

ENGLAND AND WALES / JUDGMENT

Elam v Secretary of State for Justice

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Neutral Citation Number: [2011] EWHC 1558 (Admin) IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION ADMINISTRATIVE COURT Case No: CO/1794/2011, CO/2427/2011 Leeds Combined Court 1 Oxford Row Leeds West Yorkshire LS1 3BG Date: Thursday, 19 May 2011 Before: HIS HONOUR JUDGE BEHRENS (SITTING AS A DEPUTY HIGH COURT JUDGE)

- ----- Between: JOHN ELAM
- and - SECRETARY OF STATE FOR JUSTICE Claimants Defendants
- ----- (DAR Transcript of WordWave International Limited A Merrill Communications Company 165 Fleet Street, London EC4A 2DY Tel No: 020 7404 1400 Fax No: 020 7404 1424 Official Shorthand Writers to the Court)
- ----- Mr Matthew Stanbury (Chivers Solicitors, 2 Wellington Street, Bingley, BD16 2NB) appeared on behalf of the Claimant. Mr Tom Weisselburg (instructed by Treasury Solicitor, One Kemble Street, London WC2B 4TS) appeared on behalf of the Defendants.
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Judgment

Judge Behrens:

1. Mr Elam is a serving prisoner at HM Prison Sudbury. He brings this application for judicial review with permission from Langstaff J dated 4 April 2011 because he considers the Secretary of State has wrongly calculated his release date. The application requires the court to consider yet again the provisions of the Criminal Justice Act 1991, the Criminal Justice Act 2003 and the Criminal Justice Act (Commencement No 8 and Transitional and Saving Provisions Order 2005); ("1991 Act"; the "2003 Act" and the "2005 Order").) v Governor of Drake Hall Prison & Anr
2. Some of the ground has been covered in the decisions of the Supreme Court in R (Noone [2010] 1 W. L. R. 1743 and Stellato v SSHD [2007] 2 AC 70, but it was the view of Langstaff J when he granted permission that the issues in this application were not covered by those decisions and that it was arguable that paragraph 25 of the 2005 Order entitled Mr Elam to succeed.

3. The facts can be very shortly stated. Mr Elam was born in 1959. On 4 April 2005 the 2003 Act came into force. On 19 March 2009 Mr Elam was sentenced to a total of five years imprisonment in respect of a number of counts. For present purposes it is important to note that he was sentenced to eighteen months for perverting the course of justice between 30 June 2004 and 31 January 2005. (Both of those dates are, of course, before 4 April 2005). In addition he was sentenced to 42 months consecutively for conspiracies to defraud between 26 March 2003 and 8 September
2006. Those dates of course span the coming into force of the 2003 Criminal Justice Act. He had spent some 340 days on remand at the time of the sentence. On 16 July 2010 he was sentenced to a further two years imprisonment, consecutive to the five- year term for offences of conspiracy to defraud.
4. The Secretary of State has calculated that the sentence and licence expiry date will occur on 13 April 2015. His calculation is along the following lines. The three sentences total seven years. They fall to be aggregated as such under section 264(3) of the 2003 Act. After taking into account the 340 days spent on remand, the overall sentence ends on 13 April 2005.
5. Mr Elam disputes this. He makes the point that the eighteen-month sentence was in respect of an offence which was committed before 4 April 2005. Under the 1991 Act he would have been entitled to be released after nine months with a licence period expiring after only a further four-and-a-half months – the three quarter point mark. Accordingly there was four-and-a-half months of his sentence when he would have been released and not subject to recall. He submits that this is an accrued right and was not lost by virtue of the provisions of the 2003 Act or the 2005 Commencement Order.
6. He accordingly submits that the appropriate method is to aggregate the sentences to arrive at a figure of seven years but then to deduct the four and a half months, so as to arrive at a date at four and a half months earlier than that suggested by the Secretary of State. He submits that this can be achieved by what he describes or submits is a purposive construction of paragraph 19 (not it be noted paragraph 25) of the 2005 Order.
7. The parties have been represented before me today. Mr Stanbury has represented Mr Elam; Mr Weisselburg has represented the Secretary of State. I immediately acknowledge that I have been greatly assisted by their submissions. This is not an area of law in which I have dipped my toe very frequently before this hearing.
8. The statutory provisions to which I was referred to start with section 33 of the 1991 Act It is headed "Duty to release short - term and long - term prisoners". Section 33(1)and provides as follows.: "(1) As soon as a short-term prisoner has served one-half of his sentence, it shall be the duty of the Secretary of State ...

