SWEET & MAXWELL

Issue 3 April 20, 2017

Archbold Review

Cases in Brief

Appeal—certificate of point of law of general public importance—appeal to Supreme Court—whether jurisdiction existed where leave to appeal refused

GARWOOD [2017] EWCA Crim 59; February 22, 2017

G whose applications for leave to appeal had been refused in *Johnson* [2016] EWCA Crim 1613, [2017] 1 Cr.App.R. 12 applied for the court to certify a point of law of general public importance for the Supreme Court. As a matter of statutory construction, there was no jurisdiction in the Court of Appeal to certify a point when leave to appeal had been refused. An appeal to the Supreme Court lay from "any decision of the Court of Appeal on an appeal to that court under part I" of the Criminal Appeal Act 1968 (s.33), and the phrase "decision of the Court of Appeal on an appeal" clearly referred to the determination of an appeal which had been pursued with leave (whether from the trial judge or the Court of Appeal) and determined on its merits, not decision on an application for leave, notwithstanding the definition of "appeal" in s.51(1) ("'appeal' where used in Part I or Part II of this Act, means appeal under that Part and 'appellant' has a corresponding meaning and in Part I includes a person who has given notice of application for leave to appeal."). Part I was careful to differentiate between what constituted an appeal and what an application (see ss.18(1), 20, 21, 22(2), 23, 23A, 31, 31A and 31B). Whether or not an applicant for leave to appeal was appealing a decision and thus could be described in that context as pursuing an appeal was not to the point. In any event, and contrary to submissions to the contrary, the court was bound by *Stafford and Luvaglio* (1969) 53 Cr.App.R. 1; *Mealey and Sheridan* (1974) 60 Cr.App.R. 59, and see commentary at [1975] Crim LR 154; and *Moulden* [2004] EWCA Crim 2715 and [2005] EWCA Crim 374.

Arrest—detention—imminent breach of the peace—European Convention on Human Rights Art.5—compliance with—proper analysis—construction of Art.5.1(c)—construction of Art. 5.1(b)

R (HICKS) v COMMISSIONER OF POLICE FOR THE METROPOLIS [2017] UKSC 9; February 15, 2017

At issue was the compliance with European Convention on Human Rights Art.5 of the detention of the applicants, potential demonstrators at a royal wedding, for short periods (between two and a half and five and a half hours) after arrest to prevent an imminent breach of the peace: detention which was lawful as a matter of domestic law, excluding the Art.5 question.

(1) The fundamental principle underlying Art.5 was the need to protect the individual from arbitrary detention, and an essential part of that protection was timely judicial control, but at the same time Art.5 must not be interpreted in such a way as would make it impracticable for the police to perform their duty to maintain public order and protect the lives and property of others. These twin requirements were not contradictory but complementary (see the general statement in *Ostendorf v Germany* (2013) 34 BHRC 738, majority [88]). In balancing these twin considerations it was central to the principle of proportionality embedded in both Art.5 and the common law on arrest for breach of the peace (see *Austin v Commissioner of Police of the Metropolis* [2009] UKHL 5, [2009] 1 AC 564, [34]) to keep a grasp of reality and practical implications. There was nothing arbitrary about the decisions to arrest, detain and release the appellants. They were taken in good faith and were proportionate to the situation. If the police could not lawfully arrest and detain a person for a relatively short time (too short for it to be practical to take the person before a court) in circumstances where this was reasonably considered to be necessary for the purpose of preventing imminent violence, the

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practical consequence would be to hamper severely their ability to maintain order, running counter to the fundamental principle above.
(2) There was, however, a difficult question of law as to how such preventive power could be accommodated within Art.5. The Strasbourg case law on the point was not clear and settled, as was evident from the division of opinions in *Ostendorf*. Moreover, while the Supreme Court must take into account the Strasbourg case law, in the final analysis it had a judicial choice to make. The court's view was that the view of the (concurring) minority in *Ostendorf* was correct. Accordingly, Art.5.1(c) was capable of applying in a case of detention for preventive purposes followed by early release before it was practicable to bring the detainee before a court. The court rejected the view of the majority, that the detention in that case was permitted under Art.5.1(b), not (c); that the second part of (c) – "when it is reasonably considered necessary to prevent his committing an offence" – only covered pre-trial detention; and that the purpose of bringing the person before a court must be for the purpose of trial, not just to determine the legality of detention. Rather, it accorded with the plain words of Art.5.1(c) that there were three situations, the second of which was where detaining a person "is reasonably considered necessary to prevent his committing an offence".
(3) As to the qualification on the power of arrest or detention under Art.5.1(c) contained in the words "for the purpose of bringing him before the competent legal authority", the court, to make coherent sense of Art.5 and to achieve its fundamental purpose, would read that requirement as implicitly dependent on the cause for detention continuing long enough for the person to be brought before the court. The court therefore agreed with the minority in *Ostendorf* (minority [5]) that in the case of an early release from detention for preventive purposes, it was enough for Art.5 if the lawfulness of the detention could subsequently be challenged and decided by a court. The court preferred this view to that of the Court of Appeal in this case ([2014] EWCA Civ 3, [2014] 1 W.L.R. 2152), that the police had a conditional purpose to take the appellants before the court, were the detention to last for sufficient time for that to be necessary, although this disagreement made no difference to the result. The Court of Appeal was right that the appellants would have been brought before a court to determine the legality of their continued detention, if it had been considered necessary to detain them long enough for this to happen. The case would then have been materially similar to *Nicol and Selvanayagam v United Kingdom*, (Application No 32213/96), 11 January 2001, an application found to be manifestly unfounded, where the applicants' initial detention was preventive and they were later kept in custody and brought before the court to be bound over. It would be contrary to the spirit and underlying objective of Art.5 if the appellants' early release placed them in a stronger position to complain of a breach of Art.5 than if it had been decided to detain them for longer in order to take them before magistrates to be bound over.
(4) As to Art.5.1(b), the court inclined to the same view as the minority in *Ostendorf* that an "obligation prescribed by law" had to be much more specific than the general obligation not to commit a criminal offence (or a breach of the peace), and that a mere reminder of that general obligation, or a narrow focus on particular facts, did not confer the requisite specificity. Further, as a practical matter, the police may find it necessary to take action to prevent an imminent breach of the peace in circumstances where there was insufficient time to give a warning.

