Neutral Citation Number: [2012] EWCA Civ 1374

Case No: C1/2011/1530/QBACF and C1/2011/1530(A)/FC3

**IN THE COURT OF APPEAL (CIVIL DIVISION)**

**ON APPEAL FROM THE ADMINISTRATIVE COURT**

**THE HON MR JUSTICE WALKER**

**Case No: CO/3808/11**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 25/10/2012

**Before :**

**LORD JUSTICE PILL**

**LORD JUSTICE ELIAS**and

**LORD JUSTICE PATTEN**

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**Between :**

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|  | **THE QUEEN ON THE APPLICATION OF**  **STUART WHISTON** | **Appellant** |
|  | **- and -** |  |
|  | **SECRETARY OF STATE FOR JUSTICE** | **Respondent** |

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**Mr Hugh Southey QC** (instructed by **Chivers Solicitors**) for the **Appellant**

**Ms Nathalie Lieven QC** (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing date : 24 July 2012

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**Judgment**

**Lord Justice Elias :**

1. 1. This case raises the question whether the revocation by the Secretary of State of a decision to release a prisoner on licence pursuant to the home detention curfew scheme is compatible with Article 5(4) of the European Convention on Human Rights. This is one of a growing number of cases which have bedevilled the appellate courts on the question whether and when decisions affecting prison detention engage that Article. Problems arise because of the combination of general and imprecise Strasbourg principles and the complexity of English sentencing practices.

*The statutory regime.*

1. 2. Prisoners who are subject to a determinate prison sentence may be released under two different kinds of licence. For sentences of twelve months or more, they have the right to be released on licence after having served half that sentence: see section 244 of the Criminal Justice Act 2003 (“the 2003 Act”). This portion of his sentence, which by section 244(3) is termed the “custodial term”, has to be served by the prisoner before he is entitled to be released on licence.
2. 3. However, sometimes prisoners may also be released on licence even during the custodial term. This power is conferred by section 246 of the Act which, so far as is relevant, is in the following terms:

(1) Subject to sub-sections (2) to (4), the Secretary of State may—

(a) release on licence under this section a fixed-term prisoner, other than an intermittent custody 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….

(2) Sub-section (1)(a) does not apply in relation to a prisoner unless—

(a) the length of the requisite custodial period is at least 6 weeks, and

(b) he has served—

(i) at least 4 weeks of that period, and

(ii) at least one-half of that period.

1. 4. Section 250(5) provides that the licence pursuant to section 246 must be subject to a curfew condition in accordance with section 253 which, ignoring exceptions and points of detail, is as follows:

“ (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 (excluding for this purpose the first and last days of the period for which the condition is in force).

(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”

As sub-section (3) makes plain, the curfew condition cannot be made to operate beyond the period of the custodial term when the prisoner would in any event be entitled to be released. Typically the place specified in the licence is a person’s home; hence the reason why the scheme is known as the “home detention curfew scheme”.

1. 5. Under section 249 a licence, whether pursuant to section 244 or 246, remains in place until the end of the determinate period of the sentence unless before then the licence is revoked and the prisoner recalled. However, any home detention curfew provisions only remain in place until the end of the custodial period. (Prisoners sentenced to fewer than twelve months will be released unconditionally at the half-way point and will not thereafter be subject to any licence.)
2. 6. The Secretary of State may revoke a licence and recall the prisoner pursuant to two different statutory provisions. First, section 254 gives the Secretary of State a general power to revoke any licence and to recall the licensee to prison. If that power is exercised it must be considered by the Parole Board who will determine whether the recall should be confirmed.
3. 7. Second, section 255 confers a specific power on the Secretary of State to revoke a section 246 licence. However, that power can only be exercised whilst the curfew condition is in force, which means until the point when the prisoner would have been entitled to be let out on licence as of right. Thereafter, the licence has to be revoked under section 254. There is no review of the section 255 power by the Parole Board, although there are certain procedural safeguards afforded to the recalled party. The section, so far as is material, is as follows:-

“**Recall of prisoners released early under section 246**

1. (1) If it appears to the Secretary of State, as regards a person released on licence under section 246 –
   * + - 1. (a) that he has failed to comply with any condition included in his licence, or
         2. (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.”