- (b) to release him on licence if that sentence is for a term of twelve months or more.” 9. I was then referred to section 37(1), which provides that subject to subsections to which I do not need to refer: “...where a short-term or long-term prisoner is released on licence that licence shall, subject to any revocation under sections 39(1) or (2) below, remain in force until the date on which he would (but for his release) have served three-quarters of the sentence.”
10. Pausing there, it became clear during the course of argument that that did not mean that his sentence was over for all purposes after the end of the licence period. Although he was not subject to recall if he committed another offence in that period he was liable to be re-sentenced for the original offence.
11. I move on to the 2003 Act, and I was referred first to section 244, which provides: “As soon as a fixed-term prisoner, other than a prisoner to whom section 247 applies, has served the requisite custodial period, it is the duty of the Secretary of State to release him on licence under this section.”
12. Under subsection (3)(a): “In this section “the requisite custodial period” means— (a)in relation to a person serving a sentence of imprisonment for a term of twelve months or more or any determinate sentence of detention under section 91 of the Sentencing Act, one-half of his sentence” And subsection (d): SMITH BERNAL WORDWAVE “in relation to a person serving two or more concurrent or consecutive sentences the period determined under sections 263(2) and 264(2).”
13. Before moving to those sections I was referred to section 249, which provides that: “Subject to subsections (2) and (3), where a fixed-term prisoner is released on licence, the licence shall, subject to any revocation under section 254 or 255, remain in force for the remainder of his sentence.”
14. Pausing there, therefore under the 2003 Act the licence remained for the remainder of the sentence, not only until the three-quarter mark.
15. I move on to section 264. Subsection 264(2) provides: “(2) Nothing in this Chapter requires the Secretary of State to release the offender on licence until he has served a period equal in length to the aggregate of the length of the custodial periods in relation to each of the terms of imprisonment.” And subsection (3): “Where any of the terms of imprisonment is a term of twelve months or more, the offender is, on and after his release under this Chapter, to be on licence—
- (a) until he would, but for his release, have served a term equal in length to the aggregate length of the terms of imprisonment, and
- (b) subject to such conditions as are required by this Chapter in respect of each of those terms of imprisonment.” I do not need to read subsection (e).
16. There is a definition of custodial period in subsection (6) which under subsection (6) (a)(ii)) in relation to a term of twelve months or more means one half of a term.

17. It is perhaps worth noting that it was paragraph 14 of the 2005 Order which was considered in detail in the decision of the Supreme Court in Noone. This case does not involve paragraph 14 but does involve paragraphs 19 and 25.
18. Paragraphs 19 – 22 come under a heading of "Savings for prisoners convicted of offences committed before 4 April 2005",. Paragraph 19, so far as relevant, provides: "The coming into force of— SMITH BERNAL WORDWAVE
- (c) the repeal of sections 33, 33A to 38A, 40A to 44, and 46 to 47 and 51 of the 1991 Act [...] is of no effect in relation to a prisoner serving a sentence of imprisonment imposed in respect of an offence committed before 4th April 2005."
19. One of the points that has been made is the distinction between the words "an offence" there and the heading which use the word "offences". I was referred to the provision in the Interpretation Act which provides that the singular normally includes the plural unless there is a contrary intention shown in the Act (or in this case the statutory instrument). However as paragraph 20 of the Order refers to offences committed before 4 April 2005, there is no necessary error in the heading. As I have noted, there are four separate paragraphs under the heading and one of them refers to "offences", so the fact that the heading refers to "offences" is not to my mind of assistance in determining whether the word "an offence" at the end of paragraph 19 is meant to be singular or plural.
20. Paragraph 25 is not in fact now relied on by Mr Stanbury. It was relied on by him until a very recent stage in this application and no doubt it was for that reason that Langstaff J took the view that the paragraph 25 point was arguable. Be that as it may, it is to my mind important that it be read: "The coming into force of—
- (a) sections 263 and 264 of the 2003 Act (consecutive or concurrent terms) [...] does not affect the date on which the Secretary of State is required to release an offender from a sentence of imprisonment passed in respect of an offence committed before 4th April 2005, whether or not that sentence of imprisonment is to run concurrently or consecutively with one passed in respect of an offence committed after that date."
21. At the heart of Mr Stanbury's submissions in relation to his purposive construction is what he describes as the principle established in Stellato which, he says, is that pre-Act offenders should not be subjected to adverse retrospective effect, save where that consequence has been enacted by Parliament and in the clearest of terms.
22. Mr Stellato had in 1998 been convicted or sentenced to ten years imprisonment. In June 2005 he was released at the two-thirds point, which was the point when he should have been released under section 33(2) of the 1991 Act. He was, however, recalled and he was again released in December 2005, but on that occasion he was released on licence. The Secretary of State purported to recall him very shortly afterwards for breach of the licence. The case turned on whether he was properly SMITH BERNAL WORDWAVE released on the second occasion on licence or whether he should in fact have been unconditionally released at the