Environmental offences—Environmental Permitting (England and Wales) Regulations 2010—application in England—extent and desirability of finding of dual regulation by Environment Agency and local authorities; whether challenge to validity of permit capable of founding defence to criminal prosecution

RECYCLED MATERIALS SUPPLIES LTD [2017] EWCA Crim 58; February 24, 2017

RMS had pleaded guilty to counts of failing to comply with the terms of an environmental permit condition, contrary to reg.38(2) of the Environmental Permitting (England and Wales) Regulations 2010, following rulings by the judge (both judge and Court of Appeal describing the drafting of the regulations as a "nightmare").
(1) The Regulations distinguished (as regards England) between activities, facilities etc that were regulated by the Environment Agency and by a local authority. RMS was charged with breaching conditions contained in a permit issued by the local authority for the area in which its establishment was located. The relevant activities (more broadly defined) were also covered by an Environment Agency permit. RMS argued on appeal that the local authority permit was invalid, as the relevant functions were exclusively exercised by the Environment Agency. It could not be said that it was never possible for there to be circumstances which were subject to two permits, one issued by the Environment Agency and the other by a local authority (such a circumstance, covering the relationship between mobile plant subject to one permit and a regulated facility subject to another, was envisioned by reg.16). However, that was not enough to found a jurisdiction in the local authority in this case. Moreover, duality of regulation, let alone where the regulators overlapped in respect of the same activity at the same time was plainly not to be encouraged, and the court would only accede to a solution which embodied dual regulation if driven to it by clear and unambiguous statutory language. The local authority had no jurisdiction to issue the permit, breach of the condition of which was charged, and the appeal was allowed.
(2) A separate ground of appeal which attacked the validity of the condition, had it been the case (contrary to the finding above), that the local authority had jurisdiction, might have been vulnerable to the Crown's counter-argument that such a defect could not be raised as a defence in a criminal trial on the basis of *Wicks* [1998] AC 92, but rather should have been challenged on an application for judicial review or a statutory appeal. It was not entirely clear if the submission based on *Wicks* was intended to extend to the grounds challenging the jurisdiction to issue a permit. If it were, the court was unable to accept it. The fundamental issue there was whether the local authority had jurisdiction to issue the permit. On that footing – and even though there may well have been scope for a challenge to the local authority permit by way of judicial review – nothing that was said in *Wicks* precluded that issue being raised as a defence in a criminal trial.

Good character—binding-over to keep the peace—evidence as to old bind over—developments in law/practice in relation to binding-over—proper approach to effect of bind-over on good character direction

B [2017] EWCA Crim 35; February 10, 2017

(1) Two references in (extensive) social services records to B being bound over in 1978 were sufficient to enable the jury to find that B had in fact been bound over in the course of proceedings arising from an allegation of assault made against him by one of his daughters, the sister of one of the complainants in the instant case (historic physical and sexual abuse), which had resulted in her being taken to hospital with bruising. There was, however, nothing to explain more fully what was said to have happened in that incident.

(2) The significance of a bind over appeared to have changed over time, at least as a matter of practice if not also as a matter of law. The court compared the account of bind overs in the edition of *Archbold* current in 1978 and *Archbold* 2017 [5-216], which demonstrated an evolution of the law in two respects: first, there was now a requirement for evidence, as distinct from "material" which may take some different form; and secondly, the test imposed was now higher – a likelihood that the peace would not be kept, rather than merely a fear that it might not be. It was implicit too that the criminal standard of proof did not apply. The court also referred (as had the judge) to the account in the Law Commission's report on binding over published in 1994 (Law Com. No.222), which suggested that a bind over could once have been imposed in a relatively informal way, when the justices took the view that a person either had behaved badly – but not necessarily criminally – or was likely to do so in the future. The court could not say that a bind over, or the conduct leading to it, must necessarily deprive a defendant of the entitlement to an unqualified good character direction. Nor, however, was it possible to conclude that, irrespective of the circumstances in which he or she had been bound over, a defendant was entitled to expect the bind over to be ignored when such a direction was given. That would always depend on the circumstances. In certain circumstances it may be appropriate to treat a defendant who had in the past been bound over as a person of "effective good character", and therefore entitled to a full good character direction. In that case, there would be no discretion in the judge and both limbs must be given, "modified as necessary to reflect the other matters and thereby ensure the jury is not misled": *Hunter* [2015] EWCA Crim 631, [2015] 1 W.L.R. 5367, [79]-[80]. If a bind over automatically deprived a defendant of the right to an unqualified good character direction, regardless of the circumstances of the bind over, it would be arguable at least that the presumption of innocence had been reversed. A defendant could lose good character as a result of allegations which had never been proved and which were not admissible as evidence of bad character. This could occur even if the offending or alleged offending that led to the bind over had been trivial, or even – there being power to bind over a witness – where there were no allegations against him or her at all. The court found it hard to think that that was what the law required. Equally, a defendant would not be entitled to have a bind over simply ignored when a judge was considering whether or not to treat him or her as a person of good character, no matter what the circumstances leading to the bind over may have been. Whether a defendant was entitled to be treated as a person of "effective good character" would depend on all the relevant circumstances, including not merely the bind over itself but also the circumstances in which it came to be made.

