Michaelmas Term
[2013] UKSC 76

JUDGMENT

In the matter of an application by Martin Corey (AP) for Judicial Review (Northern Ireland)

before

Lord Mance
Lord Kerr
Lord Clarke
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

4 December 2013

Heard on 7 October 2013

Appellant
Karen Quinlivan QC
Andrew Moriarty BL
(Instructed by Peter Murphy Solicitors)

Respondent
Gerald Simpson QC
Robert Palmer
(Instructed by Crown Solicitor's Office)

Respondent (written submissions only)
Nicolas Hanna QC
Donal Sayers BL
(Instructed by Carson McDowell)

LORD KERR (with whom Lord Clarke, Lord Hughes and Lord Toulson agree)

1. On 3 December 1973, the appellant, Martin Corey, was convicted of the murder of two police officers. He was sentenced to life imprisonment. He remained in prison until 26 June 1992 when the Secretary of State for Northern Ireland released him on licence, pursuant to section 23(1) of the Prison Act (Northern Ireland) 1953.

2. Following his release in 1992 the appellant remained at liberty for almost 18 years. On 13 April 2010 the Secretary of State wrote to the parole commissioners referring Mr Corey's case to them under article 9(1) of the Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564 (NI 2)) and seeking a recommendation on whether the licence on which appellant had been released should be revoked. Article 9(1) provides that, if recommended to do so by the commissioners, in the case of a life prisoner who has been released on licence, the Secretary of State may revoke his licence and recall him to prison.

3. On 14 April 2010, a single commissioner recommended that the licence of Mr Corey should be revoked. That recommendation was based on material which had been supplied by the Secretary of State. The material included a confidential file containing intelligence information which had been provided by the security services. After that recommendation had been received, a minister of state, acting on behalf of the Secretary of State, revoked the appellant's licence on 15 April 2010. Mr Corey was taken into custody again on 16 April 2010 and has remained in prison since then.

4. By virtue of article 9(4) of the 2001 Order, a prisoner recalled to prison must have his case referred to the parole commissioners. After he had been recalled to prison, therefore, Mr Corey's case was duly referred. Initially it was considered by a single commissioner. She gave provisional directions under the Parole Commissioners' Rules (Northern Ireland) 2009 (SRNI 2009/82). Part of the material which had been supplied to the commissioners in April 2010 had been certified as confidential information under rule 9(1) of the 2009 Rules. And rule 9(3) requires that a gist of such information should be served on the commissioners and the prisoner.

5. On 7 June 2010 the Secretary of State provided a dossier of material in relation to Mr Corey's case. In compliance with rule 9(3) it was accompanied by a statement of evidence which set out the gist of the confidential information. This

was considered by the single commissioner. She also examined the confidential material itself. She recommended, pursuant to rule 19, that the Advocate General for Northern Ireland should appoint a special advocate to represent Mr Corey's interests. The commissioner also recommended that the appellant's case should be dealt with by a panel of commissioners, rather than by a single commissioner considering it alone. A panel was duly convened.

6. On 9 November 2010, following a directions hearing, the chairman of the panel ordered that a statement of all open and closed material relevant to the case, including the product of any exculpatory matter that undermined the Secretary of State's case, should be served on the panel and the special advocate. It was ordered that a similar statement in respect of the open material be served on the prisoner's representatives. They were not to receive the closed material, of course.

7. A closed hearing took place on 25 January 2011 to consider the material which had been served on the panel and the special advocate. The panel heard submissions on behalf of the Secretary of State. The special advocate also made representations to the panel about the adequacy of the disclosure of the closed material. The commissioners gave a ruling on these submissions on 7 February 2011. Hearings before the panel were then conducted into Mr Corey's case. These took place between 29 and 31 March and 23/24 May 2011. Open and closed evidence was received. Counsel appeared for Mr Corey and the Secretary of State at the open hearings. The special advocate represented the appellant's interests during closed hearings.

8. On 15 August 2011 the panel gave its decision. This comprised both a closed and an open judgment. In a detailed ruling which formed part of the open judgment, the panel stated that it was satisfied that Mr Corey had become involved in the Continuity Irish Republican Army from early 2005 and that he was in a position of leadership in that organisation from 2008 until his recall to prison. It was concluded that the appellant posed a risk of serious harm to the public at the time of his recall.

9. Under article 6(4) of the 2001 Order the commissioners are forbidden to direct that a life prisoner be released unless they are satisfied that "it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined". Since the commissioners were not so satisfied in relation to Mr Corey, they refused to direct his release.

10. The appellant sought judicial review of the commissioners' decision on the grounds (among others) that inadequate material had been disclosed in the gist and that the refusal to direct his release had been based solely or to a decisive degree

on the closed material and was, on that account, in breach of Mr Corey's rights under article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Secretary of State was a notice party to the application for judicial review.

