessity tests, however formulated, provide only inadequate conceptions of the *ratio decidendi*."

51. It therefore seems to me that, when the *ratio decidendi* is described as a ruling or reason which is treated as "necessary" for the decision, this cannot mean logically or causally necessary. Rather, such statements must, I think, be understood more broadly as indicating that the *ratio* is (or is regarded by the judge as being) part of the best or

preferred justification for the conclusion reached: it is necessary in the sense that the justification for that conclusion would be, if not altogether lacking, then at any rate weaker if a different rule were adopted.

52. A second objection to the test proposed by Cross and Harris is that it appears to make the question whether a proposition of law constitutes *ratio* entirely dependent on whether the judge who decided the case intended it to have that status. However, as Cross and Harris themselves recognise, later courts sometimes interpret an earlier decision as authority for a proposition which is either wider or (more often) narrower than the reason or ruling treated by the judge as a step in reaching his or her conclusion in the precedent case: see *Precedent in English Law* (4th edn, 1991) at 72-74. In the words of Glanville Williams (quoted by Cross and Harris): “Courts do not accord to their predecessors an unlimited power of laying down wide rules.”

53. To give an illustration, in *NWL Ltd v Woods (The Nawala) (No 2)* [1979] 1 WLR 1294 the House of Lords recognised an exception or qualification to the formulation in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 of the test to be applied in deciding whether to grant an interim injunction, accepting that it is appropriate for a court to give greater consideration to the merits of the claim in a case where its decision is in practice likely to be dispositive of the action because the dispute will have become academic by the time a trial can take place. The House did not suggest that it was thereby departing from its earlier decision, but rather that it was elaborating or interpreting its earlier decision to address this category of case.

54. Sometimes this technique is used by a court lower in the hierarchy than the court which decided the precedent case. For example, in *Muller v Linsley & Mortimer* [1996] PNLR 74 Hoffmann LJ (controversially) interpreted the decision of the House of Lords in *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 that “without prejudice” communications are privileged from disclosure to third parties as limited to communications making admissions against interest, although such a limitation was not articulated in the unanimous judgment of the House of Lords.

55. Cross and Harris explain this feature of the doctrine of precedent on the basis that subsequent courts have a power to revise or modify the *ratio* of a past case, in particular by restricting its scope, in order to distinguish the earlier decision. A similar explanation has been given by some other commentators: see e.g. Raz, *The Authority of Law* (1979) at 183-189. However, while it may to some extent be a matter of semantics, it seems to me desirable and to accord better with judicial practice to use the term *ratio decidendi* to refer to a proposition which a lower court is bound to apply. It must therefore be recognised that there are circumstances in which a later court, even sometimes one at a lower level than the court which decided a precedent case, may properly consider that the true *ratio* of such a case is narrower than the ruling stated in the judgment.

56. The potential for such interpretation reflects the difference between judicial decision-making and legislation. A court, even the highest court in our legal system, does not have authority to enact rules of law in the form of a canonical text which is to be interpreted and applied like a statute. The doctrine of precedent operates in a more flexible and open-textured way, which recognises that the primary task of any court is to decide the case actually before it, and which gives scope for the law to evolve and

adapt as circumstances change or new factual situations are presented. As Lord Reid put it in *Broome v Cassell & Co Ltd* [1972] AC 1027, 1085:

> "… it is not the function of noble and learned Lords or indeed of any judges to frame definitions or to lay down hard and fast rules. It is their function to enunciate principles and much that they say is intended to be illustrative or explanatory and not to be definitive."

57. This element of flexibility makes it impossible to identify the *ratio decidendi* of a case by applying a simple definition or test of the kind offered by Cross and Harris. As recounted by Professor Duxbury, a series of ever more sophisticated attempts made by a number of leading legal scholars in the mid-twentieth century to devise such a test ultimately served only to demonstrate that the quest was misconceived: see *The Nature and Authority of Precedent* (2008) at 76-90. But nor does it follow, as some sceptics have suggested, that the *ratio decidendi* of a case is whatever proposition a later court chooses to regard as its *ratio* or that the concept is illusory or meaningless. It shows only that whether a past decision should be treated as binding authority for a particular proposition may depend on a range of factors and involve evaluative judgments which cannot be reduced to a simple rule or algorithm.