Trial—directions—need for a written route to verdict document—failure to properly address law and evidence in a structured way

BROWN [2017] EWCA Crim 167; February 17, 2017

Although not lengthy at five days, a trial involving three defendants which gave rise to a degree of complexity by virtue of the number of defendants, their different roles, reliance on joint enterprise, and alibi defences meant that it warranted provision of a written route to verdict document. Not every trial required a written route to verdict, but where none were provided, it was all the more important that the oral directions were well structured and defined, with a clear focus on each issue and the evidence that might be relevant to it. In this case, numerous deficiencies in the legal directions, combined with the absence of a structured route to verdict, rendered convictions for robbery unsafe. There was in rare cases a tipping point that was reached when, if the law and the defence cases were not properly addressed in a structured way by the judge, convictions were liable to be unsafe. So it was in this case.

SENTENCING CASE

Factual basis for sentence

KING [2017] EWCA Crim 128 (3 March 2017)

The appellant had been convicted of manslaughter on 17 December 2015 and sentenced to twelve years' imprisonment. His appeal was based on two grounds. (1) In making a number of findings of fact against the appellant the judge: a) failed to direct himself as he ought to have done; b) made findings against the weight of the evidence; c) made findings that no reasonable jury, properly directed, would have done. (2) The sentence was manifestly excessive.

The first ground of appeal raised the issue of the correct approach by the judge, after a trial, to the determination of the factual basis upon which to pass sentence. In particular, as to whether, when positive cases have been advanced at trial, and there is evidence to support two or more possible versions of events consistent with the jury's verdict(s), sentence must be passed on the basis that is most favourable to the defendant. The court stated that the correct approach to the determination of the factual basis upon which to pass sentence in such a case is clear. If there is only one possible interpretation of a jury's verdict(s) then the judge must sentence on that basis. When there is more than one possible interpretation, then the judge must make up his own mind, to the criminal standard, as to the factual basis upon which to pass sentence. If there is more than one possible interpretation, and he is not sure of any of them, then (in accordance with basic fairness) he is obliged to pass sentence on the basis of the interpretation (whether in whole or in relevant part) most favourable to the defendant. There is abundant authority for this approach (listed in [32] of the judgment).

It was a matter for the judge's discretion as to whether the instant case was one of the rare ones in which, as part of the summing up, it was necessary to pose a question(s) to

the jury which might make clear the factual basis of any verdict. Having chosen not to do so, it is obvious that the judge was fully aware that it fell to him to decide the factual basis upon which to pass sentence. It is evident that he approached the task with considerable care. There was no doubt that he was applying the criminal standard. There was evidence upon which a properly directed jury could have reached each of the disputed findings. It was therefore inappropriate for the court to interfere with them. Concluding also that the sentence was not manifestly excessive the court dismissed the appeal.

SENTENCING GUIDELINES

On 7 March 2017, the Sentencing Council published two new definitive sentencing guidelines: *sentencing children and young people and reduction in sentence for a guilty plea*. The guidelines are to be used from 1 June 2017. The guidelines may be found here: https://www.sentencingcouncil.org.uk/publications

Features

IPP: How long is too long?

By Dr Elaine Freer[1]

The Criminal Justice Act 2003 introduced, for the first time, indeterminate sentences for certain offenders who were "dangerous"; sentences of Imprisonment for Public Protection. The idea was simple: a dangerous offender could be rehabilitated through interventions available in prison. How long such rehabilitation would take could not be known, so the sentence had a minimum tariff, after which the offender could apply to the Parole Board for release. The test for release was set in statute as a finding that the offender was no longer dangerous.

From the start, the sentence caused legal complexities, and theoretical and practical challenges. It was amended by the Criminal Justice and Immigration Act 2008, and abolished by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. As recent cases and research have shown, however, the problems it created remain as a spectre in the wake of its abolition. For the prisoners still detained on IPP, many far past their tariff, this is a problem that will not simply go away.

In 2016, four years after IPP was abolished, Her Majesty's Chief Inspector of Prisons published a thematic report into IPP prisoners, named "Unintended Consequences". Perhaps a better title would have been "Foreseeable Consequences". The report highlighted the effect on the prison system of IPP, focussing on the high numbers of IPP prisoners still detained, all past their tariff, and most without access to courses that would enable them to move through the system. For those who were able to access courses, they then had to wait for the Parole Board to have the resources to give them a hearing.

This is the crux of the problem. For the years that IPP was in existence there was precious little opportunity for those serving such sentences to make progress. A lack of availability of programmes, and the perennially slow movement of the Parole Board in reviewing the cases to determine whether the prisoner is no longer a risk, led to a huge backlog in the system. Without a solution to this, the outlook for IPP prisoners remains bleak.

Legislative background

In its original guise, s.225(3) of the Criminal Justice Act 2003 provided that a sentence of Imprisonment for Public Protection (IPP) was mandatory under certain circumstances. These were that someone over 18 was convicted of a serious offence after 4 April 2005 and the sentencing court was of the opinion that that there was a significant risk to members of the public of serious harm occasioned by the offender committing further specified offences, but a sentence of life imprisonment was not available or justified. For these purposes, "specified offence" referred to Parts 1 and 2 of Sch.15 of the 2003 Act, which contained some 153 categories of offences. The court had to specify a minimum term; essentially the equivalent of the tariff period in a mandatory life sentence.

Injustices flowing from this were swift and significant. As it was mandatory, it caught many offenders who would not otherwise have been subject to such a harsh sentence. The first reported appeal was *Lang*.[2] It focussed on what a sentencing judge should properly consider before determining that an offender was "dangerous", and for whom the imposition of an IPP sentence was mandatory.

