



Press Summary

19 April 2023

Morgan and others (Respondents) v Ministry of Justice (Appellant) (Northern Ireland)

[2023] UKSC 14

On appeal from: [2021] NICA 67

Justices: Lord Reed (President), Lord Sales, Lord Hamblen, Lord Burrows, Lord Stephens

Background to the Appeal

The respondents were convicted of terrorism offences. On 13 November 2020, they were sentenced to determinate custodial sentences by Colton J. In accordance with the Criminal Justice (Northern Ireland) Order 2008 (the ‘2008 Order’), the judge specified a “custodial period” of half of the term of their sentences which gave rise to an obligation on the part of the Department of Justice to release the respondents on licence (e.g. living in the community while complying with set rules) when they had served half their sentences.

On 29 April 2021, the Counter Terrorism and Sentencing Act 2021 (the ‘2021 Act’) received Royal Assent. Section 30 of the 2021 Act introduced Article 20A (‘Article 20A’) into the 2008 Order. Article 20A provided that prisoners convicted of certain terrorist offences would not be released from custody at the halfway point, but rather their cases would be referred at the two-thirds point to the Parole Commission which would not direct their release on licence unless satisfied that it was no longer necessary for the protection of the public that they should be confined. The end date of the respondents’ determinate custodial sentences was unaltered.

The respondents challenged section 30 of the 2021 Act, which inserted Article 20A. On appeal to the Court of Appeal and insofar as relevant, they argued that:

- The changes effected by Article 20A breached Article 5(1) of the European Convention on Human Rights (the ‘ECHR’) as the change to their sentences was not foreseeable.

- The changes effected by Article 20A breached Article 7(1) of the ECHR as it retrospectively changed the penalty for the offences committed.

The Court of Appeal declared that section 30 of the 2021 Act, inserting Article 20A, was incompatible with Article 7(1) of the ECHR. Given that decision, it made no determination about Article 5 of the ECHR. The Court of Appeal considered that the changes to the respondents' sentences caused by Article 20A were a redefinition or modification of the scope of the penalty imposed applied retrospectively in breach of Article 7 of the ECHR.

The appellant appealed the declaration of incompatibility with Article 7(1) of the ECHR, and the respondents were given permission to cross-appeal in relation to Article 5 of the ECHR. The issues for the Supreme Court were therefore the compatibility of section 30 of the 2021 Act, inserting Article 20A, with Articles 5 and 7 of the ECHR.

Judgment

The Supreme Court allows the appellant's appeal in respect of Article 7 of the ECHR and sets aside the declaration of incompatibility made by the Court of Appeal. The respondents' cross appeal on Article 5 of the ECHR is dismissed.

The Supreme Court finds unanimously that section 30 of the 2021 Act, inserting Article 20A, is compatible with Article 7 and Article 5 of the ECHR. Lord Stephens gives the lead judgment with which all the other justices agree.

Reasons for the Judgment

Article 7 of the ECHR

Article 7 of the ECHR distinguishes between redefinition or modification of a penalty (which is not permitted retrospectively) and changes to the manner of execution or enforcement of a penalty (which is permitted retrospectively under Article 7 of the ECHR). The key question was whether the changes effected by Article 20A redefined or modified the scope of the penalty, or whether they changed the manner of execution or enforcement of the penalty [105].

The Supreme Court found that section 30 of the 2021 Act, inserting Article 20A, changed the manner of execution or enforcement of the penalty and therefore did not breach Article 7 of the ECHR. Its reasons were:

- The penalty was the determinate custodial sentence imposed [107].
- Specifying the custodial period did not change the penalty imposed [112].
- Judicial involvement does not mean that a measure is no longer a change to the manner of execution or enforcement of a penalty [110].
- There has been no retroactive increase in the penalties imposed on the respondents. The changes effected by Article 20A concern only the way in which lawfully prescribed determinate custodial sentences are to be executed [116].

Article 5 of the ECHR

Article 5, insofar as relevant, ensures that no one shall be deprived of their liberty except in accordance with a procedure prescribed by law. The law authorising the detention must have a legal basis and must comply with the 'quality of law requirements', namely that the law authorising deprivation of liberty must be sufficiently accessible, precise, and foreseeable in its application [122].

The quality of law requirements in Article 5 of the ECHR apply to detention, with the effect that a measure which relates to the execution of a penalty (and therefore does not come within Article 7 of the ECHR) may authorise the deprivation of liberty (and therefore come within Article 5 of the ECHR and be required to meet the quality of law requirements in Article 5 of the ECHR) [121].

The Supreme Court therefore considered whether the changes effected by Article 20A complied with the quality of law requirements in Article 5 of the ECHR [123].

The Court concluded that the changes were compliant with Article 5 of the ECHR because:

- The lawfulness of the respondents' detention was decided for the duration of the whole sentence, by the determinate custodial sentences imposed [125].
- The respondents' expectation that they would be released on licence does not affect the lawfulness of that detention [126]
- It is entirely foreseeable that the manner of the execution of the sentence might be changed by policy or legislation [127].

References in square brackets are to paragraphs in the judgment

NOTE:

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)