* + - * 1. 8. Accordingly a prisoner can be recalled under section 255 even where 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.
        2. 9. The short point raised in this appeal is whether the 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.

*Article 5.*

* + - * 1. 10. Article 5(1)(a) of the Convention is 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; …”

* + - * 1. 11. 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.”

* + - * 1. 12. There is an obvious inter-relationship between these two provisions. Article 5(1) recognises the right to liberty; Article 5(4) confers an associated right on any person who is detained to challenge the legality of the detention and have that question determined by a body sufficiently judicial in character.
        2. 13. There are two decisions of the High Court which have concluded that the section 255 revocation does not involve a deprivation of liberty so as to engage Article 5(4). These cases are *R* *(McAlinden) v Secretary of State for Justice* [2010] HWC 1557 a decision of Judge Milwyn Jarman QC, sitting as a Deputy High Court judge, who in turn followed the decision of Collins J in *R (Benson) v Secretary of State for* *Justice* [2007] EWHC Admin 2055. Permission was given to appeal to the Court of Appeal in the former case but the applicant died and the appeal was not pursued.
        3. 14. The current appeal is from the order of Mr Justice Walker who, in view of the earlier two cases of the High Court and with the consent of the parties, rejected the application without a hearing and granted leave to appeal to this court.

*The facts.*

* + - * 1. 15. The facts can be very shortly stated. The appellant was sentenced to 18 months’ imprisonment for robbery on 5 October 2010. He was released on home detention curfew pursuant to section 246 on 21 February 2011. His date for automatic release after serving half his sentence was 5 July 2011  Release on home detention curfew therefore took place within the custodial part of his sentence, as it necessarily must do. He was recalled to prison on 7 April 2011 because his whereabouts could no longer be monitored in the community. The custodial period still had almost three months to run. The decision to revoke was taken by the Secretary of State alone, pursuant to section 255, without any judicial supervision.

*The legal context.*

* + - * 1. 16. In *R (Giles) v Parole Board* [2004] 1 AC 1 Lord Bingham described the core rights which Article 5 is designed to protect in the following terms:

“Its primary target is deprivation of liberty which is arbitrary or directed or controlled by the executive.”

Plainly, where a person is detained in prison pursuant to a determinate custodial sentence imposed by a court, it would be absurd if that sentence had to be periodically reviewed. There is no obligation on the state to provide a further level of judicial supervision. Provided the justification for the detention lies in the original sentencing decision, the detention will not infringe Article 5.

* + - * 1. 17. Lord Hope confirmed this principle in the *Giles* case. After considering two Strasbourg decisions, *E v Norway* (1990) 17 EHRR 30and *Van Droogonbroeck v Belgium* (1982) 4 EHRR 443,he continued (para 40):

“The important point which emerges from these two decisions for present purposes is 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. This is because there is a risk that the link between continued detention and the original justification for it will be lost as conditions change with the passage of time. If this happens there is a risk that decisions which are taken by the executive will be arbitrary. That risk is absent where the length of the period of detention is fixed as part of its original decision by the court.”

Lord Hope referred to the principle enunciated in the *De Wilde* case – the principle that when a sentence is imposed following a criminal trial the necessary Article 5(4) supervision is incorporated into the decision itself - as the “basic rule.” Later in his judgment he commented on when there should be a departure from that basic rule (para 51):

“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 of the court.”