The court noted that the drafting of the section lacked clarity [8], and concluded with a warning note as to the complexity and poor drafting of the provisions:

> It would be inappropriate to conclude these proceedings without expressing our sympathy with all those sentencers whose decisions have been the subject of appeal to this Court. The fact that, in many cases, the sentencers were unsuccessful in finding their way through the provisions of this Act, which we have already described as labyrinthine, is a criticism not of them but of those who produced these astonishingly complex provisions.

Such sentiments were prescient of what followed over the course of the seven years for which IPP was available as a sentencing option.

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2 [2005] EWCA Crim 2864.

IPP Amended

In July 2008 there was a little light relief when the Act was amended,[3] meaning the imposition of IPP became effectively discretionary. There was also a new requirement that before an IPP sentence could be passed, the offender fulfilled one of two conditions:

> (3A) The condition in this subsection is that, at the time the offence was committed, the offender had been convicted of an offence specified in Schedule 15A.
>
> (3B) The condition in this subsection is that the notional minimum term is at least two years.

In relation to the first condition, Sch.15A contains a much shorter list than the list of "specified offences" in Sch.15. It is in effect essentially the list of "serious offences" found in s.109 of the Powers of Criminal Courts (Sentencing) Act 2000, as amended by the Sexual Offences Act 2003, with some further offences from the Sexual Offences Act 2003, and a catch-all provision for attempts. The second condition is that the offender would receive a minimum term of at least two years. By virtue of s.82A of the Powers of Criminal Courts (Sentencing) Act 2000 and s.28 of the Crime (Sentences) Act 1997 this would be the equivalent of a determinate sentence of four years.

If either of these conditions was satisfied, and there was a significant risk of serious harm, there were still two further requirements of which the court had to be satisfied before it imposed an IPP sentence. The court had to consider whether it was necessary to impose a special form of sentence (i.e. something other than a determinate sentence), and if so, whether an IPP or an extended sentence was the appropriate option.

This amendment was not sufficient, however, to stem the tide of appeals. The nature of the future offending was not relevant, providing it incorporated specified offences. Section 225 did not require any kind of nexus between the facts of the particular offence and the finding of dangerousness. Such cases might be rare, but the court expressed no doubt as to the position in principle.[4]

IPP abolished

And so the position stayed until the Legal, Aid, Sentencing and Punishment of Offenders Act (LAPOSA) 2012 abolished IPP sentences for good. No-one convicted after 3 December 2012, regardless of the date of the offence, can receive an IPP sentence. In their place came determinate sentences with extended licence periods for serious violent and sexual offences (so-called extended determinate sentences, or "EDS").[5] These sentences meant that there would no longer be any indeterminate sentences imposed (other than life sentences, and for juveniles, detention during Her Majesty's pleasure).

For those already serving IPP sentences, however, this is by no means the end of the story. At the end of October 2016, there were 3,998 serving IPP prisoners.[6] More troubling than their sheer number, however, is the length of time beyond their tariff that many have spent in custody.

How long is indefinite?

The idea behind the IPP sentence was that it protected the public from "dangerous offenders" by enabling such offenders to be kept in prison until they were no longer a risk to the public as defined in s.225(1)(b). The statute allowed that a prisoner serving an IPP sentence would be released when they were no longer a danger to the public. But how is a prisoner serving an IPP sentence to prove this? The idea was that by undertaking courses available in custody, appropriately targeted at the behaviours or traits that related to their offending, a prisoner could reduce their risk and demonstrate this reduction to the Parole Board, who would decide.

The reality, however, was that the rehabilitative aims of the system were not matched by availability of programmes. Consequently, many IPP prisoners ended up "trapped" in prison waiting to take courses which are not available. Thus, in *Secretary of State for Justice v Walker and James*[7] the court was faced with:

> …the consequences of the fact that the provisions of the CJA 2003 have resulted in more offenders in need of rehabilitation being imprisoned than existing resources can accommodate.[8]

Walker had been sentenced to IPP with a minimum term of 18 months, James to IPP with a minimum term of one year and 295 days. Both were serving at HMP Doncaster, a Serco-run private prison. In 2005, the Chief Inspector of Prisons had identified that the enhanced thinking skills programme had been withdrawn there due to costs, meaning there was no course provision for IPP prisoners.[9] Provision was recommended. In 2008, an unannounced inspection highlighted the scale of the challenges of IPP prisoners facing HMP Doncaster – numbers had risen from 20 in 2005 to 64 in 2008.[10] Furthermore, there was still no thinking skills programme available.[11]

For this reason, Mr Walker had had "*no access to any meaningful programme, course or work*" to enable him to demonstrate to the Parole Board that the risk he posed had been reduced enough to justify his release [24]. The LCJ categorised this as:

> …an unhappy state of affairs. There has been a systemic failure on the part of the Secretary of State to put in place the resources necessary to implement the scheme of rehabilitation necessary to enable the relevant provisions of the 2003 Act to function as intended [70].[12]

For these reasons, the Court of Appeal held that the Secretary of State's appeal against the decisions of the High Court failed (except in a limited respect in relation to one respondent). The Secretary of State for Justice was in breach of his public law duty by failing to provide relevant offending behaviour courses to allow IPP prisoners to demonstrate to the Parole Board by the time of the expiry of their minimum terms that their detention was no longer

3 Criminal Justice and Immigration Act 2008, Pt 2, s.13(1).
4 *Green* [2009] EWCA Crim 2172.
5 Section 124 LASPOA 2012.
6 Ministry of Justice (2016), *Annual prison population: 2016*, table A1.15, 27 October 2016.
7 [2008] EWCA Civ 30; [2008] 1 W.L.R. 1977.
8 Per LCJ in *Brooke* [2008] EWCA Civ 29; [2008] 1 W.L.R. 1950 at [3].
9 HMCIP (2005) *Report on an announced inspection of HMP/YOI Doncaster (14-18 November 2005) by HM Chief Inspector of Prisons*. The report is available at: http://webarchive.nationalarchives.gov.uk/20110204170815/http://www.justice.gov.uk/inspectorates/hmi-prisons/doncaster.htm
10 HMCIP (2008) *Report on an unannounced full follow-up inspection of HMP/YOI Doncaster (11–15 February 2008) by HM Chief Inspector of Prisons*, at p.81.
11 *Ibid,* [8.13], p.79.
12 The case continued to the ECHR, see fn 14.

necessary for public protection. The respondents were in an unacceptable situation as they had effectively been denied review of the lawfulness of their detention and, if that continued, it was likely to result in a breach of Art.5(4). The court held that their detention would cease to be justified under Art.5(1)(a) when it was no longer necessary for the protection of the public or if such a long time elapsed without a meaningful review that their detention became disproportionate or arbitrary. However, on the facts it was held that stage had not yet been reached.