three-quarter point. The effect of the decision, both of the Court of Appeal and the House of Lords, was that he was not correctly released on licence. He was entitled to be released unconditionally because he was still entitled to the provisions of the 1991 Act.

23. I was referred to various parts of the judgment, including paragraphs of the judgment of Lord Hope. I was referred to paragraph 14, where he said the provisions of paragraphs 19 and 23 of the 2005 Order do not purport to amend or repeal the provisions of the 1991 Act under which long-term prisoners were entitled to be released unconditionally when they reached the three quarter point of their term, nor do they purport to amend the Crime and Disorder Act by giving retrospective effect to section 104, which provided that if a pre-30 September 1998 prisoner was released on licence and then recalled, his further release was to be on licence until the end of his sentence. Yet the result for which the Secretary of State contends would have the effect of depriving the respondent and all the other pre-2003 offenders who are in the same position as he of the entitlement to unconditional release at the three quarter point which they were afforded by the 1991 Act. The effect would be to amend the regime under which the respondent and others like him were sentenced retrospectively.
24. Mr Stanbury seeks to derive from that the principle that Mr Elam should not be subjected to adverse retrospective effect, save where there was clear enactment by Parliament.
25. Mr Weisselburg made four or perhaps five submissions. He submits that section 264(3) of the 2003 Act is clear that, where there are consecutive terms of imprisonment and where any of those terms is a term of twelve months or more, the total licence period is to be a term equal in length to the aggregate term of the imprisonment, and he submits that that is not effected by the transitional provisions. He makes the point that paragraph 19 does not in turn refer to section 264. Although paragraph 25 refers to release dates; it does not refer to the term of imprisonment.
26. He submits that it is not possible to “shoehorn” the construction favoured by Mr Stanbury, into paragraph 19 itself. He submits that there is no legal basis for the purposive construction that Mr Stanbury puts forward. Either, he says, section 264(3) applies to the first sentence or it does not. If it does, then the first sentence must be aggregated in full with the other two sentences. If it does not, then the provisions of section 37(1) of the 1990 Act must be applied to the first sentence separately. In other words, he says that the purposive construction is simply not possible; either the sentences are aggregated or they are not. He submits that are.
27. If section 37(1) is to be applied to the first sentence separately, it would give rise to difficulties that were considered and appear to have been rejected in the Supreme Court decision in Noone. The licence period of the first sentence would become submerged in the second sentence. Furthermore there are the difficulties in determining the release date which are explained in Noone. The release date would be dependent on which sentence is deemed to be served first. SMITH BERNAL WORDWAVE