* + - * 1. 18. There are two distinct categories of case where Article 5(4) may require effective review of a sentence of imprisonment. First, as Lord Hope indicated, where indeterminate sentences are imposed and the decision is left to the executive to decide when the prisoner should be released, depending on an assessment of future risk, the responsibility for the length of the decision has been passed from the court to the executive. In those circumstances there must be a periodic review by a court in order to satisfy Article 5(4). This has been recognised in a series of cases from Strasbourg: see e.g *Hussain v United Kingdom* (1996) 22 EHRR 1 and *Stafford v United Kingdom* (2002) EHRR 1121. Second, even in the case of a determinate sentence, the executive may be empowered to release on licence and to recall those so released if the licence conditions are infringed. The question arises whether these decisions can be said to break the link between the detention and the original justification for it. If, properly analysed, that link is broken and it is a new period of detention, the principles of Article 5(4) must apply.
        2. 19. At the heart of this appeal, therefore, is the question whether the administrative recall pursuant to section 255 from home detention curfew during the custodial element of the sentence remains covered by what Lord Hope termed the basic rule, or whether the proper analysis is that the recall constitutes a fresh decision to detain made by the executive. If the latter, Article 5(4) will have been infringed given that there is no supervision by the Parole Board or any other judicial body. The decision to detain will have passed from the court to the executive and will necessarily involve the consideration of factors which have changed since the original sentencing decision.
        3. 20. There is no doubt that a decision not to release on licence, whether home curfew detention or otherwise, does not engage Article 5. The House of Lords confirmed as much in *R (Black) v* *Justice Secretary* [2009] 1 AC 949. In that case a long term prisoner could be released on licence after serving half of his sentence and had the right to be released after serving two thirds. The question was whether a decision by the Secretary of State not to release a prisoner who had committed serious crimes of robbery and kidnapping before the custodial term had been completed engaged the safeguards of Article 5(4). The Parole Board had in fact recommended his release, but the Secretary of State, who had the final decision, chose not to follow that recommendation on the grounds that the risk of re-offending had not been sufficiently reduced. Their Lordships (Lord Rodger, Baroness Hale, Lord Carswell and Lord Brown; Lord Phillips dissenting) held that Article 5(4) was not engaged in those circumstances.
        4. 21. Lord Rodger formulated the relevant question for the court as follows:

“whether article 5(4) gives a long term prisoner, with a determinate sentence of more than 15 years, the right to take legal proceedings, at the half way stage of his sentence, to determine the lawfulness of his continuing detention.”

He concluded that Article 5(4) did not confer that right (paras 46-47):

“According to the constant jurisprudence of the European Court conveniently summarised by Lord Hope of Craighead in *R (Giles) v Parole Board* [[2004] 1 AC 1](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKHL/2003/42.html%22%20%5Co%20%22Link%20to%20BAILII%20version) , 30, para 40, the answer to that question is No. In 1995 and 1996, judges determined that it would be appropriate, and therefore lawful by virtue of section 2 of the 1991 Act, for Mr Black to be sentenced to be detained for a total of 24 years. In these circumstances, failing any fresh development which might make his detention unlawful, Mr Black’s article 5(4) Convention right to have the lawfulness of his detention after conviction decided by a court was satisfied by the original sentencing procedures.

Is the mere fact that he has reached the half-way stage in his sentences a fresh development which might make his detention unlawful? Plainly not: his detention would not be unlawful after the half-way point and before the two-thirds point, unless the Secretary of State had ordered his release under section 35 and he remained in custody. In fact, however, the Secretary of State has decided that he should not be released. So he remains detained in terms of the original lawful sentences and has no right to be set free. Other things being equal, he will not have a right to be set free until he has served two-thirds of his sentence and section 33(2) applies to him. At that point, if he were not released on licence, he would indeed have an article 5(4) Convention right to bring proceedings to have the lawfulness of his detention determined. In English law he would bring habeas corpus proceedings to secure his release.”

* + - * 1. 22. Lord Brown, with whose speech each of the majority members agreed, carried out a detailed analysis of both Strasbourg and domestic law and also concluded that there was no infringement of Article 5. Determinate sentences were in this regard different to indeterminate sentences (para 83):

“83…. The essential contrast struck by the European court is between on the one hand “the administrative implementation of the sentence of the court”, for example decisions regarding “early or conditional release from a determinate term of imprisonment” (para 87 of the court’s judgment in *Stafford* 35 EHRR 1121….), and on the other hand “fixing the tariff” and later determining the length of post-tariff detention in life sentence cases. 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.”