On appeal to the House of Lords this broad principle was upheld. Where a prisoner serving an indeterminate sentence of imprisonment for the protection of the public was, after the expiry of his tariff period, unable to demonstrate his safety for release, his continued detention was not unlawful at common law. Nor did it breach the European Convention on Human Rights 1950 Art.5(4), and nor did it breach Art.5(1) unless there had been a period of years without any effective review.[13] (The case was then taken to the European Court of Human Rights, where the complaint was upheld – see below).

Not the end of the matter

For those prisoners still serving IPP sentences, however, not only do they continue to face the problems highlighted above regarding access to programmes and progress through the system, but now they also have to contend with the risk that they will be forgotten about. Section 128 LASPOA enabled the Secretary of State to modify the threshold for release. No such modification has yet been made (and this was criticised by the Court of Appeal in *Roberts*, see below, at [45]).

Since the beginning of IPP, one of its main problems has been the numbers of prisoners who are held after the expiry of their tariff period. For many this is because they have not been able to demonstrate that their risk has been reduced through the completion of programmes and rehabilitative activities whilst in prison, as in the cases of *James* and *Walker*. This issue culminated with a case before the European Court of Human Rights (one of the Applicants being Mr James).[14] It regarded: "*a real opportunity for rehabilitation [as] a necessary element of any part of the detention which is to be justified solely by reference to public protection*" and on this basis held that "one of the purposes" of IPP sentences was the rehabilitation of those so sentenced [209]. The court ruled that detention could become arbitrary and therefore unlawful under Art.5 ECHR, in contradiction to the ruling of the highest domestic court in 2009.[15] However, this ruling was confined in domestic law by the judgement of the Supreme Court in *R (Haney) v The Secretary of State for Justice*,[16] which held that it was the State's duty to provide an opportunity which was *reasonable in all the circumstances* for a prisoner to demonstrate at or just after tariff expiry that they no longer pose an unacceptable risk to the public. However, that was an ancillary duty which could not be brought within the express language of either Art.5(1)(a) or Art.5(4) and did not therefore affect the lawfulness of detention.

As recently as 2016 there have continued to be appeals on points relating to IPP. In *Roberts*,[17] 13 appellants sentenced to IPP during its currency applied for leave to appeal out of time [11]. All the applicants had been either detained in custody long after their tariff period, or were recalled for breach of licence. The court was very clear: it could not interfere with a sentence of IPP that was lawfully passed at the time of sentencing simply because, with hindsight, it was aware that there was potential for significant injustice to have resulted due to appellants being held long after their tariffs had expired.

The court emphasised that the failure to consider how to deal with remaining IPP prisoners was one for Parliament and the Executive:

> […] As we have observed, there is some evidence that the effect of long periods of imprisonment or the recall to prison of those sentenced to IPP under their licence requirements may be either impeding their rehabilitation or increasing the risk they pose. It is not for this court to examine that evidence or to suggest a new test which might be premised on the basis that the Parole Board should take into account, as a balancing factor, the risks posed by continued detention or long periods of licence. That must be a matter for Parliament and the Secretary of State. […] It would appear that there is no likely solution other than (1) significant resources be provided to enable those detained to meet the current test for release which the Parole Board must apply or (2) for Parliament to use the power contained in s.128 of LASPO 2012 to alter the test for release which the Parole Board must apply or (3) for those in custody to be re-sentenced on defined principles specially enacted by Parliament. [45-46]

The application for extension of time was refused in all 13 applications.

Shortly after this, another case regarding IPP (*Docherty)* was heard in the Supreme Court.[18] This case, however, had no impact on the decision in *Roberts,* as the court in that case stated expressly at [34]. In *Docherty* the appellant fell to be sentenced for two counts of s.18 grievous bodily harm with intent two weeks before the relevant sections of LASPOA abolishing IPP were brought into force. The appellant argued that as by his sentencing date it had been decided already that IPP was to be abolished (LASPOA was enacted in May 2012), but from a date to be appointed, he should not have been sentenced to IPP for one or more of three reasons. First, under the principle of *lex mitior* (binding on English courts via Art.7 ECHR as held in *Scoppola v Italy (No 2)*[19]) that where a new regime was less severe, applying the old regime would be unlawful. Secondly, that because LASPOA was removing IPP as a sentencing option, transitional provisions which preserved it to any extent were outside the authority given by that statute; or, thirdly, because to impose an IPP on him, but not on a person convicted after the LASPOA commencement date, amounted to unlawful discrimination against him, contrary to Art.14 of the ECHR, read with Art.5. The appeal failed on all grounds:

> The reality is that all changes in sentencing law or practice have to start somewhere. It is perfectly rational, indeed sensible, for a date to be fixed and for the sentencing of any offender which takes place after that date to be governed by the new rule/practice, whenever the offence was committed, in accordance with the usual English approach and subject only to avoiding lex gravior. [53][20]

13 [2009] UKHL 22.
14 *James, Wells and Lee v United Kingdom* (2013) 56 EHRR 12 6.
15 *R (Wells) v Parole Board of England and Wales* [2009] UKHL 22.
16 [2014] UKSC 66.
17 [2016] EWCA Crim 71.
18 [2014] EWCA Crim 1197; [2016] UKSC 62, [2017] 1 WLR 181.
19 (2010) 51 EHRR 12.
20 For further detail on *Docherty*, see Walker [2017] "Lex Mitior and Article 7: the Supreme Court decision in Docherty," *Archbold Review*, Issue 1.