11. In a judgment delivered on 9 July 2012, Treacy J held that the commissioners' decision was indeed based solely or decisively on the closed material. He further found that the allegations contained in the open material were not sufficiently specific to enable the appellant to provide his lawyers and the special advocate with information to refute them. The hearing which the commissioners had conducted into the appellant's case constituted, on that account, a breach of the appellant's "right to procedural fairness" under article 5(4) of the Convention.

12. Instead of quashing the decision of the commissioners, however, Treacy J decided, pursuant to section 21 of the Judicature (Northern Ireland) Act 1978, to remit the matter to them with a direction that they reconsider the case and reach a decision in accordance with his ruling. The judge also decided to admit the appellant to bail pending reconsideration of his case by the parole commissioners. The Secretary of State immediately applied for a stay of Treacy J's order and within a short time thereafter lodged an appeal against the judge's decision. Although the commissioners also lodged an appeal, this was not pursued and they participated as a notice party in the appeal proceedings brought by the Secretary of State.

13. The Court of Appeal convened an early hearing to consider that part of the judge's order by which he had directed the appellant's release. On 11 July 2012 it decided that the judge did not have power to grant bail. The Court of Appeal therefore stayed enforcement of that part of Treacy J's order which had admitted the appellant to bail. Delivering the judgment of the court, Morgan LCJ said that the determining issue was whether there had been "a break between the sentence [of life imprisonment] and the continued detention of the [appellant]" (para 8). Since there was no such break, the judge did not have power to grant bail.

14. An application for permission to appeal the decision of the Court of Appeal on the question of the High Court's jurisdiction to grant bail was lodged with this court on 27 September 2012. Permission to appeal was granted on 13 December 2012. In the meantime, the appeal by the Secretary of State against that part of Treacy J's decision in relation to the breach of article 5(4) (which had been deferred in July 2012) was heard by the Court of Appeal on 26 October and 26 November 2012. In a judgment delivered on 21 December 2012 the appeal was allowed: [2012] NICA 57. The Court of Appeal concluded that the material provided to the appellant and his advisers was sufficient to allow him to give

effective instructions to those representing him. There was therefore no breach of article 5(4) of the Convention.

15. Application was made to this court for permission to appeal the Court of Appeal's decision on the issue of breach of article 5(4). That application was refused. In these circumstances, the appellant's appeal on the question whether the High Court had an inherent jurisdiction to grant him bail or otherwise order his interim release is, strictly speaking, academic. Because of the importance of the issue, however, this court considered that the appellant's appeal on this question should be allowed to proceed.

The appellant's arguments

16. Ms Quinlivan QC made three principal arguments on behalf of the appellant. Firstly, she submitted that, when determining a judicial review challenge to the commissioners' refusal to release a recalled prisoner, the High Court had power to order the discharge of the prisoner as part of its inherent jurisdiction. Secondly, she argued that the Human Rights Act 1998 afforded an applicant whose Convention rights were found to have been violated the right to an effective remedy. Where breach of the appellant's article 5(4) rights had occurred, the effective remedy for that breach must include entitlement to be admitted to bail. Finally, she contended that the continued detention of the appellant some two years and three months after revocation of his licence, without there having been an article 5(4) compliant hearing at which the legal propriety of his detention was reviewed, amounted to a breach of article 5(1) of the Convention; alternatively, his continued detention was arbitrary. In either event, the High Court had power to direct that the appellant should be released.

17. The third and final of these arguments had not been addressed to Treacy J. Nor had it been – at least in the terms in which it is now made – advanced to the Court of Appeal. Article 5(1) of the Convention, in its material part, provides that "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court …" For the first time before this court, Ms Quinlivan sought to argue that the delay in holding an article 5(4) compliant inquiry into the appellant's detention had rendered that detention unlawful.

The inherent jurisdiction of the High Court of Northern Ireland

18. The Supreme Court of Judicature Act (Ireland) 1877 (40 & 41 Vict c 57) replaced the existing court structure in Ireland. It created a Supreme Court of Judicature which comprised a High Court of Justice and a Court of Appeal. The 1877 Act replicated the reform of the courts of England and Wales under the Judicature Acts of 1873 and 1875. As in England and Wales, the High Court in Ireland inherited the same inherent jurisdiction as had been enjoyed by the pre-1877 superior courts of common law and equity.

19. The Government of Ireland Act 1920 abolished the Supreme Court of Judicature which had been created by the 1877 Act. Separate High Courts for Northern Ireland and the remainder of the island of Ireland (later to become the Republic of Ireland) were brought into existence. They continued to function in much the same way as previously but as separate entities. In Northern Ireland a new Supreme Court of Judicature was created by the Judicature (Northern Ireland) Act 1978. Under this Act, the basic court structure remained largely unchanged. In particular, the general jurisdiction of the High Court was preserved. Section 16(2)(a) provided that all such jurisdiction as was capable of being exercised previously by the High Court of Justice in Northern Ireland would continue to be exercisable. There can be no doubt, therefore, that the Northern Ireland High Court has an inherent jurisdiction.

