



14 December 2016

PRESS SUMMARY

R v Docherty (Appellant) [2016] UKSC 62
On appeal from [2014] EWCA Crim 1197

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Reed, Lord Carnwath, Lord Hughes

BACKGROUND TO THE APPEAL

The appellant Shaun Docherty was convicted on 13 November 2012 of serious violent offences under s.18 of the Offences against the Person Act 1861. He had displayed a clear pattern of aggressive offending and posed a high risk of serious further violence. The nature of Docherty’s offences was such that he fell under the scheme of preventative sentencing for “dangerous offenders”, defined by the Criminal Justice Act 2003 (“CJA 2003”) as those who are convicted of specified offences and who present a significant risk to the public of serious harm from further serious offending. The statutory maximum sentence for the offences of which Docherty was convicted is, and has been for well over a century, life imprisonment.

The scheme under the CJA 2003 included inter alia a possible indeterminate sentence of imprisonment for public protection (“IPP”). This required the judge to specify a minimum period to be served before the IPP prisoner could be eligible for release on licence, providing that the Parole Board was satisfied that it was no longer necessary for the protection of the public that he be detained. The CJA 2003 also provided a form of extended sentence known as an extended sentence for public protection (“EPP”).

That scheme was later replaced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”), which introduced new discretionary and mandatory life sentences and a new form of extended determinate sentence (“EDS”), while abolishing IPP and EPP. A Commencement Order specified the commencement date as 3 December 2012 for the new scheme, and included transitional provisions that IPP and EPP would still be available for anyone convicted but not yet sentenced before 3 December 2012, as in the case of the Appellant. The Appellant was sentenced to IPP on 20 December 2012, with a specified minimum period of five years and four months.

The Appellant contended that he ought to have been sentenced instead to EPP, and that the Commencement Order was unlawful to the extent that its transitional provisions preserved IPP for him. He argued the Order was unlawful for three reasons. Firstly, the new scheme was less severe, so to apply the harsher, earlier scheme was contrary to an international principle of “lex mitior” binding on English courts by virtue of article 7 of the European Convention on Human Rights (“ECHR”). Secondly, because the purpose of LASPO was to remove IPP as a sentencing option, preserving it to any extent was outside the authority given by LASPO. Thirdly, it was unlawful discrimination contrary to Article 14 ECHR to impose IPP on him but not on a person convicted after the specified commencement date. The Court of Appeal dismissed all of the Appellant’s arguments and the Appellant appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses Mr Docherty’s appeal. Lord Hughes gives the judgment, with which the rest of the Court agrees.

REASONS FOR THE JUDGMENT

The Commencement Order setting out transitional provisions for the introduction of LASPO was lawful. It did not breach Article 7 ECHR, it was legitimately made and was rational, and if it was discriminatory (which was doubtful) then it was justifiably so.

With the exception of a mandatory life sentence for murder, English criminal sentencing is a matter for the judge. Statute prescribes the statutory maximum, within which the judge may sentence, taking into account the relevant guidelines. The judge must sentence according to the law and practice prevailing at the time of sentence, regardless of when the offence was committed. Thus if the maximum sentence has been reduced by statute since the offence was committed, the court will sentence within that now current maximum, or if sentencing practice has moved downward, the court should sentence in line with that.

Article 7 ECHR requires that there be no punishment without law. This has always said, explicitly, that no sentence may be imposed which exceeds that to which the defendant was exposed at the time of committing the offence (“lex gravior”). Since the statutory maximum for the Appellant’s offences was the same at the time of offence and sentence, the principle of lex gravior is not offended. The principle of “lex mitior”, in contrast, is that if provision is made by law for a lighter penalty, subsequent to the commission of the offence, the offender shall benefit from that lighter penalty. The Strasbourg court has held in 2010 in *Scoppola v Italy (No 2)* (2010) 51 EHRR 12 that Article 7 also requires compliance with this principle. There are some difficulties in establishing the exact meaning which the court gave to lex mitior, but it is not necessary to resolve them because it is clear that the English practice of sentencing according to current law and practice, subject to the statutory maximum obtaining at the time of the offence (if lower) complies with it. The Strasbourg court cannot have meant that it is necessary to examine all intervening rules or practices between the offence and the sentencing process, and to sentence according to whichever is the most favourable. That would not accord with good reason or with the rationale of lex mitior, or with the English practice. Lex mitior is in any event of no assistance to Docherty because it does not involve anticipating the commencement of a new and more favourable sentencing scheme [42-49].

The reading of the provisions of the Commencement Order, together with the provisions of LASPO is clear: IPP and EPP disappear from the sentencing armoury on 3 December 2012, except for anyone already convicted but not yet sentenced, as in the case of the Appellant. There was no breach of Article 7 ECHR. In any event, the Appellant’s argument that he should benefit from the accelerated removal of IPP from the old scheme but claim the preservation of another part of it (EPP) is inconsistent [58].

Further, there was nothing contrary to LASPO’s statutory purpose in the Commencement Order’s transitional provisions. s.151 of LASPO enables such an order to be made, and that it may make transitional provisions. The phased commencement of the new sentencing scheme was both legitimate and rational. The Appellant’s discrimination argument also fails. It is doubtful whether being subjected to a different sentencing regime to another prisoner, due to a different date of conviction, could amount to a sufficient status to bring it within the anti-discrimination provision of Article 14 ECHR. Even if it could, the differential treatment is clearly justified by the need for all sentencing changes to start somewhere [61-63].

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:

<http://supremecourt.uk/decided-cases/index.html>