Conclusions

There have been periodic attempts to confront the issues surrounding IPP. In 2008 there was a Thematic Review carried out by Her Majesty's Chief Inspectors of Prisons and Probation.[21]

This highlighted that:

> This large number of new, and resource-intensive, prisoners was fed into a system that was already under strain. […] Similarly, the Probation Service was increasingly under strain as a result of increased workloads. Even more alarmingly, central national systems for managing lifers and indeterminate-sentenced prisoners through their prison sentence had been considerably weakened. […] This was a perfect storm. It led to IPP prisoners languishing in local prisons for months and years, unable to access the interventions they would need before the expiry of their often short tariffs. A belated decision to move them to training prisons, without any additional resources and sometimes to one which did not offer relevant programmes, merely transferred the problem. […] A prison lifer governor told [us]: "It is as though the government went out and did its shopping without first buying a fridge".

The more recent thematic report by Her Majesty's Inspectorate of Prisons further highlighted the effect on the prison system of IPP. That report concluded, amongst other findings, that release on temporary licence ("ROTL") should be extended, in appropriate cases, to those serving IPP sentences. It was noted that with current legislation most IPP prisoners would have had a determinate rather than indeterminate sentence, and over 80% are over tariff. Therefore the report considered that the expansion of ROTL to those IPP prisoners in closed conditions deemed eligible may be one means of "progressing those stuck in the prison system towards a safe and more speedy release".[22]

In July 2016, Prof Nick Hardwick, Chairman of the Parole Board, set out an ambitious vision to reduce the IPP prisoner population to 1,500 by 2020, highlighting that any greater reduction would require legislative or policy changes.[23] It seems that, despite public pressure, and an awareness that these prisoners are in a dire position, not as much is being done to address this as there should be. There is also the question of what is done regarding those IPP prisoners who do remain dangerous. Release is not an option for all those serving well past their tariff on IPP, but there needs to be a clear and coherent plan for addressing the needs of those who must remain in custody.

IPP prisoners, as with all lifers, have a right to an oral hearing by the Parole Board. In 2007/08, release was directed in 216 cases (15%) of the 1,423 lifer cases considered, but was least likely for IPP prisoners: 253 cases were considered at oral hearings, with 17 directed to be released (7%). Nicola Padfield, who has written extensively on this subject, observes that this is an astonishingly low figure when it is considered that these are all prisoners who have completed their minimum term.[24] There is also considerable delay accessing an oral hearing, meaning that even those eventually determined safe for release may have a long wait for a hearing deciding this.

In *Docherty* the court highlighted three options: (1) for significant resources to be provided to enable those detained to meet the current test for release which the Parole Board must apply; (2) for Parliament to use the power contained in s.128 of LASPOA 2012 to alter the test for release which the Parole Board must apply; or (3) for those in custody to be re-sentenced on defined principles specially enacted by Parliament.

Option 1 is perhaps the most attractive. The whole point of the IPP sentence from the beginning was that it would enable detention until a prisoner was rehabilitated. If we still believe that this is a worthwhile aim (and it is argued that we should), then the answer to this problem is to provide the courses that it is thought could possibly rehabilitate these prisoners. In an ever-underfunded criminal justice system, however, this is arguably the least likely of all the possible solutions. The use of s.128 might seem an initially appealing prospect. But it raises the question of "change it to what?". If these prisoners are still dangerous, then simply releasing them could have dreadful repercussions.

One possibility would be to change the method by which they are assessed for release to circumnavigate the terrible delays caused by the wait for Parole Board oral hearings (as detailed extensively by Padfield).[25]

The third option is a resentencing exercise in terms defined by Parliament – essentially, a legislative successor to IPP is created, and those who are still serving IPP would be resentenced according to new principles set out, which would end with a determinate sentence. This would undoubtedly be an initially-resource intensive exercise, but in terms of giving these prisoners a path to release, it could be a controlled way of doing so.

As noted above, the "Unintended Consequences" Report considered that the expansion of ROTL to those IPP prisoners in closed conditions deemed eligible may be one means of "*progressing those stuck in the prison system towards a safe and more speedy release*".[26]

This must surely be the aim for all IPP prisoners. If they were sentenced now, the majority would receive determinate sentences. Surely common decency and humanity require us to be exercised about the fate of these prisoners, serving sentences with no end in sight past modest tariff periods of as little as 18 months. The failings of the system in providing access to courses and Parole Board hearings are simply unacceptable.

21 Her Majesty's Chief Inspectors of Prisons and Probation (2008) *The indeterminate sentence for public protection: A thematic review,* London: HMCIP.

22 Her Majesty's Inspectorate of Prisons (2016) "*Unintended Consequences: Finding a way forward for prisoners serving sentences of imprisonment for public protection: A thematic review,*" London: HMIP, at p.44.

23 Ministry of Justice (2016) "Statement on IPP prisoners from Parole Board Chairman" https://www.gov.uk/government/news/statement-on-ipp-prisoners-from-parole-board-chairman.

24 Padfield, N. (2009) "Parole and early release: the Criminal Justice and Immigration Act 2008 changes in context", *Crim LR* 3, 166.

25 Padfield, N. (2016) "*Justifying indefinite detention - on what grounds?*" CrimLR 11, 797.

26 Her Majesty's Inspectorate of Prisons (2016) "*Unintended Consequences: Finding a way forward for prisoners serving sentences of imprisonment for public protection: A thematic review*", London: HMIP, at p.44.