The nature of inherent jurisdiction

20. Sir Jack Jacob in his authoritative work, "The inherent jurisdiction of the Court" [1970] CLP 23, 25-27 has said that the historical development of inherent jurisdiction has proceeded along two paths, firstly by way of punishment for contempt of court and secondly as a means of regulating the practice of the court and preventing abuse of its process. On the latter aspect, Sir Jack said that "the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused".

21. The power to control the court's proceedings and process has a number of aspects: the regulation of proceedings; dealing with abuse of process; and compelling observance of the court's orders and directions. Ultimately, however, these are geared to the same aim *viz* ensuring the effective delivery and enforcement of the court's decisions. Approached in that way, the issue in the present case can be expressed thus: 'Is it necessary for the effective disposal of the appellant's claim that the court should have power to order his release pending reconsideration of his case by the commissioners?'

22. The fact that the release of life sentence prisoners is governed by the 2001 Order does not, per se, inhibit the exercise of an inherent jurisdiction. As Sir Jack Jacob put it, at p 24, "the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute". But he added an important rider. Recourse to an inherent jurisdiction, he said, must not contravene any statutory provision. One may go further, however. Using an inherent jurisdiction in a way that runs counter to the purpose or spirit of legislation is not permissible. The present case exemplifies the point. It could not be right to purport to exercise an inherent jurisdiction in a way that would undermine the intended operation of the statute. And therefore to direct the release of a recalled prisoner where the statutory safeguards surrounding a decision to restore liberty to such a prisoner are not in place could not be justified by invoking the inherent jurisdiction.

Did the High Court have inherent jurisdiction to grant bail in this instance?

23. The gravamen of the appellant's case on this question was that the common law in relation to inherent jurisdiction is both flexible and versatile. It can and should respond to changing needs and circumstances. Although it was primarily a means of controlling procedure, it should be adapted to meet the requirement of ensuring that the court's decision is fully effective.

24. This argument has as its corollary the claim that, to be effective, the remedy for the breach of a recalled prisoner's article 5(4) rights must include the opportunity to seek from the court his release from prison in vindication of the right. Article 5(4) provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

25. It is important to recall that in the present case, the lawfulness of the appellant's detention on foot of his recall to prison was not directly in issue in the judicial review proceedings before Treacy J. The focus of the appellant's challenge was to the commissioners' failure to direct his immediate release and the manner in which their determination was made. The appellants had not made a substantive challenge to the lawfulness of his detention under article 5(1) of the Convention. As the judge said in para 58 of his judgment:

> "This court is concerned only with the *fairness of the determination and the process used to come to it* …" (emphasis added)

26. The decision to grant bail in the present case was not founded, therefore, on the conclusion that the appellant's detention was unlawful. The judge did not address that issue. He based his decision on the manner in which the commissioners' review of the appellant's case had been conducted. The claim that the court had inherent jurisdiction to order his release must be viewed against that backdrop. The same applies to the claim that the finding of a breach of article 5(4), to be practical and effective, required that the court should be able to order the appellant's release. Put shortly, the critical question is whether it was necessary that, in order to give meaningful and realistic effect to the finding that the review into the appellant's detention had not been conducted lawfully, the court should have power to order the appellant's release.

27. In my view it is clear that the judge's decision did not require that underpinning. His order that the review of the appellant's detention had not been conducted lawfully and that it should be reconsidered was, on its own terms, a full vindication of the right which the appellant had asserted. On that ground alone, I consider that the judge did not have power to order the appellant's release. That conclusion makes it unnecessary to deal with the submission made on behalf of the appellant that the decision in *Ex parte Blyth* [1944] KB 532, that the High Court did not have jurisdiction to grant bail post conviction, should not be followed.

28. Ms Quinlivan had relied on the decisions in *R v Secretary of State for Home Department, Ex p Turkoglu* [1998] QB 398 and *R (Sezek) v Secretary of State for the Home Department* [2002] 1 WLR 348 in support of the claim that a more expansive approach to the scope of inherent jurisdiction was warranted. In *Turkoglu* the applicant had been granted bail by a High Court judge when he was given leave to apply for judicial review of the decision refusing him leave to enter the United Kingdom. His application for judicial review was subsequently dismissed and the judge, considering that he had no further jurisdiction in the matter, refused bail pending an appeal. On his appeal against the refusal of bail it was held that, unless there was statutory provision or judicial precedent to the contrary, the High Court seized of a civil matter had jurisdiction to grant bail. In *Sezek* the applicant, a Turkish national, had been granted indefinite leave to remain in the United Kingdom but his subsequent application for British citizenship had been refused for failing to declare previous criminal convictions. A deportation order was made in April 1999 which included authorisation for his detention. He applied for judicial review of that decision which was dismissed. He appealed the dismissal and applied to the Court of Appeal for bail pending the hearing of his appeal. It was held that the High Court had power in judicial review proceedings to make an ancillary order temporarily releasing on bail an applicant detained pursuant to the Immigration Act 1971. The Court of Appeal, it was decided, also had power to order the appellant's release by virtue of section 15(3) of the Supreme Court Act 1981 but, in that instance, the court was exercising an original jurisdiction.