28. The decision in Noone makes it clear that those anomalies are not acceptable and should, if necessary, be avoided by a purposive construction of the transitional provisions. He took me to various parts of the decision of the Supreme Court in Noone.
29. He took me to paragraph 12 in the judgment of Lord Phillips where he pointed out the objectives of the 2003 Act being the rehabilitation of offenders. With this objective in mind, those who drafted the Act set out to achieve, amongst other things, the following: the introduction of custody class, which in fact was never brought in; the increase in the licence period to make this coextensive with the period of the sentence.
30. He took me to paragraph 30 of Lord Phillips's speech, where he sets out the arguments which were being put forward in relation to paragraph 14, and to paragraph 37, where he explains the effect of his interpretation of paragraph 14 is to provide uniformity approach regardless of the order which the individual sentences were imposed. It qualifies the prisoner for maximum grant of HDC release, but subjects prisoners to the latest sentence and latest licence expiry date. He recognised, therefore, that the effect of the decision might well be to extend the sentence.
31. I was also referred to various parts of the speech of Lord Mance. In particular I was referred to paragraph 56 where Lord Mance made the point that the effect of the Court of Appeal's construction was that the licence did indeed become submerged and deprecated that approach. More importantly, I was taken to paragraph 76, because it was in that paragraph that Lord Mance expressed a view in relation to paragraphs 19 and 25 of the 2005 Order. He said this: "76. Some attention was directed in argument and in the courts below to further provisions of Schedule 2, especially paras 19 and 25 dealing with the application of provisions of the 2003 Act in relation to offences committed before 4 April 2005. To my mind these cannot be decisive in either direction. I would only comment that, as at present advised, I would find it difficult to agree with the Secretary of State's and Court of Appeal's interpretation of their effect as regards sections 263 and 264. The omission from para 19 of any reference to sections 263 and 264 and the reference in para 25 to those sections seem to me more easily understood as indicating an intention to apply the aggregation provisions of those sections from 4 April 2005 in all circumstances (save only where all sentences in question are for less than 12 months and are therefore within para 14). It was understandable to mention section 244 in para 19 (and so to make clear that, where all sentences in question were for offences committed before 4 April 2005, the relevant provisions of the 1991 Act were to apply). But, where offences committed either side of 4 April 2005 are in question, the language of section SMITH BERNAL WORDWAVE 264(2) seems to me quite capable of operating, and to have been intended by para 19 to operate, to require the Secretary of State to release the offender on licence after the period specified. Nothing in para 25 suggests that it was to be confined in scope to cases where one of the sentences was an extended sentence. There seems no reason why para 25 should not be relevant generally (for example, to preclude a long-term prisoner serving a sentence of 4 years or more for an offence committed before 4 April 2005 in conjunction with another

prison sentence for an offence committed after that date from claiming under section 264(6)(a)(ii) the benefit of a custodial period of one-half in respect of the former sentence, instead of the period of two thirds which would follow from section 33(2) of the 1991 Act, the application of which is preserved in relation to the former offence by para 19)."

32. As Mr Stanbury accepts, that paragraph plainly supports the Secretary of State's construction. Indeed, the Secretary of State has changed his stance since that judgment because, of course, he was arguing to the contrary in Noone. Mr Stanbury, however, points out that this was an obiter remark; it was not part of the judgment and there was no full argument before him. He therefore submits that I should not follow what Lord Mance says.
33. Mr Weisselburg also submits that the transitional provisions do not have the effect for which Mr Stanbury submits. He submits (i) that paragraph 19 applies only where all of the consecutive sentence being served arise out of offences committed pre-4 April 2005 and (ii) where some consecutive sentences arise from offences pre-4 April 2005, and others from offences post-4 April 2005, paragraph 25 saves the provisions of the 1991 Act in relation to the former sentences in terms of custodial release dates, but not in terms of sentence and licence expiry dates.. That submission is expanded in paragraphs 40 and 41 of Mr Weisselburg's detailed grounds and it is not necessary for me to refer to them in detail.
34. Mr Weisselburg makes a number of points in relation to Stellato,. His main point was that the claimant is not here being deprived of any rights. All of the relevant legislation was in force at the time when he was sentenced and a proper interpretation of that legislation has always produced the sentence and licence expiry date that he now challenges.
35. This is plainly not a straightforward matter. It is a matter which is capable of argument either way. I see the force of Mr Stanbury's arguments, but I prefer those of Mr Weisselburg. I agree with Mr Weisselburg that it is impossible to derive Mr Stanbury's construction from paragraph 19. It is not to my mind clear precisely what words he wants to import into paragraph 19 to give effect to this purposive construction. In those circumstances I agree that his construction is impermissible SMITH BERNAL WORDWAVE and despite what is said in Stellato I am not convinced that for a person sentenced after 4 April 2005 the right to the termination of the licence procedure after three quarters of the term can be said to be an accrued right.
36. If one applies the licence expiry provisions of the 1991 Act to pre-4 April 2005 offences, I agree that it gives rise to the anomalies which Noone sought to avoid in relation to submerging of the licence period and the question of which sentences were to be treated as being served first. Furthermore, it seems to me that I, at first instance, should follow the dicta of Lord Mance in the Supreme Court, which clearly support the Secretary of State's argument. I acknowledge that there may not have been full argument, but it is clear that Stellato was cited to him because he referred to it in the previous paragraph, paragraph 75, of his judgment.