58. In looking for the *ratio decidendi* of a case, the starting-point is always the rulings and reasons given in the judgment(s) to justify the court's decision, read in the light of the facts of the case and the issues that arose. Generally, this is also where the inquiry ends. But where there is scope for argument that a rule or ruling stated in the precedent case was framed too broadly, or that the decision is for some other reason better explained on a different basis which would enable it to be distinguished, the search for the *ratio* will also involve an evaluation of the strength and persuasiveness of the reasons expressed in the judgment(s) or otherwise advanced or available for the ruling. Such an evaluation will require consideration of a wider legal context in order to assess whether and to what extent the reasoning and the result reached in the precedent case are consistent with other authorities and legal principles (including subsequent authorities and developments in the law).

59. Whether it is permissible for a later court to engage in such an assessment depends on a variety of factors. Without seeking to be exhaustive, relevant considerations include: (1) the degree of unanimity or consensus among the judges (assuming there was more than one) who decided the precedent case; (2) the clarity or otherwise of the ruling and of the supporting reasoning; (3) whether or to what extent the point on which the court ruled was in dispute and/or the subject of argument; (4) whether or how clearly the court evinced an intention to establish a binding rule; (5) whether and to what extent prior relevant authorities were considered by the court; (6) whether the court would, or sensibly could, have reached the same result if it had not ruled as it did; (7) whether the court's ruling has been applied or approved in later cases; (8) whether the ruling or its underlying reasoning has been criticised by commentators or by judges in later cases; (9) whether the court considered or contemplated the factual situation that has arisen in the current case; and (10) the level in the court hierarchy of the court which decided the precedent case in comparison with the level of the court deciding the current case.

The *ratio* of Whiston's case

60. In this case the judge, at paragraph 25 of his judgment, applying the test formulated by Cross and Harris, observed that:

> "In order to decide the appeal before the Supreme Court, it was not necessary for Lord Neuberger PSC in *Whiston's* case to go further than to find that recall within the home detention curfew scheme fell outside the scope of article 5(4). He did not have to go so far as to broaden the basis of his analysis so as to cover the legally distinct status of prisoners released as of statutory right."

This is true in the sense that if Lord Neuberger (and the three other justices who agreed with his judgment) had concluded only that article 5(4) does not apply to the recall of prisoners released early under the home detention curfew scheme, even if article 5(4) does apply to the recall of prisoners released on licence as of right, they would still have decided that Mr Whiston's claim should fail. I have already explained, however, why the fact that a judge could – or even that the judge, if forced to choose, would – have justified the result reached on a different basis is not an adequate test of whether the basis actually adopted by the judge constitutes the *ratio* of the decision.

61. As mentioned earlier, the justification actually given by Lord Neuberger for dismissing Mr Whiston's appeal was that the requirements of article 5(4) are satisfied by the original sentencing decision for the full period of any determinate sentence, including any period after the prisoner has been conditionally released on licence. That principle was adopted as the basis for the decision in clear and explicit terms in a judgment endorsed by the majority of the Supreme Court. The relevant earlier authorities were discussed in the judgment and *West's* case, in which an inconsistent view had been taken by the House of Lords, was expressly said to have been wrongly decided. Moreover, Lord Neuberger's judgment left no doubt that it was intended to settle the law in this area unless and until the European Court of Human Rights decides to reconsider its jurisprudence. Nor has the broad principle adopted in *Whiston's* case been criticised or qualified in any subsequent case. To the contrary, as Nicola Davies LJ has explained at paragraphs 26 and 27 of her judgment, it has been treated by the Supreme Court in *Brown v Parole Board for Scotland* [2017] UKSC 69; [2018] 1 AC 1 as a correct statement of the law.

62. In these circumstances I think it plain that it is not open to a lower court to embark on a consideration of whether the reasoning contained in Lord Neuberger's judgment – including his analysis of *West's* case and other earlier authorities – is persuasive or sound, or to examine whether the conclusion reached in *Whiston's* case is better explained on a narrower basis than that adopted by the majority of the Supreme Court. I am confirmed in this view by the responses of judges to attempts made in the past to argue in similar circumstances that pronouncements of the UK's highest court were *obiter dicta*. I will give three examples.