29. These cases, Ms Quinlivan argued, illustrated the versatility of the law and its responsiveness to the requirements of the liberty of the individual. A similar approach was, she suggested, appropriate in this case.

30. It should be noted, firstly, that in both *Turkoglu* and *Sezek* it was accepted by the Secretary of State that the relevant courts had power to grant bail. It should also be remembered that in *Sezek* the Court of Appeal considered that it was by recourse to an original, as opposed to inherent, jurisdiction, that the grant of bail might be made. All that aside, the principal difficulty with Ms Quinlivan's argument is that in both cases the applicants were asserting their right to liberty. If their claims were upheld, they were entitled not to be detained, whereas what Mr Corey claims is the right to have his valid recall to prison reviewed in a way that is compliant with article 5(4) of the Convention. A power to grant bail ancillary to the declaration that the appellant was entitled to that particular form of relief was not only unnecessary in order to make the grant of relief practical and effective, it was unrelated to it.

31. Quite apart from the inaptness of recourse to an inherent jurisdiction for the purpose of making the judge's order practically and meaningfully effective, to recognise an inherent jurisdiction to order release in the circumstances of this case would run directly counter to the operation of the 2001 Order. One of the principal philosophies underlying the Order is expressed in article 6(4) which provides:

> "The Commissioners shall not give a direction [that the prisoner should be released] unless-
>
> (a) …
>
> (b) the Commissioners are satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined."

32. That philosophy has received the endorsement of the court in Strasbourg. In *Stafford v United Kingdom* (2002) 35 EHRR 1121, para 80 the European Court of Human Rights said "Once the punishment element of the sentence (as reflected in the tariff) has been satisfied, the grounds for the continued detention, as in discretionary life and juvenile murderer cases, must be considerations of risk and dangerousness …". A statement to like effect is to be found in the later case of *von Bülow v United Kingdom* (2004) 39 EHRR 16, para 43.

33. As Mr Simpson QC for the Secretary of State reminded us, the 2001 Order prominently required, in article 3(2), that a miscellany of experts drawn from a variety of fields be appointed to be life sentence commissioners (the predecessors of parole commissioners). That requirement was replicated in later legislation. Under paragraph 1 of Schedule 4 to the Criminal Justice (Northern Ireland) Order 2008 (SI 2008/1216) the Secretary of State is enjoined to ensure that at least one of the commissioners is a person who holds or has held judicial office; one must be a medical practitioner who is a psychiatrist; one a chartered psychologist; one who has experience of working with victims of crime; and one who has made a study of the causes of delinquency or the treatment of offenders. This requirement reflects the need to have available a range of specialists who can contribute to what must often be a difficult debate as to whether the rigorous test set out in article 6(4)(b) is satisfied. It would be inconsistent with the protection of the public (which is such a central feature of the legislation) that a judge should order the release of a life sentence prisoner by reason only of a failure to conduct an article 5(4) compliant review, where the intense examination, contemplated by article 6(4)(b), of whether his detention is no longer necessary has not taken place. Put simply, the legislature has placed in the hands of a panel of experts the difficult decision as to when a life sentence prisoner should be released. Their role should not be supplanted by a judge who does not have access to the range of information and skills available to the commissioners. In this connection it should be noted that Ms Quinlivan sensibly accepted that, even if the High Court had inherent jurisdiction to release a life sentence prisoner on bail, it should not do so unless satisfied that he would pose no risk of serious harm to the public.

The hearing before the Court of Appeal

34. It appears that the case for the appellant in the Court of Appeal took a distinctly different turn from that which had been presented to Treacy J. In para 5 of his ex tempore judgment delivered on 11 July 2012, Morgan LCJ observed that the court had been "referred to extensive authorities in relation to the lawfulness of the detention of the [appellant]". So far as one can tell from the understandably brief judgment, the focus seems no longer to have been on whether there had been a review of the appellant's detention that was compliant with article 5(4) of the Convention but on whether his detention had become unlawful because of "a break between the sentence and the continued detention" (para 8).

35. In deciding that there was no such break the Court of Appeal considered the decision of the House of Lords in *R (James) v Secretary of State for Justice* (reported as *R (Walker) v Secretary of State for Justice (Parole Board intervening)* [2010] 1AC 553). That case was concerned with indeterminate sentences for public protection (IPP) which had been introduced by section 225 of the Criminal Justice Act 2003. Such sentences comprise a tariff period (which must be served before the prisoner is considered for release by the Parole Board) and a post tariff

period which ends when the Parole Board concludes that it would no longer be dangerous for the prisoner to be released.