37. In those circumstances, I have come to the conclusion that this application falls to be dismissed. Mr Stanbury: My Lord, I am grateful. The one point in your judgment that you asked us to look at was the date and that was 13 April (inaudible). Judge Behrens: I was right first time. Mr Weisselburg: There was a reference early on to six years rather than seven, but I am sure when your Lordship gets the transcript back -- what I understand is now an easier procedure -- I understand that it may be available more quickly than previously (inaudible) administrative staff, but in any event so far as ancillary matters are concerned I do not object or oppose an order for costs in the usual terms, that is to say subject to the Access to Justice Act proviso and I do ask for detailed assessment of the claimant's publicly funded costs. Judge Behrens: Thank you. Mr Stanbury: My Lord, which leaves obviously the less straightforward and perhaps not unexpected matter of an application for permission to appeal. I do not intend in any way to re-litigate the matter now and I do not suppose that your Lordship would be content if I were to do so, but plainly this is a matter which does have on any reading an impact on a number of offenders and is a matter -- Judge Behrens: (Inaudible) permission. Mr Weisselburg: My Lord, I do not seek to dissuade your Lordship from granting permission. Mr Stanbury: I am obliged. Judge Behrens: It seems to me that this is a matter which the Supreme Court (inaudible) (laughter). SMITH BERNAL WORDWAVE Mr Stanbury: Will that be staying in the transcript, my Lord? (Laughter) I am obliged. Because for Legal Aid purposes the delays have become absolutely intolerable in terms of getting an application within 21 days, if for no other reason than that it makes my life considerably easier. Judge Behrens: I take the view that, as I indicated in the course of my judgment, this is not a straightforward matter and it plainly involves a point of law, questions of (inaudible) construction. It involves a number of people. I am about to learn there is another prisoner it involves and I have no doubt there are others. Mr Stanbury: There are live certificates for three I understand who I represent, but I have no intention -- I anticipate the court would wish to stay and I certainly do not intend to overburden the court. Plainly (inaudible). Judge Behrens: Do you have permission? Mr Stanbury: No -- Judge Behrens: My view was, having thought about it for precisely ten seconds, that the correct order for me to make would be to grant permission but to dismiss it. Mr Stanbury: Are we talking about the case of Melrose? Judge Behrens: Yes. Mr Stanbury: Yes, I would agree with that. Judge Behrens: That will keep alive and to extend any period for permission to appeal until after in any event 21 days in any event and if and insofar as an application as an appeal in Elam is pursued until after the conclusion of that appeal. Mr Stanbury: Yes, certainly. Judge Behrens: That seems to me to be the appropriate course. I do not know what your view will be. Mr Weisselburg: Absolutely, my Lord (inaudible). Judge Behrens: I imagine between you, you can draft an order which incorporates that. Mr Stanbury: I do not think there need be any costs order in relation to Melrose for any number of reasons, but not least because it has not (inaudible). I suppose the acknowledgment of service one could argue that they are entitled to (inaudible). Judge Behrens: They are not because I have given permission. SMITH BERNAL WORDWAVE Mr Stanbury: Of course. Judge Behrens: But it might be arguable because I have dismissed the application. Yes... Mr Weisselburg: I do not have a costs application. Judge Behrens: There is no costs application; it does not arise, but I think

because (inaudible) entitled to it. So if you could draft the orders. Mr Stanbury: Of course. Judge Behrens: Thank you very much indeed. And submit them to the Admin court and I can approve them. Any other matters? Mr Stanbury: No, thank you. Mr Weisselburg: Thank you very much, my Lord. SMITH BERNAL WORDWAVE

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