63. In *Young v Bristol Aeroplane Co Ltd* [1946] AC 163 the question was whether an employee who accepted payments of compensation under the Workmen's Compensation Act for an injury suffered at work was thereby barred from suing his employer for negligence at common law. The House of Lords unanimously held that the claim at common law was barred, but there was a difference of opinion among the

members of the appellate committee. The majority took the view that the common law claim was barred only because – as had been found on the facts of that case – the plaintiff knew of the option to bring such a claim when he accepted compensation under the Act and that two contrary decisions of the Court of Appeal were wrongly decided. The two law lords in the minority, on the other hand, considered that the acceptance of compensation under the Act barred the claim irrespective of the plaintiff's knowledge of his option.

64. In *Leathley v John Fowler & Co* [1946] KB 579, decided by the Court of Appeal shortly afterwards, the plaintiff did not know of the option to bring a claim at common law when he accepted payments of compensation under the Act. The defendant argued that the *Bristol Aeroplane* case was distinguishable on that footing and that the views of the majority of the appellate committee in that case were *obiter dicta*, with the result that the Court of Appeal remained bound by its earlier decisions. That argument was firmly rejected. Somervell LJ, giving the judgment of the court, said (at 583):

> "In our opinion, … the majority laid down a principle, and, whatever the technical position, we think that this court should give effect to that principle."

65. The second example is *Hedley Byrne & Co v Heller & Partners Ltd* [1964] AC 465, where all the law lords agreed that there could in certain circumstances be liability in tort for a negligent misrepresentation by the defendant on which the claimant had relied even in the absence of a contract between the parties, contrary to the view taken by a majority of the Court of Appeal in *Candler v Crane, Christmas & Co* [1951] 2 KB 164. But the House of Lords nevertheless concluded that on the facts the defendant had successfully disclaimed responsibility for the representation made. In *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850, 857, Cairns J said:

> "An academic lawyer might be prepared to contend that the opinions expressed by their lordships about liability for negligent misrepresentation were *obiter*, and that *Candler v Crane, Christmas & Co* is still a binding decision. In my judgment that would be an unrealistic view to take. When five members of the House of Lords have all said, after close examination of the authorities, that a certain type of tort exists, I think that a judge of first instance should proceed on the basis that it does exist without pausing to embark on an investigation of whether what was said was necessary to the ultimate decision."

66. Again, in *Italmare Shipping Co v Ocean Tanker Co Inc (The Rio Sun)* [1982] 1 WLR 158 it was argued that guidance given by the House of Lords in *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No 2)* [1982] AC 724 as to the test to be applied in deciding whether to give leave to appeal from an arbitration award was "technically obiter". Lord Denning MR (at 162) confessed that he was "almost persuaded" by this argument. But even Lord Denning felt bound to accept that "we must go by the guidelines set out by the House of Lords". Griffiths LJ was more forthright, stating that "[w]hatever may be the technicalities of the matter, it would make a mockery of our system of judicial precedent if we were not to follow and apply" the guidance given by the House of Lords, and that "it would be an act of judicial anarchy for this court to refuse to accept and follow that guidance": see [1982] 1 WLR 158, 165.

67. References in these cases to "the technical position", or to statements of the law being "technically *obiter*", should, I think, be understood as indicating that there was a difference between the facts of the precedent case and the facts of the case before the court which could in theory or in other circumstances have provided a ground for distinguishing the earlier decision, but that the distinction was not one which in the actual circumstances any lower court would be justified in drawing. Similarly, I read the statement of Lady Hale in *Whiston's* case that the views expressed in Lord Neuberger's judgment "are, strictly speaking, *obiter dicta*" as signifying only that it would be open to the Supreme Court in future to revisit the question and explain the result of that case on the narrower basis that she favoured, and not as seeking to suggest that it would be permissible for a lower court to decline to accept and apply the principle articulated by Lord Neuberger.

Conclusion

68. In agreement with Nicola Davies LJ, I therefore think it incontestable in this court that the broad principle adopted by four of the five members of the Supreme Court in *Whiston's* case is its binding *ratio decidendi*. I also agree with her that the third ground of appeal must fail for the reasons she gives. Accordingly, I too would dismiss the appeal.