36. There had been a systemic failure to provide courses for the prisoners in the *James* case. It was argued that, if they had completed such courses successfully, they could have demonstrated to the Parole Board their suitability for release. Among other claims, the appellants asserted that they were, in consequence, unlawfully detained under article 5(1) of the Convention. It was unanimously held that the absence of material to enable the Parole Board to form a view as to the safety of the appellants' release did not make their detention unlawful. Relying on the decision of the Strasbourg court in *Weeks v United Kingdom* (1987) 10 EHRR 293' para 42, the House of Lords held that, for a prisoner's detention to be justified under article 5(1), there had to be "sufficient causal connection" between his conviction and the deprivation of liberty: [2010] 1AC 553, para 38. Such a link, the House held, might be broken by a prolonged failure to enable the prisoner to demonstrate that he was safe for release but the delay in the appellants' case was not such as to give rise to a breach of article 5(1).

37. This was the burden of the two principal opinions given by Lord Brown of Eaton-under-Heywood and Lord Judge CJ. In para 42, Lord Brown considered whether the objectives of an IPP included not only the continued detention of the prisoner until he could be safely released but also his reform and rehabilitation. At para 49 he said that the IPP legislation went no further than providing the government with the opportunity to introduce treatment courses but the provision of rehabilitative treatment necessary to obviate the risk was not among the specific legislative objectives. If it was not possible to assess the prisoner's dangerousness because he had been unable to undertake courses which might demonstrate that he no longer posed a risk to the public "detention beyond the tariff period is justified because the sentencing court decided that the prisoner would continue to be dangerous at the expiry of the punitive element of the sentence; the necessary predictive judgment will have been made." (para 50)

38. Lord Judge was also of the view that the purposes of the 2003 Act did not include the rehabilitation of prisoners (see para 126). He expressed the same opinion as Lord Brown as to the enduring effect of the decision on dangerousness made by the trial judge at the time of sentencing. At para 103 he said:

> "As the court is required to make an informed predictive assessment at the date of sentence, and the justification for detention beyond the tariff period is found in the judgment of the court that an IPP is indeed necessary, I respectfully disagree with the views expressed by Laws LJ in the Divisional Court in *R (Wells) v Parole Board* [2008]

1 All ER 138, para 46 that what he described as 'further detention' after the expiry of the tariff period was

> 'not at all justified by or at the time of sentence, for the very reason that the extent to which, or the time for which, the prisoner will remain a danger is unknown at the time of sentence ... The justification for detention during the tariff period is of course spent; it is spent the moment the tariff expires.'

For the same reasons I am unable to accept the observations of Moses LJ in *R (Lee) v Secretary of State for Justice* in the Administrative Court [2008] EWHC 2326, para 22, no doubt reflecting the earlier judgment of Laws LJ, that 'the position of a prisoner whose level of dangerousness cannot be ascertained is the same as one who ceases to be a danger. The original justification for the sentence, namely his dangerousness, has ceased to exist'. In my judgment detention beyond the tariff period is justified just because the sentencing court has decided that the prisoner would continue to be dangerous at the expiry of the punitive element of the sentence. The necessary predictive judgment will have been made."

39. On one view the opinions of Lord Brown and Lord Judge as expressed in these passages suggest that the judgment, made at the time of sentencing that an IPP was required in order to protect the public, was not to be dislodged and remained fully effective until displaced by positive evidence, accepted by the Parole Board, that this was no longer the position. On that view, the circumstance that courses (which were the only means by which the prisoner might demonstrate his lack of dangerousness) had not been provided was neither here nor there.

40. A softening of such a rigid stance can be detected, however, in other passages from the speeches of Lord Hope of Craighead, Lord Brown and Lord Judge. At para 51 Lord Brown said this:

> "In my opinion, the only possible basis upon which article 5(1) could ever be breached in these cases is that contemplated by the Court of Appeal [2008] 1 WLR 1977, paras 61, 69 of their judgment … namely after 'a very lengthy period' without an effective review of the case. The possibility of an article 5(1) breach on this basis is not, I think, inconsistent with anything I said either in *R (Noorkoiv) v Secretary of State for the Home Department* [2002] 1 WLR 3284 or in *R (Cawser) v Secretary of State for the Home Department* [2004]

> UKHRR 101. *Cawser,* it is important to appreciate, was a case all about treating the prisoner to reduce his dangerousness, rather than merely enabling him to demonstrate his safety for release. To my mind, however, before the causal link could be adjudged broken, the Parole Board would have to have been unable to form any view of dangerousness for a period of years rather than months. It should not, after all, be forgotten that the Act itself provides for two-year intervals between references to the Parole Board."

41. And at para 15 Lord Hope had said this:

> "It is just possible to conceive of circumstances where the system which the statutes have laid down breaks down entirely, with the result that the Parole Board is unable to perform its function at all. In that situation continued detention could be said to be arbitrary because there was no way in which it could be brought to an end in the manner that the original sentence contemplated."

42. At para 128 Lord Judge echoed the remarks of Lord Brown quoted at para 40 above when he said:

> "I should perhaps add that, like Lord Brown, I should not exclude the possibility of an article 5(1) challenge in the case of a prisoner sentenced to IPP and allowed to languish in prison for years without receiving any of the attention which both the policy and the relevant rules, and ultimately common humanity, require."