Upholding the Conviction of the Innocent

By J.R. Spencer

As every criminal lawyer knows – or should know – the Criminal Appeal Act 1968 imposes a 28-day time-limit for the institution of appeals against convictions on indictment, though s.18(3) provides that "The time limit for giving notice under this section may be extended, either before or after it expires, by the Court of Appeal".

When (as sometimes happens) a decision of the higher courts reshapes the criminal law to make it narrower, defendants who were convicted under the previous and wider understanding of the law sometimes seek leave to appeal out of time in the hope of having their convictions quashed. In *Ramsden*[1] the Court of Appeal spoke of the "alarming consequences" that would follow if leave to appeal were routinely given in these "change of law" cases; and in a series of later cases the courts glossed the statute by ruling that leave to appeal out of time should only be granted in a change of law case if "substantial injustice" would result from a refusal. Last year this gloss was approved, obiter, by the Supreme Court in *Jogee*.[2] Later in the year the Supreme Court's observations were endorsed and applied by the Court of Appeal in *Johnson and others*[3] when it rejected the applications of 13 applicants who were seeking leave to appeal out of time against murder convictions returned by juries directed on the law relating to joint enterprise as it was understood before it was reinterpreted in *Jogee*. Then, as explained in the summary on page 1 of this Issue, some weeks ago a further nail was driven into the coffin of such cases in *Garwood*,[4] the effect of which is to preclude a reconsideration of the current understanding of "substantial injustice" in an appeal to the Supreme Court.

One of the rare cases in which leave to appeal out of time was given in a change of law case is *Bestel and others*[5]. In that case the Court of Appeal, having carefully examined the authorities as they then stood, qualified its generally hard-nosed approach in change of law cases by saying "… we find that the practice of this court, almost without exception, has been to examine the underlying justice of a conviction for a criminal offence."[6] But the recent decision of the Court of Appeal in *Ordu* now provides a clear exception where, contrary to what was said to be the rule in *Bestel*, the justice of the underlying conviction has been disregarded.

In 2007 Mehemet Ordu arrived in the UK on a false passport, having travelled by train to Germany, and thence by plane to England. It was later accepted by the UK authorities that he had fled his native Turkey as a refugee from persecution; and to jump ahead, he was later granted asylum, indefinite leave to stay in the UK and finally, nationality. But before all that happened he was prosecuted for possessing false identity documents and sentenced to nine months' imprisonment, of which he served the customary half.

He was convicted on a plea of guilty, which he entered following the advice of his lawyers that he had no defence.

At the time this advice appeared to be correct. In 1999 Parliament, in grudging compliance with the 1951 UN Refugee Convention, had changed the law to provide a statutory defence for those who use false passports to flee persecution;[7] but its minimalistic terms appeared to exclude from the defence any refugee who had stopped off in another country on the way, even if only to transfer from one means of transport to another. In 2008, however, the House of Lords ruled that the statutory defence should be interpreted so as to conform to the requirements of the Refugee Convention, which envisaged a defence available to refugees who had only made a short stop-over in the course of transit.[8] So the legal advice on the basis of which Ordu had pleaded guilty, though given in good faith, was rendered retrospectively incorrect.

However it was not until some point in 2015 that Ordu came to understand this, and in 2016 he sought leave to appeal against his conviction. Invoking s.18(3) of the Criminal Appeal Act, he sought leave to appeal out of time.

His application was refused.[9] By the long-standing limitative gloss about the need to show "substantial injustice" the court in *Ordu* was clearly bound. But then glossing the judicial gloss upon the statute further, the court said that "substantial injustice" is only demonstrated where the would-be appellant is still suffering the consequences of the conviction, which was not the case here because Ordu had been released from prison.

> He was released from his sentence in 2008 and the licence period expired in the same year. He has now been granted indefinite leave to remain in the UK and UK nationality. Apart from the stigma of having suffered conviction and the unpleasant experience of serving four and a half months in a prison nearly 10 years ago there are no continuing consequences of this conviction. Because the term was more than 6 months but less than 30 months the conviction became spent at the end of 48 months following the end of the sentence, including any licence period, see s.5(2) of the Rehabilitation of Offenders Act 1974 ([22]).
>
> …
>
> … he has now lived through all the adverse consequences and the conviction and emerged to a happier, more settled and safe life in the United Kingdom. The conviction and sentence is now a long time ago and quashing the conviction will not remedy the unpleasant memories which are now its only legacy. On the information before us, quashing the conviction would actually make no real difference to the applicant's life at all, and in those circumstances it is impossible to say that a substantial injustice will occur if this appeal is not allowed to proceed ([33]).

An apparent obstacle to adopting this position were the court's previous decisions in *AM*[10] and *Mateta*[11], both involving groups of defendants some of whom had been given leave to appeal out of time in circumstances which appeared to be identical. But these decisions, it said, did not count, because the courts involved "did not have the benefit of the decisions of the Supreme Court in *Jogee* and the Court of Appeal in *Johnson*".

1 [1972] Crim LR 587.
2 *Jogee* [2016] UKSC 8, *Ruddock v The Queen* [2016] UKPC 7, [2016] 2 WLR 681, at [100].
3 *Johnson* [2016] EWCA Crim 1613, [2017] 1 Cr App R 12.
4 [2017] EWCA Crim 59.
5 [2013] EWCA Crim 1305, [2014] 1 WLR 457; noted in [2014] *Cambridge Law Journal*, 241.
6 At [24].
7 Immigration and Asylum Act 1999 s.31.
8 *Afsaw* [2008] UKHL 31, [2008] 1 AC 1061.
9 [2017] EWCA Crim 4.
10 [2010] EWCA Crim 2400, [2011] 1 Cr App R 35.
11 [2013] EWCA Crim 1372, [2013] 2 Cr App R 35.