* + - * 1. 23. However, that analysis raises the question: what constitutes the administrative implementation of a determinate sentence? A refusal to release on licence simply leaves the original sentence unaffected and the original justification for the sentence continues to explain it. But what is the position where a prisoner has been released on licence and is later recalled by the executive? In a system where a prisoner is released on licence after serving half his sentence, that possibility is clearly anticipated in the original sentence imposed by the sentencing court. Does the renewed detention brought about by the recall constitute the administrative implementation of the original sentence, so that it remains justified by that sentence? Or is it a fresh detention attracting the safeguards of Article 5(4)?
        2. 24. This was one of the issues confronting the House of Lords in *R (West) v Parole Board* [2005] 1 WLR 350, a case preceding *Black*. Their Lordships held that the recall of a prisoner for breach of his licence conditions who had been released as of right after serving the custodial element of his sentence did engage Article 5(4), as well as common law duties of fairness. Both Lord Bingham (with whose judgment Lords Hope, Walker and Carswell agreed) and Lord Slynn observed that the liberty of someone on licence is conditional and to that extent precarious; nonetheless it was sufficient for the safeguards of Article 5(4) to apply before that liberty was lost. This was not a case where the necessary judicial supervision could be said to have been incorporated into the original sentencing decision. Only Lord Slynn gave any reasons for explaining why Article 5(4) applied (paras 54-55):

“In the absence of a specific challenge to the conviction, when the prisoner begins his sentence, there is clearly lawful detention by a competent court. Furthermore that sentence is subject to all the provisions of release on licence and revocation provided for by statute and the rules applicable to determinate sentence prisoners. My initial view was that there are not two formal orders for detention; it is a combined sentence and, in the subsequent decisions as to licence and revocation and recall, the Parole Board is giving effect to the initial sentencing of the trial judge. If that is right, recall from conditional release was itself empowered by the initial sentence of the court.

I have, however, been persuaded by Mr Fitzgerald QC that this is too restrictive an approach and that recall, even of someone who has only a conditional right to his freedom under licence ("more circumscribed in law and more precarious than the freedom enjoyed by the ordinary citizen" (*Weeks v United Kingdom* [10 EHRR 293](http://www.bailii.org/cgi-bin/redirect.cgi?path=/eu/cases/ECHR/1987/3.html%22%20%5Co%20%22Link%20to%20BAILII%20version)), is a new deprivation of liberty by detention. The prisoner is therefore entitled to take proceedings by which the lawfulness of that detention can be decided speedily by a court under Article 5 (4). Review by the Parole Board of the recall decision, however, if conducted in accordance with the fairness which the common law requires, is in my view a compliance with Article 5 (4) and therefore there is no breach of this Article. ”

* + - * 1. 25. Mr Southey QC, counsel for the appellant, relies on this case as the central plank in his submission. He recognises that *West* is not on all fours with this case since it was concerned with recall in circumstances where the custodial period had elapsed and the prisoner was entitled to be out on licence, whereas here the recall is during the custodial period. However, he contends that Lord Slynn’s observations are equally apposite here. There is no rational basis for distinguishing between the recall decision in *West* and the recall decision taken in this case. The critical feature in each is that the prisoner has been released on licence and therefore his recall constitutes a new and independent deprivation of liberty whose legality depends upon establishing one of the two facts referred to in section 255. Either the appellant must be in breach of a licence condition or it must be impossible, for one reason or another, to monitor his curfew arrangements. Either way that involves a fresh finding of fact which provides a new justification for the detention. On this analysis, to use Lord Hope’s words in *Giles*, “the link between continued detention and the original justification for it is lost”.
        2. 26. Mr Southey accepts, as he must, that Article 5(4) does not apply to a refusal to release on home curfew detention for the reasons given in *Black*: the period of detention is then still regulated by the decision of the court which imposed the original sentence. But once the prisoner has been released on licence, the picture changes. He then has a right to liberty, albeit of a precarious nature, which can only be terminated for specific reasons. It is false to characterise the recall as the administrative implementation of the original sentence.
        3. 27. In support of this submission, Mr Southey places considerable weight on certain observations of Lord Brown in *Black* where he commented upon some remarks of Lord Bingham in the *West* case. Lord Bingham had observed that it was “noteworthy” in that case that the appellants had a statutory right to be free, thereby suggesting that there may be a difference between recalls during the custodial period of the sentence and recalls after that time. Lord Brown did not accept that their Lordships in *West* were intending to draw that distinction (paras 73-74):