James v United Kingdom

43. When the Court of Appeal gave judgment in the present case, the House of Lords' decision in *James* was the most recent judicial pronouncement on whether a failure to provide courses by which prisoners might demonstrate their suitability for release could give rise to a breach of article 5(1). Two months after the Court of Appeal ruling, the European Court of Human Rights (ECtHR) handed down its judgment in *James v United Kingdom* (2012) 56 EHRR 399. The court did not agree with the finding of the House of Lords that the purposes of the 2003 Act did not include the rehabilitation of prisoners. At para 209 of its judgment the court said:

> "The court is … satisfied that in cases concerning indeterminate sentences of imprisonment for the protection of the public, a real

> opportunity for rehabilitation is a necessary element of any part of the detention which is to be justified solely by reference to public protection. In the case of the IPP sentence, it is in any event clear that the legislation was premised on the understanding that rehabilitative treatment would be made available to those prisoners on whom an IPP sentence was imposed, even if this was not an express objective of the legislation itself. Indeed, this premise formed the basis upon which a breach of the Secretary of State's public law duty was found and confirmed (see paras 31, 104 and 107 above).The court accordingly agrees with the applicants that one of the purposes of their detention was their rehabilitation."

44. Since the applicants in *James* did not have the opportunity to embark on rehabilitative courses, successful completion of which was indispensable to their establishing their suitability for release, their continued detention was found to be arbitrary. Significantly at para 221 the court said this:

> "… following the expiry of the applicants' tariff periods and until steps were taken to progress them through the prison system with a view to providing them with access to appropriate rehabilitative courses … their detention was arbitrary and therefore unlawful within the meaning of article 5(1)1 of the Convention."

45. The arbitrariness (and, on that account, the unlawful nature) of the continued detention stemmed from their detention while the means of bringing it to an end remained elusive for the prisoners. This was not directly related to the question of the causal link between the detention and the original sentence, however. The causal link survived. The sentence was imposed because of the perception that the prisoners posed a threat to the public if released. (The perception was grounded, at least to a certain extent, on a presumption built into the statute but it is unnecessary for present purposes to go into that). Until the risk of danger to the public could be dispelled the causal link with that part of the sentence which required the detention of the prisoner remained intact. It was because there was no means of ascertaining whether the danger had dissipated that the detention had become arbitrary.

46. Logically, therefore, so soon as a means of assessing the risk of danger to the public became available through the courses which the prisoner was able to undertake, in order to demonstrate that he no longer constituted such a danger, the detention was no longer to be regarded as arbitrary. Thus, the court said in para 221 that "*until steps were taken* to progress [the prisoners] through the prison system" (emphasis added) with a view to enabling them to undertake courses that would reduce or eliminate the danger that they presented and until, thereby, they

were able to demonstrate their suitability for release, their detention remained arbitrary. When the necessary steps were taken, detention which had until then been arbitrary, was no longer so.

47. This analysis stands apart from the question of the causal link between the original sentence and the reasons for continued detention. The original sentence is premised on the existence of a danger to the public which must be extinguished before release is to be ordered. Until that extinguishment can be demonstrated, the reasons for the original sentence (and therefore the causal link) endure. But if one deprives the prisoner of the opportunity to show that the danger no longer obtains the detention is arbitrary, not because the causal link does not continue, but because the prisoner cannot show that the risk on which it is founded is no longer present.

48. The lawfulness of the appellant's detention is not to be approached, therefore, solely in terms of whether the causal link between his original sentence and his current detention has been broken. The essential question is whether he has had an opportunity to demonstrate that the reasons that he was considered to present a threat to society no longer apply. If he does not have such an opportunity, then clearly, on the authority of *James v United Kingdom*, his continued detention is arbitrary. Whether it follows that he must, therefore, be released is an altogether different question.

49. In the present case it is clear that the appellant did indeed have an opportunity to show that he no longer posed a risk to the public. The Court of Appeal's judgment dismissing his claim that the review of his detention was not compliant with article 5(4) disposes conclusively of that issue. He has had what has been found to be a fully ample chance to show that he can be safely released. There is, therefore, no question of his continued detention being arbitrary. Moreover, the review of the panel's decision, foreshadowed in their ruling, is already under way and we were informed in the course of the hearing that this is likely to be completed soon.

50. The more problematic, although, in terms of this case, academic, question is whether, if it is shown that a prisoner has not had a chance to demonstrate that his continued detention is no longer necessary and if, for that reason, that detention constitutes a violation of article 5(1) and he is therefore unlawfully detained, he must be released.