With all due respect to the Court of Appeal, this decision does not represent its finest hour. The result is demonstrably unjust and, unlike some harsh outcomes, was not one forced upon it: whether by binding precedent, or compelling practical considerations.

First, it is completely unrealistic to say that a criminal conviction loses its potency to harm the convicted person as soon as it is spent.

It is true that s.4 of the Rehabilitation of Offenders Act says that:

> ... a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction.

However, this rule is subject to a host of statutory exceptions. By s.7 of the Act the operation of s.4 is excluded from a long list of legal proceedings, headed by subsequent proceedings in the criminal courts[12]. For the purpose of these listed proceedings the spent conviction still exists, and as with unspent convictions, the convicted person is still presumed to have committed the offence (albeit rebuttably). In addition to this, s.4(4) of the Act authorises the Secretary of State to exclude from the operation of s.4 a range of different types of office, occupation and employment. This exception-making power has been liberally applied.[13] Official guidance on the Act now groups the various offices, occupations and employments excluded from the general rule into 11 categories, the detailed contents of which range from employment as care-workers and taxi-drivers at one end of the social scale, to judicial appointments at the other; and also excluded from the Act are many voluntary occupations too, notably those involving contact with children[14]. Broadly speaking, the more respectable or the more altruistic the life the convicted person later seeks to lead, the greater the chance that his spent convictions will come back to bite him when he seeks advancement. Nor is this all. Since 2012, spent convictions are no longer treated as expunged for the purpose of decisions about naturalisation and immigration.[15]

The contents of the previous paragraph, furthermore, only relate to what the law officially provides. In practice it is relatively easy to discover that a person has a previous conviction, even if it is in theory spent: and some employers, and prospective suppliers of goods and services, take unofficial steps to do so. For many years, employers or suppliers would seek to circumvent the Rehabilitation of Offenders Act by requiring would-be employees or customers to disclose all previous convictions, spent or otherwise: an abuse to which Parliament eventually responded in the traditional Parliamentary manner by making it a criminal offence.[16] But this was only one method of research and the others remain open. Unless you are a juror, there is no law against seeking information about another person by surfing the internet. In truth, a conviction is a stain upon the convicted person's character which only completely disappears if it is quashed.

Secondly, the dicta in *Jogee* were uttered (and the decision in *Johnson* made) in a context that was significantly different, because the would-be appellants in those cases were not demonstrably innocent. Those appellants had been convicted after trials at which judges had given juries directions on the law, now disapproved, which might or might not have influenced the juries' decisions to convict. If the verdicts might or might not have been influenced by what is now seen as a misdirection there is indeed a case for arguing that justice requires the conviction to be quashed, albeit out of time, and a retrial ordered;[17] but in a legal world in which resources are limited a plausible case can also be made the other way. And the same goes for those cases where the appellant, though now seen as innocent of the offence of which he was convicted, is still clearly guilty of some other offence. But Ordu, by contrast with the appellants in those cases, was demonstrably innocent: it is clear from the report that his conviction would have been quashed if he had been allowed to proceed with his appeal[18]. No decent argument is possible against granting leave to appeal out of time in such a case as this. That no one in the legal system was to blame for what went wrong is neither here nor there; nor, surely, the fact that more than 28 days elapsed between Ordu's discovering that he had been wrongly advised and his attempting to appeal.[19] An innocent person was convicted and a wrong thereby done to him which should obviously be righted. Not even on resource grounds could an argument be made against doing so; the court could have granted Ordu leave to appeal and then dealt with the appeal then and there.

Sadly, it seems that in this case the Court's usual sense of justice has suffered from what the French call *déformation professionelle*: a tendency by all professionals (including, incidentally, university professors) to view their tasks in terms of what is comfortable to them, rather than what the task is intended to achieve. An attitude satirised in another context by Evelyn Waugh in his novel *Scoop,* when a naïve would-be journalist suggests to an experienced colleague that newspapers might respond to accidental misreporting by admitting their mistakes, and gets the answer:

> Risky, old boy, and unprofessional. It's the kind of thing you can do once or twice in a real emergency, but it doesn't pay. They don't like printing denials – naturally. Shakes public confidence in the Press. Besides, it looks as if we weren't doing our job properly.

12 Though the operation of this exception is attenuated, at least to some extent, by the Criminal Practice Direction, Part 21A.

13 A search on Westlaw reveals that the original instrument, the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975/1023, has now been amended no less than 30 times.

14 New Guidance on the Rehabilitation of Offenders Act 1974 (2014); online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299916/rehabilitation-of-offenders-guidance.pdf.

15 LASPO 2012 s.140, adding a new s.56A to the UK Borders Act 2007.

16 Data Protection Act 1998 s.56; brought into force, some 15 years after enactment, in 2013. The offence is punishable with a fine.

17 See David Ormerod and Karl Laird, "*Jogee* – Not the End of a Legal Saga but the Start of the New One?" [2016] Crim LR 539.

18 This emerges from the judgment, at [15] and [16].

19 The court seemed to think that it was relevant: see [30].

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Editorial inquiries: House Editor, Archbold Review.
Sweet & Maxwell document delivery service: £9.45 plus VAT per article with an extra £1 per page if faxed.
Tel. (01422) 888019

Archbold Review is published in 2017 by Thomson Reuters (Professional) UK Limited, trading as Sweet & Maxwell.
Registered in England & Wales. Company number 1679046. Registered office 5 Canada Square, Canary Wharf, London E14 5AQ.

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www.sweetandmaxwell.co.uk
ISSN 0961–4249

Typeset by Matthew Marley
Printed in Great Britain by Hobbs the Printers Ltd, Totton, Hampshire, SO40 3WX

715605