“…Plainly, however, [*West*] was reached in the very specific context of the recall to prison of prisoners released on licence for breach of their licence conditions. (In each case the appellant had in fact been released automatically after serving the requisite proportion of his sentence and thus, as Lord Bingham pointed out at para 30, had “a statutory right to be free”. Although, however, Lord Bingham described this as “noteworthy”, I do not myself understand the opinions as a whole to suggest that article 5(4) would call for any different conclusion in the case of those recalled after discretionary, rather than automatic, release on licence.)

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.”

* + - * 1. 28. Mr Southey says that there is no answer to this analysis which places recall decisions firmly in the camp of executive detention engaging Article 5(4) even where the recall is during the custodial period.
        2. 29. Ms Lieven QC, counsel for the Secretary of State, submits that on the contrary there is a clear distinction to be drawn between the situation where the prisoner is recalled when he has a right to be on licence subject to complying with the relevant conditions, and the case where he is released on licence during the custodial period and is recalled before that period has expired. In the latter situation the prisoner’s detention for the remainder of the custodial period is still justified by reference to the original sentence. This analysis involves treating the observations of Lord Brown as *obiter*, not binding on the court, and not to be followed.

*Discussion.*

* + - * 1. 30. The critical question is whether in the particular circumstances of this case the recall from home detention curfew constitutes a fresh deprivation of liberty or whether that renewed detention remains justified by the original sentence of imprisonment. In my judgment, this depends upon the nature, quality and purpose of the liberty afforded to a prisoner who is made subject to such a licence.
        2. 31. I am not persuaded that the release on home detention curfew is properly to be viewed as the restoration of liberty sufficient to engage Article 5 if and when the prisoner is recalled to prison. It is true that *West* shows that the mere fact that the liberty is conditional on compliance with the conditions of the licence, and is to that extent precarious, does not prevent it amounting to sufficient liberty to engage Article 5(4) when the prisoner is denied it. But it seems to me that release on home detention curfew is much more closely integrated with the original sentence than is release as of right once the custodial period has been completed. The curfew is a compulsory feature of the scheme and if it cannot be enforced, the licence must be withdrawn and the prisoner recalled, irrespective of the fact that the prisoner has honoured the conditions of his licence. Indeed, that is this case. The purpose of granting such freedom to the prisoner is to help him integrate into society. In my view, it is properly to be seen as a modified way of performing the original sentence imposed by the judge; the recall simply restores the primary way in which it was assumed that the sentence would be served. This was essentially the basis on which Collins J found that Article 5(4) was inapplicable in the *Benson* case (para 19):

“In my judgment, having regard to the various authorities, it would be wrong for me to decide that Article 5(4) does apply in the situation that exists here. Accordingly, as it seems to me, the provisions of section 255(2) are not incompatible with the Convention. There is no right to have a consideration of the lawfulness of the detention since it is covered by the determinate sentence passed by the court. One can perhaps justify that by saying that it is simply the means whereby the sentence of the court is to be served. It may be in a closed prison. It may be in an open prison. It may equally be by means of a licence and tagging which itself involves a degree of restriction on liberty. Indeed, one has to note that there is a decision in relation to control orders whereby alleged terrorists have orders made, which involve tagging and curfew, and those can amount to deprivation of liberty within the meaning of Article 5 if the conditions are severe enough to justify it. ….But that makes plain that this sort of licence involving tagging and curfew orders is capable of being regarded as a deprivation of liberty. It certainly is less than freedom, so far as the individual is concerned. In those circumstances, as it seems to me, it can properly be regarded as a manner in which the sentence is being served in the same way as, as I have said, open prison or closed prison. That may well be a way of justifying the distinction to be drawn between it and the situation where there has to be a release on licence and the licence cannot and does not contain such severe measures as are appropriate in release under section 246.”