51. In *James v United Kingdom* the ECtHR found that a detention which was arbitrary and unlawful could be restored to a condition of lawfulness by making accessible the courses whose unavailability were the cause of the arbitrary and

unlawful detention. What is not completely clear from the judgment is whether, during the period that the detention was unlawful, the prisoners were entitled to be released. Observations made in para 217 of the court's judgment are somewhat ambiguous on the question whether release is the automatic consequence of a finding of violation of article 5(1):

> "The court acknowledges that the IPP sentence was intended to keep in detention those perceived to be dangerous until they could show that they were no longer dangerous. The Government have suggested that, in these circumstances, a finding of a violation of article 5(1) as a result of the lack of access to appropriate treatment courses would allow the release of dangerous offenders who had not yet addressed their risk factors. The court accepts that where an indeterminate sentence has been imposed on an individual who was considered by the sentencing court to pose a significant risk to the public at large, it would be regrettable if his release were ordered before that risk could be reduced to a safe level."

52. It is not immediately obvious whether the court was there indicating that such a regrettable eventuality should be avoided or that the outcome, although unwelcome, was inescapable. Since there was no violation of article 5(1) in this case and it is therefore unnecessary to reach a final conclusion on it, I would prefer to leave the decision on this vexed question for a future occasion when the issue arises directly.

53. I would dismiss the appeal.

LORD MANCE (with whom Lord Clarke, Lord Hughes and Lord Toulson agree)

54. I agree that this appeal must be dismissed for the reasons given by Lord Kerr.

55. I add some words on the decision of the Fourth Section of the European Court of Human Rights in *James v United Kingdom* (2012) 56 EHRR 399, which, as Lord Kerr remarks, leaves at least one question problematic.

56. On a straightforward reading of the European Convention on Human Rights, article 5(1) establishes the right to liberty and addresses the circumstances in which a person may be deprived of liberty, while article 5(4) provides that

anyone deprived of his liberty has the right to speedy access to court and to a decision whether such deprivation was in circumstances permitted under article 5(1).

57. *James*, like the present case, concerned prisoners whose detention was justified by the authorities on the ground that it constituted "the lawful detention of a person after conviction by a competent court" within article 5(1)(a). But, after the expiry of their tariff period, their continued detention also depended under domestic law upon whether or not they could satisfy the Parole Board that such detention was no longer necessary for the protection of the public.

58. In the absence of appropriate available courses, they could not hope to satisfy the Parole Board of this. Nonetheless, under the relevant domestic law, the result was on the face of it that they remained lawfully detained under the original court sentence. Equally, nothing was stopping them going to court to test the validity of their detention, but it would not on the face of it have done them any good to do so. What they could and did in *James* do was seek by judicial review orders that they be provided with the courses that they needed.

59. The House of Lords in *James* [2010] 1 AC 553 (sub nom *R (Walker) v Secretary of State for Justice (Parole Board intervening)*) recognised that prisoners in this invidious position had a public law entitlement to such orders by way of judicial review, but held that they had no complaint by reference to the Human Rights Convention rights. The European Court of Human Rights in finding that the circumstances also constituted a cause of complaint under the Convention had to locate the violation somewhere in the Convention. It located it in article 5(1): see paras 221 and 231 and holding (3). It did so on the basis that the detention was "arbitrary and therefore unlawful" under article 5(1) during the relevant periods of delay - that is, during the periods after expiry of the relevant tariffs and before steps were taken to progress the prisoners through the system by moving them to "first stage" prisons where courses would be available, and also, in the case of Lee, during a subsequent period when he was still not offered any course: para 231.

60. Two further issues were raised before the Court of Human Rights in *James*, under respectively articles 5(4) and 13. Under article 5(4), all three applicants complained that, because "there had been no meaningful review of the legality of [the prisoners'] post-tariff detention as a result of the failure to operate a system [of courses] properly", there had been a violation of article 5(4): para 223. The court held that the complaint under article 5(4) gave rise to no separate issue, and said that it followed that it could not "make any award in respect of the alleged violation of article 5(4)": paras 226 and 243. It is not clear to me whether or not that means that the court thought that article 5(4) had been breached.

61. The second further issue was raised under article 13 by Mr Wells and Mr Lee, but the court regarded article 5(4) as *a lex specialis* in relation to the more general requirements of article 13, and so dealt with this issue also under article 5(4): para 229. The complaint was that the obstacle under primary legislation to the prisoners' release until they satisfied the Parole Board that they were no longer a public danger meant that, even if they had succeeded in their challenge to their detention, they would not have had any effective remedy in respect of the violation: para 224. In dealing with this, the court noted that Mr Wells and Mr Lee had been able to commence judicial review proceedings to obtain orders that they be provided with the relevant courses and that their commencement of such proceedings had led to their speedy transfer to first stage prisons for that purpose. Accordingly, they had "failed to establish that the combination of the Parole Board and judicial review proceedings could not have resulted in an order for their release" and, so, there had been no violation in this regard: para 232. This reasoning does not explicitly address the further five month delay in actually providing courses which Mr Lee suffered. But the underlying thinking may again be that Mr Lee could have commenced further judicial review proceedings which, in combination with the Parole Board's power to release once satisfied that he no longer presented a public danger, constituted an effective remedy.