* + - * 1. 32. I do not suggest that someone subject to equivalent restrictions on his liberty in other circumstances, for example as part of bail conditions, would be unable to claim that he had lost his liberty if he were to be imprisoned. Article 5(4) would no doubt be applicable to imprisonment for alleged breach of the licensing conditions in those circumstances. But in a context where the licensing arrangements are made as an alternative to compulsory detention, the question is whether the link with the original sentence imposed by the judge is broken. In my view, it is not and therefore the conditions of Article 5(4) are satisfied by the original trial.
        2. 33. I recognise that it can be said that just as in the *West* case, new facts have to be established before the prisoner can be recalled. But in my view that is not of itself sufficient to engage Article 5(4) because the highly restricted liberty inherent in the home detention curfew scheme is so intimately connected with the original custodial sentence. Nor do I believe that Lord Brown had this scheme in mind when he made the observations he did in the *Black* case (see para 27 above). I believe he was considering the licensing arrangements under the Criminal Justice Act 1991 considered in *West* when long term prisoners could be released on discretionary licence after serving half their sentence on precisely the same terms as they would be released as of right after serving two-thirds. I should add that I wholly reject a submission of Mr Southey that Lord Brown’s remarks, made in passing in his speech, were binding on us.
        3. 34. It does not in my view necessarily follow, as Ms Lieven contends, that whenever a prisoner is released on licence and later recalled before the custodial period has expired, the justification for his fresh detention will always be referable to the reasons justifying the original sentence. It may be, as Lord Brown clearly thought, that recall even during the custodial period could, depending on the quality and nature of the licence in issue, attract Article 5(4) safeguards. The issue does not in my opinion need to be resolved in this appeal, and I would reserve judgment on it.
        4. 35. Accordingly, in agreement with the decisions in *Benson* and *McAlinden*, I would reject this part of the appeal.

*Article 6.*

* + - * 1. 36. Mr Southey ran a further argument contingent on Article 5 being found not to be applicable. He contended that the recall decision should at least be subject to the procedural safeguards in Article 6, and he submits that they were not. The original grounds of appeal did not include this ground; they were added in the light of the decision of the ECtHR in the case of *Boulois v* *Luxembourg* decided on 14 December 2010. There, the Chamber of the Court by a bare majority held that the exercise of a discretion refusing to allow a prisoner out on temporary leave as part of the process of rehabilitation involved the exercise of a civil right which engaged Article 6. However, since that ground of appeal was added, on 3 April 2012 the Grand Chamber of the Strasbourg Court reversed that decision. Far from assisting the appellant’s argument, this judgment is in my view inconsistent with it.
        2. 37. In *Boulois*, the Grand Chamber said this (para 87):

“According to the Court’s traditional case-law, the examination of requests for temporary release or of issues relating to the manner of the execution of custodial sentences do not fall within the scope of Article 6(1).”

Given my conclusion that the release and recall did relate to the manner of execution of the sentence, it follows that Article 6 was not engaged either.

* + - * 1. 38. I would add that in any event, even if Article 6 was engaged, I am inclined to the view that the availability of judicial review was in the circumstances sufficient compliance with Article 6, particularly when the procedural safeguards provided by section 255 itself are taken into account. In *R (King) and others v Secretary of State for Justice* [2012] EWCA Civ 376 this court held that even if cellular confinement could be said to amount to the deprivation of a civil right for a prisoner to associate with other prisoners within the meaning of Article 6 (which the majority thought it could not), the availability of judicial review constituted the necessary compliance with that Article. The facts were different but some of the reasoning in that case is equally applicable here.
        2. 39. For these reasons, therefore, I would reject this appeal.

**Lord Justice Patten:**

* + - * 1. 40. I agree.

**Lord Justice Pill:**

* + - * 1. 41. I also agree.