62. The court's reference in *James* to the detention as "unlawful" under article 5(1) during periods when courses were not being duly provided is problematic. It suggests that the circumstance identified in article 5(1)(a) - that is "the lawful detention of a person after conviction by a competent court" – had ceased to exist. If that were so, then logically that implies that the prisoner should have been at once released. In its forensic endeavour to persuade the Strasbourg Court not to find any violation of article 5(1), the United Kingdom Government itself suggested that a finding of such a violation would "allow [*logically, require*] the release of dangerous offenders who had not yet addressed their risk factors": para 217. The court did not face up directly to the logic of this submission, but contented itself with saying that "it would be regrettable if …. release were ordered before that risk could be reduced to a safe level", adding only that "However, this does not appear to be the case here": para 217.

63. Although the submissions before the court took this extreme form, which much of the court's description of the issues echoed (see paras 175 onwards), I doubt whether it follows axiomatically from the court's judgment that a prisoner who was not being given appropriate courses could assert a right to release until such courses became available. The suggestion that this follows would lose its basis, if the court were to be understood as implying into article 5 an ancillary duty on the state to provide the courses which would enable prisoners to progress towards release in accordance with domestic law. That is in substance what the court was doing in, for example, para 206, where it said that "it would be irrational

to have a policy of making release dependent on a prisoner undergoing a treatment course without making reasonable provision for such courses".

64. There are, I think, some other indications in the court's judgment in *James* that, if the matter had to be decided, the court would not expect that prisoners should be released during periods when courses were not being duly provided.

65. First, the court said that the detention was only arbitrary and in breach of article 5(1) "during the periods" in which the prisoner were not progressed in their sentences (para 231) and that, once they had access to relevant courses "their detention once again became lawful": para 244. It is difficult to think that the court would expect prisoners to be released for a period, eg until appropriate first stage prison places and courses were available, and then, by some mechanism, recalled.

66. Second, there is the way in which the court dealt with Mr Wells' and Mr Lee's complaint that the pre-condition to their release introduced by primary legislation, constituted by the requirement to satisfy the Parole Board that they were no longer a public danger, prevented them having an effective remedy under article 13. The court said nothing to question the legitimacy of this requirement during periods when courses were not available. On the contrary, it recited that "Pursuant to the 1997 and 2003 Acts, the release of a prisoner sentenced to an IPP could be ordered by the Parole Board, having satisfied itself that the individual was no longer dangerous": para 231. It is however true that the court in its further reasoning was only concerned with, and accepted, the effectiveness of the judicial remedy available through the combination of the Parole Board and the judicial review proceedings which Mr Wells and Mr Lee actually took: para 232.

67. Third, I find significant the court's reasoning in rejecting the claims to recover in respect of the violation of article 5(1) any damages over and above sums for distress and frustration: para 244. The court rejected such claims because, it said, it "cannot be assumed that, if the violations in the present cases had not occurred, the applicants would not have been deprived of their liberty": para 244. That reasoning makes good sense, if the obligation to progress prisoners towards courses, which could facilitate their release, was an obligation ancillary to their continued detention. They would not be entitled to release, but they could claim damages for the ancillary and "arbitrary" failure to enable them to progress towards release. However, any damages claimed for loss of liberty (as distinct from damages for distress and frustration on account of the delays in providing courses) would depend upon showing that, had they been moved earlier to first stage prisons and given courses sooner, they would in fact have been released sooner. That, the court in effect said, had not been shown, and could not "be assumed": para 244.

68. This explanation of the court's reasoning loses force if the court thought that the prisoners should have been released during any periods when they were not being duly progressed through the prison system. On that basis, the prisoners' continued detention would simply be illegitimate, and, as such, damages for wrongful detention should follow. It is not normally possible for a public authority, after a wrongful arrest or imprisonment, to argue that, if it had not been guilty of a wrongful arrest or imprisonment, then it could and would have taken different steps which would have achieved a rightful arrest or imprisonment. And, even if such an argument were possible, the onus would surely be on the public authority to show that it could and would have taken those different steps with that result. It would not be sufficient to put the onus on the wrongfully detained prisoners to show that the public authority could not or would not have taken such steps. So the court's statement that it "cannot be assumed" (para 244) that the prisoners would not anyway have been detained would not have been appropriate.

69. For these reasons, despite the court's description in para 221 of the detention as arbitrary and unlawful under article 5(1), I believe it to be well arguable that what was in truth being identified was a breach of an ancillary obligation to progress the prisoners through the prison system arising by implication from, rather than directly under the terms of, article 5(1). Such a breach would not mean that the prisoners were entitled to be released, but would entitle them to recover any damages which they could show had been suffered as a result of that breach. If this were to be regarded as the correct analysis, then their continuing detention would continue to be legitimate under the Convention as well as under domestic law, until the Parole Board was satisfied that their detention was no longer necessary for the protection of the public.